UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

B & R SUPERMARKET, INC., d/b/a MILAM'S MARKET, a Florida corporation, et al., Individually and on Behalf of All Others Similarly Situated, Plaintiffs, v. VISA, INC., et al., Defendants.	:	Case No. 1:17-cv-02738-BMC-JAM CLASS ACTION

JOINT DECLARATION OF CLASS COUNSEL GEORGE C. AGUILAR AND MICHAEL J. NICOUD IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS

I, GEORGE C. AGUILAR, declare as follows:

1. I am a partner with the law firm Robbins LLP, Class Counsel and one of the counsel of record for plaintiffs B & R Supermarket, Inc. (d/b/a Milam's Market), Grove Liquors LLC, Strouk Group LLC (d/b/a Monsieur Marcel), and Palero Food Corp. and Cagueyes Food Corp. (d/b/a Fine Fare Supermarket) (collectively, "Plaintiffs" or "Class Representatives") in the above-captioned action ("Action"). I am a member in good standing of the Bar of the State of California, and I have been admitted to practice *pro hac vice* before this Court. I have personal knowledge of the matters set forth herein, based on my participation in the prosecution and settlement of this Action. If called upon, I could and would competently testify that the following facts are true and correct based on my personal involvement in the litigation.

I, MICHAEL J. NICOUD, declare as follows:

2. I am a partner with the law firm Robbins LLP, Class Counsel and one of the counsel of record for Plaintiffs in the above-captioned Action. I am a member in good standing of the Bar of the State of California, and I have been admitted to practice *pro hac vice* before this Court. I have personal knowledge of the matters set forth herein, based on my participation in the prosecution and settlement of this Action. If called upon, I could and would competently testify that the following facts are true and correct based on my personal involvement in the litigation.

I. INTRODUCTION

3. Class Counsel submit this Joint Declaration in support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards ("Motion"). This Joint Declaration is intended to provide the Court with information regarding Class Counsel's litigation efforts in reaching the outstanding result Class Counsel have presented to the Court for final approval: a common fund of $231,700,000 (the "Common Fund"). This Joint Declaration explains, from Class Counsel's

perspective, the work that went into achieving this result, and the risks that Class Counsel faced throughout the litigation. This Joint Declaration illustrates the work Class Counsel did, building on the initial foundation established by Robbins Geller Rudman & Dowd LLP ("RGRD"), the firm that litigated as lead counsel prior to Class Counsel. The declaration of Alexandra S. Bernay in support of Plaintiffs' Motion, attached hereto as Exhibit 1, describes the work that RGRD did in this Action from the outset, including in investigating and initiating the claims and the early phases of litigation. Together, these declarations are intended to provide facts to support Class Counsel's determination that the requested attorneys' fees ("Fee Request"), request for reimbursement of expenses ("Expense Request"), and the service award request ("Service Awards"), are reasonable, fair, and should be granted. This Motion is the only such motion that will be filed by Plaintiffs' counsel, and with the Court's permission Class Counsel will, in its sole discretion, distribute any attorneys' fees or expenses awarded by the Court to Plaintiffs' counsel who have worked on this Action.

II. HISTORY AND LITIGATION OF THE ACTION

A. Class Counsel Began Working on the Action in 2016 and Transitioned to Lead the Litigation of the Action in Mid-2017

4. Class Counsel first began working on the Action in May 2016. At this time, Class Counsel were working on the Action in a supporting role, assisting and working with RGRD. At the time, RGRD was leading the litigation of the Action as sole lead counsel.

5. Class Counsel's initial role in the Action was primarily to provide substantial assistance with the discovery efforts in the case, which, even in May 2016, were understood to be substantial. Both the size of the productions, and the scope of the case meant that discovery was expected to be a time consuming, complicated, and laborious task that would require many

attorney and professional hours to complete effectively. This expectation turned out to be correct, if not understated, as further detailed throughout this declaration.

6. In addition to providing substantial assistance with discovery, Class Counsel's initial efforts in this Action also included an assessment of the potential avenues for settlement, including an assessment of the results of the first mediation (with defendants Visa and Mastercard only)[1] that occurred prior to Class Counsel's involvement. Class Counsel learned of the outcome and progress of this mediation through RGRD, which helped inform our views on the case and how to effectively litigate it going forward.

7. Even during this initial involvement phase, prior to becoming lead counsel (and then later formally appointed Class Counsel), Class Counsel dedicated significant attorney and professional resources to this Action. These efforts centered primarily on discovery, and involved the analysis, review, and coding of document productions from Defendants and third parties and assisting RGRD with preparing for depositions.

8. This initial involvement phase ended in mid-July 2017, when RGRD withdrew from representing Plaintiffs, and Class Counsel took over as the lead firm litigating the Action. We continued to work with co-counsel Devine Goodman & Rasco, LLP ("DG&R"). We also brought in local counsel, the Law Offices of Thomas G. Amon. From mid-July 2017 on, Class Counsel led all aspects of this litigation as sole lead counsel.

9. Class Counsel immediately shifted resources and priorities in recognition of the significant litigation burdens of this Action. Class Counsel's first task was appropriately staffing

[1] "Defendants" or "Networks" refers collectively to defendants Discover Financial Services ("Discover"), American Express Company ("Amex"), Visa, Inc. and Visa U.S.A., Inc. ("Visa"), and Mastercard International Incorporated ("Mastercard"). Unless otherwise noted, capitalized terms shall have the same meaning as defined in the accompany memorandum in support of Plaintiffs' Motion.

the Action as lead counsel. This meant adding, and maintaining, significant attorney and professional resources to this Action. Class Counsel understood that this case could last for many years and would require significant investment of time and expenses to litigate effectively on behalf of the Class.

10. Class Counsel also understood from the outset that litigating this Action would be risky. When Class Counsel took over as lead counsel, no class was yet certified, fact discovery was far from complete, and although some expert discovery had occurred, it was limited to class certification issues. Plaintiffs did not know who Defendants' merits experts would be, or what arguments and defenses they would present. As Class Counsel continued to litigate this Action, the litigation risks only intensified. As described in this declaration, this case was replete with motion practice that had the possibility of ending the Action or seriously undermining Plaintiffs' damages arguments.

11. Class Counsel also understood we were taking on the role of lead counsel with no guarantee of payment. Class Counsel have not received any payment for any work done in this Action and have received no promise of payment either. The only certainty for Class Counsel when we took over as lead counsel was that this litigation would be complex, costly, and hard-fought.

12. At the time Class Counsel took over as lead counsel, fact discovery was underway, and there was a motion for class certification fully briefed and pending before the Court. Building on the foundation of the Action built by RGRD during its time as lead counsel, Class Counsel next took this case through the remainder of fact discovery, through expert discovery, and through significant motion practice. This motion practice culminated with the defeat of Defendants' motions for summary judgment and *Daubert* motions. Class Counsel also engaged in appellate

work, including both in the Second Circuit and in preventing Defendants' attempts at obtaining interlocutory review of key decisions. Finally, through years of extensive litigation, Class Counsel, only after using two mediators and going through three unsuccessful mediations, were able to start settling this Action. Though the first three mediations were unsuccessful, the Court's decisions on the motions for class certification, summary judgment, *Daubert* motions, and other key motions (as described further herein), paved the way for a settlement with Discover, then a second with Amex, and the third and final settlement with Visa and Mastercard (together, the "Settlement"). This Joint Declaration explains Class Counsel's efforts throughout each of these stages.

B. Class Counsel Engaged in Significant Fact Discovery Efforts

13. When Class Counsel took over the lead role, fact discovery was underway but far from complete, particularly with respect to depositions. Class Counsel spent considerable time and effort on completing fact discovery. Fact discovery in this Action was complex and broad, covering numerous areas, including, but not limited to: the structure of the credit and debit payment market in the U.S.; EMV technology, fraud rates, and alternative technologies for combatting fraud; migrations to EMV in other markets, including the Fraud Liability Shift ("FLS") policies of the Networks for these other transitions; merchant steering behavior; related government actions, investigations, and pressure regarding payment technologies and policies; the interactions between the Networks and other links in the payment ecosystem, including especially issuing and acquiring banks; industry groups relating to the payments market and/or fraud, including especially EMVCo, the Electronic Migration Forum, and the Payment Security Taskforce; communications between Defendants regarding EMV and the FLS; technical specifications and requirements for payment terminals in relation to the FLS; technical and practical problems for merchants in implementing

FLS-compliant terminals, including bottlenecks, certification problems, and delays; the types of chargebacks issued to merchants, and the amounts of FLS chargebacks assessed to merchants following the FLS; the Networks' EMV migration roadmaps, and their FLS policies; considerations by the Networks for potential delays of the FLS; and considerations by the Networks of potential positive incentives for merchants to incentivize migration to EMV.

14. Class Counsel's discovery efforts included organizing and strategizing for further document review efforts, assessing Defendants' productions and engaging in meet and confers, and extensive deposition practice. These tasks were particularly onerous given the gargantuan size of the evidentiary record in this Action and the scope of the issues involved. Visa's productions alone amount to more than 700,000 documents. Discovery also included dozens of third parties, including primarily acquirers—one of the links in the credit card payment processing chain. These third parties produced hundreds of thousands of documents. In total, Plaintiffs received nearly two million documents in discovery (1.97 million) that spanned tens of millions of pages. This required the use of dedicated document hosting and review platforms, including Relativity and DISCO.

1. Organization and Strategy for Document Review Efforts

15. Given the size and complexity of the evidentiary record, Class Counsel first started by assessing the state of the record, and what had been reviewed, and began to organize the efforts to complete fact discovery. Class Counsel worked to ensure that we understood what had been produced, what had been reviewed, and what we still needed. We also worked with the many attorneys who were diligently assessing the document discovery materials to ensure that everyone working on the Action understood the key issues, what to look for and focus on, and how to prioritize review.

a. Document Review Memorandum and Coding Guide and Guidance for Reviewers

16. Class Counsel reviewed the existing document coding protocol put in place by RGRD and updated the same to address developments in the Action thus far and the remaining challenges. This protocol served as a guide for those working on document analysis in the Action to ensure consistency of document coding, as well as to improve the quality of the review by identifying issues that should be flagged for further consideration or would be useful in establishing Plaintiffs' claims or disputing Defendants' defenses.

17. Class Counsel regularly communicated with the document analysis team to ensure it was appropriately staffed and working efficiently. Class Counsel also regularly communicated with the document analysis team to discuss and update their priorities, discuss the documents that were being uncovered, as well determine where there may be gaps in the productions, and to provide further direction to hone the review process. This was an ongoing effort throughout the lifespan of the fact discovery (and also expert discovery) efforts.

b. Analysis of Deponents

18. Another key task for Class Counsel during fact discovery was to assess potential deponents, both from Defendants and third parties. Class Counsel directed the document analysis team to assess the potential usefulness of certain deponents by engaging in targeted analysis of documents pertaining to those individuals. Class Counsel would then discuss the results of these reviews with the analysis team, in conjunction with other information available regarding the potential deponents, to assess which deponents would be most useful.

19. This process involved significant judgment on the part of Class Counsel. Given how large each of the Defendants are, and how complex the subject matter was in this Action, ensuring the most efficient and useful depositions was a challenging task. Class Counsel attempted

to ensure that the individuals deposed would provide the most valuable information to advance the Class's claims or defeat Defendants' defenses.

20. Class Counsel directed the document review team to review the documents pertaining to those individuals selected as deponents. The document review team would create deposition sets of potential exhibits for each deponent. Class Counsel would then work with the document review team to further refine those sets as necessary.

2. Assessment of Document Productions and Privilege Logs

21. As part of the fact discovery efforts, Class Counsel also engaged in significant efforts to assess the completeness of productions and to review and assess the completeness and appropriateness of Defendants' privilege logs.

22. Class Counsel worked to ensure that each Defendant's productions were complete and produced in the agreed-upon fashion. Class Counsel engaged in meet and confer efforts where appropriate to follow up on apparently missing pieces of the production or to correct production errors or other issues.

23. Class Counsel also directed the review of Defendants' privilege logs by the attorneys working on document analysis, who had the best understanding of the production and were well positioned to understand whether the claimed privileges were appropriate and/or appropriately documented. Again, Class Counsel engaged in meet and confer follow-ups with the Defendants as needed to supplement or correct any perceived deficiencies in Defendants' privilege logs.

3. Complete Written Discovery Requests

24. Class Counsel also engaged with Defendants in significant additional written discovery. While some written discovery had been completed, many additional discovery requests were served once Class Counsel took over.

25. Both Discover and Mastercard propounded requests for admission on Plaintiffs, to which Class Counsel prepared Plaintiffs' responses.

26. Each of the Defendants propounded interrogatories on Plaintiffs. Mastercard propounded a second and third set of interrogatories on Plaintiffs. Discover propounded its first and second set of interrogatories on Plaintiffs. Amex propounded a set of interrogatories on Plaintiffs. Finally, Visa propounded a set of interrogatories on Plaintiffs. Class Counsel worked with Plaintiffs and the attorneys working on the Action to prepare Plaintiffs' responses to these interrogatories.

27. Defendants' propounded interrogatories sought detailed information about Plaintiffs' claims, and responding to these interrogatories required a massive effort on the part of Class Counsel. For example, each of the Defendants asked Plaintiffs to identify all documents, deposition testimony, and other evidence supporting Plaintiffs' allegations that the propounding Defendant participated in an unlawful agreement. Class Counsel identified hundreds of documents and not only specific depositions, but portions of those depositions, responsive to these interrogatories. Defendants also asked Plaintiffs to identify all of the specific conduct and communications by each person that was part of the alleged conspiracy. Though Class Counsel objected to these overbroad and otherwise objectionable requests, Plaintiffs nevertheless provided fulsome responses. Plaintiffs' responses and objections to Visa's interrogatories alone spanned over 150 pages, as one example of how significant this undertaking was. These responses included

dozens of pages of responsive, narrative information detailing Plaintiffs' claims and the proof thereof, backed by reference to specific documents and testimony relating to each Defendant's involvement in the conspiracy.

28. Class Counsel also drafted twenty-three interrogatories and propounded them on each of the Defendants. Defendants' interrogatory responses helped guide our further fact and expert discovery efforts.

4. Taking Depositions of Defendants and Third Parties and Defending Client Depositions

29. Prior to Class Counsel taking over as lead counsel, seventeen depositions were taken, including each of the Class Representatives, a 30(b)(6) deposition of each Defendant, class certification depositions of Plaintiffs' and Defendants' class certification experts, and a handful of other defendant and third party depositions.

30. Class Counsel took or attended dozens of additional depositions once taking over as lead counsel. Class Counsel prepared for and took the depositions of sixteen current or former employees of Defendants. Many of these depositions were coordinated with plaintiffs in the Interchange action[2] and took place over two days. Class Counsel also took or attended numerous depositions of third parties.

31. Class Counsel took the depositions of leaders and executives at each of the Networks, including some of the highest-ranking individuals. For example, key depositions included Visa's President (at the relevant times), and Mastercard's former President of North America. These depositions significantly advanced Plaintiffs' case and provided useful information for summary judgment and beyond.

[2] "Interchange Action" refers to *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, No. 1:05-md-01720-BMC-JAM (E.D.N.Y.).

32. In total, Class Counsel took, defended, or attended fact depositions of thirty-eight witnesses across a total of forty-five days (in addition to the seventeen depositions taken, defended, or attended by RGRD when it was serving as lead counsel).

C. Class Counsel Engaged in Significant Expert Discovery Efforts

33. Expert Discovery proceeded in two phases. First, the parties engaged in expert discovery regarding class certification issues with one expert for Plaintiffs, and one expert for Defendants. Then, the parties later engaged in merits expert discovery, where the scope expanded to two experts for Plaintiffs and seven experts across the Defendants. Like fact discovery, the scope of expert discovery was broad and covered myriad topics, including, among other things: the technological landscape for EMV and the FLS, the economic motivations of the Networks and the other entities in the payment processing chain, other migrations to EMV technology in other countries, the appropriate legal framework to assess alleged collusion, constructing an appropriate but-for world to assess damages and analyze the actions of the Defendants, and numerous issues relating to the parties' damages analyses.

1. Continued Work with Dr. Officer in Support of Class Certification

34. Following the Court's initial denial of Plaintiffs' motion for class certification, Class Counsel worked with Dr. Micah S. Officer to prepare a third report in connection with Plaintiffs' renewed motion for class certification. Dr. Officer's third report covered three main additional issues: the likely date by which Defendants would have imposed the FLS in the but-for world, the likelihood of any chargebacks being absorbed by intermediaries in the payment chain, and to describe deficiencies in Defendants' data productions and the impact of such deficiencies on his analysis.

35. While in Dr. Officer's prior reports he had opined that Defendants' conduct had caused the Class significant damages, and that in the but-for world competitive responses would have led to delays of the FLS by the Networks, in connection with his third report he offered further, more specific testimony regarding the nature of the but-for world. The major issue he addressed was providing a specific model by which Defendants would have imposed the FLS in a realistic but-for world and the date for when the FLS would likely have been delayed in the but-for world.

36. Class Counsel worked extensively with Dr. Officer on this third expert report to develop the information he needed for his analysis. This involved data pertaining to each of his two approaches. First, Dr. Officer analyzed what he determined to be the behavior of Defendants in a different market with similar challenges, after Defendants were aware that their conduct was under scrutiny. To this end, he analyzed the FLS transition that occurred in the automated fuel dispenser ("AFD") market. Dr. Officer's second approach was to examine statements in memoranda, presentations, emails and other documents made by various executives of the Networks, concerning their expectations for enforcement of the FLS in the United States. Dr. Officer thus studied and opined regarding what the executives said about their expectations in the months leading up to the FLS.

37. Class Counsel's work with Dr. Officer on his report in support of Plaintiffs' renewed motion for class certification was a significant undertaking, given the scope of the issues considered by Dr. Officer and the evidentiary record necessary to support those opinions. Class Counsel prepared Dr. Officer and defended him during a second deposition in connection with his class certification work [the first deposition being previously defended by RGRD]. His report notes that he relied on nearly two thousand documents in support.

2. Work with Dr. Officer and Dr. Abrantes-Metz on Developing Merits Reports

38. Following the completion of fact discovery, Class Counsel delved into the extensive merits expert discovery issues. The parties had already completed some expert work, with respect to the class certification issues. However, the merits expert work required new analyses and presented new issues. Plaintiffs retained an additional expert—Dr. Rosa M. Abrantes-Metz, to provide expert testimony and analysis regarding Defendants' conspiracy. For the merits expert work, Plaintiffs worked with both Dr. Officer, who had previously opined on class certification issues, and Dr. Abrantes-Metz.

39. Dr. Officer is a Professor of Finance at Loyola Marymount University, has been an editor and reviewer for the Journal of Financial Economics, the Journal of Law and Economics, the European Economic Review, and the Journal of Accounting and Economics, and has published dozens of peer-reviewed articles involving quantitative analysis of large datasets. Dr. Abrantes-Metz is an economist specializing in industrial organization, econometrics, and asset pricing. She is a Managing Director at BRG and previously served as a Managing Director and Principal at Global Economics Group, as well as a Principal at The Brattle Group. She focuses her work on conspiracies, fraud, and the detection of cartel behavior—including price-fixing conspiracies—through various empirical "screening" methods.

40. Class Counsel worked with Dr. Officer to supplement the work he had previously done in support of class certification. This required supplementing the information available to Dr. Officer with the fact discovery now available to Plaintiffs, as well as clarifying his opinions and responding to the criticisms of Defendants' class certification expert, David Kaplan.

41. Class Counsel worked with Dr. Officer to develop an expert report and testimony primarily regarding the damages suffered by the Class and attributable to Defendants' alleged wrongdoing.

42. Class Counsel worked with Dr. Officer to gather the necessary data for his opinions. This included a massive amount of data from each of the Defendants regarding chargebacks incurred by Class members. These data were not limited to just the FLS chargebacks at issue in this Action, but other forms of chargebacks as well. This, among other complexities in the data sets, greatly increased the difficulty of the analysis. Class Counsel had to engage with each of the Defendants to ensure that we obtained all the data needed for Dr. Officer's analysis.

43. Dr. Officer's analysis also required a significant amount of data from third parties. These data were necessary to respond to contentions from Defendants that acquirers were absorbing significant amounts of the FLS chargebacks at issue. Among other things, Class Counsel worked to gather merchant agreements and annual filings with the U.S. Securities and Exchange Commission from major payment processors and acquirers. Class Counsel subpoenaed numerous acquirers and payment processors to obtain data on potential absorption of chargebacks. Class Counsel had to meet and confer with many of these entities to obtain responsive documents and/or statements or declarations in lieu of documents in order to support Dr. Officer's analysis. Identifying the largest and most significant payment processors, then subpoenaing them, then communicating with them and obtaining this information was a substantial undertaking that took months of consistent effort. These pieces of data were vital to Dr. Officer's analysis and to help rebut Defendants' claims that significant portions of the FLS chargebacks at issue were being absorbed by intermediaries in the payment chain.

44. Class Counsel also worked with Dr. Officer to ensure that he had the necessary technical documentation from Defendants relating to their chargeback rules and procedures, so that he could complete his analysis. This included assessment of data dictionaries and sets of rules for the different Networks.

45. In addition to the numerical and technical data analyzed by Dr. Officer, Class Counsel also worked with Dr. Officer to ensure he had the necessary documents from Defendants and third parties to authoritatively opine on the nature of the but-for world. One of Dr. Officer's key opinions was that in the but-for world, Defendants would have delayed the FLS by two years, starting with Visa. Class Counsel worked with Dr. Officer to obtain the necessary documents demonstrating the internal decision making of the Networks and comparing the process with another related field that also experienced a FLS transition—the automated fuel dispenser (AFD) market.

46. The sum of all this work was a 56-page opening merits expert report from Dr. Officer. However, the substance of his report was built on a much larger foundation. Dr. Officer relied on hundreds of documents and generated thousands of pages of schedules and supporting materials that spanned eight volumes.

47. Dr. Abrantes-Metz's opening report was similarly a substantial undertaking. Class Counsel worked with Dr. Abrantes-Metz to obtain the documents she needed to opine on the nature of Defendants' behavior, leading her to opine that the implementation of the FLS in the United States was inconsistent with competitive behavior and consistent with an explicit agreement to set the FLS dates. This required an extensive assessment of the discovery record available. Dr. Abrantes-Metz opined on the nature of the relevant antitrust market, including the economics of multi-sided platforms, explaining the function of the market, and defining the market by

geographic bounds. Dr. Abrantes-Metz applied a single-sided analysis to this market, focusing on the actions of the Networks as they affected merchants. Dr. Abrantes-Metz then opined on the alleged conspiracy and the evidence in the record consistent with the alleged conspiracy, including the development of the FLS framework in the United States, communications between the Networks, their participation in industry groups, the concerns of merchants in connection with the EMV migration and the FLS, technical difficulties with the EMV migration, and the Networks' decision making regarding potential delays of the FLS. Dr. Abrantes-Metz also opined regarding the specific industry features that facilitated the emergence and sustainability of the alleged collusion at issue in this Action. Dr. Abrantes-Metz's completed opening merits report was 103 pages long, and relied upon hundreds of pieces of evidence from discovery and external sources like industry publications, white papers, and academic articles. Class Counsel worked extensively with Dr. Abrantes-Metz to complete this work.

3. Analysis of the Expert Reports of Defendants' Combined Seven Experts

48. After Class Counsel served Defendants with Plaintiffs' experts' reports, Defendants had their opportunity to respond. Defendants took this opportunity by retaining seven expert witnesses between the four of them to provide merits reports and testimony, including Kaplan, who had previously provided opinions regarding class certification issues. Class Counsel had to assess each of these reports and proffered expert witnesses to determine how to challenge their opinions, and to assess the potential impact of their opinions and testimony on the Action.

49. Just as Class Counsel did, Defendants—some of the largest companies in the world, represented by some of the largest and most prominent law firms—retained well-regarded experts with impressive backgrounds and experience. Challenging their backgrounds and opinions was a

significant undertaking for Class Counsel. These experts also raised a host of issues and challenges for the Action. Class Counsel recognized that each of these experts added risks to the litigation.

50. Visa retained three experts to provide merits reports and testimony: David Kaplan, who had opined already on class certification issues; Dr. Andres V. Lerner; and R. Garrison Harvey.

51. Kaplan's opinions were largely focused on challenging Dr. Officer's view of the but-for world and Dr. Officer's conclusion that a two-year delay of the FLS was the likely outcome. Kaplan also briefly challenged Dr. Abrantes-Metz's view of the but-for world. Kaplan's opening merits report was 258 pages.

52. R. Garrison Harvey's report and opinions were also directed at Dr. Officer's damages analysis. Harvey's opening merits report was 81 pages.

53. Dr. Andres Lerner's opinions and testimony were focused on Dr. Abrantes-Metz's opinions. Dr. Lerner's opening merits report was 288 pages.

54. Mastercard retained two experts of its own: Julie Conroy and Dr. Celeste C. Saravia.

55. Julie Conroy's report and testimony was focused primarily on the EMV industry as a whole. Conroy's opening merits report was 102 pages.

56. Dr. Saravia's report and opinions focused primarily on challenging Dr. Abrantes-Metz's analysis. Dr. Saravia's report was 93 pages.

57. Discover retained one expert: Dr. Daniel L. Rubinfeld, who opined on Discover's business model and challenged Dr. Abrantes-Metz's opinions. Dr. Rubinfeld's report was 84 pages.

58. Amex also retained one expert: Dr. Mark A. Israel, who challenged the opinions of both Dr. Abrantes-Metz and Dr. Officer. Dr. Israel's report was 119 pages.

59. In sum, Defendants' seven experts submitted opening reports—not including exhibits appendices, or other materials, but only the substance of the reports themselves—that spanned a total of 1025 pages. These expert reports cited thousands of documents, articles, and other information in support of their opinions. Class Counsel thus faced a monumental effort in analyzing not only these reports themselves, but the documents and evidence that Defendants' experts relied upon in drafting these reports. Class Counsel, with the assistance of Plaintiffs' experts, worked extensively to analyze Defendants' expert reports and determine how to respond to them.

4. Depositions of Defendants' Experts and Drafting Plaintiffs' Experts' Rebuttal Reports

60. Class Counsel took the depositions of each of the Defendants' experts between July and October 2021. Given the breadth of the issues explored by the experts and the volume of their reports and cited materials, each of these depositions required a significant amount of preparation time. Class Counsel analyzed key documents in the Action, Defendants' experts' reports, and the documents and materials cited by Defendants' experts in support of their reports. Class Counsel also conferred with Plaintiffs' experts to determine areas of each of Defendants' experts' reports that were most susceptible to challenge or were lacking support.

61. Class Counsel then worked with Plaintiffs' experts to prepare rebuttal reports to respond to the contentions of each of Defendants' experts. This required further analysis of the discovery record, the arguments made by each of Defendants' experts, and the materials cited by them in support of those arguments. Class Counsel then conferred with Plaintiffs' experts to

develop a strategy to obtain the necessary materials to generate rebuttal reports that would further advance Plaintiffs' claims and undermine Defendants' experts' opinions.

62. Dr. Officer's rebuttal report responded to three main categories of objections from Defendants' experts. First, criticisms of Dr. Officer's conclusions that the FLS chargebacks would not have been incurred by Class members in the but-for world. Second, that his use of the AFD market as a comparison point for the point-of-sale ("POS") market was not well supported or a useful framework. Third, that he had not adequately assessed the potential for "absorption" of FLS chargebacks by intermediary entities in the payment ecosystem. Dr. Officer also challenged a number of other arguments from Defendants' experts in his rebuttal report, including FLS chargebacks after the end of the class period, the Target data breach, merchant readiness concerns, purported benefits to merchants from the FLS, common timing of the FLS between all four Networks, and international experience with EMV. Dr. Officer also updated his damages analysis. Dr. Officer's rebuttal report was 52 pages, although again, his report was supported by many schedules and attachments detailing his analysis.

63. Similarly, Dr. Abrantes-Metz also structured her rebuttal report around several key arguments from Defendants' experts. This included that Defendants' experts had erroneously denied the existence of an economic framework to assess explicit collusion, and that they had wrongly classified an explicit agreement among the Networks as unilateral conduct. Dr. Abrantes-Metz opined further regarding the incentives of each of the Networks, explained in more detail the communications and coordination between the Networks surrounding the EMV migration and the FLS date, and also explained the methods by which the Networks ensured the collusive agreement stayed in place despite merchant pressure for a delay of the FLS. Dr. Abrantes-Metz also responded to the contention from several of Defendants' experts that a one-sided analysis of the

market was inappropriate and that a two-sided analysis was required. Dr. Abrantes-Metz further challenged the assertion from certain of Defendants' experts that the coordination of the Networks would be defensible under the Department of Justice and Federal Trade Commission's guidelines on collaborations among competitors. Finally, Dr. Abrantes-Metz further explained her opinion that in the but-for world the Networks would have likely extended the FLS date, even if there was tacit coordination between the Networks. She also opined that the October 2015 FLS was not, as Defendants' experts claimed, effective at achieving better economic outcomes. Dr. Abrantes-Metz's rebuttal report was 127 pages.

5. Depositions of Plaintiffs' Experts

64. After submitting opening merits reports, assessing Defendants' experts' reports, and working with Plaintiffs' experts to draft rebuttal reports, Class Counsel then prepared Plaintiffs' experts for depositions. Dr. Abrantes-Metz, having not been deposed yet in the Action, was deposed by Defendants over the course of two days in February 2022. Dr. Officer, having been deposed twice already in connection with his class certification opinions, was deposed on a single day in March 2022. Class Counsel spent many hours preparing Plaintiffs' experts for these depositions.

6. Close of Discovery on March 8, 2022

65. On March 7, 2022, the parties filed a joint letter with the Court certifying that expert discovery was complete. On March 8, 2022, the Court entered an order certifying that discovery was complete.

D. Class Counsel Engaged in Voluminous Motion Practice, Culminating with Defeating Several Motions for Summary Judgment

66. This Action involved numerous instances of Defendants filing motions that could either end Plaintiffs' case altogether, or seriously damage Plaintiffs' ability to recover damages on

behalf of the Class. RGRD had already defeated the Networks' attempts to have the case dismissed at the pleading stage, but no class had yet been certified when Class Counsel took over as lead. Further, Defendants took many more opportunities to try and eliminate the Class's claims. Class Counsel recognized in responding to these motions that we were facing substantial risks at each turn. Given the complexity of antitrust cases in general, and the unique complexities of this case, as well as the fact that each of the four Networks had their own defenses and arguments, we faced substantial challenges on this front.

1. Discover's Motion for Judgment on the Pleadings

67. One of the first challenges Class Counsel faced in terms of additional motion practice was Discover's motion for judgment on the pleadings. On July 6, 2017, Discover submitted a letter brief requesting a pre-motion conference on its intended Rule 12(c) motion for judgment on the pleadings. Discover argued that the Class's claims were fatally inconsistent with claims made by what it asserted was an overlapping Rule 23(b)(3) merchant class in the Interchange Action. Discover asserted those claims were part of the record in this Action. The motion was fully briefed, and Class Counsel vigorously disputed the premise of Discover's argument and its basis for dismissal.

68. Class Counsel prepared an opposition to Discover's motion for judgment on the pleadings explaining that Discover was largely repeating arguments it made and lost on the motion to dismiss briefing, that there were no "contradictions" in Plaintiffs' allegations, and that dismissal was inappropriate.

69. Discover vigorously pursued this motion, first filing a notice of supplemental authority, to which Class Counsel responded. Next, after the parties received a report and recommendation ("R&R") that recommended Discover's motion be denied, Discover briefed

objections to the R&R. Once again, Class Counsel vigorously opposed Discover's objections. On September 18, 2018, the Court entered an order adopting the R&R entirely and denying Discover's motion.

2. Initial and Renewed Motions for Class Certification

70. When Class Counsel took over as lead counsel, Plaintiffs' motion for class certification was pending, though it was initially filed in the U.S. District Court for the Northern District of California. On May 4, 2017, the Action was transferred to this Court.

71. Class Counsel first drafted supplemental briefing in support of the initial motion for class certification. This supplemental briefing, submitted in September 2017, identified Second Circuit authority that was different from Ninth Circuit authority on the relevant issues.

72. Class Counsel prepared for a hearing on the motion for class certification and argued the motion on November 29, 2017.

73. On March 11, 2018, the Court denied Plaintiffs' motion for class certification, but concluded that Plaintiffs had satisfied the explicit requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of both class representatives and counsel. The Court concluded that Plaintiffs, in offering four potential end dates for the class, had not satisfied Rule 23(a)'s implied requirement of ascertainability.

74. Class Counsel thus worked to further analyze the discovery record and worked with Plaintiffs' damages expert, Dr. Officer, to further assess what the but-for world would look like and determine how to define a class period with definite bounds. Class Counsel thus sought to review key documents pertaining to issues such as merchant readiness, considerations of delay of the FLS by Defendants—especially Visa—requests by merchants for exceptions and delays, and

other issues that bore on determining when the Networks would set their FLS dates in the but-for world.

75. After factual analysis of the discovery record, Plaintiffs' counsel concluded, with the assistance of Dr. Officer and his third expert report, that a two-year delay of the FLS was the most likely outcome in the but-for world. Class Counsel prepared a renewed motion proposing a two-year class period, based on the argument that September 30, 2017 "reflects the most likely alternate FLS date, but-for Defendants' collusion." Dkt. No. 706-1 at 1; Dkt. No. 707-1 at 1. Class Counsel argued that the evidence demonstrated that without Defendants' collusion, "the [n]etworks would have delayed the FLS by two years, starting with an announcement of a delay by Visa, and with the other [n]etworks following closely behind." Dkt. No. 725 at 10; Dkt. No. 744 at 10 (alterations in original). Class Counsel's renewed motion for class certification sought certification of the following class: Merchants who incurred one or more unreimbursed chargeback(s) between October 1, 2015 through and including September 30, 2017, pursuant to the Fraud Liability Shift for the assessment of Mastercard, Visa, Discover and/or Amex payment card chargebacks (the "Class"). Excluded from the Class are members of the judiciary and government entities or agencies.

76. Class Counsel served their renewed motion for class certification on July 16, 2018. However, after service of the renewed motion, Amex informed Plaintiffs of an inadvertent error resulting in documents being omitted from Amex's document production. From October 26, 2018 through November 10, 2018, Amex produced those missing documents. Amex produced a privilege log for those documents on November 15, 2018. Class Counsel analyzed this privilege log and production in the following months. Class Counsel then met and conferred with Amex regarding this additional privilege log. Amex produced additional documents in response on

January 25, 2019. The parties then agreed upon a new briefing schedule for Plaintiffs' pending renewed motion for class certification.

77. Defendants raised a number of challenges to Plaintiffs' renewed motion for class certification. Defendants argued that "[Dr.] Officer's analysis fails to consider the 'host of evidence that disproves his two-year opinion and in fact disproves the notion of a delay of any length.'" Dkt. Nos. 725 at 36; 744 at 36. Defendants also argued that Plaintiffs had predominance issues because they had not shown how merchants would have responded to networks adopting a later FLS date, and that the "new" but-for world posited by Plaintiffs would lead to individual questions predominating. Defendants argued that it would be necessary to assess whether any merchant incurred chargebacks because of the alleged conspiracy or because of the merchant's individual business decisions regarding when and how merchants would become EMV compliant.

78. Amex also raised two unique defenses to Plaintiffs' renewed motion for class certification. First, Amex argued that Plaintiffs had not met the ascertainability standard because Amex asserted Plaintiffs had not offered a method to determine which merchants had a Card Acceptance Agreement ("CAA") with Amex, and which did not. This, according to Amex, made for an ascertainability problem because those with a CAA were purportedly subject to arbitration. Second, Amex argued that Plaintiffs' theory of the Action had changed from the Networks adopting different FLS dates in the but-for world to the Networks all delaying to the same date two years later.

79. Class Counsel drafted an opposition to Defendants' new arguments regarding class certification and argued that Plaintiffs' selected two-year class period was the missing piece that would permit the Court to grant class certification.

80. Class Counsel successfully obtained certification of the Class, with the full two-year class period sought in the renewed motion. This was a significant victory given that Defendants had suggested a six-month class period was all that Plaintiffs could demonstrate, relying on internal consideration of a six-month delay and prior experience in Canada, where certain Networks provided a six-month delay of the FLS. A shorter class period would have greatly diminished the Class's potential recoverable damages at trial.

81. Demonstrating the complexity of the issues involved in this renewed certification briefing, the Court's August 28, 2020 order granting class certification and denying Defendants' motion to exclude expert testimony was 106 pages long, detailing the various arguments and counterarguments made by the parties.

82. In September 2020, Defendants filed petitions for leave to appeal the Court's class certification decision. Class Counsel opposed these petitions, the granting of which would have complicated and delayed the Action. In January 2021, the Second Circuit denied Defendants' Rule 23(f) petitions.

83. On May 6, 2021, the Court appointed George C. Aguilar and Michael J. Nicoud of Robbins LLP as Class Counsel.

3. Motion to Approve Notice to Class and Notice

84. Following the Court's order granting class certification, Class Counsel engaged Epiq Class Action & Claims Solutions, Inc. ("Epiq") to assist in preparing the class notice ("Notice"), and to plan and effectuate the dissemination of that Notice.

85. In connection with Class Counsel's notice efforts, Class Counsel sought and received notice data from Defendants, which included more than two and a half million rows of

data. Class Counsel worked with Epiq to analyze these data and build a dataset for notifying merchants who were, or were likely to be, members of the now-certified Class.

86. Class Counsel filed a motion for approval of the proposed class notice and notice plan on May 19, 2022. The Court approved this plan on June 3, 2022.

87. From June 28, 2022, through July 1, 2022, Epiq carried out the individual notice portion of the Class Notice plan. This consisted of mailing over 1 million postcard notices and emailing over 110,000 email notices. Together, the individual notice efforts reached approximately 96.6% of identified Class members. These direct notice efforts were supplemented by a media plan that ran from July 1, 2022, through July 31, 2022. The media plan included targeted internet advertising including more than 249.6 million impressions nationwide; a publication notice in numerous ethnic newspapers in Korean, Chinese, Russian, Japanese, and Vietnamese; internet search engine sponsored listings displayed more than 50,000 times; an informational release issued over PR Newswire's U.S. Newsline in English and Hispanic Newsline in Spanish to approximately 5,000 general media outlets, and specifically targeted to "Small Business" influencers; a dedicated Case Website (www.FraudLiabilityShiftLitigation.com) that has registered more than 25,000 unique visitor sessions; and the establishment of a toll-free telephone number and postal mailing address.

88. At the conclusion of the Class Notice plan, Class Counsel received only 334 exclusion requests, though the Class is estimated to consist of approximately 400,000 merchants, and notice was directly mailed to over one million merchants.

4. Discover's Motion to Compel Arbitration

89. Discover attempted to file its motion to compel arbitration shortly after the Court granted class certification. Class Counsel met and conferred with Discover regarding this motion,

insisting that it would not be properly filed or considered until the Class Notice plan was complete and the period for opt-outs had expired. Plaintiffs were unable to reach an agreement with Discover on the timing of its motion.

90. Discover initially served its motion to compel arbitration on October 30, 2020. Class Counsel opposed this motion both on the merits and on the grounds that it was not timely—given that the period for opt-outs had not expired, and thus, the bounds of the Class was yet to be determined.

91. The Court agreed with Class Counsel that Discover's motion to compel arbitration was prematurely filed, given that it was not yet known which merchants might opt out of the Class. On September 27, 2021, the Court denied Discover's motion to compel arbitration as premature, holding it could be refiled once the notice and opt-out period for the Class had ended.

92. After the close of fact and expert discovery, on November 30, 2022, Defendants served a slew of motions presenting serious risks for Plaintiffs. These motions included two motions to compel arbitration, two motions to decertify the class, five *Daubert* motions, and three motions for summary judgment.

93. Among this slew of motions was Discover's resubmission of its motion to compel arbitration. This motion presented significant risk given that many of Discover's merchants have a direct relationship with Discover, with an arbitration agreement as part of that relationship. Once again, Class Counsel opposed the motion, though this time purely on the merits. Class Counsel argued that the language of Discover's own arbitration agreement exempted the claims pursued in this Action from arbitration.

94. While Discover's motion to compel arbitration was pending, the Court sought supplemental briefing from the parties regarding the effect, if any, of the Second Circuit's decision

in *Local Union 97, International Brotherhood of Electrical Workers v. Niagara Mohawk Power Corp.*, 67 F.4th 107 (2d Cir. 2023) on the pending motion (as well as Amex's motion to compel arbitration, discussed below). Class Counsel drafted and submitted this supplemental briefing.

95. Class Counsel defeated Discover's motion to compel arbitration. In an order dated August 14, 2024, the Court agreed with Plaintiffs that the language of Discover's arbitration agreement excluded the claims at issue in this Action and denied Discover's motion.

5. Amex's Motion to Compel Arbitration and Decertify the Class

96. Amex also filed a motion to compel arbitration, arguing that merchants who accept Amex cards have signed a CAA that subjects them to arbitration. Complicating Amex's motion, however, was that it combined its motion to compel arbitration with a motion to decertify the Class. Amex argued that if the Court granted its motion to compel arbitration, then the Court could not adjudicate liability or damages as to Amex without an individualized inquiry into whether or not class members are bound by a CAA. Amex further argued that because only chargebacks imposed on merchants who did not accept Amex, and were not bound by a CAA, could subject Amex to liability, the Class would need to be decertified as to Amex. Amex argued that Plaintiffs had no way of establishing which chargebacks were attributable to merchants without a CAA.

97. Class Counsel opposed Amex's motion to compel arbitration and decertify the Class. In its August 14, 2024 order, the Court granted Amex's motion to compel arbitration. However, the Court agreed with Class Counsel's arguments that common issues still predominated over individual issues and that Dr. Officer's damages methodology could still be applied class-wide, and denied Amex's request to decertify the Class.

98. Though Class Counsel defeated Amex's motion to decertify the Class, Amex filed an appeal from the Court's order that granted Amex's motion to compel arbitration but denied its motion to decertify the Class.

99. Class Counsel argued on appeal that Amex's appeal was improper because it could not appeal a motion to compel arbitration that was granted. Class Counsel argued that Amex's assertion that it was seeking review of a "denial of a motion to stay," was not an accurate description of what the Court actually did. Class Counsel nevertheless had to brief this appeal. This appeal presented additional risk for the Action. This appeal was fully briefed and set for oral argument when Plaintiffs reached a settlement with Amex.

6. Visa and Mastercard's Motion to Decertify the Class

100. Like Amex, Visa and Mastercard also filed a motion to decertify the class. Visa and Mastercard's motion was premised on the claim that Dr. Abrantes-Metz had introduced a new theory of liability in connection with her rebuttal report. Visa and Mastercard argued that she posited a theory pitting small- and medium-sized merchants against large merchants (Class Counsel disputed this characterization). Visa and Mastercard asserted that this purportedly new theory meant that the Class Representatives' claims were no longer typical, the representatives were no longer adequate to represent large merchants, that individual questions predominated over common questions, and that this new liability theory was inconsistent with Plaintiffs' theory of damages.

101. Class Counsel drafted an opposition to Visa and Mastercard's motion to decertify the class explaining the flaws in each of their arguments. Class Counsel explained that Dr. Abrantes-Metz had not introduced a new theory, and that the portion of her rebuttal report Visa and Mastercard were referring to was only seven paragraphs out of dozens of pages. Class Counsel

also refuted the contention that Dr. Abrantes-Metz had pitted any group of merchants against each other. Class Counsel also explained that any reference to benefits certain merchants may have had because of an earlier FLS was far from suggesting that they were involved with the collusion. Class Counsel also reiterated yet again that Plaintiffs' liability theory still matched their damages theory, and that Visa and Mastercard's argument to this effect was an argument the Court had already rejected several times. The Court agreed with Plaintiffs, denying Visa and Mastercard's motion to decertify the class in an order on August 15, 2024.

7. Merits *Daubert* Motions

102. Class Counsel needed to respond to Defendants' five *Daubert* motions targeted at Dr. Officer's and Dr. Abrantes-Metz's merits reports and testimony. Class Counsel defeated these motions almost in their entirety. Class Counsel also drafted a *Daubert* motion against Mastercard's expert Conroy.

a. Defendants' Motions to Exclude Testimony of Dr. Officer

103. On November 30, 2022, Defendants served three motions to exclude the merits testimony of Dr. Officer: a motion by Visa, Mastercard, and Discover to exclude certain of his opinions; a motion by Amex to exclude Dr. Officer's testimony; and a motion by Visa and Mastercard to exclude Dr. Officer's testimony relating to the AFD market. These motions sought to both have Dr. Officer's testimony and opinions rejected in their entirety, and to reduce the damages Plaintiffs could seek at trial by pointing to purported flaws in his analysis. Class Counsel reviewed each of these motions, consulted with Plaintiffs' experts, and drafted oppositions to each. On September 13, 2024, the Court denied all of Defendants' motions directed at Dr. Officer, with the exception of part of Amex's motion.

104. Visa, Mastercard, and Discover's motion to exclude Dr. Officer's testimony and opinions argued that Dr. Officer was not qualified as an expert economist and did not apply well-established economic principles to his analysis of the AFD benchmark. These defendants also asserted that Dr. Officer could not opine on the Action because it involves a two-sided market and Dr. Officer did not purport to have knowledge of the economic literature regarding two-sided transaction platforms. They further argued that Dr. Officer testified he was not familiar with what they well-established economic literature regarding using a benchmark in an antitrust case. Visa, Mastercard, and Discover argued that Dr. Officer's damages model was inconsistent with Plaintiffs' liability theory. They also argued that Dr. Officer's damages calculations were unreliable because they: included reimbursed chargebacks; failed to exclude chargebacks to government entities (excluded from the Class); and failed to exclude cross-border chargebacks. Additionally, Visa, Mastercard, and Discover argued that Dr. Officer's substitution analysis was incorrectly performed.

105. Class Counsel responded to each of these issues, explaining Dr. Officer's significant experience and expertise in the relevant areas, and how his methodology was reliable and appropriate. Class Counsel explained how Dr. Officer's opinions were supported through his use of the discovery record, statements in the public record, and Dr. Officer's own knowledge, experience, and training in assessing economic and competitive responses and behavior. Class Counsel also rebutted Visa, Mastercard, and Discover's contentions regarding purported flaws in Dr. Officer's damages methodology and calculations.

106. Amex's motion to exclude Dr. Officer's testimony on the damages owed by Amex was premised on the idea that Dr. Officer's model applies regardless of whether or not a merchant was bound by a CAA with Amex.

107. Class Counsel argued in response that Amex had failed to articulate any requirement under *Daubert*, Rule 702, or otherwise for Dr. Officer to segregate his damages analysis between merchants with or without a CAA with Amex. In partly denying this motion, the Court did recognize that it would issue a limiting instruction informing the jury that it could not consider Dr. Officer's testimony for establishing the amount of damages owed by Amex to CAA-bound merchants.

108. Visa and Mastercard's motion to exclude Dr. Officer's AFD opinions sought to exclude his comparison between the FLS policies in the POS market and the AFD market. Their motion was premised on four main arguments: that his "cost-benefit" analysis was unreliable because he could not identify benefits of collusion in either the POS or AFD markets; that his AFD opinions are not based on an established methodology in economics; that the benchmark is "speculative or conjectural"; and that his opinions lack support in the evidentiary record.

109. Class Counsel's opposition rebutted each of these arguments. Class Counsel argued that Dr. Officer established the costs and benefits associated with a traditional economic approach in analyzing Defendants' motives, opportunities, and behavior. Class Counsel also argued that Dr. Officer's methodology of comparing a similar market with similar decisions, close in time and likely free of collusion, was a widely accepted methodology to generate a but-for world to define class-wide damages. Class Counsel also contended that Visa and Mastercard's arguments about the AFD and POS market comparisons only confirmed the reasonableness of Dr. Officer's conclusions.

b. Defendants' Motions to Exclude Testimony of Dr. Abrantes-Metz

110. On November 30, 2022, Defendants served two motions to exclude the opinions and testimony of Dr. Abrantes-Metz: Visa, Mastercard, and Discover's motion to exclude her

opinions; and Amex's motion to exclude her opinions. These motions sought to have Dr. Abrantes-Metz's testimony and opinions excluded in their entirety, and to limit her ability to opine on certain issues. Class Counsel reviewed these motions, consulted with Plaintiffs' experts, and drafted oppositions to both of these motions. As with the motions directed at Dr. Officer, in the same September 13, 2024 order, the Court denied all of Defendants' motions directed at Dr. Abrantes-Metz, with the exception of part of Amex's motion.

111. Visa, Mastercard, and Discover's motion to exclude the opinions of Dr. Abrantes-Metz was primarily premised on the argument that her reliance on a single-sided market analysis, as opposed to a two-sided analysis, was in error. These Defendants argued that this analysis was contrary to the law governing transaction platforms, including Second Circuit and Supreme Court precedent. They argued further that certain of her opinions were unreliable and unhelpful, that her opinions on evidence of collusion should be excluded, and that her opinion on anticompetitive effects is contrary to governing law and unreliable.

112. Class Counsel refuted each of these arguments. This involved a significant effort to explain the nature of single-sided and two-sided markets, the law applicable to each, and why Dr. Abrantes-Metz was correct to utilize a single-sided analysis. Class Counsel understood that this was a significant area of risk for the Action, as it could render Dr. Abrantes-Metz's testimony nearly entirely, if not entirely, inadmissible, if the Court were to agree with Defendants. This response required focusing primarily on the Supreme Court decision in *Ohio v. American Express Co.*, 585 U.S. 529 (2018) ("*Amex*"), and the details of that decision, to support Dr. Abrantes-Metz's methodology. Class Counsel also delved further into the details of the Second Circuit authority cited by Defendants, explaining why this authority also did not compel the conclusion that a two-sided analysis was necessary or appropriate in this Action. Further, Class Counsel highlighted

issues regarding the horizontal nature of the agreement at issue in this Action, in explaining why Dr. Abrantes-Metz's methodology was correct and reliable.

113. In addition, Class Counsel refuted Visa, Mastercard, and Discover's other arguments regarding Dr. Abrantes-Metz's testimony. Class Counsel argued that her opinions regarding the timing of liability shifts in other countries were supported with a significant factual basis in the record. Similarly, we argued that Dr. Abrantes-Metz's opinions regarding merchant steering were reliable and supported by proper evidence. Class Counsel also rebutted these defendants' argument that Dr. Abrantes-Metz had not properly defined the relevant product market, noting that she supported in several ways, including among other things, with a review of the DOJ and FTC's Horizontal Merger Guidelines and consideration of competitive constraints in multi-sided platforms.

114. Amex's motion to exclude Dr. Abrantes-Metz's opinions and testimony regarding Amex's participation in the conspiracy was premised on the idea that she employed improper approaches and techniques. Class Counsel responded separately to Amex's contentions as well.

115. Amex argued that many of the communications and documents relied upon by Dr. Abrantes-Metz to demonstrate evidence of the conspiracy did not involve Amex. Amex further asserted that she had miscited or misinterpreted the materials she relied upon.

116. Class Counsel argued in response that Dr. Abrantes-Metz's opinion was reliable as to Amex, even though many of the pieces of evidence she cited were not Amex documents or testimony. Class Counsel noted that case law establishes that a participant in a conspiracy need not have knowledge of all of the details of the conspiracy or its scope to be held to be a participant. Further, Class Counsel rebutted the contention that Dr. Abrantes-Metz had miscited any of the materials she relied upon. The Court agreed with Class Counsel, denying Amex's motion, except

in one respect. The Court excluded certain of Dr. Abrantes-Metz's opinions regarding Amex's intent and state of mind.

c. Class Counsel's Motion to Exclude Testimony of Conroy

117. Class Counsel drafted a motion to exclude the testimony of Mastercard's expert Conroy and filed it on November 30, 2022. Class Counsel argued that Conroy's work was largely lifted word for word from prior work produced years ago in a different context, primarily by authors other than Conroy. Thus, we argued that her report and opinions were reverse-engineered. Class Counsel also argued that her opinions were not supported by sufficient facts or data connected to this matter, often evidenced by her assertion that something was supported purely by her unspecified "conversations, experience, or understandings." The Court granted portions of Plaintiffs' motion to exclude the testimony of Conroy, including her testimony as to what merchants would or would not have done had the Networks delayed their respective liability shifts.

8. Motions for Summary Judgment

118. Defendants filed three motions for summary judgment: one from Visa and Mastercard, one from Amex, and one from Discover. Defendants' motions for summary judgment raised key dispositive issues as well as arguments that would severely limit Plaintiffs' ability to recover damages at trial. Combined, these motions comprised 114 pages of briefing, 648 exhibits spanning 32,098 pages, and 496 separate statements of material fact. Class Counsel's oppositions to these motions comprised 125 pages of briefing, 355 exhibits spanning 8,707 pages, and 513 separate statements of material fact as to which Plaintiffs contended there existed a genuine issue to be tried.

119. Responding to Defendants' motions for summary judgment was a massive undertaking given the scope of this Action and the motions themselves. From a legal research and

caselaw perspective, the motions presented myriad issues for Class Counsel to address. These included key dispositive issues like Defendants' argument that merchants could not recover because they are, according to Defendants, indirect purchasers of the services at issue, and thus barred from recovery under the *Illinois Brick* doctrine. Class Counsel also devoted significant efforts to the relevant legal framework for assessing Defendants' alleged collusion. A key issue was whether the law required the collusion at issue to be assessed through a single-sided or two-sided market analysis. Defendants also asserted the analysis should be Rule of Reason. Class Counsel instead argued that the appropriate analysis was per se, or failing that, Quick Look review. Further, Class Counsel needed to respond to Defendants' assertions regarding the necessary evidentiary showing to demonstrate an antitrust conspiracy and caselaw distinguishing unilateral conduct from collusion. Visa and Mastercard argued that the Court "should grant partial summary judgment to limit damages to six months of Visa chargebacks and exclude Mastercard, American Express, and Discover chargebacks, cross-border chargebacks, and chargebacks to government entities."

120. In addition to the legal research and caselaw perspective, the motions for summary judgment involved myriad factual issues. Class Counsel thoroughly combed the discovery record for the best evidence to use in opposition to Defendants' motions. Class Counsel analyzed the materials cited by Defendants and crafted detailed responses and rebuttals to Defendants' statements of material fact, along with appropriate objections. Class Counsel also prepared additional separate statements of material fact for each of Defendants' motions for summary judgment. Given the dozens of depositions, nine experts, and millions of documents that are part of the discovery record in this Action, these tasks were significant.

121. Expert issues were also highly intertwined with the motions for summary judgment. These issues were significant for the motions, ranging from completely dispositive to damages issues that could reduce Plaintiffs' potential damages to a mere fraction of what Plaintiffs were seeking. Class Counsel worked with Plaintiffs' experts to appropriately respond to these issues—which were highly intertwined with the responses to Defendants' *Daubert* motions.

a. Visa and Mastercard's Motion for Summary Judgment

122. On November 30, 2022, Visa and Mastercard served a 67-page motion for summary judgment, with 272 exhibits, along with a 107-page separate statement of material facts in support, spanning 264 individual statements.

123. Visa and Mastercard raised a number of challenges to Plaintiffs' Action in their motion for summary judgment. These included that the *Illinois Brick* doctrine barred Plaintiffs' claims. Visa and Mastercard claimed that Second Circuit authority was controlling and dispositive on this issue.

124. Visa and Mastercard also argued that Plaintiffs could not show anticompetitive effects. They argued that the proper analysis for the alleged conduct at issue was the Rule of Reason. Following that argument, Visa and Mastercard then argued that Plaintiffs could not meet that burden, claiming that Plaintiffs did not define a legally permissible antitrust market, did not show anticompetitive effects on output or quality, and could not demonstrate that the FLS led to supracompetitive prices in the relevant market as a whole, and that Plaintiffs were attempting to improperly shift the burden to Defendants regarding demonstrating anticompetitive impact. Part of this argument was Visa and Mastercard's contention that a single-sided analysis like the one performed by Dr. Abrantes-Metz was insufficient and inappropriate.

125. Visa and Mastercard's motion for summary judgment also presented their own versions of what happened, arguing that they each had non-collusive reasons to not delay their FLS. Their motion argued the factual record demonstrated that the decision making was based on the unique decision-making process of each Network, with their own independent reasons not to delay. One of these reasons was the massive Target data breach that occurred shortly before the FLS, which Visa and Mastercard contended was a major driver of refusing the delay the FLS. Visa and Mastercard also challenged Plaintiffs' proferred plus factors, arguing that they were legally and factually insufficient to support Plaintiffs' allegations of conspiracy.

126. In addition to trying to get the Action dismissed entirely, Visa and Mastercard's motion also sought to limit the claims at issue and the damages at issue. They raised arguments that Plaintiffs' state law claims failed. They also raised numerous arguments in an attempt to limit Plaintiffs' damages at trial. These arguments included that at most, any delay in the but-for world would have been six months, rather than two years; that any delay would not have included cross-border transactions; and that Plaintiffs' damages should be lowered to account for government entities or agencies and reimbursed chargebacks.

127. Class Counsel prepared and served a 75-page opposition to Visa and Mastercard's motion to dismiss supported by 355 exhibits. In conjunction with this opposition, Plaintiffs filed a response to Visa and Mastercard's separate statement of material fact, which included an additional 320 statements of material fact as to which there existed a genuine issue to be tried. In total the response and additional statements amounted to 249 pages of material.

128. The Court ultimately agreed with Plaintiffs, denying Visa and Mastercard's motion for summary judgment in its entirety in an order dated September 25, 2024.

129. On October 9, 2024, Visa and Mastercard moved to certify the September 25, 2024 Order for interlocutory appeal. Discover joined in this motion. Visa and Mastercard raised two challenges that it contended qualified for interlocutory appeal: their *Illinois Brick* standing arguments, and their two-sided vs. one-sided market analysis arguments pursuant to *Amex*.

130. Class Counsel briefed these issues, explaining how Visa and Mastercard had failed to meet the requirements for certification. In an order dated March 13, 2025, the Court agreed with Class Counsel, denying Visa and Mastercard's motion to certify issues for interlocutory appeal.

b. Discover's Motion for Summary Judgment

131. On November 30, 2022, Discover served its own motion for summary judgment that added its own arguments and version of the facts to the analysis. Discover also cited to 143 of its own exhibits in support. Discover focused on its unique place amongst the Networks as the smallest Network and attempted to differentiate itself because it had not been named as a defendant in other credit card antitrust litigation, unlike the other Networks. Discover challenged Plaintiffs' evidence, arguing that there was no direct or circumstantial evidence of Discover's participation in the alleged agreement. Discover filed a separate statement of material fact in support of its motion that included 157 separate statements.

132. Class Counsel prepared and served a 25-page opposition to Discover's motion, and submitted a response to Discover's separate statement of material fact, which included an additional 78 statements of material fact specific to Discover's motion.

133. The Court agreed with Class Counsel on Discover's motion as well, denying it in its entirety in the Court's September 25, 2024 Order.

134. On October 9, 2024, Discover served a motion for reconsideration of the Court's September 25, 2024 Order denying its motion for summary judgment. Discover argued that the Court had not considered controlling and undisputed facts. Discover's motion focused on several pieces of evidence and argued that the Court had either analyzed them incorrectly or not at all.

135. Class Counsel filed an opposition explaining how Discover was mistaken that there was any error in the Court's analysis, and that it had properly examined the evidence and arguments put forth by the parties. The Court agreed with Class Counsel, denying Discover's motion to reconsider on February 12, 2025.

c. Amex's Motion for Summary Judgment

136. On November 30, 2022, Amex also served a motion for summary judgment, raising a host of issues unique to Amex. Amex's motion also offered its own version of events, arguing that the evidence showed unilateral competitive decision-making as opposed to collusion. Amex also argued that summary judgment was warranted because Plaintiffs' damages evidence could not properly facilitate an award against Amex. In support of its motion, Amex submitted 233 exhibits. Amex also submitted its own separate statement of material fact that included 75 statements.

137. Class Counsel prepared and filed a 25-page opposition to Amex's motion for summary judgment and responded to Amex's separate statement of material facts, which included Plaintiffs submitting an additional 115 separate statements specific to Amex's motion for summary judgment. The Court agreed with Class Counsel, denying Amex's motion for summary judgment in its entirety in the Court's September 25, 2024 Order.

E. Class Counsel Engaged in Hard-Fought, Good-Faith Negotiations with Defendants, Through Two Neutral Mediators, Which Resulted in Three Separate Settlements Totaling $231,700,000

138. Class Counsel's efforts to resolve this Action in a way that provided the greatest possible benefit for the Class took many years of litigation, numerous attempts, and multiple

mediators. Class Counsel engaged in six mediations in addition to the first mediation conducted by RGRD. Each of these mediations was a hard-fought, arm's-length attempt to settle the Action in good faith. These efforts led to the creation of a Common Fund of $231,700,000.

139. One key pressure point for the case was class certification. After the Court's order on March 11, 2018, denying class certification, but holding that Plaintiffs had satisfied Rule 23(a)'s explicit requirements of numerosity, commonality, typicality, and adequacy of both class representatives and counsel, Class Counsel believed there may be an opportunity to resolve the matter. Class Counsel scheduled a second mediation with Visa and Mastercard on May 11, 2018.

140. The May 11, 2018 mediation was a full day, in-person session held with a highly regarded and experienced former federal judge as the mediator, the Honorable Edward A. Infante (Ret.) ("Judge Infante") in San Francisco, CA. Attached as Exhibit 4 to this declaration is the Declaration of Edward A. Infante in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards and Motion for Final Approval of Settlements with Defendants, in which Judge Infante discusses the four mediation sessions he held with Plaintiffs and Visa and Mastercard, and the nature of these negotiations.

141. Class Counsel were unable to reach a settlement with Visa and Mastercard during the May 11, 2018 mediation session. Many dispositive issues and significant damages issues remained unresolved at that point. Among other things, the yet-to-be-filed renewed motion for class certification would clarify the length of the class period. This was a key issue because the length of the class period dictated the length of time for which merchants could recover for FLS chargebacks. A settlement at this time would have avoided the uncertainty regarding class certification, and the possibility that the Court could reject Plaintiffs' motion entirely or approve a much shorter class period than Plaintiffs envisioned. Class Counsel decided it best to continue

litigating the case, seeking to further develop Plaintiffs' claims and continue pressuring Defendants rather than reach an early settlement.

142. The next attempt at mediating the claims in this Action did not occur for many years. The next mediation between Plaintiffs and Visa and Mastercard was scheduled with Judge Infante on June 23, 2023. At this point, the Court had granted Plaintiffs' renewed motion for class certification, approving the full two-year class period sought by Plaintiffs. Class Counsel had provided notice to the Class, and the opt-out period had expired. Additionally, the parties had completed fact and expert discovery. Defendants had filed a slew of motions, including three motions for summary judgment, five *Daubert* motions, two motions to compel arbitration, and two motions to decertify the Class. Class Counsel had served their oppositions to those motions and were awaiting Defendants' reply briefs at the time of the June 23, 2023 mediation.

143. The June 23, 2023 mediation thus had the benefit of occurring following the resolution of some of the uncertainty in the Action—including the major hurdle of whether the Class would be certified and what length the class period would be. However, as evidenced by Defendants' multitude of summary judgment and other motions, there were numerous dispositive issues and significant damages issues yet to be resolved in the Action. Class Counsel understood going into this mediation that Defendants were prepared to point to these defenses to explain their position at mediation. Class Counsel also understood that, as before, we faced numerous dispositive motions that could completely end the Action with no relief for the Class. We were unable to reach a suitable settlement, and determined the best course of action was to press on and await the Court's orders on summary judgment.

144. The next opportunity to potentially resolve the Action presented itself when the Court began issuing its orders on the motions Defendants filed along with summary judgment.

The first of these orders was issued on August 14, 2024. The Court denied Discover's motion to compel arbitration, and granted Amex's motion to compel arbitration, but denied its motion to decertify the class. The next day, on August 15, 2024, the Court issued its order denying Visa and Mastercard's motion to decertify the Class.

145. Plaintiffs and Visa and Mastercard scheduled a fourth mediation with Judge Infante for September 11, 2024. At this point, though some of Defendants' motions had already been denied, serious risks for the case still loomed. These risks included adverse rulings on the *Daubert* motions or on the motions for summary judgment. Adverse rulings could have meant a total loss or a devastation of the potential ability of Plaintiffs to recover damages at trial. Nevertheless, Class Counsel went into this mediation prepared to try and leverage our recent wins. However, we were again unsuccessful at reaching an appropriate settlement. Though the risks in continued litigation were high, we were confident in the oppositions to Defendants' *Daubert* and summary judgment motions. We determined that the best course of action for the Class was yet again to go back to litigating and to wait for the Court's rulings.

146. On September 13, 2024, and September 25, 2024, the Court issued its orders on the *Daubert* motions and the motions for summary judgment, respectively. These orders denying Defendants' motions (except for with respect to a small portion of Amex's *Daubert* motions as to Dr. Officer and Dr. Abrantes-Metz) paved the way for further settlement negotiations.

147. Having now tried to mediate with Judge Infante and Visa and Mastercard four times, Class Counsel elected to try a different approach. Class Counsel determined it would be valuable to try a new mediator and to try to obtain icebreaker settlements with the smaller Networks first. Class Counsel planned to achieve valuable cooperation agreements with the smaller Networks, put pressure on the remaining Defendants to settle, and help streamline a trial

with any remaining Defendants so that Class Counsel could focus the case on the largest Defendants—Visa and Mastercard—who were responsible for a majority of the damages.

148. Class Counsel set up a mediation with Discover on December 6, 2024, in New York, NY, utilizing another highly regarded and very experienced former federal judge—the Honorable Layn R. Phillips (Ret.) of Phillips ADR Enterprises, P.C. ("Judge Phillips"). Attached as Exhibit 5 to this declaration is the Declaration of Layn R. Phillips in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards and Motion for Final Approval of Settlements with Defendants, which details the mediation with Discover and the subsequent mediations with Amex and then with Visa and Mastercard.

149. The December 6, 2024 mediation was a full-day in-person mediation in New York NY. At the conclusion of this mediation, as the result of a mediator's proposal, Plaintiffs and Discover reached agreement on a settlement in principle. Over the next few weeks, Class Counsel and Discover negotiated and drafted a stipulation of settlement, which was executed on February 10, 2025. Class Counsel and Discover negotiated and executed an amended stipulation of settlement on June 6, 2025 (the "Discover Settlement.").[3] The Discover Settlement provides that Discover will pay $12.2 million to the Common Fund. Discover Settlement, ¶¶36, 65. The Discover Settlement also provided for several forms of cooperation from Discover in further litigation against the remaining Defendants. *Id*., ¶¶56-57.

150. Following the successful Discover mediation, Class Counsel next turned to Amex. Plaintiffs and Amex attended a full-day in-person mediation on March 28, 2025, also in New York, NY, and again utilizing Judge Phillips. Once again, through a mediator's proposal, Plaintiffs and

[3] The Discover Settlement is Exhibit 1 (Dkt. No. 975-3) to the Declaration of George C. Aguilar in Support of Plaintiffs' Motion for Preliminary Approval of Settlement with Discover and Amex. Dkt. No. 975-2.

Amex were able to reach a settlement in principle at the conclusion of the day of mediation. Thereafter, Class Counsel and Amex negotiated and drafted a stipulation of settlement, which was executed on May 16, 2025 (the "Amex Settlement.").[4] The Amex Settlement. provides that Amex will pay $20 million to the Common Fund. Amex Settlement, ¶¶23, 65. The Amex Settlement also provided for certain terms of cooperation from Amex with Plaintiffs' litigation against the remaining Defendants. *Id.*, ¶¶56-57.

151. Finally, building on the successful icebreaker mediations with the smaller Networks, Plaintiffs tried to mediate for a fifth time with Visa and Mastercard, this time utilizing Judge Phillips. Plaintiffs and Visa and Mastercard attended a full-day in-person mediation on August 13, 2025, in New York, NY with Judge Phillips. At the conclusion of this fifth mediation session, as the result of a mediator's proposal, Plaintiffs and Visa and Mastercard reached agreement on a settlement in principle. Over the next few weeks, Class Counsel and Visa and Mastercard negotiated and drafted a stipulation of settlement, which was executed on September 12, 2025 (the "V/MC Settlement" and together with the Discover Settlement and the Amex Settlement, the "Settlement").[5] The V/MC Settlement provided that Visa and Mastercard will pay $119,700,000, and $79,800,000, respectively, to the Common Fund. V/MC Settlement, ¶¶21, 67.

[4] The Amex Settlement. is Exhibit 2 (Dkt. No. 975-4) to the Declaration of George C. Aguilar in Support of Plaintiffs' Motion for Preliminary Approval of Settlement with Discover and Amex.

[5] The V/MC Settlement is Exhibit 1 (Dkt. No. 980-3) to the Declaration of George C. Aguilar in Support of Plaintiffs' Motion for Preliminary Approval of Settlement with Visa and Mastercard. Dkt. No. 980-2.

F. Class Counsel Have Expended Significant Efforts on Settlement Notice and Preparation for Settlement Administration and Expect to Spend an Even Greater Effort to Administer the Settlement, If Approved

152. Class Counsel prepared and filed a Motion for Preliminary Approval of Settlement with Discover and Amex on June 24, 2025. In connection with this motion, Class Counsel developed a plan of distribution for the common fund established by the Discover and Amex Settlements. Class Counsel also worked with Epiq to determine how to modify the notice plan that had been utilized for class notice, to provide notice of the settlements, when approved. During this process, Class Counsel worked with Epiq and with Plaintiffs' damages expert and his staff to assess the available data and how best to administer the settlement.

153. While the motion was pending, Plaintiffs reached the V/MC Settlement. Class Counsel then submitted a Motion for Preliminary Approval of Settlement with Visa and Mastercard on October 10, 2025. Along with this motion, Class Counsel submitted a proposed order contemplating approval of the Discover, Amex, and V/MC Settlements at the same time.

154. On October 16, 2025, the Court granted preliminary approval of the Discover, Amex, and V/MC Settlements.

155. Class Counsel worked with Epiq to update the notices that had been provided for class certification, modifying them to include all the information the Class would need regarding the Settlement. Class Counsel also oversaw updates to the case website and the phoneline setup for the Action.

156. Class Counsel also continued working with Epiq to revise the distribution plan and preliminarily assess the available data for that process. Class Counsel sent additional data sets to Epiq to help prepare for the settlement administration process. Class Counsel and Epiq also engaged in discussions regarding what information was available and what additional information Class Counsel may be able to obtain.

157. Class Counsel expect that the administration of the Settlement will be a significant undertaking, not only for Epiq but also for Class Counsel. While it is difficult to predict the magnitude of this task at this time, Class Counsel believes it will be a minimum of hundreds of hours in attorney and professional time and could potentially be many more. Class Counsel will remain committed to this Action until the Settlement administration process is fully completed.

III. CLASS COUNSEL'S FEE AND EXPENSE REQUESTS

A. The Time and Labor Devoted to, and Expenses Incurred in, the Action by Plaintiffs' Counsel

158. Class Counsel believe the requested fee is supported by the factors articulated in *Goldberger v. Integrated Res.*, *Inc.*, 209 F. 3d 43, 57 (2d Cir. 2000), and provide further factual support for the analysis of these factors in the following sections. In preparing the expense and lodestar information for submission with this Motion, Class Counsel has utilized a cut-off date for time and expenses of October 16, 2025. This is the date the Court granted preliminary approval of the Settlement.

159. Class Counsel established a set of criteria to review the attorney and professional time and expenses to be claimed as lodestar in connection with this Motion. Class Counsel applied these criteria ourselves to our own expenses and hours, and provided the criteria to RGRD and DG&R and instructed them to apply the criteria to their own records as well. Robbins LLP's time report reflects time recorded and compiled in the firm's electronic time-keeping system. Having carefully reviewed our firm's time records, Class Counsel can aver that the hours reported and the work they reflect were reasonably necessary to the successful commencement, prosecution, and settlement of the Action.

160. Class Counsel conducted a review of all of the time entries for each timekeeper claimed on behalf of Robbins LLP in connection with this Motion. These steps were also

communicated to RGRD and DG&R for them to apply to their own timekeepers by the partner(s) in charge of the litigation. Class Counsel reviewed each of our timekeepers' entries to ensure the accuracy of the entries, as well as the reasonableness of the work in relation to this Action. During this process certain reductions were made in the exercise of billing judgment or to reduce the time spent on a task if necessary to ensure it was reasonable. Class Counsel reduced any time for the review or analysis of discovery documents to ten hours per day. Class Counsel ensured that entries were sufficiently detailed to describe the work done or reduced or eliminated the entry accordingly. For travel, any entries that listed only travel without any additional work being performed were reduced by 50%. Any entries relating solely to fee-related work were eliminated. No work in support of this Motion was claimed.

161. In addition, Class Counsel followed the following steps to further refine the time reports of each timekeeper claimed on behalf of Robbins LLP. Class Counsel eliminated any entries for timekeepers who accumulated fewer than twenty hours on the Action. Class Counsel applied current rates to all timekeepers, with the exception of any individuals who left the firm during the pendency of the litigation—those individuals' claimed rates are the rates at the time of their departure.

162. Class Counsel followed all of the above steps regarding the review of all timekeepers claimed on behalf of Robbins LLP and have confirmed that the claimed time was reasonably incurred in service of this Action. The claimed lodestar (which does not include a significant portion of time given the above reductions) for Robbins LLP for purpose of this Motion is: $19,369,205.00. Class Counsel provide timekeeper charts showing the hours incurred, the categories of work performed, and the rates charged for each professional as Exhibit 10. All of this lodestar has been generated on an entirely contingent basis. Class Counsel have no expectation

of or right to payment for any of this lodestar from any source other than in connection with this Motion or any other relief that the Court may grant. Robbins LLP's lodestar is based on 33,737.75 hours at hourly rates ranging from $825 to $1,225 for partners, $375 to $560 for associates, and $160 to $350 for staff attorneys, project attorneys, paralegals, and other necessary legal support staff. Robbins LLP's rates are the usual and customary rates charged for each individual in all of our cases, with the exception of the Project Attorneys, tasked primarily with the review and analysis of documents, which has been set solely for purposes of this Action at $300. Robbins LLP's blended hourly rate for this Action is $574.

163. As reported in their own declarations, the lodestar of RGRD is $9,765,555.00 for 18,496.25 hours; the lodestar of DG&R is $3,682,581.25 for 5,034.70 hours; and the lodestar of Amon is $51,600.00 for 64.50 hours. Thus, the total reported lodestar for Plaintiffs' Counsel for purposes of this Motion is $32,868,941.25 for 57,333.20 hours. The blended hourly rate for all plaintiffs' counsel is $573.

164. Class Counsel also engaged in a review of the expenses claimed in support of this Motion. Class Counsel, working with the firm's finance department and other members of the firm's staff as necessary, reviewed each of the expenses that are claimed in connection with this Motion. As with the lodestar, Class Counsel created a set of criteria for the review of the expenses in connection with this Motion, applying those criteria to Robbins LLP's expenses, and providing the criteria to RGRD and DG&R for them to apply to their own expenses. Class Counsel are not claiming any expenses from local counsel Amon in connection with the Motion.

165. The criteria for the review of expenses applied by Robbins LLP, and provided to RGRD and DG&R for them to apply to their firm's respective expenses are: ensuring that the expenses were incurred specifically and only for this Action; ensuring the claimed expenses are

the type of expenses appropriately claimed in connection with litigation; removing any upgrade fees to first/business class, and reducing any first class or business class travel to an equivalent fare for economy (or reduced by 30% if the equivalent rate was not available from other travelers); reducing meals to $100/person/meal; removing alcohol where apparent or believed it was consumed; and removing any room upgrade fees.

166. Class Counsel followed all of the above steps regarding the review of expenses and have confirmed that the claimed expenses from Robbins LLP are reasonable, supported by our records, and were incurred in support of litigating this Action. Robbins LLP's claimed expenses for purposes of this Motion are $3,719,222.19. All of these expenses were actually incurred and have been entirely unreimbursed. Class Counsel has no expectation of or right to repayment of these expenses from any source other than in connection with this Motion or any other relief that the Court may grant. Class Counsel provide a chart of the expenses incurred and the categories for such expenses as Exhibit 11.

167. Class Counsel's expenses are for the following categories:

(a) Experts: these expenses are for Plaintiffs' damages and liability experts and their staff;

(b) Discovery Review Platform: these expenses are for the discovery platforms utilized for the review and analysis of discovery, including Relativity and DISCO, along with charges for project management for the same;

(c) Depositions: these expenses are for court reporting, videography, realtime, and other services in connection with depositions;

(d) Mediation: these expenses are for the mediations held with Judge Infante and Judge Phillips, and follow up communications with the mediators;

(e) Travel & Meals: these expenses are for accommodations, transport (including primarily airfare, as well as ubers/taxis/rental cars), parking associated with travel, and meals;

(f) Photocopies: these expenses are for internal printing costs at $0.25 per page and $0.15 per scan;

(g) Research & Investigation: these expenses are for legal research through Westlaw, PACER charges, and research through Bloomberg;

(h) Communications & Messaging: these expenses are for courier costs, postage, and conference call charges; and

(i) Filing/Service Fees: these expenses are for *pro hac vice* fees and court filing fees.

168. Class Counsel understands from their declarations that RGRD's claimed expenses are $781,985.23 and DG&R's claimed expenses are $47,093.49. Accordingly, the total claimed expenses for purposes of this Motion are $4,548,300.91 (the "Expense Request"). The vast majority of expenses—86%—are for experts, depositions, and discovery review platform costs (72% are for expert costs alone). These expenses amount to 1.96% of the common fund.

169. Class Counsel's expenses do not include any expenses incurred by Epiq in connection with providing notice to the Class of class certification, or notice to the Class of the Settlement. Nor do they include the anticipated costs for administration of the Settlement. Class Counsel expect to submit these expenses, including those already incurred, and those yet-to-be-incurred in service of the Class, to the Court on behalf of Epiq at the appropriate time, with the appropriate support and documentation, to be approved for payment out of the Common Fund. The expenses also do not include the payment of taxes and tax expenses imposed on the Common

Fund as defined in the settlement agreements and which will be paid by the Claims Administrator out of the Common Fund.

170. Class Counsel completed sprawling discovery efforts here that included: review and analysis of a massive evidentiary record consisting of 1.97 million documents, spanning tens of millions of pages; expert reports from nine experts, including two of Plaintiffs' experts (with rebuttal reports) and seven for Defendants; and depositions of fifty-five fact witnesses and all nine experts (in some instances multiple times) over seventy-two days of depositions. These efforts were particularly onerous given that Class Counsel built this case without any prior government or related action paving the way. The factual and legal bases for this Action had to be entirely developed from scratch.

171. Class Counsel also defeated motion after motion by Defendants that attempted to have Plaintiffs' claims dismissed outright or greatly diminish Plaintiffs' ability to recover damages at trial. These motions included: motions to dismiss, a motion for judgment on the pleadings, motions to compel arbitration, two motions to decertify the class, five *Daubert* motions (defeated almost in their entirety), and three motions for summary judgment, among others. Class Counsel obtained certification of the Class after two rounds of briefing with the assistance of Plaintiffs' expert, Dr. Officer.

172. These litigation efforts paved the way for Class Counsel's robust settlement efforts, which included seven mediations with two highly respected and experienced mediators, both of whom are former federal judges.

B. Magnitude and Complexity of the Litigation

173. Additional complexity in this case came from the development of new Supreme Court authority during the pendency of the litigation—*Ohio v. American Express Co.*, 585 U.S.

529 (2018). The *Amex* case presented an issue that became a focal point of the litigation: does an alleged restraint require a two-sided (i.e. merchant and issuer) analysis as opposed to a one-sided (merchant) analysis. Defendants argued that a two-sided analysis was required, while Plaintiffs maintained that the single-sided analysis performed by Dr. Abrantes-Metz was not only proper, but the more appropriate analysis. This issue permeated Defendants' *Daubert* motions and summary judgment motions.

C. Risk of the Litigation

174. In taking on this litigation, Class Counsel expected heavy resistance from Defendants, some of the largest companies in the world. The claims pursued here were a novel extension of horizontal price-fixing cases, based on a one-time technological transition in the United States, the adoption of EMV and the accompanying FLS. It was not disputed that the underlying technology being implemented in connection with the FLS—the EMV chip—worked to reduce fraud by being more secure than the magnetic strip technology it supplemented. This presented Defendants with the opportunity to argue—as they did throughout the litigation—that their actions regarding the FLS itself were also designed to reduce fraud and were actually pro-competitive. This supposed pro-fraud-reduction argument fed into Defendants' argument that the Court needed to apply a Rule of Reason analysis to this Action. Similarly, government pressure to adopt EMV and reduce fraud and a significant highly publicized data breach at Target in late 2013 created convenient scapegoats for the lack of any delay of the FLS. Defendants utilized seven experts to ensure they could fully develop these—and myriad other arguments—to defeat Plaintiffs' claims.

175. At no point during this litigation did some external event occur that decreased the risk for Class Counsel. There was no related action that settled, or new government investigation, or public revelation of relevant new evidence.

176. The Supreme Court's decision in *Amex* created a new point of uncertainty that greatly affected the litigation of this case. Class Counsel devoted significant time and effort to addressing the issues that arose out of this authority in *Daubert* motions, summary judgment briefing, and in other aspects of the case. This development greatly enhanced the risk for Class Counsel. Defendants seized on this decision to argue that a two-sided market analysis was required and that Dr. Abrantes-Metz's opinions, based on a single-sided analysis, must be rejected. While Class Counsel believed Dr. Abrantes-Metz's opinion was well-founded, *Amex* presented a significant risk. If the Court were to agree with Defendants that a two-sided analysis was required here, Plaintiffs would have been deprived of Dr. Abrantes-Metz's testimony regarding anticompetitive impact and antitrust injury.

177. Class Counsel also faced serious risk because of Defendants' *Illinois Brick* defense, where they argued that merchants were not the "direct purchasers" of the chargebacks at issue and thus were barred from recovery.

178. Despite these risks, Class Counsel persevered over nearly a decade of litigation, pressing the case at each stage. Class Counsel took this case on a contingent basis, receiving no payment or promise thereof in exchange for this Action, while taking on $4,548,300.91 in expenses, and devoting 57,333.20 hours of attorney and professional time to this matter. Class Counsel took on the risk that the Action could fail at the motions to dismiss, the motion for judgment on the pleadings, the motion for class certification, the two motions to decertify the class,

and Defendants' three summary judgment motions. Class Counsel also faced serious risk through Defendants' five *Daubert* motions.

D. Quality of Representation

179. Class Counsel provide several measures of the quality of representation here, including the experience of our attorneys and the results achieved. Class Counsel provide further factual support for these measures in this subsection. Robbins LLP is a nationally recognized shareholder rights law firm dedicated to the prosecution of shareholder derivative and class action lawsuits. Since its inception, the firm has been dedicated to complex litigation, and we have achieved significant victories on behalf of shareholders, classes, and companies across the country. The firm has recovered more than $1 billion of value for its clients, classes they represent, and institutions in which they have invested. The firm has received numerous accolades for its work in complex litigation. A true and correct copy of the Firm Resume is attached as Exhibit 9.

180. Dr. Officer's estimates of the chargebacks attributable to each Defendant during the class period are: $762,051,815 for Visa, $544,384,692 for Mastercard, $118,273,655 for Amex, and $29,775,524 for Discover, for a total of $1,454,485,686. However, this figure included chargebacks for merchants who opted-out of the Class, merchants who had their chargebacks reimbursed or absorbed by payment processors or acquiring banks, and government entities who are excluded from the Class. Class Counsel analyzed data available to us, with the assistance of Dr. Officer's staff, including the number and identify of the 334 opt-outs, data regarding absorptions or reimbursements, and data pertaining to government entities, to try to determine an estimate for Plaintiffs' current best-case scenario recoverable damages at trial. After this analysis, Class Counsel believes that the best-case-scenario recoverable damages for Plaintiffs are

$1,286,375,666 (Visa: $673,973,571; Mastercard: $481,464,498; Amex: $104,603,540, and Discover: $26,334,057).

181. Visa's experts have provided alternative chargeback calculations for different scenarios for each of the four Defendants through its expert reports. These scenarios include figures for a three-, six-, twelve-, eighteen-, or twenty-four-month delay of the Fraud Liability Shift; along with three different scenarios: 1) a delay of only domestic debit FLS charges, 2) a delay of domestic credit and debit FLS charges, with no delay of cross-border FLS charges; and 3) a delay of credit and debit charges including a delay of cross-border FLS charges. The lowest of these figures is $24,649,294, associated with a three-month delay of only debit transactions. The highest figure is $1,424,068,666 associated with a two-year delay of credit and debit transactions, including cross-border. Visa's experts also provided a figure for a six-month delay of the debit and credit transactions, without cross-border charges (in Visa and Mastercard's summary judgment motion they argued, among other things, that the Court should limit damages to six months and exclude cross-border chargebacks), amounting to $392,390,199, broken up as $223,999,732 (Visa), $126,306,627 (Mastercard), $34,000,000 (Amex), and $8,083,840 (Discover).

E. Requested Fee in Relation to the Common Fund

182. Class Counsel have endeavored to provide the Court with appropriate comparators, and to that end have compiled a list of antitrust class actions that have settled since 2011 with a common fund between $100 and $250 million. Class Counsel filled this list with all such examples that could be located with a diligent search regardless of whether the fee awarded was higher or lower than that sought here. Class Counsel have attached as Exhibit 12 a chart showing those cases, including: (a) the size of the common fund, (b) the fee awarded, and (c) the expenses

awarded. Further, the source documents for this chart are attached as Exhibits 13 & 14 (with the Tab numbers corresponding to the chart row number).

183. This Action has always been litigated by a single firm as lead counsel—though assisted throughout by DG&R, and since the transfer to this Court by local counsel.

F. Lodestar Crosscheck

184. Class Counsel's reported lodestar of $32,868,941.25, and resulting multiplier of 2.00, does not take into account the anticipated additional work that Class Counsel will complete relating to administering the settlement. Class Counsel expect to spend hundreds of hours of attorney and professional time, and perhaps more, answering questions from Class members, helping them fill out claims forms, working with Epiq on administering the Distribution Plan, and dealing with any potential disputes or issues that arise.

IV. EXHIBITS

185. Attached hereto are true and correct copies of the following:

Exhibit 1: Declaration of Alexandra S. Bernay in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards;

Exhibit 2: Declaration of John Devine in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards;

Exhibit 3: Declaration of Thomas G. Amon in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards;

Exhibit 4: Declaration of Edward A. Infante in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards and Motion for Final Approval of Settlements with Defendants;

Exhibit 5: Declaration of Layn R. Phillips in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards and Motion for Final Approval of Settlements with Defendants;

Exhibit 6: Declaration of Max Milam in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards and Motion for Final Approval of Settlements with Defendants;

Exhibit 7: Declaration of Stephane Strouk in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards and Motion for Final Approval of Settlements with Defendants;

Exhibit 8: Declaration of Carlos Collado in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards and Motion for Final Approval of Settlements with Defendants;

Exhibit 9: Firm Resume of Robbins LLP;

Exhibit 10: Robbins LLP Lodestar Summary;

Exhibit 11: Robbins LLP Expense Summary;

Exhibit 12: Chart: Collection of Antitrust Cases Settling Between 2011 and Now with Common Funds Between $100-250M;

Exhibit 13: Chart Supporting Documents Part I (Tabs 1-27);

Exhibit 14: Chart Supporting Documents Part II (Tabs 28-57);

Exhibit 15: *Qsberg v. Foot Locker, Inc., et al.*, No. 1:07-cv-1358, slip op. (S.D.N.Y. June 8, 2018);

Exhibit 16: *2024 Antitrust Annual Report: Class Actions in Federal Court*, Center for Litigation and Courts & Huntington Bank (July 2025); and

Exhibit 17: [Proposed] Order Awarding Attorneys' Fees and Expenses and Approving Service Awards.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 23rd day of December, 2025, at San Diego, California.

GEORGE C. AGUILAR

I declare under penalty of perjury that the foregoing is true and correct. Executed this 23rd day of December, 2025, at San Diego, California.

MICHAEL J. NICOUD

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2025, I authorized the electronic filing of the foregoing, including all exhibits, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all registered parties and attorneys of record.

s/ George C. Aguilar

GEORGE C. AGUILAR
ROBBINS LLP
5060 Shoreham Place, Suite 300
San Diego, CA 92122
Telephone: (619) 525-3990
Facsimile: (619) 525-3991
gaguilar@robbinsllp.com

EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

B & R SUPERMARKET, INC., d/b/a MILAM'S MARKET, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. VISA, INC., et al., Defendants.	:	Case No. 1:17-cv-02738-BMC-JAM CLASS ACTION

DECLARATION OF ALEXANDRA S. BERNAY FILED ON BEHALF OF ROBBINS GELLER RUDMAN & DOWD LLP IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS

I, ALEXANDRA S. BERNAY, declare as follows:

1. I am an attorney duly licensed to practice before all of the courts of the State of California and was previously admitted *pro hac vice* in the above-entitled action (the "Action"). I am a member of the law firm of Robbins Geller Rudman & Dowd LLP ("Robbins Geller" or the "Firm"). I have personal knowledge of the matters stated herein and, if called upon, I could and would competently testify thereto. I am submitting this declaration in support of the motion for an award of attorneys' fees, expenses, and service awards (collectively, the "fees and expenses") in connection with services rendered in the Action.

2. This Declaration is intended to assist the Court in assessing the litigation efforts the Firm engaged in, which contributed to the outstanding resolution for the Class as set forth in Plaintiffs' Motion for Preliminary Approval of Settlement with Discover and Amex and Motion for Preliminary Approval of Settlement with Visa and Mastercard, as granted by this Court (Dkt. Nos. 982, 983).

3. This Firm originally represented plaintiffs B & R Supermarket, Inc. (d/b/a Milam's Market), Grove Liquors LLC, Strouk Group LLC (d/b/a Monsieur Marcel), and Palero Food Corp. and Cagueyes Food Corp. (d/b/a Fine Fare Supermarket) (collectively, "Plaintiffs") and the Class herein.

4. The Firm conducted significant, critical work in the Action which supports the Firm's request for fees and expenses. Robbins Geller was counsel of record during a critical and risky time of the case; indeed, the Firm filed the original action on March 8, 2016. Dkt. No. 1. Days later, on March 11, 2016, the Firm filed a motion for injunctive relief, seeking to halt the implementation of the "Liability Shift" that defendants Visa, Inc. and Visa U.S.A., Inc. ("Visa"); Mastercard International Incorporated ("Mastercard"); American Express Company ("Amex");

Discover Financial Services ("Discover," and collectively, the "Networks"); Bank of America, N.A.; Capital One Financial Corporation; Chase Bank USA, National Association, Citibank (South Dakota), N.A.; Citibank, N.A.; PNC Bank, National Association; U.S. Bank National Association; Wells Fargo Bank, N.A.; and EMVCo, LLC (collectively the "Defendants") had announced. Dkt. No. 10. Unlike many antitrust cases, this Action was not a follow-on from a governmental action. Because of this, significant time, investigation and analysis, including the locating and hiring of consultants, was necessary in order to piece together the allegations in a complaint that could withstand a motion to dismiss filed by some of the most sophisticated defense lawyers in the country. Robbins Geller's work in this regard included locating and hiring an expert in EMV technology, becoming subject matter experts on the impact of EMV technology globally and nationwide, meeting with merchants across the country who would be paying fraud liability shifts costs and investigating public statements regarding the change in chargeback policy.

5. Robbins Geller was also retained by additional plaintiffs in the spring and summer of 2016, including plaintiff Fine Fare. This is significant as Fine Fare did not accept Amex cards as a form of payment and was a critically important addition to the case as a party that did not sign an arbitration agreement with Amex.

6. Robbins Geller successfully defeated Defendants' multiple motions to dismiss on September 30, 2016, overcoming a critical hurdle in the Action, as Robbins Geller's successful opposition to the dispositive motions allowed the case to proceed into the discovery phase and ultimately into the settlement/trial phase. Dkt. No. 346. These motions encompassed hundreds of pages of briefing on complex issues ranging from plausibility of the conspiracy pled, to market power and the use of trade organizations as a fora for collusive conduct, and other complex factual matters. To make things more complicated, Defendant Discover filed a motion to compel

arbitration. Dkt. No. 308. Robbins Geller opposed that motion (Dkt. No. 319), arguing both the motions to dismiss and the motion to compel arbitration in lengthy hearings in June 2016 and September 2016.

7. Robbins Geller was also responsible for preparing and filing an amended complaint on July 15, 2016. Dkt. No. 291. This included additional investigation to further bolster the claims. The Firm conducted significant legal and factual research, including combing public sources for information regarding Defendants' announcements regarding the Fraud Liability Shift and working with an investigator to find possible former employee witnesses.

8. As the case moved forward, Robbins Geller initiated sprawling discovery efforts, sending out multiple requests for production and interrogatories to the Networks as well as document and data subpoenas to more than 30 third parties. The amount of time spent on discovery was significant as there were multiple defendants and third parties, and the issues were complicated. The enormous amount of discovery resulted in the need for extensive work by lawyers on the case to handle meet-and-confers and deal with disagreements with parties and non-parties. These requests resulted in nearly seven million pages of documents and data being produced to Robbins Geller and hosted on Robbins Geller's internal Relativity hosting platform. In order to properly review this vast number of documents, Robbins Geller developed specific and detailed coding protocols and trained highly qualified and experienced lawyers on an ongoing basis, holding frequent meetings to discuss documents and refine the protocols to ensure the most relevant documents were surfaced. This protocol served as a roadmap for all of the discovery taken in the litigation. Robbins Geller also coordinated and managed Plaintiffs' document production which resulted in thousands of pages of documents being organized, reviewed, and, ultimately, produced to Defendants. This coordination also involved multiple Court hearings

regarding discovery disputes as the case moved forward. Robbins Geller lawyers prepared for and argued at these hearings and were responsible for each of the associated filings. *See, e.g.*, Dkt. Nos. 360 (discovery dispute letter), 366 (Order requiring in-person meet-and-confer in Court's jury room).

9. As discovery progressed, Robbins Geller took or defended nearly 20 depositions. These depositions included high-ranking executives, including the Chief Executive Officer of Visa and Vice Presidents and Senior Vice Presidents at Amex, Visa, and Mastercard, substantially progressed the litigation, and contributed to the outstanding settlement. At the same time, Robbins Geller filed the original motion for class certification which required a significant amount of time and effort to synthesize the enormous amount of discovery received and reviewed. The Firm also retained expert Dr. Micah S. Officer and worked closely with him to support the motion for class certification, which was filed on March 10, 2017. Dkt. No. 425. Robbins Geller also handled the response to the multiple oppositions to class certification filed by Defendants, including their proffered expert opinions from David Kaplan. This included researching, preparing, and filing a detailed brief supported by numerous exhibits and a rebuttal report by Dr. Officer. Dkt. No. 503.

10. During the time the Firm was counsel, Robbins Geller participated in a day-long in-person mediation session with the Honorable Edward A. Infante (Ret.) in San Francisco, CA on March 22, 2017. This meeting was attended by parties with settlement authority, and the parties engaged in frank communications regarding the strengths and weaknesses of the Action. Following the mediation session, Judge Infante held numerous calls with the parties in an effort to reach a resolution. Although these sessions did not result in resolution, it helped set the course for the outstanding result reached in this matter.

11. The information in this declaration regarding the Firm's time and fees and expenses is based upon contemporaneously prepared time and fee and expense reports and supporting documentation prepared and/or maintained by the Firm in the ordinary course of business. Although Robbins Geller had a team assigned to this matter, I am the partner who oversaw and/or conducted the day-to-day activities in the Action. During the pendency of the Action, I reviewed the detailed time entries of every timekeeper on a quarterly basis for purposes of ensuring accuracy and reasonableness. I conducted a review of the time and fee and expense reports (and back-up documentation where necessary or appropriate) in connection with the preparation of this declaration. I also worked with other partners at the Firm to review the time and fees and expenses submitted herein. The purpose of this review was to confirm both the accuracy of the entries as well as the necessity for, and reasonableness of, the time and fees and expenses committed to the Action. As a result of this review and the ongoing quarterly reviews, reductions were made in the exercise of billing judgment. Based on this review and the adjustments made, all of which were to write off certain time and/or fees and expenses, I am confident that the time reflected in the Firm's lodestar calculation and the fees and expenses for which payment is sought herein are reasonable and were necessary for the effective and efficient prosecution and resolution of the Action.

12. In addition to the review of the Firm's time and expenses as explained above, I also received instructions from Class Counsel regarding the review of the Firm's time and expense records for submission in connection with the Motion. The Firm followed those instructions, as detailed below, with one caveat: in some instances, the Firm's own policies regarding the review of our time and expenses involved steps or judgments that would reduce our recorded time or

expenses even further than the criteria established by Class Counsel. In those instances, we utilized the Firm's more restrictive policies, further reducing our reported time and expenses.

13. I reduced any time for the review or analysis of discovery documents to ten hours per day. I ensured that entries were sufficiently detailed to describe the work done or reduced or eliminated the entry accordingly. For travel, any entries that listed only travel without any additional work being performed were reduced by 50%. Any entries relating solely to fee-related work were eliminated. No work in support of this Motion was claimed.

14. I eliminated any entries for timekeepers who accumulated fewer than 20 hours on the Action. I applied current rates to all timekeepers, with the exception of any individuals who left the Firm during the pendency of the litigation – those individuals' claimed rates are the rates at the time of their departure. The hourly rates applied for each professional are the Firm's current rates in contingent cases set by the Firm, except that in certain instances rates have been decreased as a judgment choice for this Motion specifically, except for the rates for Project Attorneys. Our claimed rates for the Project Attorneys, tasked primarily with the review and analysis of documents, has been set solely for purposes of this Action at $300, a lower rate than we would typically claim for these attorneys. The Firm's regular hourly rates are consistent with hourly rates submitted by the Firm to, and regularly accepted by, state and federal courts in other class action litigations. The Firm's regular rates are set based on periodic analysis of rates charged by firms performing comparable work both on the plaintiff and defense side. Different timekeepers within the same employment category (*e.g.*, partners, associates, paralegals, etc.) may have different rates based on a variety of factors, including, but not limited to, years of practice and the rates of similarly experienced peers at this Firm or other firms. A true and correct copy of the identification and background of the Firm and its partners is attached as Exhibit A.

15. This case was staffed by highly seasoned antitrust litigators, some of whom have since left the firm. I provide here some details regarding the extensive litigation experience of the primary lawyers who worked on the case. I currently serve as co-lead counsel in *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig*., in which a settlement of $5.5 billion was upheld by the Second Circuit Court of Appeals. This case was brought on behalf of millions of U.S. merchants against Visa and MasterCard and various card-issuing banks, challenging the way these companies set and collect tens of billions of dollars annually in merchant fees. The settlement is believed to be the largest antitrust class action settlement of all time. In addition, I work on most of the antitrust actions in which the firm is involved including *In re American Airlines/JetBlue Antitrust Litig*., *Leifer v. Live Nation Entertainment, Inc., et al.*, *In re Remicade Antitrust Litig*., *In re Dealer Mgmt. Sys. Antitrust Litig*., and other actions. In this action I was the partner responsible for the day to day work on the case and managed all aspects of the litigation, including briefing, depositions, hearings, discovery and all aspects related to the named plaintiffs in the case. Patrick Coughlin also served as co-lead counsel in *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig*., in which a settlement of $5.5 billion was approved in the Eastern District of New York. He also handled a number of large antitrust cases including the *Currency Conversion* cases in which $360 million was recovered for consumers and the Private Equity litigation (*Dahl v. Bain Capital Partners, LLC*) in which $590.5 million was recovered for investors. He also served as class counsel in the *ISDAfix Benchmark* action against 14 major banks and broker ICAP plc, obtaining $504.5 million for plaintiffs. Mr. Coughlin has tried more than 50 cases, including a number of antitrust actions. Mr. Coughlin was responsible for all major strategic decisions in the case. He successfully argued the motion to dismiss and handled mediation efforts as well as taking a key deposition of Visa's top executive. Carmen Medici, formerly a partner,

also served as co-lead counsel in the *Interchange Fee* case. In addition, Mr. Medici was a part of the litigation team in several of Robbins Geller's antitrust actions including *In re SSA Bonds Antitrust Litig.*, *In re Dealer Mgmt. Sys. Antitrust Litig.*, *In re Aluminum Warehousing Antitrust Litig.*, and *In re Remicade Antitrust Litig.*, among other actions. Mr. Medici took a number of depositions, worked on all briefing, including class certification and handled the drafting and filing of the initial and amended complaint. Armen Zohrabian, formerly a senior associate at the firm, worked on several large cases including *Persian Gulf v. BP, et al.*, a massive case against California's gas refiners as well as several of the Firm's complex securities fraud class actions. He also worked as a law clerk for the Federal Trade Commission. Mr. Zohrabian was responsible for all third party discovery and prepared and took many of the depositions in the case. He also worked on briefing the opposition to the motion to dismiss and handled discovery disputes. Lonnie Browne, also a former senior associate, worked on several large antitrust cases including *Persian Gulf v. BP, et al.*, and as class counsel in the *ISDAfix Benchmark* action against 14 major banks and broker ICAP plc, obtaining $504.5 million for plaintiffs. Mr. Browne was responsible for a number of discovery-related matters in the case, including handling various disputes. He also assisted in briefing various motions.

16. After following all of the above steps, the Firm's claimed lodestar (which does not include a significant portion of time given the above reductions) for purposes of this Motion is 18,496.25 hours, representing $9,765,555.00. The Firm has not been paid for this lodestar, which has been incurred on an entirely contingent basis. I have provided timekeeper charts showing the hours incurred, the categories of work performed, and the rates charged for each professional as Exhibit B.

17. I have also engaged in a review of the expenses claimed by the Firm in connection with this Motion, again with instructions from Class Counsel. Once again, where the Firm's own policies would reduce our reported expenses below what would be reported by following Class Counsel's instructions, we followed our more restrictive approach. The Firm followed the instructions for review of the expenses, as instructed by Class Counsel, as detailed below.

18. I ensured that the expenses claimed by the Firm were incurred specifically and only for this Action; that the expenses were the type of expenses appropriately claimed in connection with litigation; I removed any upgrade fees to first/business class, and reduced any first class or business class travel to an equivalent fare for economy (or reduced by 30% if the equivalent rate was not available from other travelers); I reduced meals to $75.00 person/meal; I removed alcohol where apparent or believed it was consumed; and removed any room upgrade fees.

19. After following all of the above steps for the review of the Firm's expenses, the expense claimed by the Firm in connection with the Motion are $781,985.23. All of these expenses were actually incurred and have been entirely unreimbursed. I have provided a chart of the expenses incurred and the categories for such expenses as Exhibit C.

20. The following is additional information regarding certain of these fees and expenses incurred by the Firm:

(a) Filing and Attorney Service Fees: $14,845.50. These fees and expenses have been paid to the Court for filing fees and to attorney service firms who, among other things, served process of the complaint or subpoenas and delivered courtesy copies of documents to judges' chambers.

(b) Transportation, Hotels, and Meals: $115,039.17. In connection with the prosecution of this Action, the Firm has paid for travel expenses to, among other things, attend

Court hearings, meet with witnesses, experts, mediators, and opposing counsel, and take or defend depositions.

(c) Court Hearing Transcripts and Deposition Reporting, Transcripts, and Videography: $47,649.00.

(d) Experts, Consultants, and Investigators: $273,363.18.

(i) Litinomics, Inc.: $186,601.22. Litinomics, Inc. was engaged to provide expert services related to damages and liability.

(ii) Micah S. Officer: $57,426.46. Mr. Officer was hired as an expert to provide reports and opinions concerning class certification and damages.

(iii) Civil Action Group, Ltd.: $14,808.50. Civil Action Group, Ltd. was hired to provide required translation services to properly serve two foreign-based defendants prior to their dismissal from the Action.

(iv) Anadyne Holdings, Inc.: $10,239.00. Anadyne Holdings, Inc. was hired in the initial phase of the case to assist in providing consulting services of its principal, Edward Slominski, related to the history and technical aspects of EMV migration.

(v) Mason Investigative Group, Inc.: $4,288.00. Mason Investigative Group, Inc. was hired to provide research regarding possible witnesses related to Defendants' former employees.

(e) Photocopies: $25,805.07. In connection with this case, the Firm made 26,478 black and white copies. Robbins Geller requests $0.15 per page for a total of $3,971.70. The Firm also made 187 color copies. Robbins Geller requests $0.50 per page for a total of $93.50. Each time an in-house copy machine is used, our billing system requires that a case or

administrative billing code be entered, and that is how the number of in-house copies were identified as related to the Action. The Firm also paid $21,739.87 to outside copy vendors.

(f) Online Legal and Financial Research: $18,640.53. This category includes vendors such as LexisNexis Products, PACER, and Westlaw. These resources were used to obtain access to public filings, factual databases, legal research, and for proofreading and "blue-booking" Court filings (including checking all legal authorities cited and quoted in briefs). This category represents the fees and expenses incurred by Robbins Geller for use of these services in connection with this Action. The charges for these vendors vary depending upon the type of services requested. For example, Robbins Geller has flat-rate contracts with some of these providers for use of their services. When Robbins Geller utilizes online services provided by a vendor with a flat-rate contract, access to the service is by a billing code entered for the specific case being litigated. At the end of each billing period in which such service is used, Robbins Geller's costs for such services are allocated to specific cases based on the percentage of use in connection with that specific case in the billing period. As a result of the contracts negotiated by Robbins Geller with certain providers, the Class enjoys substantial savings in comparison with the "market-rate" for à la carte use of such services which some law firms pass on to their clients.

(g) eDiscovery Database Hosting: $228,734.48. Robbins Geller has installed top-tier database software, infrastructure, and security. The platform implemented, Relativity, is offered by over 100 vendors and is currently being used by 198 of the Am Law 200 firms. Over 50 servers are dedicated to Robbins Geller's Relativity hosting environment with all data stored in a secure SSAE 18 Tier III data center with automatic replication to a datacenter located in a different geographic location. By hosting in-house, Robbins Geller is able to charge a reduced all-inclusive rate that includes many services which are often charged as extra fees when hosted by a

third-party vendor. Robbins Geller's hosting fee includes user logins, ingestion, processing, OCRing, TIFFing, Bates-stamping, productions, and archiving – all at no additional per unit cost. Robbins Geller is able to provide all these services for a cost that is typically much lower than outsourcing to a third-party vendor. Utilizing this secure, advanced platform in-house has allowed Robbins Geller to prosecute actions more efficiently and has reduced the expense to the Class of maintaining and searching electronic discovery databases. Similar to third-party vendors, Robbins Geller uses a tiered-rate system to calculate hosting charges. This amount reflects charges for managing and hosting from case inception until the Action transitioned to Robbins LLP. There was some overlap between Robbins Geller and Robbins LLP during the transition period where Robbins LLP reviewers continued to access the Relativity database, but Robbins Geller did not. The amount requested reflects charges for the hosting of over 7.1 million pages of documents received by parties and non-parties in this Action.

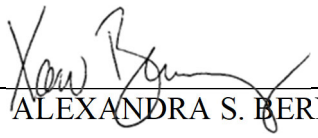
(h) Database Analytics: $27,760.50. Relativity-structured analytics is a software package that was utilized by the attorneys as part of the electronic review of over 7.1 million pages of documents. This technology allowed Robbins Geller to group email threads together and identify the most inclusive email, which increased the efficiency of the review.

(i) Mediation Fees (JAMS, Inc.): $15,080.00. The parties retained certain mediators to provide mediation services in the Action.

(j) Publications and Subscriptions: $4,219.45. This amount represents the cost of several articles and publication materials used for research during the Action.

21. The fees and expenses pertaining to this case are reflected in the books and records of this Firm. These books and records are prepared from receipts, expense vouchers, check records, and other documents and are an accurate record of the fees and expenses.

I declare under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct. Executed this 23rd day of December, 2025, at San Diego, California.



ALEXANDRA S. BERNAY

EXHIBIT A

GLOBAL ANTITRUST AND UNFAIR COMPETITION PRACTICE RESUME

Robbins Geller Rudman & Dowd LLP

(800) 449-4900 | rgrdlaw.com

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INTRODUCTION

Robbins Geller Rudman & Dowd LLP ("Robbins Geller" or the "Firm") is a 200-lawyer firm with offices in Boca Raton, Chicago, Manhattan, Melville, Nashville, San Diego, San Francisco, Philadelphia, Washington, D.C., and Wilmington (www.rgrdlaw.com). The Firm is actively engaged in complex litigation, emphasizing antitrust, securities, consumer, insurance, healthcare, human rights and employment discrimination class actions. The Firm's unparalleled experience and capabilities in these fields are based upon the talents of its attorneys, who have successfully prosecuted thousands of class action lawsuits and numerous individual cases, recovering billions of dollars.

The Firm's record of success includes some of the largest recoveries in history, including the largest antitrust class action settlement: $5.5 billion (*Visa/Mastercard*); the largest securities class action recovery: $7.2 billion (*Enron*); and the largest securities class action recovery following a trial: $1.575 billion (*HSBC Finance Corp.*).

This successful track record stems from our experienced attorneys, including many who came to the Firm from federal or state law enforcement agencies. The Firm also includes several dozen former federal and state judicial clerks. The depth and breadth of the Firm's resources are unequalled. With hundreds of highly skilled attorneys and employees, including forensic accountants, economists, damage analysts, investigators, paralegals, database programmers and computer security experts, Robbins Geller is able to give the highest level of attention and professionalism to each case and client.

The Firm is committed to practicing law with the highest level of integrity in an ethical and professional manner. We are a diverse firm with lawyers and staff from all walks of life. Our lawyers and other employees are hired and promoted based on the quality of their work and their ability to treat others with respect and dignity.

We strive to be good corporate citizens and work with a sense of global responsibility. Contributing to our communities and environment is important to us. We often take cases on a pro bono basis and are committed to the rights of workers, and to the extent possible, we contract with union vendors. We care about civil rights, workers' rights and treatment, workplace safety and environmental protection. Indeed, while we have built a reputation as the finest securities and consumer class action law firm in the nation, our lawyers have also worked tirelessly in less high-profile, but no less important, cases involving human rights and other social issues.

Private antitrust "suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations."

- *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979).

ANTITRUST

Robbins Geller's antitrust attorneys have successfully prosecuted some of the nation's most complicated antitrust actions. Able to draw on exceptional resources and experience, the Firm's cadre of antitrust specialists are willing and able to bring each case to trial. Several of the Firm's antitrust attorneys, including David W. Mitchell, are former Assistant U.S. Attorneys with extensive criminal and civil trial experience, and the Firm's roll of attorneys includes more than 25 former federal and state judicial clerks. Robbins Geller also features a strong appellate department with U.S. Supreme Court experience.

Robbins Geller has been appointed lead counsel in numerous federal antitrust class actions, and has achieved some of the largest recoveries on behalf of antitrust plaintiffs. For example:

- *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, MDL No. 1720 (E.D.N.Y.). Co-lead counsel. Settled for $5.5 billion.

- *Dahl v. Bain Capital Partners, LLC*, No. 07-cv-12388 (D. Mass). Co-lead counsel. Settled for $590.5 million.

- *Alaska Electrical Pension Fund v. Bank of America Corp.*, No. 14-cv-07126 (S.D.N.Y.). Co-lead counsel. Settled for $504 million.

- *In re Currency Conversion Fee Antitrust Litig.*, 01 MDL No. 1409 (S.D.N.Y.). Co-lead counsel. Settled for $336 million.

- *Hall v. NCAA* (Restricted Earnings Coach Antitrust Litigation), No. 94-2392 (D. Kan.). Lead counsel for one of the three classes of coaches. After successful jury trial, settled for more than $70 million.

- *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.* (Carbon Fiber Antitrust Litigation), No. CV-99-07796 (C.D. Cal.). Co-lead counsel. Settled for $67.5 million.

Courts have recognized Robbins Geller's attorneys for the results they have achieved. In approving an antitrust class action settlement in which Robbins Geller served as co-lead counsel, the court praised counsel for providing "***extraordinarily high-quality representation***" and for litigating with "***enormous attention to detail and unflagging devotion to the cause***." *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 129 (S.D.N.Y. 2009). The judge said the attorneys "***represented the Class with a high degree of professionalism, and vigorously litigated every issue against some of the ablest lawyers in the antitrust defense bar***." *Id.*

Antitrust Attorneys

Samuel H. Rudman, *Partner*. Sam Rudman is a founding member of the Firm, a member of the Firm's Executive and Management Committees, and manages the Firm's New York offices.

Rudman is co-lead counsel in several multi-district antitrust class actions pending in federal courts around the country, including *In re Aluminum Warehousing Antitrust Litig.*, No. 13-md-2481 (S.D.N.Y.), and leads the Firm's litigation teams *In re Domestic Airline Travel Antitrust Litig.*, No. 15-mc-01404 (D.D.C.), and *In re Treasury Sec. Auction Litig.*, No. 15-cv-05794 (S.D.N.Y.).

In addition to antitrust litigation, Rudman's practice focuses on recognizing and investigating securities fraud, and initiating securities and shareholder class actions to vindicate shareholder rights and recover shareholder losses. A former attorney with the U.S. Securities and Exchange Commission, Rudman has recovered hundreds of millions of dollars for shareholders, including: $129 million recovery in *In re Doral Fin. Corp. Sec. Litig.*, No. 05 MD 1706 (S.D.N.Y.); $74 million recovery in *In re First BanCorp Sec. Litig.*, No. 05-CV-2148 (D.P.R.); $65 million recovery in *In re Forest Labs., Inc. Sec. Litig.*, No. 05-CV-2827 (S.D.N.Y.); and $50 million recovery in *In re TD Banknorth S'holders Litig.*, No. 2557-VCL (Del. Ch.).

In the *TD Banknorth* litigation, the court appointed Rudman and the Firm to be lead counsel for the plaintiff class only after rejecting as "wholly inadequate" the settlement negotiated for the class by another law firm. When the Firm later achieved a $50 million recovery for the class, the court stated: "This is one of the cases – there's probably been a half a dozen since I've been a judge that I handled which have – really through the sheer diligence and effort of plaintiffs' counsel – resulted in substantial awards for plaintiffs, after overcoming serious procedural and other barriers. . . . [I]t appears plainly from the papers that you and your co-counsel have diligently, and at great personal expense and through the devotion of many thousands of hours of your time, prosecuted this case to a successful conclusion." The court also credited the Firm with raising the inadequacy of the initial settlement.

David W. Mitchell, *Partner*. David Mitchell is a former Assistant U.S. Attorney in the Southern District of California. While at the United States Attorney's Office, he worked on cases involving narcotics trafficking, bank robbery, murder-for-hire and alien smuggling. He tried nearly 20 cases to verdict before federal criminal juries and made numerous appellate arguments before the Ninth Circuit Court of Appeals.

Mitchell's practice focuses on antitrust and securities fraud litigation. He leads the Firm's antitrust benchmark rate litigations as well as the Firm's pay-for-delay actions. He has served as lead or co-lead counsel in numerous cases and has helped achieve substantial settlements for shareholders. His most notable cases include *Dahl v. Bain Cap. Partners, LLC*, obtaining more than $590 million for shareholders, and *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, in which a settlement of $5.5 billion was approved in the Eastern District of New York. This case was brought on behalf of millions of U.S. merchants against Visa and MasterCard and various card-issuing banks, challenging the way these companies set and collect tens of billions of dollars annually in merchant fees. The settlement is believed to be the largest antitrust class action settlement of all time. Additionally, Mitchell served as class counsel in the ISDAfix Benchmark action against 14 major banks and broker ICAP plc, obtaining $504.5 million for plaintiffs. Currently, Mitchell serves as court-appointed counsel in *In re Aluminum Warehousing Antitrust Litig.*, *City of Providence, Rhode Island v. BATS Global Markets Inc.*, *In re SSA Bonds Antitrust Litig.*, *In re Remicade Antitrust Litig.*, and *In re 1-800 Contacts Antitrust Litig.*

Mitchell is a member of the prestigious Enright Inn of Court. He was nationally recognized for his legal work and named an "Antitrust Trailblazer" by *The National Law Journal*, which honored attorneys for their

achievements in various specialties. The American Antitrust Institute 2018 Antitrust Enforcement Awards selected him as an Honoree in the category of Outstanding Antitrust Litigation Achievement in Private Law Practice for his work in *Alaska Electrical Pension Fund v. Bank of America Corp.* Mitchell has also been named to the Best Lawyers in America and the Southern California Best Lawyers lists by *Best Lawyers*® and the "Best of the Bar – The Most Outstanding Lawyers in San Diego" list by the *San Diego Business Journal*. In addition, he has been named multiple times to the Super Lawyers list and the Global Directory of Who's Who. He has also been named a Leading Lawyer in America and a Leading Plaintiff Financial Lawyer by *Lawdragon*.

Mark J. Dearman, *Partner*. Mark Dearman is a partner in the Firm's Boca Raton office. Dearman, along with other Robbins Geller attorneys, is currently leading the effort on behalf of cities and counties around the country in *In re National Prescription Opiate Litig*. He was recently appointed to the Plaintiffs' Steering Committee in *In re Zantac (Ranitidine) Prods. Liab. Litig.*, and as Chair of the Plaintiffs' Executive Committee in *In re Apple Inc. Device Performance Litig.*, Dearman obtained a $310 million settlement. His other recent representative cases include *In re FieldTurf Artificial Turf Mktg. Pracs. Litig.*, No. 3:17-md-02779 (D.N.J.); *In re NHL Players' Concussion Injury Litig.*, MDL No. 14-2551 (SRN), 2015 U.S. Dist. LEXIS 38755 (D. Minn. Mar. 25, 2015); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942 (S.D. Cal. 2012); *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, MDL No. 2672 CRB (JSC), 2016 U.S. Dist. LEXIS 1357 (N.D. Cal. Jan. 5, 2016); *In re Ford Fusion & C-Max Fuel Econ. Litig.*, No. 13-MD-2450 (KMK), 2015 U.S. Dist. LEXIS 155383 (S.D.N.Y. Nov. 12, 2015); *Looper v. FCA US LLC*, No. 5:14-cv-00700-VAP-DTB (C.D. Cal.); *In re Aluminum Warehousing Antitrust Litig.*, 95 F. Supp. 3d 419 (S.D.N.Y. 2015), *aff'd*, 833 F.3d 151 (2d Cir. 2016); *In re Liquid Aluminum Sulfate Antitrust Litig.*, No. 16-md-2687 (JLL) (JAD) (D.N.J.); *In re Winn-Dixie Stores, Inc. S'holder Litig.*, No. 16-2011-CA-010616 (Fla. 4th Jud. Cir. Ct., Duval Cnty.); *Gemelas v. Dannon Co. Inc.*, No. 1:08-cv-00236 (N.D. Ohio); and *In re AuthenTec, Inc. S'holder Litig.*, No. 05-2012-CA-57589 (Fla. 18th Jud. Cir. Ct., Brevard Cnty.).

Dearman is a member of the faculty of the inaugural Mass Torts MDL Certificate Program at the Bolch Judicial Institute of Duke Law School (March 2019). He is also a member of The National Trial Lawyers Top 100 (March 2021). He has been rated AV by Martindale-Hubbell (the highest rating available), named a Leading Plaintiff Financial Lawyer by *Lawdragon*, and has been recognized as a Florida Super Lawyer by *Super Lawyers Magazine* for seven consecutive years. Dearman has also been recognized by his peers as being in the top 1.5% of Florida Civil Trial Lawyers as published in *Florida Trend*'s Florida Legal Elite.

Before joining the Firm, Dearman spent several years defending Fortune 500 companies in all aspects of litigation, with an emphasis in complex commercial litigation, consumer claims, and mass torts (products liability and personal injury). Dearman went on to found the firm of Dearman & Gerson where he continued to defend many publicly traded corporations for over 12 years. Within the last 20 years of practice, Dearman has obtained extensive jury trial experience on the plaintiffs' side, protecting the rights of investors throughout the United States.

Dearman received a Bachelor of Arts degree from the University of Florida. He earned his Juris Doctor degree from Nova Southeastern University. Upon graduation from law school, he worked in the Miami office of Ruden, McClosky, Smith, Schuster & Russell.

Alexandra S. Bernay, *Partner*. Xan Bernay is a partner in the Firm's San Diego office, where she specializes in antitrust and unfair competition class-action litigation. She has also worked on some of the Firm's largest securities fraud class actions, including the *Enron* litigation, which recovered an unprecedented $7.2 billion for investors.

Bernay currently serves as co-lead counsel in *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, in which a settlement of $5.5 billion was upheld by the Second Circuit Court of Appeals. This case was brought on behalf of millions of U.S. merchants against Visa and MasterCard and various card-issuing banks, challenging the way these companies set and collect tens of billions of dollars annually in merchant fees. The settlement is believed to be the largest antitrust class action settlement of all time.

Additionally, Bernay is involved in *In re Remicade Antitrust Litig.* pending in the Eastern District of Pennsylvania – a large case that settled for $25 million involving anticompetitive conduct in the biosimilars market, where the Firm was sole lead counsel for the end-payor plaintiffs. She is also part of the litigation team in *In re American Airlines/JetBlue Antitrust Litig.* pending in the Eastern District of New York. That case is brought on behalf of airline passengers who overpaid for tickets because of alleged anticompetitive conduct between American and JetBlue. She is also a member of the team in *In re Dealer Mgmt. Sys. Antitrust Litig.* (N.D. Ill.), which involves anticompetitive conduct related to dealer management systems on behalf of auto dealerships across the country. Another representative case is against Lloyd's of London. That action is a massive civil RICO case against the insurance company and its syndicates.

Bernay has also had experience in large consumer class actions, including *In re Checking Account Overdraft Litig.*, which case was brought on behalf of bank customers who were overcharged for debit card transactions and resulted in more than $500 million in settlements with major banks that manipulated customers' debit transactions to maximize overdraft fees. She also helped try to verdict a case against one of the world's largest companies who was sued on behalf of consumers. Her more recent trial experience includes a jury trial related to foreign exchange trading against one of the largest banks in the world, where the jury found that plaintiffs had proved a conspiracy as to a large network of banks. She was responsible for many of the successful trial motions in the case.

Arthur L. Shingler III, *Partner*. Arthur Shingler is a partner in the Firm's San Diego office. Shingler has successfully represented both public and private sector clients in hundreds of complex, multi-party actions with billions of dollars in dispute. Throughout his career, he has obtained outstanding results for those he has represented in cases generally encompassing shareholder derivative and securities litigation, unfair business practices and antitrust litigation, publicity rights and advertising litigation, ERISA litigation, and other insurance, health care, employment, and commercial disputes.

Representative matters in which Shingler has served as a core member of the litigation team or settlement counsel include, among others: *In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices & Antitrust Litig.*, No. 2:17-md-02785 (D. Kan.) ($609 million total recovery achieved weeks prior to trial in certified class action alleging antitrust claims involving the illegal reverse payment settlement to delay the generic EpiPen, which allowed the prices of the life-saving EpiPen to rise over 600% in 9 years); *In re Remicade Antitrust Litig.*, No. 2:17-cv-04326 (E.D. Pa.) ($25 million recovery for indirect purchasers in antitrust action); *In re Liquid Aluminum Sulfate Antitrust Litig.*, No. 2:16-md-02687 (D.N.J.) (direct purchaser class settled in excess of $100 million); *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, No. 1:08-cv-10783 (S.D.N.Y.) ($272 million recovery); *In re Royal Dutch/Shell ERISA Litig.*, No. 3:04-cv-00374 (D.N.J.) ($90 million settlement); *In re Priceline.com Sec. Litig.*, No. 3:00-cv-01884 (D. Conn.) ($80 million settlement); *In re General Motors ERISA Litig.*, No. 05-71085 (E.D. Mich.) ($37.5 million settlement, in addition to significant revision of retirement plan administration); *Wood v. Ionatron, Inc.*, No. 4:06-cv-00354 (D. Ariz.) ($6.5 million settlement); *In re Lattice Semiconductor Corp. Derivative Litig.*, No. C 043327CV (Or. Cir. Ct., Wash. Cnty.) (corporate governance settlement, including substantial revision of board policies and executive management); *In re 360networks Class Action Sec. Litig.*, No. 1:02-cv-04837 (S.D.N.Y.) ($7 million settlement); and *Rothschild v. Tyco Int'l (US), Inc.*, 83 Cal. App. 4th 488 (2000) (shaped scope of California's Unfair Practices Act as related to limits of State's False Claims Act).

In addition, Shingler is currently working on behalf of plaintiffs in several class actions, including, for example, *In re National Prescription Opiate Litig.*, No. 1:17-md-02804 (N.D. Ohio), and *In re American Airlines/JetBlue Antitrust Litig.*, No. 1:22-cv-07374 (E.D.N.Y.).

Arthur earned a Bachelor of Arts degree, *cum laude*, from Point Loma Nazarene College and a Juris Doctor degree from Boston University School of Law.

Vincent M. Serra, *Partner*. Vincent Serra is a partner in the Firm's Melville office and focuses his practice on complex antitrust, consumer, employment, and securities litigation. His efforts have contributed to the recovery of billions of dollars on behalf of aggrieved plaintiffs and class members. Serra has contributed to several significant antitrust recoveries, including *In re Currency Conversion Fee Antitrust Litig.* ($336 million recovery).

Serra was also a member of the team of attorneys who secured a $590.5 million settlement on behalf of investors in *Dahl v. Bain Capital Partners, LLC*, an antitrust action against some of the world's largest and most powerful private equity firms in the world alleging collusive practices in multi-billion dollar leveraged buyouts. Additionally, Serra was part of the litigation team that obtained a $22.75 million settlement fund on behalf of route drivers in an action asserting violations of federal and state overtime laws against Cintas Corp. He was also part of the successful trial team in *Lebrilla v. Farmers Grp., Inc.*, which involved Farmers' practice of using inferior imitation parts when repairing insureds' vehicles. Other notable cases include *Alaska Elec. Pension Fund v. Pharmacia Corp.* ($164 million recovery), *In re Priceline.com Sec. Litig.* ($80 million recovery), and *In re DouYu Int'l Holdings Ltd. Sec. Litig* ($15 million recovery pending final approval).

Serra has been listed as a Best Lawyer in America: One to Watch by *Best Lawyers*®. He earned his Bachelor of Arts degree in International Relations with a minor in History from the University of Delaware and his Juris Doctor degree from California Western School of Law, where he received the Wiley W. Manuel award for pro bono legal services. He interned and clerked at the Firm during law school.

Notable Antitrust Achievements and Recoveries

Robbins Geller's antitrust practice focuses on representing businesses and individuals who have been the victims of price-fixing, unlawful monopolization, market allocation, tying, and other anti-competitive conduct. The Firm has taken a leading role in many of the largest federal and state price-fixing, monopolization, market allocation, and tying cases throughout the United States.

- ***In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation***, MDL No. 1720 (E.D.N.Y.). Robbins Geller attorneys, serving as co-lead counsel on behalf of merchants, obtained a settlement amount of $5.54 billion. In approving the settlement, the court noted that Robbins Geller and co-counsel "demonstrated the utmost professionalism despite the demands of the extreme perseverance that this case has required, litigating on behalf of a class of over 12 million for over fourteen years, across a changing legal landscape, significant motion practice, and appeal and remand. Class counsel's pedigree and efforts alone speak to the quality of their representation."

- ***Dahl v. Bain Cap. Partners, LLC***, No. 07-cv-12388 (D. Mass). Robbins Geller attorneys served as co-lead counsel on behalf of shareholders in this antitrust action against the nation's largest private equity firms that colluded to restrain competition and suppress prices paid to shareholders of public companies in connection with leveraged buyouts. Robbins Geller attorneys recovered more than $590 million for the class from the private equity firm defendants, including Goldman Sachs Group Inc. and Carlyle Group LP.

- ***Alaska Elec. Pension Fund v. Bank of Am. Corp.***, No. 14-cv-07126 (S.D.N.Y.). Robbins Geller attorneys prosecuted antitrust claims against 14 major banks and broker ICAP plc who were alleged to have conspired to manipulate the ISDAfix rate, the key interest rate for a broad range of interest rate derivatives and other financial instruments in contravention of the competition laws. The class action was brought on behalf of investors and market participants who entered into interest rate derivative transactions between 2006 and 2013. Final approval has been granted to settlements collectively yielding $504.5 million from all defendants.

- ***In re Currency Conversion Fee Antitrust Litig.***, 01 MDL No. 1409 (S.D.N.Y.). Robbins Geller attorneys served as lead counsel and recovered $336 million for a class of credit and debit cardholders. The court praised the Firm as "indefatigable," noting that the Firm's lawyers "vigorously litigated every issue against some of the ablest lawyers in the antitrust defense bar."

- ***In re SSA Bonds Antitrust Litig.***, No. 1:16-cv-03711 (S.D.N.Y.). Robbins Geller attorneys are serving as co-lead counsel in a case against several of the world's largest banks and the traders of certain specialized government bonds. They are alleged to have entered into a wide-ranging price-fixing and bid-rigging scheme costing pension funds and other investors hundreds of millions. To date, three of the more than a dozen corporate defendants have settled for $95.5 million.

- ***In re Aftermarket Auto. Lighting Prods. Antitrust Litig.***, 09 MDL No. 2007 (C.D. Cal.). Robbins Geller attorneys served as co-lead counsel in this multi-district litigation in which plaintiffs allege that defendants conspired to fix prices and allocate markets for automotive lighting products. The last defendants settled just before the scheduled trial, resulting in total settlements of more than $50 million. Commenting on the quality of representation, the court commended the Firm for "expend[ing] substantial and skilled time and efforts in an efficient manner to bring this action to conclusion."

- ***In re Dynamic Random Access Memory (DRAM) Antitrust Litig.***, 02 MDL No. 1486 (N.D. Cal.). Robbins Geller attorneys served on the executive committee in this multi-district class action in which a class of purchasers of dynamic random access memory (or DRAM) chips alleged that the leading manufacturers of semiconductor products fixed the price of DRAM chips from the fall of 2001 through at least the end of June 2002. The case settled for more than $300 million.

- ***Microsoft I-V Cases***, JCCP No. 4106 (Cal. Super. Ct., San Francisco Cnty.). Robbins Geller attorneys served on the executive committee in these consolidated cases in which California indirect purchasers challenged Microsoft's illegal exercise of monopoly power in the operating system, word processing, and spreadsheet markets. In a settlement approved by the court, class counsel obtained an unprecedented $1.1 billion worth of relief for the business and consumer class members who purchased the Microsoft products.

ADDITIONAL PRACTICE AREAS AND SERVICES

Securities Fraud

As recent corporate scandals demonstrate clearly, it has become all too common for companies and their executives – often with the help of their advisors, such as bankers, lawyers, and accountants – to manipulate the market price of their securities by misleading the public about the company's financial condition or prospects for the future. This misleading information has the effect of artificially inflating the price of the company's securities above their true value. When the underlying truth is eventually revealed, the prices of these securities plummet, harming those innocent investors who relied upon the company's misrepresentations.

Robbins Geller is the leader in the fight to protect investors from corporate securities fraud. We utilize a wide range of federal and state laws to provide investors with remedies, either by bringing a class action on behalf of all affected investors or, where appropriate, by bringing individual cases.

The Firm's reputation for excellence has been repeatedly noted by courts and has resulted in the appointment of Firm attorneys to lead roles in hundreds of complex class-action securities and other cases. In the securities area alone, the Firm's attorneys have been responsible for a number of outstanding recoveries on behalf of investors. Currently, Robbins Geller attorneys are lead or named counsel in hundreds of securities class action or large institutional-investor cases. Some notable current and past cases include:

- ***In re Enron Corp. Sec. Litig.***, No. H-01-3624 (S.D. Tex.). Robbins Geller attorneys and lead plaintiff The Regents of the University of California aggressively pursued numerous defendants, including many of Wall Street's biggest banks, and successfully obtained settlements in excess of ***$7.2 billion*** for the benefit of investors. ***This is the largest securities class action recovery in history***.

- ***Jaffe v. Household Int'l, Inc.***, No. 02-C-05893 (N.D. Ill.). As sole lead counsel, Robbins Geller obtained a record-breaking settlement of ***$1.575 billion*** after 14 years of litigation, including a six-week jury trial in 2009 that resulted in a securities fraud verdict in favor of the class. In 2015, the Seventh Circuit Court of Appeals upheld the jury's verdict that defendants made false or misleading statements of material fact about the company's business practices and financial results, but remanded the case for a new trial on the issue of whether the individual defendants "made" certain false statements, whether those false statements caused plaintiffs' losses, and the amount of damages. The parties reached an agreement to settle the case just hours before the retrial was scheduled to begin on June 6, 2016. ***The $1.575 billion settlement, approved in October 2016, is the largest ever following a securities fraud class action trial, the largest securities fraud settlement in the Seventh Circuit and the eighth-largest settlement ever in a post-PSLRA securities fraud case.*** According to published reports, the case was just the seventh securities fraud case tried to a verdict since the passage of the PSLRA.

- ***In re Valeant Pharms. Int'l, Inc. Sec. Litig.***, No. 3:15-cv-07658 (D.N.J.). As sole lead counsel, Robbins Geller attorneys obtained a $1.2 billion settlement in the securities case that *Vanity Fair* reported as "the corporate scandal of its era" that had raised "fundamental questions about the functioning of our health-care system, the nature of modern markets, and the slippery slope of ethical rationalizations." The settlement resolves claims that defendants made false and misleading statements regarding Valeant's business and financial performance during the class period, attributing Valeant's dramatic growth in revenues and profitability to "innovative new marketing approaches" as part of a business model that was low risk and "durable and sustainable." *Valeant* is the largest securities class action settlement against a pharmaceutical manufacturer and the ninth largest ever.

- ***In re Am. Realty Cap. Props., Inc. Litig.***, No. 1:15-mc-00040 (S.D.N.Y.). As sole lead counsel, Robbins Geller attorneys zealously litigated the case arising out of ARCP's manipulative accounting practices and obtained a $1.025 billion settlement. For five years, the litigation team prosecuted nine different claims for violations of the Securities Exchange Act of 1934 and the Securities Act of 1933, involving seven different stock or debt offerings and two mergers. The recovery represents the highest percentage of damages of any major PSLRA case prior to trial and includes the largest personal contributions by individual defendants in history.

- ***In re UnitedHealth Grp. Inc. PSLRA Litig.***, No. 06-CV-1691 (D. Minn.). Robbins Geller represented the California Public Employees' Retirement System ("CalPERS") and demonstrated its willingness to vigorously advocate for its institutional clients, even under the most difficult circumstances. The Firm obtained an $895 million recovery on behalf of UnitedHealth shareholders, and former CEO William A. McGuire paid $30 million and returned stock options representing more than three million shares to the shareholders, bringing the total recovery for the class to over $925 million, the largest stock option backdating recovery ever, and ***a recovery that is more than four times larger than the next largest options backdating recovery***. Moreover, Robbins Geller obtained unprecedented corporate governance reforms, including election of a shareholder-nominated member to the company's board of directors, a mandatory holding period for shares acquired by executives via option exercise, and executive compensation reforms that tie pay to performance.

- ***Alaska Elec. Pension Fund v. CitiGroup, Inc. (In re WorldCom Sec. Litig.)***, No. 03 Civ. 8269 (S.D.N.Y.). Robbins Geller attorneys represented more than 50 private and public institutions that opted out of the class action case and sued WorldCom's bankers, officers and directors, and auditors in courts around the country for losses related to WorldCom bond offerings from 1998 to 2001. The Firm's attorneys recovered more than $650 million for their clients, substantially more than they would have recovered as part of the class.

- ***Luther v. Countrywide Fin. Corp.***, No. 12-cv-05125 (C.D. Cal.). Robbins Geller attorneys secured a $500 million settlement for institutional and individual investors in what is the largest RMBS purchaser class action settlement in history, and one of the largest class action securities settlements of all time. The unprecedented settlement resolves claims against Countrywide and Wall Street banks that issued the securities. The action was the first securities class action case filed against originators and Wall Street banks as a result of the credit crisis. As co-lead counsel Robbins Geller forged through six years of hard-fought litigation, oftentimes litigating issues of first impression, in order to secure the landmark settlement for its clients and the class.

- ***In re Wachovia Preferred Sec. & Bond/Notes Litig.***, No. 09-cv-06351 (S.D.N.Y.). On behalf of investors in bonds and preferred securities issued between 2006 and 2008, Robbins Geller and co-

counsel obtained a significant settlement with Wachovia successor Wells Fargo & Company and Wachovia auditor KPMG LLP. ***The total settlement – $627 million – is one of the largest credit-crisis settlements involving Securities Act claims and one of the 25 largest securities class action recoveries in history***. The settlement is also one of the biggest securities class action recoveries arising from the credit crisis. The lawsuit focused on Wachovia's exposure to "pick-a-pay" loans, which the bank's offering materials said were of "pristine credit quality," but which were actually allegedly made to subprime borrowers, and which ultimately massively impaired the bank's mortgage portfolio. Robbins Geller served as co-lead counsel representing the City of Livonia Employees' Retirement System, Hawaii Sheet Metal Workers Pension Fund, and the investor class.

- ***In re Cardinal Health, Inc. Sec. Litig.***, No. C2-04-575 (S.D. Ohio). As sole lead counsel representing Cardinal Health shareholders, Robbins Geller obtained a recovery of $600 million for investors on behalf of the lead plaintiffs, Amalgamated Bank, the New Mexico State Investment Council, and the California Ironworkers Field Trust Fund. At the time, the $600 million settlement was the tenth-largest settlement in the history of securities fraud litigation and is the largest-ever recovery in a securities fraud action in the Sixth Circuit.

- ***AOL Time Warner Cases I & II***, JCCP Nos. 4322 & 4325 (Cal. Super. Ct., Los Angeles Cnty.). Robbins Geller represented The Regents of the University of California, six Ohio state pension funds, Rabo Bank (NL), the Scottish Widows Investment Partnership, several Australian public and private funds, insurance companies, and numerous additional institutional investors, both domestic and international, in state and federal court opt-out litigation stemming from Time Warner's disastrous 2001 merger with Internet high flier America Online. After almost four years of litigation involving extensive discovery, the Firm secured combined settlements for its opt-out clients totaling over $629 million just weeks before The Regents' case pending in California state court was scheduled to go to trial. The Regents' gross recovery of $246 million is the largest individual opt-out securities recovery in history.

- ***In re HealthSouth Corp. Sec. Litig.***, No. CV-03-BE-1500-S (N.D. Ala.). As court-appointed co-lead counsel, Robbins Geller attorneys obtained a combined recovery of $671 million from HealthSouth, its auditor Ernst & Young, and its investment banker, UBS, for the benefit of stockholder plaintiffs. The settlement against HealthSouth represents one of the larger settlements in securities class action history and is considered among the top 15 settlements achieved after passage of the PSLRA. Likewise, the settlement against Ernst & Young is one of the largest securities class action settlements entered into by an accounting firm since the passage of the PSLRA.

- ***Jones v. Pfizer Inc.***, No. 1:10-cv-03864 (S.D.N.Y.). Lead plaintiff Stichting Philips Pensioenfonds obtained a $400 million settlement on behalf of class members who purchased Pfizer common stock during the January 19, 2006 to January 23, 2009 class period. The settlement against Pfizer resolves accusations that it misled investors about an alleged off-label drug marketing scheme. As sole lead counsel, Robbins Geller attorneys helped achieve this exceptional result after five years of hard-fought litigation against the toughest and the brightest members of the securities defense bar by litigating this case all the way to trial.

- ***In re Dynegy Inc. Sec. Litig.***, No. H-02-1571 (S.D. Tex.). As sole lead counsel representing The Regents of the University of California and the class of Dynegy investors, Robbins Geller attorneys obtained a combined settlement of $474 million from Dynegy, Citigroup, Inc., and Arthur Andersen LLP for their involvement in a clandestine financing scheme known as Project Alpha. Most notably, the settlement agreement provides that Dynegy will appoint two board members to be nominated by The Regents, which Robbins Geller and The Regents believe will benefit all of Dynegy's stockholders.

- ***In re Qwest Commc'ns Int'l, Inc. Sec. Litig.***, No. 01-cv-1451 (D. Colo.). In July 2001, the Firm filed the initial complaint in this action on behalf of its clients, long before any investigation into Qwest's financial statements was initiated by the SEC or Department of Justice. After five years of litigation, lead plaintiffs entered into a settlement with Qwest and certain individual defendants that provided a $400 million recovery for the class and created a mechanism that allowed the vast majority of class members to share in an additional $250 million recovered by the SEC. In 2008, Robbins Geller attorneys recovered an additional $45 million for the class in a settlement with defendants Joseph P. Nacchio and Robert S. Woodruff, the CEO and CFO, respectively, of Qwest during large portions of the class period.

- ***Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.***, No. 1:09-cv-03701 (S.D.N.Y.). Robbins Geller attorneys served as lead counsel for a class of investors and obtained court approval of a $388 million recovery in nine 2007 residential mortgage-backed securities offerings issued by J.P. Morgan. The settlement represents, on a percentage basis, the largest recovery ever achieved in an MBS purchaser class action. The result was achieved after more than five years of hard-fought litigation and an extensive investigation.

- ***Smilovits v. First Solar, Inc.***, No. 2:12-cv-00555 (D. Ariz.). As sole lead counsel, Robbins Geller obtained a $350 million settlement in *Smilovits v. First Solar, Inc.* The settlement, which was reached after a long legal battle and on the day before jury selection, resolves claims that First Solar violated §§10(b) and 20(a) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. The settlement is the fifth-largest PSLRA settlement ever recovered in the Ninth Circuit.

- ***NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.***, No. 1:08-cv-10783 (S.D.N.Y.). As sole lead counsel, Robbins Geller obtained a $272 million settlement on behalf of Goldman Sachs' shareholders. The settlement concludes one of the last remaining mortgage-backed securities purchaser class actions arising out of the global financial crisis. The remarkable result was achieved following seven years of extensive litigation. After the claims were dismissed in 2010, Robbins Geller secured a landmark victory from the Second Circuit Court of Appeals that clarified the scope of permissible class actions asserting claims under the Securities Act of 1933 on behalf of MBS investors. Specifically, the Second Circuit's decision rejected the concept of "tranche" standing and concluded that a lead plaintiff in an MBS class action has class standing to pursue claims on behalf of purchasers of other securities that were issued from the same registration statement and backed by pools of mortgages originated by the same lenders who had originated mortgages backing the lead plaintiff's securities.

- ***Schuh v. HCA Holdings, Inc.***, No. 3:11-cv-01033 (M.D. Tenn.). As sole lead counsel, Robbins Geller obtained a groundbreaking $215 million settlement for former HCA Holdings, Inc. shareholders – the largest securities class action recovery ever in Tennessee. Reached shortly before trial was scheduled to commence, the settlement resolves claims that the Registration Statement and Prospectus HCA filed in connection with the company's massive $4.3 billion 2011 IPO contained material misstatements and omissions. The recovery achieved represents more than 30% of the aggregate classwide damages, far exceeding the typical recovery in a securities class action.

- ***In re AT&T Corp. Sec. Litig.***, MDL No. 1399 (D.N.J.). Robbins Geller attorneys served as lead counsel for a class of investors that purchased AT&T common stock. The case charged defendants AT&T and its former Chairman and CEO, C. Michael Armstrong, with violations of the federal securities laws in connection with AT&T's April 2000 initial public offering of its wireless tracking stock, one of the largest IPOs in American history. After two weeks of trial, and on the eve of scheduled testimony by Armstrong and infamous telecom analyst Jack Grubman, defendants agreed to settle the case for $100 million.

- ***Silverman v. Motorola, Inc.***, No. 1:07-cv-04507 (N.D. Ill.). The Firm served as lead counsel on behalf of a class of investors in Motorola, Inc., ultimately recovering $200 million for investors just two months before the case was set for trial. This outstanding result was obtained despite the lack of an SEC investigation or any financial restatement.

- ***City of Pontiac Gen. Emps.' Ret. Sys. v. Wal-Mart Stores, Inc.***, No. 5:12-cv-05162 (W.D. Ark.). Robbins Geller attorneys and lead plaintiff City of Pontiac General Employees' Retirement System achieved a $160 million settlement in a securities class action case arising from allegations published by *The New York Times* in an article released on April 21, 2012 describing an alleged bribery scheme that occurred in Mexico. The case charged that Wal-Mart portrayed itself to investors as a model corporate citizen that had proactively uncovered potential corruption and promptly reported it to law enforcement, when in truth, a former in-house lawyer had blown the whistle on Wal-Mart's corruption years earlier, and Wal-Mart concealed the allegations from law enforcement by refusing its own in-house and outside counsel's calls for an independent investigation. Robbins Geller "achieved an exceptional [s]ettlement with skill, perseverance, and diligent advocacy," said Judge Hickey when granting final approval.

- ***Bennett v. Sprint Nextel Corp.***, No. 2:09-cv-02122 (D. Kan.). As co-lead counsel, Robbins Geller obtained a $131 million recovery for a class of Sprint investors. The settlement, secured after five years of hard-fought litigation, resolved claims that former Sprint executives misled investors concerning the success of Sprint's ill-advised merger with Nextel and the deteriorating credit quality of Sprint's customer base, artificially inflating the value of Sprint's securities.

- ***In re LendingClub Sec. Litig.***, No. 3:16-cv-02627 (N.D. Cal.). Robbins Geller attorneys obtained a $125 million settlement for the court-appointed lead plaintiff Water and Power Employees' Retirement, Disability and Death Plan of the City of Los Angeles and the class. The settlement resolved allegations that LendingClub promised investors an opportunity to get in on the ground floor of a revolutionary lending market fueled by the highest standards of honesty and integrity. The settlement ranked among the top ten largest securities recoveries ever in the Northern District of California.

- ***Knurr v. Orbital ATK, Inc.***, No. 1:16-cv-01031 (E.D. Va.). In the *Orbital* securities class action, Robbins Geller obtained court approval of a $108 million recovery for the class. The Firm succeeded in overcoming two successive motions to dismiss the case, and during discovery were required to file ten motions to compel, all of which were either negotiated to a resolution or granted in large part, which resulted in the production of critical evidence in support of plaintiffs' claims. Believed to be the fourth-largest securities class action settlement in the history of the Eastern District of Virginia, the settlement provides a recovery for investors that is more than ten times larger than the reported median recovery of estimated damages for all securities class action settlements in 2018.

- ***Hsu v. Puma Biotechnology***, No. SACV15-0865 (C.D. Cal.). After a two-week jury trial, Robbins Geller attorneys won a complete plaintiffs' verdict against both defendants on both claims, with the jury finding that Puma Biotechnology, Inc. and its CEO, Alan H. Auerbach, committed securities fraud. The Puma case is only the fifteenth securities class action case tried to a verdict since the Private Securities Litigation Reform Act was enacted in 1995.

- ***Marcus v. J.C. Penney Co., Inc.***, No. 13-cv-00736 (E.D. Tex.). Robbins Geller attorneys obtained a $97.5 million recovery on behalf of J.C. Penney shareholders. The result resolves claims that J.C. Penney and certain officers and directors made misstatements and/or omissions regarding the company's financial position that resulted in artificially inflated stock prices. Specifically, defendants failed to disclose and/or misrepresented adverse facts, including that J.C. Penney

would have insufficient liquidity to get through year-end and would require additional funds to make it through the holiday season, and that the company was concealing its need for liquidity so as not to add to its vendors' concerns.

- ***Monroe County Employees' Retirement System v. The Southern Company***, No. 1:17-cv-00241 (N.D. Ga.). As lead counsel, Robbins Geller obtained an $87.5 million settlement in a securities class action on behalf of plaintiffs Monroe County Employees' Retirement System and Roofers Local No. 149 Pension Fund. The settlement resolves claims for violations of the Securities Exchange Act of 1934 stemming from defendants' issuance of materially misleading statements and omissions regarding the status of construction of a first-of-its-kind "clean coal" power plant in Kemper County, Mississippi. Plaintiffs alleged that these misstatements caused The Southern Company's stock price to be artificially inflated during the class period. Prior to resolving the case, Robbins Geller uncovered critical documentary evidence and deposition testimony supporting plaintiffs' claims. In granting final approval of the settlement, the court praised Robbins Geller for its "hard-fought litigation in the Eleventh Circuit" and its "experience, reputation, and abilities of [its] attorneys," and highlighted that the firm is "well-regarded in the legal community, especially in litigating class-action securities cases

- ***Luna v. Marvell Tech. Grp., Ltd.***, No. 3:15-cv-05447 (N.D. Cal.). In the *Marvell* litigation, Robbins Geller attorneys represented the Plumbers and Pipefitters National Pension Fund and obtained a $72.5 million settlement. The case involved claims that Marvell reported revenue and earnings during the class period that were misleading as a result of undisclosed pull-in and concession sales. The settlement represents approximately 24% to 50% of the best estimate of classwide damages suffered by investors who purchased shares during the February 19, 2015 through December 7, 2015 class period.

- ***Garden City Emps.' Ret. Sys. v. Psychiatric Sols., Inc.***, No. 3:09-cv-00882 (M.D. Tenn.). In the *Psychiatric Solutions* case, Robbins Geller represented lead plaintiff and class representative Central States, Southeast and Southwest Areas Pension Fund in litigation spanning more than four years. Psychiatric Solutions and its top executives were accused of insufficiently staffing their in-patient hospitals, downplaying the significance of regulatory investigations and manipulating their malpractice reserves. Just days before trial was set to commence, attorneys from Robbins Geller achieved a $65 million settlement that was the fourth-largest securities recovery ever in the district and one of the largest in a decade.

- ***Plumbers & Pipefitters Nat'l Pension Fund v. Burns***, No. 3:05-cv-07393 (N.D. Ohio). After 11 years of hard-fought litigation, Robbins Geller attorneys secured a $64 million recovery for shareholders in a case that accused the former heads of Dana Corp. of securities fraud for trumpeting the auto parts maker's condition while it actually spiraled toward bankruptcy. The Firm's Appellate Practice Group successfully appealed to the Sixth Circuit Court of Appeals twice, reversing the district court's dismissal of the action.

- ***Villella v. Chemical and Mining Company of Chile Inc.***, No. 1:15-cv-02106 (S.D.N.Y.) Robbins Geller attorneys, serving as lead consel, obtained a $62.5 million settlement against Sociedad Química y Minera de Chile S.A. ("SQM"), a Chilean mining company. The case alleged that SQM violated the Securities Exchange Act of 1934 by issuing materially false and misleading statements regarding the company's failure to disclose that money from SQM was channeled illegally to electoral campaigns for Chilean politicians and political parties as far back as 2009. SQM had also filed millions of dollars' worth of fictitious tax receipts with Chilean authorities in order to conceal bribery payments from at least 2009 through fiscal 2014. Due to the company being based out of Chile and subject to Chilean law and rules, the Robbins Geller litigation team put together a multilingual litigation team with Chilean expertise. Depositions are considered unlawful in the

country of Chile, so Robbins Geller successfully moved the court to compel SQM to bring witnesses to the United States.

- ***In re BHP Billiton Ltd. Sec. Litig.***, No. 1:16-cv-01445 (S.D.N.Y.). As lead counsel, Robbins Geller obtained a $50 million class action settlement against BHP, a Australian-based mining company that was accused of failing to disclose significant safety problems at the Fundão iron-ore dam, in Brazil. The Firm achieved this result for lead plaintiffs City of Birmingham Retirement and Relief System and City of Birmingham Firemen's and Policemen's Supplemental Pension System, on behalf of purchasers of the American Depositary Shares ("ADRs") of defendants BHP Billiton Limited and BHP Billiton Plc (together, "BHP") from September 25, 2014 to November 30, 2015.

- ***In re St. Jude Med., Inc. Sec. Litig.***, No. 0:10-cv-00851 (D. Minn.). After four and a half years of litigation and mere weeks before the jury selection, Robbins Geller obtained a $50 million settlement on behalf of investors in medical device company St. Jude Medical. The settlement resolves accusations that St. Jude Medical misled investors by utilizing heavily discounted end-of-quarter bulk sales to meet quarterly expectations, which created a false picture of demand by increasing customer inventory due of St. Jude Medical devices. The complaint alleged that the risk of St. Jude Medical's reliance on such bulk sales manifested when it failed to meet its forecast guidance for the third quarter of 2009, which the company had reaffirmed only weeks earlier.

- ***Deka Investment GmbH v. Santander Consumer USA Holdings Inc.***, No. 3:15-cv-02129 (N.D. Tex.). Robbins Geller and co-counsel secured a $47 million settlement in a securities class action against Santander Consumer USA Holdings Inc. ("SCUSA"). The case alleges that SCUSA, 2 of its officers, 10 of its directors, as well as 17 underwriters of its January 23, 2014 multi-billion dollar IPO violated §§11, 12(a)(2), and 15 of the Securities Act of 1933 as a result of their negligence in connection with misrepresentations in the prospectus and registration statement for the IPO ("Offering Documents"). The complaint also alleged that SCUSA and two of its officers violated §§10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 as a result of their fraud in issuing misleading statements in the IPO Offering Documents as well as in subsequent statements to investors.

- ***Snap Inc. Securities Cases***, JCCP No. 4960 (Cal. Super. Ct., Los Angeles Cnty). Robbins Geller, along with co-counsel, reached a settlement in the Snap, Inc. securities class action, providing for the payment of $32,812,500 to eligible settlement class members. The securities class action sought remedies under §§11, 12(a)(2) and 15 of the Securities Act of 1933. The case alleged that Snap, certain Snap officers and directors, and the underwriters for Snap's Initial Public Offering ("IPO") were liable for materially false and misleading statements and omissions in the Registration Statement for the IPO, related to trends and uncertainties in Snap's growth metrics, a potential patent-infringement action, and stated risk factors.

Robbins Geller's securities practice is also strengthened by the existence of a strong appellate department, whose collective work has established numerous legal precedents. The securities practice also utilizes an extensive group of in-house economic and damage analysts, investigators, and forensic accountants to aid in the prosecution of complex securities issues.

Shareholder Derivative and Corporate Governance Litigation

The Firm's shareholder derivative and corporate governance practice is focused on preserving corporate assets and enhancing long-term shareowner value. Shareowner derivative actions are often brought by institutional investors to vindicate the rights of the corporation injured by its executives' misconduct, which can effect violations of the nation's securities, anti-corruption, false claims, cyber-security, labor, environmental, and/or health & safety laws.

Robbins Geller attorneys have aided Firm clients in significantly enhancing shareowner value by obtaining hundreds of millions of dollars in financial clawbacks and successfully negotiating corporate governance enhancements. Robbins Geller has worked with its institutional clients to address corporate misconduct such as options backdating, bribery of foreign officials, pollution, off-label marketing, and insider trading and related self-dealing. Additionally, the Firm works closely with noted corporate governance consultants Robert Monks and Richard Bennett and their firm, ValueEdge Advisors LLC, to shape corporate governance practices that will benefit shareowners.

Robbins Geller's efforts have conferred substantial benefits upon shareowners, and the market effect of these benefits measures in the billions of dollars. The Firm's significant achievements include:

- ***City of Westland Police & Fire Ret. Sys. v. Stumpf (Wells Fargo Derivative Litigation)***, No. 3:11-cv-02369 (N.D. Cal.). Prosecuted shareholder derivative action on behalf of Wells Fargo & Co. alleging that Wells Fargo's executives allowed participation in the mass-processing of home foreclosure documents by engaging in widespread robo-signing, *i.e.*, the execution and submission of false legal documents in courts across the country without verification of their truth or accuracy, and failed to disclose Wells Fargo's lack of cooperation in a federal investigation into the bank's mortgage and foreclosure practices. In settlement of the action, Wells Fargo agreed to provide $67 million in homeowner down-payment assistance, credit counseling, and improvements to its mortgage servicing system. The initiatives will be concentrated in cities severely impacted by the bank's foreclosure practices and the ensuing mortgage foreclosure crisis. Additionally, Wells Fargo agreed to change its procedures for reviewing shareholder proposals and a strict ban on stock pledges by Wells Fargo board members.

- ***In re Ormat Techs., Inc. Derivative Litig.***, No. CV10-00759 (Nev. Dist. Ct., Washoe Cnty.). Robbins Geller brought derivative claims for breach of fiduciary duty and unjust enrichment against the directors and certain officers of Ormat Technologies, Inc., a leading geothermal and recovered energy power business. During the relevant time period, these Ormat insiders caused the company to engage in accounting manipulations that ultimately required restatement of the company's financial statements. The settlement in this action includes numerous corporate governance reforms designed to, among other things: (i) increase director independence; (ii) provide continuing education to directors; (iii) enhance the company's internal controls; (iv) make the company's board more independent; and (iv) strengthen the company's internal audit function.

- ***In re Alphatec Holdings, Inc. Derivative S'holder Litig.***, No. 37-2010-00058586 (Cal. Super. Ct., San Diego Cnty.). Obtained sweeping changes to Alphatec's governance, including separation of the Chairman and CEO positions, enhanced conflict of interest procedures to address related-party transactions, rigorous director independence standards requiring that at least a majority of directors be outside independent directors, and ongoing director education and training.

- ***In re Finisar Corp. Derivative Litig.***, No. C-06-07660 (N.D. Cal.). Prosecuted shareholder

derivative action on behalf of Finisar against certain of its current and former directors and officers for engaging in an alleged nearly decade-long stock option backdating scheme that was alleged to have inflicted substantial damage upon Finisar. After obtaining a reversal of the district court's order dismissing the complaint for failing to adequately allege that a pre-suit demand was futile, Robbins Geller lawyers successfully prosecuted the derivative claims to resolution obtaining over $15 million in financial clawbacks for Finisar. Robbins Geller attorneys also obtained significant changes to Finisar's stock option granting procedures and corporate governance. As a part of the settlement, Finisar agreed to ban the repricing of stock options without first obtaining specific shareholder approval, prohibit the retrospective selection of grant dates for stock options and similar awards, limit the number of other boards on which Finisar directors may serve, require directors to own a minimum amount of Finisar shares, annually elect a Lead Independent Director whenever the position of Chairman and CEO are held by the same person, and require the board to appoint a Trading Compliance officer responsible for ensuring compliance with Finisar's insider trading policies.

- ***Loizides v. Schramm (Maxwell Technology Derivative Litigation)***, No. 37-2010-00097953 (Cal. Super. Ct., San Diego Cnty.). Prosecuted shareholder derivative claims arising from the company's alleged violations of the Foreign Corrupt Practices Act of 1977 ("FCPA"). As a result of Robbins Geller's efforts, Maxwell insiders agreed to adopt significant changes in Maxwell's internal controls and systems designed to protect Maxwell against future potential violations of the FCPA. These corporate governance changes included establishing the following, among other things: a compliance plan to improve board oversight of Maxwell's compliance processes and internal controls; a clear corporate policy prohibiting bribery and subcontracting kickbacks, whereby individuals are accountable; mandatory employee training requirements, including the comprehensive explanation of whistleblower provisions, to provide for confidential reporting of FCPA violations or other corruption; enhanced resources and internal control and compliance procedures for the audit committee to act quickly if an FCPA violation or other corruption is detected; an FCPA and Anti-Corruption Compliance department that has the authority and resources required to assess global operations and detect violations of the FCPA and other instances of corruption; a rigorous ethics and compliance program applicable to all directors, officers, and employees, designed to prevent and detect violations of the FCPA and other applicable anti-corruption laws; an executive-level position of Chief Compliance Officer with direct board-level reporting responsibilities, who shall be responsible for overseeing and managing compliance issues within the company; a rigorous insider trading policy buttressed by enhanced review and supervision mechanisms and a requirement that all trades are timely disclosed; and enhanced provisions requiring that business entities are only acquired after thorough FCPA and anti-corruption due diligence by legal, accounting, and compliance personnel at Maxwell.

- ***In re SciClone Pharms., Inc. S'holder Derivative Litig.***, No. CIV 499030 (Cal. Super. Ct., San Mateo Cnty.). Robbins Geller attorneys successfully prosecuted the derivative claims on behalf of nominal party SciClone Pharmaceuticals, Inc., resulting in the adoption of state-of-the-art corporate governance reforms. The corporate governance reforms included the establishment of an FCPA compliance coordinator; the adoption of an FCPA compliance program and code; and the adoption of additional internal controls and compliance functions.

- ***Policemen & Firemen Ret. Sys. of the City of Detroit v. Cornelison (Halliburton Derivative Litigation)***, No. 2009-29987 (Tex. Dist. Ct., Harris Cnty.). Prosecuted shareholder derivative claims on behalf of Halliburton Company against certain Halliburton insiders for breaches of fiduciary duty arising from Halliburton's alleged violations of the FCPA. In the settlement, Halliburton agreed, among other things, to adopt strict intensive controls and systems designed to detect and deter the payment of bribes and other improper payments to foreign officials, to enhanced executive compensation clawback, director stock ownership requirements, a limitation

on the number of other boards that Halliburton directors may serve, a lead director charter, enhanced director independence standards, and the creation of a management compliance committee.

- ***In re UnitedHealth Grp. Inc. PSLRA Litig.***, No. 06-CV-1691 (D. Minn.). In the *UnitedHealth* case, our client, CalPERS, obtained sweeping corporate governance improvements, including the election of a shareholder-nominated member to the company's board of directors, a mandatory holding period for shares acquired by executives via option exercises, as well as executive compensation reforms that tie pay to performance. In addition, the class obtained $925 million, the largest stock option backdating recovery ever and four times the next largest options backdating recovery.

- ***In re Fossil, Inc. Derivative Litig.***, No. 3:06-cv-01672 (N.D. Tex.). The settlement agreement included the following corporate governance changes: declassification of elected board members; retirement of three directors and addition of five new independent directors; two-thirds board independence requirements; corporate governance guidelines providing for "Majority Voting" election of directors; lead independent director requirements; revised accounting measurement dates of options; addition of standing finance committee; compensation clawbacks; director compensation standards; revised stock option plans and grant procedures; limited stock option granting authority, timing, and pricing; enhanced education and training; and audit engagement partner rotation and outside audit firm review.

- ***Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. Sinegal (Costco Derivative Litigation)***, No. 2:08-cv-01450 (W.D. Wash.). The parties agreed to settlement terms providing for the following corporate governance changes: the amendment of Costco's bylaws to provide "Majority Voting" election of directors; the elimination of overlapping compensation and audit committee membership on common subject matters; enhanced Dodd-Frank requirements; enhanced internal audit standards and controls, and revised information-sharing procedures; revised compensation policies and procedures; revised stock option plans and grant procedures; limited stock option granting authority, timing, and pricing; and enhanced ethics compliance standards and training.

- ***In re F5 Networks, Inc. Derivative Litig.***, No. C-06-0794 (W.D. Wash.). The parties agreed to the following corporate governance changes as part of the settlement: revised stock option plans and grant procedures; limited stock option granting authority, timing, and pricing; "Majority Voting" election of directors; lead independent director requirements; director independence standards; elimination of director perquisites; and revised compensation practices.

Options Backdating Litigation

As has been widely reported in the media, the stock options backdating scandal suddenly engulfed hundreds of publicly traded companies throughout the country in 2006. Robbins Geller was at the forefront of investigating and prosecuting options backdating derivative and securities cases. The Firm has recovered over $1 billion in damages on behalf of injured companies and shareholders.

- ***In re KLA-Tencor Corp. S'holder Derivative Litig.***, No. C-06-03445 (N.D. Cal.). After successfully opposing the special litigation committee of the board of directors' motion to terminate the derivative claims, Robbins Geller recovered $43.6 million in direct financial benefits for KLA-Tencor, including $33.2 million in cash payments by certain former executives and their directors' and officers' insurance carriers.

- ***In re Marvell Tech. Grp. Ltd. Derivative Litig.***, No. C-06-03894 (N.D. Cal.). Robbins Geller recovered $54.9 million in financial benefits, including $14.6 million in cash, for Marvell, in addition to extensive corporate governance reforms related to Marvell's stock option granting practices, board of directors' procedures, and executive compensation.

- ***In re KB Home S'holder Derivative Litig.***, No. 06-CV-05148 (C.D. Cal.). Robbins Geller served as co-lead counsel for the plaintiffs and recovered more than $31 million in financial benefits, including $21.5 million in cash, for KB Home, plus substantial corporate governance enhancements relating to KB Home's stock option granting practices, director elections, and executive compensation practices.

Corporate Takeover Litigation

Robbins Geller has earned a reputation as the leading law firm in representing shareholders in corporate takeover litigation. Through its aggressive efforts in prosecuting corporate takeovers, the Firm has secured for shareholders billions of dollars of additional consideration as well as beneficial changes for shareholders in the context of mergers and acquisitions.

The Firm regularly prosecutes merger and acquisition cases post-merger, often through trial, to maximize the benefit for its shareholder class. Some of these cases include:

- ***In re Tesla Motors, Inc. S'holder Litig.*,** No. 12711-VCS (Del. Ch.). Robbins Geller, along with co-counsel, secured a $60 million partial settlement after nearly four years of litigation against Tesla. This partial settlement is one of the largest derivative recoveries in a stockholder action challenging a merger. This partial settlement resolves the claims brought against defendants Kimbal Musk, Antonio J. Gracias, Stephen T. Jurvetson, Brad W. Buss, Ira Ehrenpreis, and Robyn M. Denholm, but not the claims against defendant Elon Musk.

- ***In re Kinder Morgan, Inc. S'holders Litig.***, No. 06-C-801 (Kan. Dist. Ct., Shawnee Cnty.). In the largest recovery ever for corporate takeover class action litigation, the Firm negotiated a settlement fund of $200 million in 2010.

- ***In re Dole Food Co., Inc. S'holder Litig.***, No. 8703-VCL (Del. Ch.). Robbins Geller and co-counsel went to trial in the Delaware Court of Chancery on claims of breach of fiduciary duty on behalf of Dole Food Co., Inc. shareholders. The litigation challenged the 2013 buyout of Dole by its billionaire Chief Executive Officer and Chairman, David H. Murdock. On August 27, 2015, the court issued a post-trial ruling that Murdock and fellow director C. Michael Carter – who also served as Dole's General Counsel, Chief Operating Officer, and Murdock's top lieutenant – had engaged in fraud and other misconduct in connection with the buyout and are liable to Dole's former stockholders for over $148 million, the largest trial verdict ever in a class action challenging a merger transaction.

- ***Nieman v. Duke Energy Corp.***, No. 3:12-cv-00456 (W.D.N.C.). Robbins Geller, along with co-counsel, obtained a $146.25 million settlement on behalf of Duke Energy Corporation investors. The settlement resolves accusations that defendants misled investors regarding Duke's future leadership following its merger with Progress Energy, Inc., and specifically, their premeditated coup to oust William D. Johnson (CEO of Progress) and replace him with Duke's then-CEO, John Rogers. This historic settlement represents the largest recovery ever in a North Carolina securities fraud action, and one of the five largest recoveries in the Fourth Circuit.

- ***In re Rural Metro Corp. S'holders Litig.***, No. 6350-VCL (Del. Ch.). Robbins Geller and co-counsel were appointed lead counsel in this case after successfully objecting to an inadequate settlement that did not take into account evidence of defendants' conflicts of interest. In a post-trial opinion, Delaware Vice Chancellor J. Travis Laster found defendant RBC Capital Markets, LLC liable for aiding and abetting Rural/Metro's board of directors' fiduciary duty breaches in the $438 million buyout of Rural/Metro, citing "the magnitude of the conflict between RBC's claims and the evidence." RBC was ordered to pay nearly $110 million as a result of its wrongdoing, the largest damage award ever obtained against a bank over its role as a merger adviser. The Delaware Supreme Court issued a landmark opinion affirming the judgment on November 30, 2015, *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816 (Del. 2015).

- ***In re Del Monte Foods Co. S'holders Litig.***, No. 6027-VCL (Del. Ch.). Robbins Geller exposed the unseemly practice by investment bankers of participating on both sides of large merger and acquisition transactions and ultimately secured an $89 million settlement for shareholders of Del Monte. For efforts in achieving these results, the Robbins Geller lawyers prosecuting the case were named Attorneys of the Year by *California Lawyer* magazine in 2012.

- ***In re TD Banknorth S'holders Litig.***, No. 2557-VCL (Del. Ch.). After objecting to a modest recovery of just a few cents per share, the Firm took over the litigation and obtained a common fund settlement of $50 million.

- ***In re Chaparral Res., Inc. S'holders Litig.***, No. 2633-VCL (Del. Ch.). After a full trial and a subsequent mediation before the Delaware Chancellor, the Firm obtained a common fund settlement of $41 million (or 45% increase above merger price) for both class and appraisal claims.

- ***Laborers' Local #231 Pension Fund v. Websense, Inc.***, No. 37-2013-00050879-CU-BT-CTL (Cal. Super. Ct., San Diego Cnty.). Robbins Geller successfully obtained a record-breaking $40 million in *Websense*, which is believed to be the largest post-merger common fund settlement in California state court history. The class action challenged the May 2013 buyout of Websense by Vista Equity Partners (and affiliates) for $24.75 per share and alleged breach of fiduciary duty against the former Websense board of directors, and aiding and abetting against Websense's financial advisor, Merrill Lynch, Pierce, Fenner & Smith, Inc. Claims were pursued by the plaintiff in both California state court and the Delaware Court of Chancery.

- ***In re Onyx Pharms., Inc. S'holder Litig.***, No. CIV523789 (Cal. Super. Ct., San Mateo Cnty.). Robbins Geller obtained $30 million in a case against the former Onyx board of directors for breaching its fiduciary duties in connection with the acquisition of Onyx by Amgen Inc. for $125 per share at the expense of shareholders. At the time of the settlement, it was believed to set the record for the largest post-merger common fund settlement in California state court history. Over the case's three years, Robbins Geller defeated defendants' motions to dismiss, obtained class certification, took over 20 depositions, and reviewed over one million pages of documents. Further, the settlement was reached just days before a hearing on defendants' motion for summary judgment was set to take place, and the result is now believed to be the second largest post-merger common fund settlement in California state court history.

- ***Harrah's Entertainment***, No. A529183 (Nev. Dist. Ct., Clark Cnty.). The Firm's active prosecution of the case on several fronts, both in federal and state court, assisted Harrah's shareholders in securing an additional $1.65 billion in merger consideration.

- ***In re Chiron S'holder Deal Litig.***, No. RG 05-230567 (Cal. Super. Ct., Alameda Cnty.). The Firm's

efforts helped to obtain an additional $800 million in increased merger consideration for Chiron shareholders.

- ***In re Dollar Gen. Corp. S'holder Litig.***, No. 07MD-1 (Tenn. Cir. Ct., Davidson Cnty.). As lead counsel, the Firm secured a recovery of up to $57 million in cash for former Dollar General shareholders on the eve of trial.

- ***In re Prime Hosp., Inc. S'holders Litig.***, No. 652-N (Del. Ch.). The Firm objected to a settlement that was unfair to the class and proceeded to litigate breach of fiduciary duty issues involving a sale of hotels to a private equity firm. The litigation yielded a common fund of $25 million for shareholders.

- ***In re UnitedGlobalCom, Inc. S'holder Litig.***, No. 1012-VCS (Del. Ch.). The Firm secured a common fund settlement of $25 million just weeks before trial.

- ***In re eMachines, Inc. Merger Litig.***, No. 01-CC-00156 (Cal. Super. Ct., Orange Cnty.). After four years of litigation, the Firm secured a common fund settlement of $24 million on the brink of trial.

- ***In re PeopleSoft, Inc. S'holder Litig.***, No. RG-03100291 (Cal. Super. Ct., Alameda Cnty.). The Firm successfully objected to a proposed compromise of class claims arising from takeover defenses by PeopleSoft, Inc. to thwart an acquisition by Oracle Corp., resulting in shareholders receiving an increase of over $900 million in merger consideration.

- ***ACS S'holder Litig.***, No. CC-09-07377-C (Tex. Cty. Ct., Dallas Cnty.). The Firm forced ACS's acquirer, Xerox, to make significant concessions by which shareholders would not be locked out of receiving more money from another buyer.

Consumer Fraud and Privacy

In our consumer-based economy, working families who purchase products and services must receive truthful information so they can make meaningful choices about how to spend their hard-earned money. When financial institutions and other corporations deceive consumers or take advantage of unequal bargaining power, class action suits provide, in many instances, the only realistic means for an individual to right a corporate wrong.

Robbins Geller attorneys represent consumers around the country in a variety of important, complex class actions. Our attorneys have taken a leading role in many of the largest federal and state consumer fraud, privacy, environmental, human rights, and public health cases throughout the United States. The Firm is also actively involved in many cases relating to banks and the financial services industry, pursuing claims on behalf of individuals victimized by abusive telemarketing practices, abusive mortgage lending practices, market timing violations in the sale of variable annuities, and deceptive consumer credit lending practices in violation of the Truth-In-Lending Act. Below are a few representative samples of our robust, nationwide consumer and privacy practice.

- ***In re Nat'l Prescription Opiate Litig.*** Robbins Geller serves on the Plaintiffs' Executive Committee to spearhead more than 2,900 federal lawsuits brought on behalf of governmental entities and other plaintiffs in the sprawling litigation concerning the nationwide prescription opioid epidemic. In reporting on the selection of the lawyers to lead the case, *The National Law Journal* reported that "[t]he team reads like a 'Who's Who' in mass torts."

- ***Apple Inc. Device Performance Litigation***. Robbins Geller serves on the Plaintiffs' Executive Committee to advance judicial interests of efficiency and protect the interests of the proposed class in the *Apple* litigation. The case alleges Apple misrepresented its iPhone devices and the nature of updates to its mobile operating system (iOS), which allegedly included code that significantly reduced the performance of older-model iPhones and forced users to incur expenses replacing these devices or their batteries.

- ***In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*** Robbins Geller served as co-lead class counsel in a case against Mylan Pharmaceuticals and Pfizer alleging anti-competitive behavior that allowed the price of ubiquitous, life-saving EpiPen auto-injector devices to rise over 600%, resulting in inflated prices for American families. Two settlements totaling $609 million were reached after five years of litigation and weeks prior to trial.

- ***Cordova v. Greyhound Lines, Inc.*** Robbins Geller represented California bus passengers *pro bono* in a landmark consumer and civil rights case against Greyhound for subjecting them to discriminatory immigration raids. Robbins Geller achieved a watershed court ruling that a private company may be held liable under California law for allowing border patrol to harass and racially profile its customers. The case heralds that Greyhound passengers do not check their rights and dignity at the bus door and has had an immediate impact, not only in California but nationwide. Within weeks of Robbins Geller filing the case, Greyhound added "know your rights" information to passengers to its website and on posters in bus stations around the country, along with adopting other business reforms.

- ***In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*** As part of the Plaintiffs' Steering Committee, Robbins Geller reached a series of settlements on behalf of purchasers, lessees, and dealers that total well over $17 billion, the largest settlement in history, concerning illegal "defeat devices" that Volkswagen installed on many of its diesel-engine vehicles. The device tricked regulators into believing the cars were complying with emissions standards, while the cars were actually emitting between 10 and 40 times the allowable limit for harmful pollutants.

- ***In re Facebook Biometric Info. Privacy Litig.,*** No. 3:15-cv-03747 (N.D. Cal.). Robbins Geller served as co-lead class counsel in a cutting-edge certified class action, securing a record-breaking $650 million all-cash settlement, the largest privacy settlement in history. The case concerned Facebook's alleged privacy violations through its collection of its users' biometric identifiers without informed consent through its "Tag Suggestions" feature, which uses proprietary facial recognition software to extract from user-uploaded photographs the unique biometric identifiers (*i.e.*, graphical representations of facial features, also known as facial geometry) associated with people's faces and identify who they are. The Honorable James Donato called the settlement "a groundbreaking settlement in a novel area" and praised the unprecedented 22% claims rate as "pretty phenomenal" and "a pretty good day in class settlement history."

- ***Yahoo Data Breach Class Action***. Robbins Geller helped secure final approval of a $117.5 million settlement in a class action lawsuit against Yahoo, Inc. arising out of Yahoo's reckless disregard for the safety and security of its customers' personal, private information. In September 2016, Yahoo revealed that personal information associated with at least 500 million user accounts, including names, email addresses, telephone numbers, dates of birth, hashed passwords, and security questions and answers, was stolen from Yahoo's user database in late 2014. The company made another announcement in December 2016 that personal information associated with more than one billion user accounts was extracted in August 2013. Ten months later, Yahoo announced that the breach in 2013 actually affected all three billion existing accounts. This was the largest data breach in history, and caused severe financial and emotional damage to Yahoo account holders. In 2017, Robbins Geller was appointed to the Plaintiffs' Executive Committee charged with overseeing the litigation.

- ***Trump University***. After six and a half years of tireless litigation and on the eve of trial, Robbins Geller, serving as co-lead counsel, secured a historic recovery on behalf of Trump University students around the country. The settlement provides $25 million to approximately 7,000 consumers, including senior citizens who accessed retirement accounts and maxed out credit cards to enroll in Trump University. The extraordinary result means individual class members are eligible for upwards of $35,000 in restitution. The settlement resolves claims that President Donald J. Trump and Trump University violated federal and state laws by misleadingly marketing "Live Events" seminars and mentorships as teaching Trump's "real-estate techniques" through his "hand-picked" "professors" at his so-called "university." Robbins Geller represented the class on a *pro bono* basis.

- ***In re Morning Song Bird Food Litig.*** Robbins Geller obtained final approval of a settlement in a civil Racketeer Influenced and Corrupt Organizations Act consumer class action against The Scotts Miracle-Gro Company and its CEO James Hagedorn. The settlement of up to $85 million provides full refunds to consumers around the country and resolves claims that Scotts Miracle-Gro knowingly sold wild bird food treated with pesticides that are hazardous to birds. In approving the settlement, Judge Houston commended Robbins Gelller's "skill and quality of work [as] extraordinary" and the case as "aggressively litigated." The Robbins Geller team battled a series of dismissal motions before achieving class certification for the plaintiffs in March 2017, with the court finding that "Plaintiffs would not have purchased the bird food if they knew it was poison." Defendants then appealed the class certification to the Ninth Circuit, which was denied, and then tried to have the claims from non-California class members thrown out, which was also denied.

- ***Bank Overdraft Fees Litigation***. The banking industry charges consumers exorbitant amounts for "overdraft" of their checking accounts, even if the customer did not authorize a charge beyond the available balance and even if the account would not have been overdrawn had the transactions been ordered chronologically as they occurred – that is, banks reorder transactions to maximize such fees. The Firm brought lawsuits against major banks to stop this practice and recover these false fees. These cases have recovered over $500 million thus far from a dozen banks and we continue to investigate other banks engaging in this practice.

- ***Visa and MasterCard Fees***. After years of litigation and a six-month trial, Robbins Geller attorneys won one of the largest consumer-protection verdicts ever awarded in the United States. The Firm's attorneys represented California consumers in an action against Visa and MasterCard for intentionally imposing and concealing a fee from cardholders. The court ordered Visa and MasterCard to return $800 million in cardholder losses, which represented 100% of the amount illegally taken, plus 2% interest. In addition, the court ordered full disclosure of the hidden fee.

- ***Sony Gaming Networks & Customer Data Security Breach Litigation.*** The Firm served as a member of the Plaintiffs' Steering Committee, helping to obtain a precedential opinion denying in part Sony's motion to dismiss plaintiffs' claims involving the breach of Sony's gaming network, leading to a $15 million settlement.

- ***Tobacco Litigation***. Robbins Geller attorneys have led the fight against Big Tobacco since 1991. As an example, Robbins Geller attorneys filed the case that helped get rid of Joe Camel, representing various public and private plaintiffs, including the State of Arkansas, the general public in California, the cities of San Francisco, Los Angeles, and Birmingham, 14 counties in California, and the working men and women of this country in the Union Pension and Welfare Fund cases that have been filed in 40 states. In 1992, Robbins Geller attorneys filed the first case in the country that alleged a conspiracy by the Big Tobacco companies.

- ***Garment Workers Sweatshop Litigation***. Robbins Geller attorneys represented a class of 30,000 garment workers who alleged that they had worked under sweatshop conditions in garment factories in Saipan that produced clothing for top U.S. retailers such as The Gap, Target, and J.C. Penney. In the first action of its kind, Robbins Geller attorneys pursued claims against the factories and the retailers alleging violations of RICO, the Alien Tort Claims Act, and the Law of Nations based on the alleged systemic labor and human rights abuses occurring in Saipan. This case was a companion to two other actions, one which alleged overtime violations by the garment factories under the Fair Labor Standards Act and local labor law, and another which alleged violations of California's Unfair Practices Law by the U.S. retailers. These actions resulted in a settlement of approximately $20 million that included a comprehensive monitoring program to address past violations by the factories and prevent future ones. The members of the litigation team were honored as Trial Lawyers of the Year by the Trial Lawyers for Public Justice in recognition of the team's efforts at bringing about the precedent-setting settlement of the actions.

- ***In re Intel Corp. CPU Mktg., Sales Pracs. & Prods. Liab. Litig.*** Robbins Geller serves on the Plaintiffs' Steering Committee in *Intel*, a massive multidistrict litigation pending in the United States District Court for the District of Oregon. *Intel* concerns serious security vulnerabilities – known as "Spectre" and "Meltdown" – that infect nearly all of Intel's x86 processors manufactured and sold since 1995, the patching of which results in processing speed degradation of the impacted computer, server or mobile device.

- ***West Telemarketing Case***. Robbins Geller attorneys secured a $39 million settlement for class members caught up in a telemarketing scheme where consumers were charged for an unwanted membership program after purchasing Tae-Bo exercise videos. Under the settlement, consumers were entitled to claim between one and one-half to three times the amount of all fees they unknowingly paid.

- ***Dannon Activia®***. Robbins Geller attorneys secured the largest ever settlement for a false advertising case involving a food product. The case alleged that Dannon's advertising for its Activia® and DanActive® branded products and their benefits from "probiotic" bacteria were overstated. As part of the nationwide settlement, Dannon agreed to modify its advertising and establish a fund of up to $45 million to compensate consumers for their purchases of Activia® and DanActive®.

- ***Mattel Lead Paint Toys***. In 2006-2007, toy manufacturing giant Mattel and its subsidiary Fisher-Price announced the recall of over 14 million toys made in China due to hazardous lead and dangerous magnets. Robbins Geller attorneys filed lawsuits on behalf of millions of parents and other consumers who purchased or received toys for children that were marketed as safe but were later recalled because they were dangerous. The Firm's attorneys reached a landmark settlement

for millions of dollars in refunds and lead testing reimbursements, as well as important testing requirements to ensure that Mattel's toys are safe for consumers in the future.

- ***Tenet Healthcare Cases***. Robbins Geller attorneys were co-lead counsel in a class action alleging a fraudulent scheme of corporate misconduct, resulting in the overcharging of uninsured patients by the Tenet chain of hospitals. The Firm's attorneys represented uninsured patients of Tenet hospitals nationwide who were overcharged by Tenet's admittedly "aggressive pricing strategy," which resulted in price gouging of the uninsured. The case was settled with Tenet changing its practices and making refunds to patients.

- ***Pet Food Products Liability Litigation***. Robbins Geller served as co-lead counsel in this massive, 100+ case products liability MDL in the District of New Jersey concerning the death of and injury to thousands of the nation's cats and dogs due to tainted pet food. The case settled for $24 million.

Human Rights, Labor Practices, and Public Policy

Robbins Geller attorneys have a long tradition of representing the victims of unfair labor practices and violations of human rights. These include:

- ***Does I v. The Gap, Inc.***, No. 01 0031 (D. N. Mar. I.). In this groundbreaking case, Robbins Geller attorneys represented a class of 30,000 garment workers who alleged that they had worked under sweatshop conditions in garment factories in Saipan that produced clothing for top U.S. retailers such as The Gap, Target, and J.C. Penney. In the first action of its kind, Robbins Geller attorneys pursued claims against the factories and the retailers alleging violations of RICO, the Alien Tort Claims Act, and the Law of Nations based on the alleged systemic labor and human rights abuses occurring in Saipan. This case was a companion to two other actions: ***Does I v. Advance Textile Corp.***, No. 99 0002 (D. N. Mar. I.), which alleged overtime violations by the garment factories under the Fair Labor Standards Act and local labor law, and ***UNITE v. The Gap, Inc.***, No. 300474 (Cal. Super. Ct., San Francisco Cty.), which alleged violations of California's Unfair Practices Law by the U.S. retailers. These actions resulted in a settlement of approximately $20 million that included a comprehensive monitoring program to address past violations by the factories and prevent future ones. The members of the litigation team were honored as Trial Lawyers of the Year by the Trial Lawyers for Public Justice in recognition of the team's efforts at bringing about the precedent-setting settlement of the actions.

- ***Liberty Mutual Overtime Cases***, No. JCCP 4234 (Cal. Super. Ct., Los Angeles Cnty.). Robbins Geller attorneys served as co-lead counsel on behalf of 1,600 current and former insurance claims adjusters at Liberty Mutual Insurance Company and several of its subsidiaries. Plaintiffs brought the case to recover unpaid overtime compensation and associated penalties, alleging that Liberty Mutual had misclassified its claims adjusters as exempt from overtime under California law. After 13 years of complex and exhaustive litigation, Robbins Geller secured a settlement in which Liberty Mutual agreed to pay $65 million into a fund to compensate the class of claims adjusters for unpaid overtime. The Liberty Mutual action is one of a few claims adjuster overtime actions brought in California or elsewhere to result in a successful outcome for plaintiffs since 2004.

- ***Veliz v. Cintas Corp.***, No. 5:03-cv-01180 (N.D. Cal.). Brought against one of the nation's largest commercial laundries for violations of the Fair Labor Standards Act for misclassifying truck drivers as salesmen to avoid payment of overtime.

- ***Kasky v. Nike, Inc.***, 27 Cal. 4th 939 (2002). The California Supreme Court upheld claims that an apparel manufacturer misled the public regarding its exploitative labor practices, thereby violating California statutes prohibiting unfair competition and false advertising. The court rejected defense contentions that any misconduct was protected by the First Amendment, finding the heightened constitutional protection afforded to noncommercial speech inappropriate in such a circumstance.

Shareholder derivative litigation brought by Robbins Geller attorneys at times also involves stopping anti-union activities, including:

- ***Southern Pacific/Overnite***. A shareholder action stemming from several hundred million dollars in loss of value in the company due to systematic violations by Overnite of U.S. labor laws.

- ***Massey Energy***. A shareholder action against an anti-union employer for flagrant violations of environmental laws resulting in multi-million-dollar penalties.

- ***Crown Petroleum***. A shareholder action against a Texas-based oil company for self-dealing and breach of fiduciary duty while also involved in a union lockout.

Environment and Public Health

Robbins Geller attorneys have also represented plaintiffs in class actions related to environmental law. The Firm's attorneys represented, on a *pro bono* basis, the Sierra Club and the National Economic Development and Law Center as *amici curiae* in a federal suit designed to uphold the federal and state use of project labor agreements ("PLAs"). The suit represented a legal challenge to President Bush's Executive Order 13202, which prohibits the use of project labor agreements on construction projects receiving federal funds. Our *amici* brief in the matter outlined and stressed the significant environmental and socio-economic benefits associated with the use of PLAs on large-scale construction projects.

Attorneys with Robbins Geller have been involved in several other significant environmental cases, including:

- ***Public Citizen v. U.S. D.O.T.*** Robbins Geller attorneys represented a coalition of labor, environmental, industry, and public health organizations including Public Citizen, The International Brotherhood of Teamsters, California AFL-CIO, and California Trucking Industry in a challenge to a decision by the Bush administration to lift a Congressionally-imposed "moratorium" on cross-border trucking from Mexico on the basis that such trucks do not conform to emission controls under the Clean Air Act, and further, that the administration did not first complete a comprehensive environmental impact analysis as required by the National Environmental Policy Act. The suit was dismissed by the United States Supreme Court, the court holding that because the D.O.T. lacked discretion to prevent crossborder trucking, an environmental assessment was not required.

- ***Sierra Club v. AK Steel***. Brought on behalf of the Sierra Club for massive emissions of air and water pollution by a steel mill, including homes of workers living in the adjacent communities, in violation of the Federal Clean Air Act, the Resource Conservation Recovery Act, and the Clean Water Act.

- ***MTBE Litigation***. Brought on behalf of various water districts for befouling public drinking water with MTBE, a gasoline additive linked to cancer.

- ***Exxon Valdez***. Brought on behalf of fisherman and Alaska residents for billions of dollars in damages resulting from the greatest oil spill in U.S. history.

- ***Avila Beach***. A citizens' suit against UNOCAL for leakage from the oil company pipeline so severe it literally destroyed the town of Avila Beach, California.

Federal laws such as the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act and state laws such as California's Proposition 65 exist to protect the environment and the public from abuses by corporate and government organizations. Companies can be found liable for negligence, trespass, or intentional environmental damage, be forced to pay for reparations, and to come into compliance with existing laws. Prominent cases litigated by Robbins Geller attorneys include representing more than 4,000 individuals suing for personal injury and property damage related to the Stringfellow Dump Site in Southern California, participation in the Exxon Valdez oil spill litigation, and litigation involving the toxic spill arising from a Southern Pacific train derailment near Dunsmuir, California.

Robbins Geller attorneys have led the fight against Big Tobacco since 1991. As an example, Robbins Geller attorneys filed the case that helped get rid of Joe Camel, representing various public and private plaintiffs, including the State of Arkansas, the general public in California, the cities of San Francisco, Los Angeles, and Birmingham, 14 counties in California, and the working men and women of this country in the Union Pension and Welfare Fund cases that have been filed in 40 states. In 1992, Robbins Geller attorneys filed the first case in the country that alleged a conspiracy by the Big Tobacco companies.

Pro Bono

Robbins Geller provides counsel to those unable to afford legal representation as part of a continuous and longstanding commitment to the communities in which it serves. Over the years the Firm has dedicated a considerable amount of time, energy, and a full range of its resources for many *pro bono* and charitable actions.

Robbins Geller has been honored for its *pro bono* efforts by the California State Bar (including a nomination for the President's Pro Bono Law Firm of the Year award) and the San Diego Volunteer Lawyer's Program, among others.

Some of the Firm's and its attorneys' *pro bono* and charitable actions include:

- Representing public school children and parents in Tennessee challenging the state's private school voucher law, known as the Education Savings Account (ESA) Pilot Program. Robbins Geller helped achieve favorable rulings enjoining implementation of the ESA for violating the Home Rule provision of the Tennessee Constitution, which prohibits the General Assembly from passing laws that target specific counties without local approval.

- Representing California bus passengers *pro bono* in a landmark consumer and civil rights case against Greyhound for subjecting them to discriminatory immigration raids. Robbins Geller achieved a watershed court ruling that a private company may be held liable under California law for allowing border patrol to harass and racially profile its customers. The case heralds that Greyhound passengers do not check their rights and dignity at the bus door and has had an immediate impact, not only in California but nationwide. Within weeks of Robbins Geller filing the case, Greyhound added "know your rights" information to passengers to its website and on posters in bus stations around the country, along with adopting other business reforms.

- Working with the Homeless Action Center (HAC) to provide no-cost, barrier-free, culturally competent legal representation that makes it possible for people who are homeless (or at risk of becoming homeless) to access social safety net programs that help restore dignity and provide sustainable income, healthcare, mental health treatment, and housing. Based in Oakland and Berkeley, the non-profit is the only program in the Bay Area that specializes in legal services to those who are chronically homeless. In 2016, HAC provided assistance to 1,403 men and 936 women, and 1,691 cases were completed. An additional 1,357 cases were still pending when the year ended. The results include 512 completed SSI cases with a success rate of 87%.

- Representing Trump University students in two class actions against President Donald J. Trump. The historic settlement provides $25 million to approximately 7,000 consumers. This means individual class members are eligible for upwards of $35,000 in restitution – an extraordinary result.

- Representing children diagnosed with Autism Spectrum Disorder, as well as children with significant disabilities, in New York to remedy flawed educational policies and practices that cause substantial harm to these and other similar children year after year.

- Representing 19 San Diego County children diagnosed with Autism Spectrum Disorder in their appeal of the San Diego Regional Center's termination of funding for a crucial therapy. The victory resulted in a complete reinstatement of funding and set a precedent that allows other children to obtain the treatments they need.

- Serving as Northern California and Hawaii District Coordinator for the United States Court of Appeals for the Ninth Circuit's Pro Bono program since 1993.

- Representing the Sierra Club and the National Economic Development and Law Center as *amici curiae* before the U.S. Supreme Court.

- Obtaining political asylum, after an initial application had been denied, for an impoverished Somali family whose ethnic minority faced systematic persecution and genocidal violence in Somalia, as well as forced female mutilation.

- Working with the ACLU in a class action filed on behalf of welfare applicants subject to San Diego County's "Project 100%" program. Relief was had when the County admitted that food-stamp eligibility could not hinge upon the Project 100% "home visits," and again when the district court ruled that unconsented "collateral contacts" violated state regulations. The decision was noted by the *Harvard Law Review*, *The New York Times*, and *The Colbert Report*.

- Filing numerous *amicus curiae* briefs on behalf of religious organizations and clergy that support civil rights, oppose government-backed religious-viewpoint discrimination, and uphold the American traditions of religious freedom and church-state separation.

- Serving as *amicus* counsel in a Ninth Circuit appeal from a Board of Immigration Appeals deportation decision. In addition to obtaining a reversal of the BIA's deportation order, the Firm consulted with the Federal Defenders' Office on cases presenting similar fact patterns, which resulted in a precedent-setting *en banc* decision from the Ninth Circuit resolving a question of state and federal law that had been contested and conflicted for decades.

PROMINENT CASES AND JUDICIAL COMMENDATIONS

Prominent Cases

Over the years, Robbins Geller attorneys have obtained outstanding results in some of the most notorious and well-known cases, frequently earning judicial commendations for the quality of their representation.

- ***In re Enron Corp. Sec. Litig.***, No. H-01-3624 (S.D. Tex.). Investors lost billions of dollars as a result of the massive fraud at Enron. In appointing Robbins Geller lawyers as sole lead counsel to represent the interests of Enron investors, the court found that the Firm's zealous prosecution and level of "insight" set it apart from its peers. Robbins Geller attorneys and lead plaintiff The Regents of the University of California aggressively pursued numerous defendants, including many of Wall Street's biggest banks, and successfully obtained settlements in excess of ***$7.2 billion*** for the benefit of investors. ***This is the largest securities class action recovery in history***.

  The court overseeing this action had utmost praise for Robbins Geller's efforts and stated that "[t]he experience, ability, and reputation of the attorneys of [Robbins Geller] is not disputed; it is one of the most successful law firms in securities class actions, if not the preeminent one, in the country." *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 586 F. Supp. 2d 732, 797 (S.D. Tex. 2008).

  The court further commented: "[I]n the face of extraordinary obstacles, the skills, expertise, commitment, and tenacity of [Robbins Geller] in this litigation cannot be overstated. Not to be overlooked are the unparalleled results, . . . which demonstrate counsel's clearly superlative litigating and negotiating skills." *Id.* at 789.

  The court stated that the Firm's attorneys "are to be commended for their zealousness, their diligence, their perseverance, their creativity, the enormous breadth and depth of their investigations and analysis, and their expertise in all areas of securities law on behalf of the proposed class." *Id.*

  In addition, the court noted, "This Court considers [Robbins Geller] 'a lion' at the securities bar on the national level," noting that the Lead Plaintiff selected Robbins Geller because of the Firm's "outstanding reputation, experience, and success in securities litigation nationwide." *Id.* at 790.

  The court further stated that "Lead Counsel's fearsome reputation and successful track record undoubtedly were substantial factors in . . . obtaining these recoveries." *Id.*

  Finally, Judge Harmon stated: "As this Court has explained [this is] an extraordinary group of attorneys who achieved the largest settlement fund ever despite the great odds against them." *Id.* at 828.

- ***Jaffe v. Household Int'l, Inc.***, No. 02-C-05893 (N.D. Ill). As sole lead counsel, Robbins Geller obtained a record-breaking settlement of ***$1.575 billion*** after 14 years of litigation, including a six-week jury trial in 2009 that resulted in a securities fraud verdict in favor of the class. In 2015, the Seventh Circuit Court of Appeals upheld the jury's verdict that defendants made false or misleading statements of material fact about the company's business practices and financial results, but remanded the case for a new trial on the issue of whether the individual defendants "made" certain false statements, whether those false statements caused plaintiffs' losses, and the amount of

damages. The parties reached an agreement to settle the case just hours before the retrial was scheduled to begin on June 6, 2016. ***The $1.575 billion settlement, approved in October 2016, is the largest ever following a securities fraud class action trial, the largest securities fraud settlement in the Seventh Circuit and the eighth-largest settlement ever in a post-PSLRA securities fraud case.*** According to published reports, the case was just the seventh securities fraud case tried to a verdict since the passage of the PSLRA.

In approving the settlement, the Honorable Jorge L. Alonso noted the team's "skill and determination" while recognizing that "Lead Counsel prosecuted the case vigorously and skillfully over 14 years against nine of the country's most prominent law firms" and "achieved an exceptionally significant recovery for the class." The court added that the team faced "significant hurdles" and "uphill battles" throughout the case and recognized that "[c]lass counsel performed a very high-quality legal work in the context of a thorny case in which the state of the law has been and is in flux." The court succinctly concluded that the settlement was "a spectacular result for the class." *Jaffe v. Household Int'l, Inc.*, No. 02-C-5892, 2016 U.S. Dist. LEXIS 156921, at *8 (N.D. Ill. Nov. 10, 2016); *Jaffe v. Household Int'l, Inc.*, No. 02-C-05893, Transcript at 56, 65 (N.D. Ill. Oct. 20, 2016).

- ***Hall v. NCAA (Restricted Earnings Coach Antitrust Litigation)***, No. 94-2392 (D. Kan.). Robbins Geller attorneys were lead counsel and lead trial counsel for one of three classes of coaches in these consolidated price-fixing actions against the National Collegiate Athletic Association. On May 4, 1998, the jury returned verdicts in favor of the three classes for more than $70 million.

- ***In re Valeant Pharms. Int'l, Inc. Sec. Litig.***, No. 3:15-cv-07658 (D.N.J.). As sole lead counsel, Robbins Geller attorneys obtained a $1.2 billion settlement in the securities case that *Vanity Fair* reported as "the corporate scandal of its era" that had raised "fundamental questions about the functioning of our health-care system, the nature of modern markets, and the slippery slope of ethical rationalizations." The settlement resolves claims that defendants made false and misleading statements regarding Valeant's business and financial performance during the class period, attributing Valeant's dramatic growth in revenues and profitability to "innovative new marketing approaches" as part of a business model that was low risk and "durable and sustainable." *Valeant* is the largest securities class action settlement against a pharmaceutical manufacturer and the ninth largest ever.

- ***In re Am. Realty Cap. Props., Inc. Litig.***, No. 1:15-mc-00040 (S.D.N.Y.). As sole lead counsel, Robbins Geller attorneys zealously litigated the case arising out of ARCP's manipulative accounting practices and obtained a $1.025 billion settlement. For five years, the litigation team prosecuted nine different claims for violations of the Securities Exchange Act of 1934 and Securities Act of 1933, involving seven different stock or debt offerings and two mergers. The recovery represents the highest percentage of damages of any major PSLRA case prior to trial and includes the largest personal contributions by individual defendants in history.

  In approving the settlement, the Honorable Alvin K. Hellerstein lauded the Robbins Geller litigation team, noting: "My own observation is that plaintiffs' representation is adequate and that the role of lead counsel was fulfilled in an extremely fine fashion by [Robbins Geller]. At every juncture, the representations made to me were reliable, the arguments were cogent, and the representation of their client was zealous."

- ***In re UnitedHealth Grp. Inc. PSLRA Litig.***, No. 06-CV-1691 (D. Minn.). In the *UnitedHealth* case, Robbins Geller represented the California Public Employees' Retirement System ("CalPERS") and

demonstrated its willingness to vigorously advocate for its institutional clients, even under the most difficult circumstances. For example, in 2006, the issue of high-level executives backdating stock options made national headlines. During that time, many law firms, including Robbins Geller, brought shareholder derivative lawsuits against the companies' boards of directors for breaches of their fiduciary duties or for improperly granting backdated options. Rather than pursuing a shareholder derivative case, the Firm filed a securities fraud class action against the company on behalf of CalPERS. In doing so, Robbins Geller faced significant and unprecedented legal obstacles with respect to loss causation, *i.e.*, that defendants' actions were responsible for causing the stock losses. Despite these legal hurdles, Robbins Geller obtained an $895 million recovery on behalf of the UnitedHealth shareholders. Shortly after reaching the $895 million settlement with UnitedHealth, the remaining corporate defendants, including former CEO William A. McGuire, also settled. McGuire paid $30 million and returned stock options representing more than three million shares to the shareholders. The total recovery for the class was over $925 million, the largest stock option backdating recovery ever, and ***a recovery that is more than four times larger than the next largest options backdating recovery***. Moreover, Robbins Geller obtained unprecedented corporate governance reforms, including election of a shareholder-nominated member to the company's board of directors, a mandatory holding period for shares acquired by executives via option exercise, and executive compensation reforms that tie pay to performance.

- ***Alaska Elec. Pension Fund v. CitiGroup, Inc. (In re WorldCom Sec. Litig.)***, No. 03 Civ. 8269 (S.D.N.Y.). Robbins Geller attorneys represented more than 50 private and public institutions that opted out of the class action case and sued WorldCom's bankers, officers and directors, and auditors in courts around the country for losses related to WorldCom bond offerings from 1998 to 2001. The Firm's clients included major public institutions from across the country such as CalPERS, CalSTRS, the state pension funds of Maine, Illinois, New Mexico, and West Virginia, union pension funds, and private entities such as AIG and Northwestern Mutual. Robbins Geller attorneys recovered more than $650 million for their clients, substantially more than they would have recovered as part of the class.

- ***Luther v. Countrywide Fin. Corp.***, No. 12-cv-05125 (C.D. Cal.). Robbins Geller attorneys secured a $500 million settlement for institutional and individual investors in what is the largest RMBS purchaser class action settlement in history, and one of the largest class action securities settlements of all time. The unprecedented settlement resolves claims against Countrywide and Wall Street banks that issued the securities. The action was the first securities class action case filed against originators and Wall Street banks as a result of the credit crisis. As co-lead counsel Robbins Geller forged through six years of hard-fought litigation, oftentimes litigating issues of first impression, in order to secure the landmark settlement for its clients and the class.

  In approving the settlement, Judge Mariana R. Pfaelzer repeatedly complimented plaintiffs' attorneys, noting that it was "beyond serious dispute that Class Counsel has vigorously prosecuted the Settlement Actions on both the state and federal level over the last six years." Judge Pfaelzer also commented that "[w]ithout a settlement, these cases would continue indefinitely, resulting in significant risks to recovery and continued litigation costs. It is difficult to understate the risks to recovery if litigation had continued." *Me. State Ret. Sys. v. Countrywide Fin. Corp.*, No. 2:10-CV-00302, 2013 U.S. Dist. LEXIS 179190, at *44, *56 (C.D. Cal. Dec. 5, 2013).

  Judge Pfaelzer further noted that the proposed $500 million settlement represents one of the "largest MBS class action settlements to date. Indeed, this settlement easily surpasses the next largest . . . MBS settlement." *Id.* at *59.

- ***In re Wachovia Preferred Sec. & Bond/Notes Litig.***, No. 09-cv-06351 (S.D.N.Y.). In litigation over bonds and preferred securities, issued by Wachovia between 2006 and 2008, Robbins Geller and co-counsel obtained a significant settlement with Wachovia successor Wells Fargo & Company ($590 million) and Wachovia auditor KPMG LLP ($37 million). ***The total settlement – $627 million – is one of the largest credit-crisis settlements involving Securities Act claims and one of the 25 largest securities class action recoveries in history***. The settlement is also one of the biggest securities class action recoveries arising from the credit crisis.

  As alleged in the complaint, the offering materials for the bonds and preferred securities misstated and failed to disclose the true nature and quality of Wachovia's mortgage loan portfolio, which exposed the bank and misled investors to tens of billions of dollars in losses on mortgage-related assets. In reality, Wachovia employed high-risk underwriting standards and made loans to subprime borrowers, contrary to the offering materials and their statements of "pristine credit quality." Robbins Geller served as co-lead counsel representing the City of Livonia Employees' Retirement System, Hawaii Sheet Metal Workers Pension Fund, and the investor class.

- ***In re Cardinal Health, Inc. Sec. Litig.***, No. C2-04-575 (S.D. Ohio). As sole lead counsel representing Cardinal Health shareholders, Robbins Geller obtained a recovery of $600 million for investors. On behalf of the lead plaintiffs, Amalgamated Bank, the New Mexico State Investment Council, and the California Ironworkers Field Trust Fund, the Firm aggressively pursued class claims and won numerous courtroom victories, including a favorable decision on defendants' motion to dismiss. *In re Cardinal Health, Inc. Sec. Litigs.*, 426 F. Supp. 2d 688 (S.D. Ohio 2006). At the time, the $600 million settlement was the tenth-largest settlement in the history of securities fraud litigation and is the largest-ever recovery in a securities fraud action in the Sixth Circuit. Judge Marbley commented: "[T]his is an extraordinary settlement relative to all the other settlements in cases of this nature and certainly cases of this magnitude. . . . This was an outstanding settlement. . . . [I]n most instances, if you've gotten four cents on the dollar, you've done well. You've gotten twenty cents on the dollar, so that's been extraordinary. *In re Cardinal Health, Inc. Sec. Litig.*, No. 2:04-CV-575, Transcript at 16, 32 (S.D. Ohio Oct. 19, 2007). Judge Marbley further stated:

  > The quality of representation in this case was superb. Lead Counsel, [Robbins Geller], are nationally recognized leaders in complex securities litigation class actions. The quality of the representation is demonstrated by the substantial benefit achieved for the Class and the efficient, effective prosecution and resolution of this action. Lead Counsel defeated a volley of motions to dismiss, thwarting well-formed challenges from prominent and capable attorneys from six different law firms.

  In re Cardinal Health Inc. Sec. Litigs., 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007).

- ***AOL Time Warner Cases I & II***, JCCP Nos. 4322 & 4325 (Cal. Super. Ct., Los Angeles Cnty.). Robbins Geller represented The Regents of the University of California, six Ohio state pension funds, Rabo Bank (NL), the Scottish Widows Investment Partnership, several Australian public and private funds, insurance companies, and numerous additional institutional investors, both domestic and international, in state and federal court opt-out litigation stemming from Time Warner's disastrous 2001 merger with Internet high flier America Online. Robbins Geller attorneys exposed a massive and sophisticated accounting fraud involving America Online's e-commerce and advertising revenue. After almost four years of litigation involving extensive discovery, the Firm secured combined settlements for its opt-out clients totaling over $629 million just weeks before The Regents' case pending in California state court was scheduled to go to trial. The Regents' gross recovery of $246 million is the largest individual opt-out securities recovery in history.

- ***Abu Dhabi Commercial Bank v. Morgan Stanley & Co.***, No. 1:08-cv-07508-SAS-DCF (S.D.N.Y.), and ***King County, Washington v. IKB Deutsche Industriebank AG***, No. 1:09-cv-08387-SAS (S.D.N.Y.). The Firm represented multiple institutional investors in successfully pursuing recoveries from two failed structured investment vehicles, each of which had been rated "AAA" by Standard & Poors and Moody's, but which failed fantastically in 2007. The matter settled just prior to trial in 2013. This result was only made possible after Robbins Geller lawyers beat back the rating agencies' longtime argument that ratings were opinions protected by the First Amendment.

- ***In re HealthSouth Corp. Sec. Litig.***, No. CV-03-BE-1500-S (N.D. Ala.). As court-appointed co-lead counsel, Robbins Geller attorneys obtained a combined recovery of $671 million from HealthSouth, its auditor Ernst & Young, and its investment banker, UBS, for the benefit of stockholder plaintiffs. The settlement against HealthSouth represents one of the larger settlements in securities class action history and is considered among the top 15 settlements achieved after passage of the PSLRA. Likewise, the settlement against Ernst & Young is one of the largest securities class action settlements entered into by an accounting firm since the passage of the PSLRA. HealthSouth and its financial advisors perpetrated one of the largest and most pervasive frauds in the history of U.S. healthcare, prompting Congressional and law enforcement inquiry and resulting in guilty pleas of 16 former HealthSouth executives in related federal criminal prosecutions. In March 2009, Judge Karon Bowdre commented in the *HealthSouth* class certification opinion: "The court has had many opportunities since November 2001 to examine the work of class counsel and the supervision by the Class Representatives. The court finds both to be far more than adequate." *In re HealthSouth Corp. Sec. Litig.*, 257 F.R.D. 260, 275 (N.D. Ala. 2009).

- ***In re Facebook Biometric Info. Privacy Litig.,*** No. 3:15-cv-03747 (N.D. Cal.). Robbins Geller served as co-lead class counsel in a cutting-edge certified class action, securing a record-breaking $650 million all-cash settlement, the largest privacy settlement in history. The case concerned Facebook's alleged privacy violations through its collection of its users' biometric identifiers without informed consent through its "Tag Suggestions" feature, which uses proprietary facial recognition software to extract from user-uploaded photographs the unique biometric identifiers (*i.e.*, graphical representations of facial features, also known as facial geometry) associated with people's faces and identify who they are. The Honorable James Donato called the settlement "a groundbreaking settlement in a novel area" and praised the unprecedented 22% claims rate as "pretty phenomenal" and "a pretty good day in class settlement history."

- ***In re Dynegy Inc. Sec. Litig.***, No. H-02-1571 (S.D. Tex.). As sole lead counsel representing The Regents of the University of California and the class of Dynegy investors, Robbins Geller attorneys obtained a combined settlement of $474 million from Dynegy, Citigroup, Inc., and Arthur Andersen LLP for their involvement in a clandestine financing scheme known as Project Alpha. Given Dynegy's limited ability to pay, Robbins Geller attorneys structured a settlement (reached

shortly before the commencement of trial) that maximized plaintiffs' recovery without bankrupting the company. Most notably, the settlement agreement provides that Dynegy will appoint two board members to be nominated by The Regents, which Robbins Geller and The Regents believe will benefit all of Dynegy's stockholders.

- ***Jones v. Pfizer Inc.***, No. 1:10-cv-03864 (S.D.N.Y.). Lead plaintiff Stichting Philips Pensioenfonds obtained a $400 million settlement on behalf of class members who purchased Pfizer common stock during the January 19, 2006 to January 23, 2009 class period. The settlement against Pfizer resolves accusations that it misled investors about an alleged off-label drug marketing scheme. As sole lead counsel, Robbins Geller attorneys helped achieve this exceptional result after five years of hard-fought litigation against the toughest and the brightest members of the securities defense bar by litigating this case all the way to trial.

  In approving the settlement, United States District Judge Alvin K. Hellerstein commended the Firm, noting that "[w]ithout the quality and the toughness that you have exhibited, our society would not be as good as it is with all its problems. So from me to you is a vote of thanks for devoting yourself to this work and doing it well. . . . You did a really good job. Congratulations."

- ***In re Qwest Commc'ns Int'l, Inc. Sec. Litig.***, No. 01-cv-1451 (D. Colo.). Robbins Geller attorneys served as lead counsel for a class of investors that purchased Qwest securities. In July 2001, the Firm filed the initial complaint in this action on behalf of its clients, long before any investigation into Qwest's financial statements was initiated by the SEC or Department of Justice. After five years of litigation, lead plaintiffs entered into a settlement with Qwest and certain individual defendants that provided a $400 million recovery for the class and created a mechanism that allowed the vast majority of class members to share in an additional $250 million recovered by the SEC. In 2008, Robbins Geller attorneys recovered an additional $45 million for the class in a settlement with defendants Joseph P. Nacchio and Robert S. Woodruff, the CEO and CFO, respectively, of Qwest during large portions of the class period.

- ***Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.***, No. 1:09-cv-03701 (S.D.N.Y.). Robbins Geller attorneys served as lead counsel for a class of investors and obtained court approval of a $388 million recovery in nine 2007 residential mortgage-backed securities offerings issued by J.P. Morgan. The settlement represents, on a percentage basis, the largest recovery ever achieved in an MBS purchaser class action. The result was achieved after more than five years of hard-fought litigation and an extensive investigation. In granting approval of the settlement, the court stated the following about Robbins Geller attorneys litigating the case: "[T]here is no question in my mind that this is a very good result for the class and that the plaintiffs' counsel fought the case very hard with extensive discovery, a lot of depositions, several rounds of briefing of various legal issues going all the way through class certification."

- ***Smilovits v. First Solar, Inc.***, No. 2:12-cv-00555 (D. Ariz.). As sole lead counsel, Robbins Geller obtained a $350 million settlement in *Smilovits v. First Solar, Inc.* The settlement, which was reached after a long legal battle and on the day before jury selection, resolves claims that First Solar violated §§10(b) and 20(a) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. The settlement is the fifth-largest PSLRA settlement ever recovered in the Ninth Circuit.

- ***NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.***, No. 1:08-cv-10783 (S.D.N.Y.). As sole lead counsel, Robbins Geller obtained a $272 million settlement on behalf of Goldman Sachs' shareholders. The settlement concludes one of the last remaining mortgage-backed securities purchaser class actions arising out of the global financial crisis. The remarkable result was achieved following seven years of extensive litigation. After the claims were dismissed in 2010, Robbins Geller secured a landmark victory from the Second Circuit Court of Appeals that clarified

the scope of permissible class actions asserting claims under the Securities Act of 1933 on behalf of MBS investors. Specifically, the Second Circuit's decision rejected the concept of "tranche" standing and concluded that a lead plaintiff in an MBS class action has class standing to pursue claims on behalf of purchasers of other securities that were issued from the same registration statement and backed by pools of mortgages originated by the same lenders who had originated mortgages backing the lead plaintiff's securities.

In approving the settlement, the Honorable Loretta A. Preska of the Southern District of New York complimented Robbins Geller attorneys, noting:

> Counsel, thank you for your papers. They were, by the way, extraordinary papers in support of the settlement, and I will particularly note Professor Miller's declaration in which he details the procedural aspects of the case and then speaks of plaintiffs' counsel's success in the Second Circuit essentially changing the law.
>
> I will also note what counsel have said, and that is that this case illustrates the proper functioning of the statute.
>
> * * *
>
> Counsel, you can all be proud of what you've done for your clients. You've done an extraordinarily good job.

NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co., No. 1:08-cv-10783, Transcript at 10-11 (S.D.N.Y. May 2, 2016).

- ***Schuh v. HCA Holdings, Inc.***, No. 3:11-cv-01033 (M.D. Tenn.). As sole lead counsel, Robbins Geller obtained a groundbreaking $215 million settlement for former HCA Holdings, Inc. shareholders – the largest securities class action recovery ever in Tennessee. Reached shortly before trial was scheduled to commence, the settlement resolves claims that the Registration Statement and Prospectus HCA filed in connection with the company's massive $4.3 billion 2011 IPO contained material misstatements and omissions. The recovery achieved represents more than 30% of the aggregate classwide damages, far exceeding the typical recovery in a securities class action. At the hearing on final approval of the settlement, the Honorable Kevin H. Sharp described Robbins Geller attorneys as "gladiators" and commented: "Looking at the benefit obtained, the effort that you had to put into it, [and] the complexity in this case . . . I appreciate the work that you all have done on this." *Schuh v. HCA Holdings, Inc.*, No. 3:11-CV-01033, Transcript at 12-13 (M.D. Tenn. Apr. 11, 2016).

- ***Silverman v. Motorola, Inc.***, No. 1:07-cv-04507 (N.D. Ill.). The Firm served as lead counsel on behalf of a class of investors in Motorola, ultimately recovering $200 million for investors just two months before the case was set for trial. This outstanding result was obtained despite the lack of an SEC investigation or any financial restatement. In May 2012, the Honorable Amy J. St. Eve of the Northern District of Illinois commented: "The representation that [Robbins Geller] provided to the class was significant, both in terms of quality and quantity." *Silverman v. Motorola, Inc.*, No. 07 C 4507, 2012 U.S. Dist. LEXIS 63477, at *11 (N.D. Ill. May 7, 2012), *aff'd*, 739 F.3d 956 (7th Cir. 2013).

In affirming the district court's award of attorneys' fees, the Seventh Circuit noted that "no other law firm was willing to serve as lead counsel. Lack of competition not only implies a higher fee

but also suggests that most members of the securities bar saw this litigation as too risky for their practices." *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958 (7th Cir. 2013).

- ***In re AT&T Corp. Sec. Litig.***, MDL No. 1399 (D.N.J.). Robbins Geller attorneys served as lead counsel for a class of investors that purchased AT&T common stock. The case charged defendants AT&T and its former Chairman and CEO, C. Michael Armstrong, with violations of the federal securities laws in connection with AT&T's April 2000 initial public offering of its wireless tracking stock, one of the largest IPOs in American history. After two weeks of trial, and on the eve of scheduled testimony by Armstrong and infamous telecom analyst Jack Grubman, defendants agreed to settle the case for $100 million. In granting approval of the settlement, the court stated the following about the Robbins Geller attorneys handling the case:

> Lead Counsel are highly skilled attorneys with great experience in prosecuting complex securities action[s], and their professionalism and diligence displayed during [this] litigation substantiates this characterization. The Court notes that Lead Counsel displayed excellent lawyering skills through their consistent preparedness during court proceedings, arguments and the trial, and their well-written and thoroughly researched submissions to the Court. Undoubtedly, the attentive and persistent effort of Lead Counsel was integral in achieving the excellent result for the Class.

In re AT&T Corp. Sec. Litig., MDL No. 1399, 2005 U.S. Dist. LEXIS 46144, at *28-*29 (D.N.J. Apr. 25, 2005), *aff'd*, 455 F.3d 160 (3d Cir. 2006).

- ***In re Dollar Gen. Corp. Sec. Litig.***, No. 01-CV-00388 (M.D. Tenn.). Robbins Geller attorneys served as lead counsel in this case in which the Firm recovered $172.5 million for investors. The *Dollar General* settlement was the largest shareholder class action recovery ever in Tennessee.

- ***Carpenters Health & Welfare Fund v. Coca-Cola Co.***, No. 00-CV-2838 (N.D. Ga.). As co-lead counsel representing Coca-Cola shareholders, Robbins Geller attorneys obtained a recovery of $137.5 million after nearly eight years of litigation. Robbins Geller attorneys traveled to three continents to uncover the evidence that ultimately resulted in the settlement of this hard-fought litigation. The case concerned Coca-Cola's shipping of excess concentrate at the end of financial reporting periods for the sole purpose of meeting analyst earnings expectations, as well as the company's failure to properly account for certain impaired foreign bottling assets.

- ***Schwartz v. TXU Corp.***, No. 02-CV-2243 (N.D. Tex.). As co-lead counsel, Robbins Geller attorneys obtained a recovery of over $149 million for a class of purchasers of TXU securities. The recovery compensated class members for damages they incurred as a result of their purchases of TXU securities at inflated prices. Defendants had inflated the price of these securities by concealing the fact that TXU's operating earnings were declining due to a deteriorating gas pipeline and the failure of the company's European operations.

- ***In re Doral Fin. Corp. Sec. Litig.***, 05 MDL No. 1706 (S.D.N.Y.). In July 2007, the Honorable Richard Owen of the Southern District of New York approved the $129 million settlement, finding in his order:

> The services provided by Lead Counsel [Robbins Geller] were efficient and highly successful, resulting in an outstanding recovery for the Class without the substantial expense, risk and delay of continued litigation. Such efficiency and effectiveness supports the requested fee percentage.

> Cases brought under the federal securities laws are notably difficult and notoriously uncertain. . . . Despite the novelty and difficulty of the issues raised, Lead Plaintiffs' counsel secured an excellent result for the Class.
>
> . . . Based upon Lead Plaintiff's counsel's diligent efforts on behalf of the Class, as well as their skill and reputations, Lead Plaintiff's counsel were able to negotiate a very favorable result for the Class. . . . The ability of [Robbins Geller] to obtain such a favorable partial settlement for the Class in the face of such formidable opposition confirms the superior quality of their representation . . . .

In re Doral Fin. Corp. Sec. Litig., No. 1:05-md-01706, Order at 4-5 (S.D.N.Y. July 17, 2007).

- ***In re Exxon Valdez***, No. A89 095 Civ. (D. Alaska), and ***In re Exxon Valdez Oil Spill Litig.***, No. 3 AN 89 2533 (Alaska Super. Ct., 3d Jud. Dist.). Robbins Geller attorneys served on the Plaintiffs' Coordinating Committee and Plaintiffs' Law Committee in this massive litigation resulting from the Exxon Valdez oil spill in Alaska in March 1989. The jury awarded hundreds of millions in compensatory damages, as well as $5 billion in punitive damages (the latter were later reduced by the U.S. Supreme Court to $507 million).

- ***Mangini v. R.J. Reynolds Tobacco Co.***, No. 939359 (Cal. Super. Ct., San Francisco Cnty.). In this case, R.J. Reynolds admitted that "the *Mangini* action, and the way that it was vigorously litigated, was an early, significant and unique driver of the overall legal and social controversy regarding underage smoking that led to the decision to phase out the Joe Camel Campaign."

- ***Does I v. The Gap, Inc.***, No. 01 0031 (D. N. Mar. I.). In this groundbreaking case, Robbins Geller attorneys represented a class of 30,000 garment workers who alleged that they had worked under sweatshop conditions in garment factories in Saipan that produced clothing for top U.S. retailers such as The Gap, Target, and J.C. Penney. In the first action of its kind, Robbins Geller attorneys pursued claims against the factories and the retailers alleging violations of RICO, the Alien Tort Claims Act, and the Law of Nations based on the alleged systemic labor and human rights abuses occurring in Saipan. This case was a companion to two other actions: ***Does I v. Advance Textile Corp.***, No. 99 0002 (D. N. Mar. I.), which alleged overtime violations by the garment factories under the Fair Labor Standards Act and local labor law, and ***UNITE v. The Gap, Inc.***, No. 300474 (Cal. Super. Ct., San Francisco Cty.), which alleged violations of California's Unfair Practices Law by the U.S. retailers. These actions resulted in a settlement of approximately $20 million that included a comprehensive monitoring program to address past violations by the factories and prevent future ones. The members of the litigation team were honored as Trial Lawyers of the Year by the Trial Lawyers for Public Justice in recognition of the team's efforts in bringing about the precedent-setting settlement of the actions.

- ***In re Prison Realty Sec. Litig.***, No. 3:99-0452 (M.D. Tenn.). Robbins Geller attorneys served as lead counsel for the class, obtaining a $105 million recovery.

- ***In re Honeywell Int'l, Inc. Sec. Litig.***, No. 00-cv-03605 (D.N.J.). Robbins Geller attorneys served as lead counsel for a class of investors that purchased Honeywell common stock. The case charged Honeywell and its top officers with violations of the federal securities laws, alleging the defendants made false public statements concerning Honeywell's merger with Allied Signal, Inc. and that defendants falsified Honeywell's financial statements. After extensive discovery, Robbins Geller attorneys obtained a $100 million settlement for the class.

- ***Schwartz v. Visa Int'l***, No. 822404-4 (Cal. Super. Ct., Alameda Cnty.). After years of litigation and a six-month trial, Robbins Geller attorneys won one of the largest consumer protection verdicts ever awarded in the United States. Robbins Geller attorneys represented California consumers in an action against Visa and MasterCard for intentionally imposing and concealing a fee from their cardholders. The court ordered Visa and MasterCard to return $800 million in cardholder losses, which represented 100% of the amount illegally taken, plus 2% interest. In addition, the court ordered full disclosure of the hidden fee.

- ***Thompson v. Metro. Life Ins. Co.***, No. 00-cv-5071 (S.D.N.Y.). Robbins Geller attorneys served as lead counsel and obtained $145 million for the class in a settlement involving racial discrimination claims in the sale of life insurance.

- ***In re Prudential Ins. Co. of Am. Sales Pracs. Litig.***, MDL No. 1061 (D.N.J.). In one of the first cases of its kind, Robbins Geller attorneys obtained a settlement of $4 billion for deceptive sales practices in connection with the sale of life insurance involving the "vanishing premium" sales scheme.

Additional Judicial Commendations

Robbins Geller attorneys have been praised by countless judges all over the country for the quality of their representation in class-action lawsuits. In addition to the judicial commendations set forth in the Prominent Cases and Precedent-Setting Decisions sections, judges have acknowledged the successful results of the Firm and its attorneys with the following plaudits:

- On October 5, 2022, at the final approval hearing of the settlement, the Honorable Paul A. Fioravanti, Jr. stated: "The settlement achieved here is, in short, impressive. . . . This litigation was hard fought. The issues were complex. . . . Plaintiffs' lead counsel here are among the most highly respected practitioners in this Court with a reputation for exacting substantial awards for the classes that they represent. . . . Again, the benefit was outstanding. . . . Counsel, this was an interesting case. I know you worked really hard on it. Fantastic result. The fee was well deserved." *City of Warren Gen. Emps.' Ret. Sys. v. Roche*, No. 2019-0740-PAF, Transcript at 26-29 (Del. Ch. Oct. 5, 2022).

- On February 4, 2021, in granting final approval of the settlement, the Honorable Mark H. Cohen of the United States District Court for the Northern District of Georgia stated: "Lead Counsel successfully achieved a greater-than-average settlement 'in the face of significant risks.'" Robbins Geller's "hard-fought litigation in the Eleventh Circuit" and "[i]n considering the experience, reputation, and abilities of the attorneys, the Court recognize[d] that Lead Counsel is well-regarded in the legal community, especially in litigating class-action securities cases." *Monroe County Employees' Retirement System v. The Southern Company*, No. 1:17-cv-00241, Order at 8-9 (N.D. Ga. Feb. 4, 2021).

- On December 18, 2020, at the final approval hearing of the settlement, the Honorable Yvonne Gonzalez Rogers of the United States District Court for the Northern District of California commended Robbins Geller, stating: "Counsel performed excellent work in not only investigating and analyzing the core of the issues, but in negotiating and demanding the necessary reforms to prevent malfeasance for the benefit of the shareholders and the consumers. The Court complements counsel for its excellence." *In re RH S'holder Derivative Litig.*, No. 4:18-cv-02452-YGR, Order and Final Judgment at 3 (N.D. Cal. Dec. 18, 2020).

- On October 23, 2020, at the final approval hearing of the settlement, the Honorable P. Kevin Castel of the United States District Court for the Southern District of New York praised the firm, "[Robbins Geller] has been sophisticated and experienced." He also noted that: "[T]he quality of the representation . . . was excellent. The experience of counsel is also a factor. Robbins Geller certainly has the extensive experience and they were litigating against national powerhouses . . . ." *City of Birmingham Ret. & Relief Sys. v. BRF S.A.*, No. 18 Civ. 2213 (PKC), Transcript at 12-13, 18 (S.D.N.Y. Oct. 23, 2020).

- In May 2020, in granting final approval of the settlement, the Honorable Mark L. Wolf praised Robbins Geller: "[T]he class has been represented by excellent honorable counsel . . . . [T]he fund was represented by experienced, energetic, able counsel, the fund was engaged and informed, and the fund followed advice of experienced counsel. Counsel for the class have been excellent, and I would say honorable." Additionally, Judge Wolf noted, "I find that the work that's been done primarily by Robbins Geller has been excellent and honorable and efficient. . . . [T]his has been a challenging case, and they've done an excellent job." *McGee v. Constant Contact, Inc.*, No. 1:15-cv-13114-MLW, Transcript at 21, 31, 61 (D. Mass. May 27, 2020).

- In December 2019, the Honorable Margo K. Brodie noted in granting final approval of the settlement that "[Robbins Geller and co-counsel] have also demonstrated the utmost professionalism despite the demands of the extreme perseverance that this case has required, litigating on behalf of a class of over 12 million for over fourteen years, across a changing legal landscape, significant motion practice, and appeal and remand. Class counsel's pedigree and efforts alone speak to the quality of their representation." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 1:05-md-01720-MKB-JO, Memorandum & Order (E.D.N.Y. Dec. 16, 2019).

- In October 2019, the Honorable Claire C. Cecchi noted that Robbins Geller is "capable of adequately representing the class, both based on their prior experience in class action lawsuits and based on their capable advocacy on behalf of the class in this action." The court further commended the Firm and co-counsel for "conduct[ing] the [l]itigation . . . with skill, perseverance, and diligent advocacy." *Lincoln Adventures, LLC v. Those Certain Underwriters at Lloyd's, London Members*, No. 2:08-cv-00235-CCC-JAD, Order at 4 (D.N.J. Oct. 3, 2019); *Lincoln Adventures, LLC v. Those Certain Underwriters at Lloyd's, London Members of Syndicates*, No. 2:08-cv-00235-CCC-JAD, Order Awarding Attorneys' Fees and Expenses/Charges and Service Awards at 3 (D.N.J. Oct. 3, 2019).

- In June 2019, the Honorable T.S. Ellis, III noted that Robbins Geller "achieved the [$108 million] [s]ettlement with skill, perseverance, and diligent advocacy." At the final approval hearing, the court further commended Robbins Geller by stating, "I think the case was fully and appropriately litigated [and] you all did a very good job. . . . [T]hank you for your service in the court. . . . [You're] first-class lawyers . . . ." *Knurr v. Orbital ATK, Inc.*, No. 1:16-cv-01031, Order Awarding Attorneys' Fees and Expenses at 3 (E.D. Va. June 7, 2019); *Knurr v. Orbital ATK, Inc.*, No. 1:16-cv-01031, Transcript at 28-29 (E.D. Va. June 7, 2019).

- In June 2019, in granting final approval of the settlement, the Honorable John A. Houston stated: Robbins Geller's "skill and quality of work was extraordinary . . . . I'll note from the top that this has been an aggressively litigated action." *In re Morning Song Bird Food Litig.*, No. 3:12-cv-01592-JAH-AGS, Transcript at 4, 9 (S.D. Cal. June 3, 2019).

- In May 2019, in granting final approval of the settlement, the Honorable Richard H. DuBois

stated: Robbins Geller is "highly experienced and skilled" for obtaining a "fair, reasonable, and adequate" settlement in the "interest of the [c]lass [m]embers" after "extensive investigation." *Chicago Laborers Pension Fund v. Alibaba Grp. Holding Ltd.*, No. CIV535692, Judgment and Order Granting Final Approval of Class Action Settlement at 3 (Cal. Super. Ct., San Mateo Cnty. May 17, 2019).

- In April 2019, the Honorable Kathaleen St. J. McCormick noted: "[S]ince the inception of this litigation, plaintiffs and their counsel have vigorously prosecuted the claims brought on behalf of the class. . . . When Vice Chancellor Laster appointed lead counsel, he effectively said: Go get a good result. And counsel took that to heart and did it. . . . The proposed settlement was the product of intense litigation and complex mediation. . . . [Robbins Geller has] only built a considerable track record, never burned it, which gave them the credibility necessary to extract the benefits achieved." *In re Calamos Asset Mgmt., Inc. S'holder Litig.*, No. 2017-0058-JTL, Transcript at 87, 93, 95, 98 (Del. Ch. Apr. 25, 2019).

- In April 2019, the Honorable Susan O. Hickey noted that Robbins Geller "achieved an exceptional [s]ettlement with skill, perseverance, and diligent advocacy." *City of Pontiac Gen. Emps.' Ret. Sys. v. Wal-Mart Stores, Inc.*, No. 5:12-cv-5162, Order Awarding Attorneys' Fees and Expenses at 3 (W.D. Ark. Apr. 8, 2019).

- In January 2019, the Honorable Margo K. Brodie noted that Robbins Geller "has arduously represented a variety of plaintiffs' groups in this action[,] . . . [has] extensive antitrust class action litigation experience . . . [and] negotiated what [may be] the largest antitrust settlement in history." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 34 (E.D.N.Y. 2019).

- On December 20, 2018, at the final approval hearing for the settlement, the court lauded Robbins Geller's attorneys and their work: "[T]his is a pretty extraordinary settlement, recovery on behalf of the members of the class. . . . I've been very impressed with the level of lawyering in the case . . . and with the level of briefing . . . and I wanted to express my appreciation for that and for the work that everyone has done here." The court concluded, "your clients were all blessed to have you, [and] not just because of the outcome." *Duncan v. Joy Global, Inc.*, No. 16-CV-1229, Transcript at 12, 20-21 (E.D. Wis. Dec. 20, 2018).

- In October 2017, the Honorable William Alsup noted that Robbins Geller and lead plaintiff "vigorously prosecuted this action." *In re LendingClub Sec. Litig.*, No. 3:16-cv-02627-WHA, Order at 13 (N.D. Cal. Oct. 20, 2017).

- On November 9, 2018, in granting final approval of the settlement, the Honorable Jesse M. Furman commented: "[Robbins Geller] did an extraordinary job here. . . . [I]t is fair to say [this was] probably the most complicated case I have had since I have been on the bench. . . . I cannot really imagine how complicated it would have been if I didn't have counsel who had done as admirable [a] job in briefing it and arguing as you have done. You have in my view done an extraordinary service to the class. . . . I think you have done an extraordinary job and deserve thanks and commendation for that." *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 1:14-cv-07126-JMF-OTW, Transcript at 27-28 (S.D.N.Y. Nov. 9, 2018).

- On September 12, 2018, at the final approval hearing of the settlement, the Honorable William H. Orrick of the Northern District of California praised Robbins Geller's "high-quality lawyering" in a case that "involved complicated discovery and complicated and novel legal issues," resulting in an "excellent" settlement for the class. The "lawyering . . . was excellent" and the case was "very well litigated." *In re Lidoderm Antitrust Litig.*, No. 14-MDL-02521-WHO, Transcript at 11, 14, 22 (N.D. Cal. Sep. 12, 2018).

- On March 31, 2017, in granting final approval of the settlement, the Honorable Gonzalo P. Curiel hailed the settlement as "extraordinary" and "all the more exceptional when viewed in light of the risk" of continued litigation. The court further commended Robbins Geller for prosecuting the case on a *pro bono* basis: "Class Counsel's exceptional decision to provide nearly seven years of legal services to Class Members on a *pro bono* basis evidences not only a lack of collusion, but also that Class Counsel are in fact representing the best interests of Plaintiffs and the Class Members in this Settlement. Instead of seeking compensation for fees and costs that they would otherwise be entitled to, Class Counsel have acted to allow maximum recovery to Plaintiffs and Class Members. Indeed, that Eligible Class Members may receive recovery of 90% or greater is a testament to Class Counsel's representation and dedication to act in their clients' best interest." In addition, at the final approval hearing, the court commented that "this is a case that has been litigated – if not fiercely, zealously throughout." *Low v. Trump Univ., LLC*, 246 F. Supp. 3d 1295, 1302, 1312 (S.D. Cal. 2017), *aff'd*, 881 F.3d 1111 (9th Cir. 2018); *Low v. Trump University LLC and Donald J. Trump*, No. 10-cv-0940 GPC-WVG, and *Cohen v. Donald J. Trump*, No. 13-cv-2519-GPC-WVG, Transcript at 7 (S.D. Cal. Mar. 30, 2017).

- In January 2017, at the final approval hearing, the Honorable Kevin H. Sharp of the Middle District of Tennessee commended Robbins Geller attorneys, stating: "It was complicated, it was drawn out, and a lot of work clearly went into this [case] . . . . I think there is some benefit to the shareholders that are above and beyond money, a benefit to the company above and beyond money that changed hands." *In re Community Health Sys., Inc. S'holder Derivative Litig.*, No. 3:11-cv-00489, Transcript at 10 (M.D. Tenn. Jan. 17, 2017).

- In November 2016, at the final approval hearing, the Honorable James G. Carr stated: "I kept throwing the case out, and you kept coming back. . . . And it's both remarkable and noteworthy and a credit to you and your firm that you did so. . . . [Y]ou persuaded the Sixth Circuit. As we know, that's no mean feat at all." Judge Carr further complimented the Firm, noting that it "goes without question or even saying" that Robbins Geller is very well-known nationally and that the settlement is an excellent result for the class. He succinctly concluded that "given the tenacity and the time and the effort that [Robbins Geller] lawyers put into [the case]" makes the class "a lot better off." *Plumbers & Pipefitters Nat'l Pension Fund v. Burns*, No. 3:05-cv-07393-JGC, Transcript at 4, 10, 14, 17 (N.D. Ohio Nov. 18, 2016).

- In September 2016, in granting final approval of the settlement, Judge Arleo commended the "vigorous and skilled efforts" of Robbins Geller attorneys for obtaining "an excellent recovery." Judge Arleo added that the settlement was reached after "contentious, hard-fought litigation" that ended with "a very, very good result for the class" in a "risky case." *City of Sterling Heights Gen. Emps.' Ret. Sys. v. Prudential Fin., Inc.*, No. 2:12-cv-05275-MCA-LDW, Transcript of Hearing at 18-20 (D.N.J. Sep. 28, 2016).

- In August 2015, at the final approval hearing for the settlement, the Honorable Karen M. Humphreys praised Robbins Geller's "extraordinary efforts" and "excellent lawyering," noting that the settlement "really does signal that the best is yet to come for your clients and for your prodigious labor as professionals. . . . I wish more citizens in our country could have an appreciation of what this [settlement] truly represents." *Bennett v. Sprint Nextel Corp.*, No. 2:09-cv-02122-EFM-KMH, Transcript at 8, 25 (D. Kan. Aug. 12, 2015).

- In August 2015, the Honorable Judge Max O. Cogburn, Jr. noted that "plaintiffs' attorneys were able [to] achieve the big success early" in the case and obtained an "excellent result." The "extraordinary" settlement was because of "good lawyers . . . doing their good work." *Nieman v. Duke Energy Corp.*, No. 3:12-cv-456, Transcript at 21, 23, 30 (W.D.N.C. Aug. 12, 2015).

- In July 2015, in approving the settlement, the Honorable Douglas L. Rayes of the District of Arizona stated: "Settlement of the case during pendency of appeal for more than an insignificant amount is rare. The settlement here is substantial and provides favorable recovery for the settlement class under these circumstances." He continued, noting, "[a]s against the objective measures of . . . settlements [in] other similar cases, [the recovery] is on the high end." *Teamsters Local 617 Pension & Welfare Funds v. Apollo Grp., Inc.*, No. 2:06-cv-02674-DLR, Transcript at 8, 11 (D. Ariz. July 28, 2015).

- In June 2015, at the conclusion of the hearing for final approval of the settlement, the Honorable Susan Richard Nelson of the District of Minnesota noted that it was "a pleasure to be able to preside over a case like this," praising Robbins Geller in achieving "an outstanding [result] for [its] clients," as she was "very impressed with the work done on th[e] case." *In re St. Jude Med., Inc. Sec. Litig.*, No. 0:10-cv-00851-SRN-TNL, Transcript at 7 (D. Minn. June 12, 2015).

- In May 2015, at the fairness hearing on the settlement, the Honorable William G. Young noted that the case was "very well litigated" by Robbins Geller attorneys, adding that "I don't just say that as a matter of form. . . . I thank you for the vigorous litigation that I've been permitted to be a part of." *Courtney v. Avid Tech., Inc.*, No. 1:13-cv-10686-WGY, Transcript at 8-9 (D. Mass. May 12, 2015).

- In January 2015, the Honorable William J. Haynes, Jr. of the Middle District of Tennessee described the settlement as a "highly favorable result achieved for the Class" through Robbins Geller's "diligent prosecution . . . [and] quality of legal services." The settlement represents the fourth-largest securities recovery ever in the Middle District of Tennessee and one of the largest in more than a decade. *Garden City Emps.' Ret. Sys. v. Psychiatric Sols., Inc.*, No. 3:09-cv-00882, 2015 U.S. Dist. LEXIS 181943, at *6-*7 (M.D. Tenn. Jan. 16, 2015).

- In September 2014, in approving the settlement for shareholders, Vice Chancellor John W. Noble noted "[t]he litigation caused a substantial benefit for the class. It is unusual to see a $29 million recovery." Vice Chancellor Noble characterized the litigation as "novel" and "not easy," but "[t]he lawyers took a case and made something of it." The court commended Robbins Geller's efforts in obtaining this result: "The standing and ability of counsel cannot be questioned" and "the benefits achieved by plaintiffs' counsel in this case cannot be ignored." *In re Gardner Denver, Inc. S'holder Litig.*, No. 8505-VCN, Transcript at 26-28 (Del. Ch. Sep. 3, 2014).

- In May 2014, at the conclusion of the hearing for final approval of the settlement, the Honorable Elihu M. Berle stated: "I would finally like to congratulate counsel on their efforts to resolve this case, on excellent work – it was the best interest of the class – and to the exhibition of professionalism. So I do thank you for all your efforts." *Liberty Mutual Overtime Cases*, No. JCCP 4234, Transcript at 20:1-5 (Cal. Super. Ct., Los Angeles Cnty. May 29, 2014).

- In March 2014, Ninth Circuit Judge J. Clifford Wallace (presiding) expressed the gratitude of the court: "Thank you. I want to especially thank counsel for this argument. This is a very complicated case and I think we were assisted no matter how we come out by competent counsel coming well prepared. . . . It was a model of the type of an exercise that we appreciate. Thank you very much for your work . . . you were of service to the court." *Eclectic Properties East, LLC v. The Marcus & Millichap Co.*, No. 12-16526, Transcript (9th Cir. Mar. 14, 2014).

- In February 2014, in approving a settlement, Judge Edward M. Chen noted the "very substantial risks" in the case and recognized Robbins Geller had performed "extensive work on the case." *In re VeriFone Holdings, Inc. Sec. Litig.*, No. C-07-6140, 2014 U.S. Dist. LEXIS 20044, at *5, *11-*12 (N.D. Cal. Feb. 18, 2014).

- In August 2013, in granting final approval of the settlement, the Honorable Richard J. Sullivan stated: "Lead Counsel is to be commended for this result: it expended considerable effort and resources over the course of the action researching, investigating, and prosecuting the claims, at significant risk to itself, and in a skillful and efficient manner, to achieve an outstanding recovery for class members. Indeed, the result – and the class's embrace of it – is a testament to the experience and tenacity Lead Counsel brought to bear." *City of Livonia Emps. Ret. Sys. v. Wyeth*, No. 07 Civ. 10329, 2013 U.S. Dist. LEXIS 113658, at *13 (S.D.N.Y. Aug. 7, 2013).

- In July 2013, in granting final approval of the settlement, the Honorable William H. Alsup stated that Robbins Geller did "excellent work in this case," and continued, "I look forward to seeing you on the next case." *Fraser v. Asus Comput. Int'l*, No. C 12-0652, Transcript at 12:2-3 (N.D. Cal. July 11, 2013).

- In June 2013, in certifying the class, U.S. District Judge James G. Carr recognized Robbins Geller's steadfast commitment to the class, noting that "plaintiffs, with the help of Robbins Geller, have twice successfully appealed this court's orders granting defendants' motion to dismiss." *Plumbers & Pipefitters Nat'l Pension Fund v. Burns*, 292 F.R.D. 515, 524 (N.D. Ohio 2013).

- In November 2012, in granting appointment of lead plaintiff, Chief Judge James F. Holderman commended Robbins Geller for its "substantial experience in securities class action litigation" and commented that the Firm "is recognized as 'one of the most successful law firms in securities class actions, if not the preeminent one, in the country.' *In re Enron Corp. Sec.*, 586 F. Supp. 2d 732, 797 (S.D. Tex. 2008) (Harmon, J.)." He continued further that, "'Robbins Geller attorneys are responsible for obtaining the largest securities fraud class action recovery ever [$***7.2*** billion in *Enron*], as well as the largest recoveries in the Fifth, Sixth, Eighth, Tenth and Eleventh Circuits.'" *Bristol Cnty. Ret. Sys. v. Allscripts Healthcare Sols., Inc.*, No. 12 C 3297, 2012 U.S. Dist. LEXIS 161441, at *21 (N.D. Ill. Nov. 9, 2012).

- In June 2012, in granting plaintiffs' motion for class certification, the Honorable Inge Prytz Johnson noted that other courts have referred to Robbins Geller as "'one of the most successful law firms in securities class actions . . . in the country.'" *Local 703, I.B. v. Regions Fin. Corp.*, 282 F.R.D. 607, 616 (N.D. Ala. 2012) (quoting *In re Enron Corp. Sec. Litig.*, 586 F. Supp. 2d 732, 797 (S.D. Tex. 2008)), *aff'd in part and vacated in part on other grounds*, 762 F.3d 1248 (11th Cir. 2014).

- In June 2012, in granting final approval of the settlement, the Honorable Barbara S. Jones commented that "class counsel's representation, from the work that I saw, appeared to me to be of the highest quality." *In re CIT Grp. Inc. Sec. Litig.*, No. 08 Civ. 6613, Transcript at 9:16-18 (S.D.N.Y. June 13, 2012).

- In March 2012, in granting certification for the class, Judge Robert W. Sweet referenced the *Enron* case, agreeing that Robbins Geller's "'clearly superlative litigating and negotiating skills'" give the Firm an "'outstanding reputation, experience, and success in securities litigation nationwide,'" thus, "'[t]he experience, ability, and reputation of the attorneys of [Robbins Geller] is not disputed; it is one of the most successful law firms in securities class actions, if not the preeminent one, in the country.'" *Billhofer v. Flamel Techs., S.A.*, 281 F.R.D. 150, 158 (S.D.N.Y. 2012).

- In March 2011, in denying defendants' motion to dismiss, Judge Richard Sullivan commented: "Let me thank you all. . . . [The motion] was well argued . . . and . . . well briefed . . . . I certainly appreciate having good lawyers who put the time in to be prepared . . . ." *Anegada Master Fund Ltd. v. PxRE Grp. Ltd.*, No. 08-cv-10584, Transcript at 83 (S.D.N.Y. Mar. 16, 2011).

- In January 2011, the court praised Robbins Geller attorneys: "They have gotten very good results for stockholders. . . . [Robbins Geller has] such a good track record." *In re Compellent Techs., Inc. S'holder Litig.*, No. 6084-VCL, Transcript at 20-21 (Del. Ch. Jan. 13, 2011).

- In August 2010, in reviewing the settlement papers submitted by the Firm, Judge Carlos Murguia stated that Robbins Geller performed "a commendable job of addressing the relevant issues with great detail and in a comprehensive manner . . . . The court respects the [Firm's] experience in the field of derivative [litigation]." *Alaska Elec. Pension Fund v. Olofson*, No. 08-cv-02344-CM-JPO (D. Kan.) (Aug. 20, 2010 e-mail from court re: settlement papers).

- In June 2009, Judge Ira Warshawsky praised the Firm's efforts in *In re Aeroflex, Inc. S'holder Litig.*: "There is no doubt that the law firms involved in this matter represented in my opinion the cream of the crop of class action business law and mergers and acquisition litigators, and from a judicial point of view it was a pleasure working with them." *In re Aeroflex, Inc. S'holder Litig.*, No. 003943/07, Transcript at 25:14-18 (N.Y. Sup. Ct., Nassau Cnty. June 30, 2009).

- In March 2009, in granting class certification, the Honorable Robert Sweet of the Southern District of New York commented in *In re NYSE Specialists Sec. Litig.*, 260 F.R.D. 55, 74 (S.D.N.Y. 2009): "As to the second prong, the Specialist Firms have not challenged, in this motion, the qualifications, experience, or ability of counsel for Lead Plaintiff, [Robbins Geller], to conduct this litigation. Given [Robbins Geller's] substantial experience in securities class action litigation and the extensive discovery already conducted in this case, this element of adequacy has also been satisfied."

- In June 2008, the court commented, "Plaintiffs' lead counsel in this litigation, [Robbins Geller], has demonstrated its considerable expertise in shareholder litigation, diligently advocating the rights of Home Depot shareholders in this Litigation. [Robbins Geller] has acted with substantial skill and professionalism in representing the plaintiffs and the interests of Home Depot and its shareholders in prosecuting this case." *City of Pontiac Gen. Emps.' Ret. Sys. v. Langone*, No. 2006-122302, Findings of Fact in Support of Order and Final Judgment at 2 (Ga. Super. Ct., Fulton Cnty. June 10, 2008).

- In a December 2006 hearing on the $50 million consumer privacy class action settlement in *Kehoe v. Fidelity Fed. Bank & Tr.*, No. 03-80593-CIV (S.D. Fla.), United States District Court Judge Daniel T.K. Hurley said the following:

> First, I thank counsel. As I said repeatedly on both sides, we have been very, very fortunate. We have had fine lawyers on both sides. The issues in the case are significant issues. We are talking about issues dealing with consumer protection

> and privacy. Something that is increasingly important today in our society. . . . I want you to know I thought long and hard about this. I am absolutely satisfied that the settlement is a fair and reasonable settlement. . . . I thank the lawyers on both sides for the extraordinary effort that has been brought to bear here . . . .

Kehoe v. Fidelity Fed. Bank & Tr., No. 03-80593-CIV, Transcript at 26, 28-29 (S.D. Fla. Dec. 7, 2006).

- In *Stanley v. Safeskin Corp.*, No. 99 CV 454 (S.D. Cal.), where Robbins Geller attorneys obtained $55 million for the class of investors, Judge Moskowitz stated:

> I said this once before, and I'll say it again. I thought the way that your firm handled this case was outstanding. This was not an easy case. It was a complicated case, and every step of the way, I thought they did a very professional job.

Stanley v. Safeskin Corp., No. 99 CV 454, Transcript at 13 (S.D. Cal. May 25, 2004).

PRECEDENT-SETTING DECISIONS

Robbins Geller attorneys operate at the vanguard of complex class action of litigation. Our work often changes the legal landscape, resulting in an environment that is more-favorable for obtaining recoveries for our clients.

Investor and Shareholder Rights

- ***Stoyas v. Toshiba Corp.***, 896 F.3d 933 (9th Cir. 2018), *cert. denied*, 588 U.S. __ (2019). In July 2018, the Ninth Circuit ruled in plaintiffs' favor in the *Toshiba* securities class action. Following appellate briefing and oral argument by Robbins Geller attorneys, a three-judge Ninth Circuit panel reversed the district court's prior dismissal in a unanimous, 36-page opinion, holding that Toshiba ADRs are a "security" and the Securities Exchange Act of 1934 could apply to those ADRs that were purchased in a domestic transaction. *Id.* at 939, 949. The court adopted the Second and Third Circuits' "irrevocable liability" test for determining whether the transactions were domestic and held that plaintiffs must be allowed to amend their complaint to allege that the purchase of Toshiba ADRs on the over-the-counter market was a domestic purchase and that the alleged fraud was in connection with the purchase.

- ***Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund***, No. 15-1439 (U.S.). In March 2018, the U.S. Supreme Court ruled in favor of investors represented by Robbins Geller, holding that state courts continue to have jurisdiction over class actions asserting violations of the Securities Act of 1933. The court's ruling secures investors' ability to bring Securities Act actions when companies fail to make full and fair disclosure of relevant information in offering documents. The court confirmed that the Securities Litigation Uniform Standards Act of 1998 was designed to preclude securities class actions asserting violations of state law – not to preclude securities actions asserting federal law violations brought in state courts.

- ***Mineworkers' Pension Scheme v. First Solar Inc.***, 881 F.3d 750 (9th Cir. 2018), *cert. denied*, 588 U.S. __ (2019). In January 2018, the Ninth Circuit upheld the district court's denial of defendants' motion for summary judgment, agreeing with plaintiffs that the test for loss causation in the Ninth Circuit is a general "proximate cause test," and rejecting the more stringent revelation of the fraudulent practices standard advocated by the defendants. The opinion is a significant victory for

investors, as it forecloses defendants' ability to immunize themselves from liability simply by refusing to publicly acknowledge their fraudulent conduct.

- ***In re Quality Sys., Inc. Sec. Litig.***, No. 15-55173 (9th Cir.). In July 2017, Robbins Geller's Appellate Practice Group scored a significant win in the Ninth Circuit in the *Quality Systems* securities class action. On appeal, a three-judge Ninth Circuit panel unanimously reversed the district court's prior dismissal of the action against Quality Systems and remanded the case to the district court for further proceedings. The decision addressed an issue of first impression concerning "mixed" future and present-tense misstatements. The appellate panel explained that "non-forward-looking portions of mixed statements are not eligible for the safe harbor provisions of the PSLRA . . . . Defendants made a number of mixed statements that included projections of growth in revenue and earnings based on the state of QSI's sales pipeline." The panel then held *both* the non-forward-looking and forward-looking statements false and misleading and made with scienter, deeming them actionable. Later, although defendants sought rehearing by the Ninth Circuit sitting *en banc*, the circuit court denied their petition.

- ***Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp.***, No. CV-10-J-2847-S (N.D. Ala.). In the *Regions Financial* securities class action, Robbins Geller represented Local 703, I.B. of T. Grocery and Food Employees Welfare Fund and obtained a $90 million settlement in September 2015 on behalf of purchasers of Regions Financial common stock during the class period. In August 2014, the Eleventh Circuit Court of Appeals affirmed the district court's decision to certify a class action based upon alleged misrepresentations about Regions Financial's financial health before and during the recent economic recession, and in November 2014, the U.S. District Court for the Northern District of Alabama denied defendants' third attempt to avoid plaintiffs' motion for class certification.

- ***Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund***, No. 13-435 (U.S.). In March 2015, the U.S. Supreme Court ruled in favor of investors represented by Robbins Geller that investors asserting a claim under §11 of the Securities Act of 1933 with respect to a misleading statement of opinion do not, as defendant Omnicare had contended, have to prove that the statement was subjectively disbelieved when made. Rather, the court held that a statement of opinion may be actionable either because it was not believed, or because it lacked a reasonable basis in fact. This decision is significant in that it resolved a conflict among the federal circuit courts and expressly overruled the Second Circuit's widely followed, more stringent pleading standard for §11 claims involving statements of opinion. The Supreme Court remanded the case back to the district court for determination under the newly articulated standard. In August of 2016, upon remand, the district court applied the Supreme Court's new test and denied defendants' motion to dismiss in full.

- ***NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.***, 693 F.3d 145 (2d Cir. 2012). In a securities fraud action involving mortgage-backed securities, the Second Circuit rejected the concept of "tranche" standing and found that a lead plaintiff has class standing to pursue claims on behalf of purchasers of securities that were backed by pools of mortgages originated by the same lenders who had originated mortgages backing the lead plaintiff's securities. The court noted that, given those common lenders, the lead plaintiff's claims as to its purchases implicated "the same set of concerns" that purchasers in several of the other offerings possessed. The court also rejected the notion that the lead plaintiff lacked standing to represent investors in different tranches.

- ***In re VeriFone Holdings, Inc. Sec. Litig.***, 704 F.3d 694 (9th Cir. 2012). The panel reversed in part and affirmed in part the dismissal of investors' securities fraud class action alleging violations of

§§10(b), 20(a), and 20A of the Securities Exchange Act of 1934 and SEC Rule 10b-5 in connection with a restatement of financial results of the company in which the investors had purchased stock.

The panel held that the third amended complaint adequately pleaded the §10(b), §20A, and Rule 10b-5 claims. Considering the allegations of scienter holistically, as the U.S. Supreme Court directed in *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S 27, 48-49 (2011), the panel concluded that the inference that the defendant company and its chief executive officer and former chief financial officer were deliberately reckless as to the truth of their financial reports and related public statements following a merger was at least as compelling as any opposing inference.

- ***Fox v. JAMDAT Mobile, Inc.***, 185 Cal. App. 4th 1068 (2010). Concluding that Delaware's shareholder ratification doctrine did not bar the claims, the California Court of Appeal reversed dismissal of a shareholder class action alleging breach of fiduciary duty in a corporate merger.

- ***In re Constar Int'l Inc. Sec. Litig.***, 585 F.3d 774 (3d Cir. 2009). The Third Circuit flatly rejected defense contentions that where relief is sought under §11 of the Securities Act of 1933, which imposes liability when securities are issued pursuant to an incomplete or misleading registration statement, class certification should depend upon findings concerning market efficiency and loss causation.

- ***Matrixx Initiatives, Inc. v. Siracusano***, 563 U.S 27 (2011), *aff'g* 585 F.3d 1167 (9th Cir. 2009). In a securities fraud action involving the defendants' failure to disclose a possible link between the company's popular cold remedy and a life-altering side effect observed in some users, the U.S. Supreme Court unanimously affirmed the Ninth Circuit's (a) rejection of a bright-line "statistical significance" materiality standard, and (b) holding that plaintiffs had successfully pleaded a strong inference of the defendants' scienter.

- ***Alaska Elec. Pension Fund v. Flowserve Corp.***, 572 F.3d 221 (5th Cir. 2009). Aided by former U.S. Supreme Court Justice O'Connor's presence on the panel, the Fifth Circuit reversed a district court order denying class certification and also reversed an order granting summary judgment to defendants. The court held that the district court applied an incorrect fact-for-fact standard of loss causation, and that genuine issues of fact on loss causation precluded summary judgment.

- ***In re F5 Networks, Inc., Derivative Litig.***, 207 P.3d 433 (Wash. 2009). In a derivative action alleging unlawful stock option backdating, the Supreme Court of Washington ruled that shareholders need not make a pre-suit demand on the board of directors where this step would be futile, agreeing with plaintiffs that favorable Delaware case law should be followed as persuasive authority.

- ***Lormand v. US Unwired, Inc.***, 565 F.3d 228 (5th Cir. 2009). In a rare win for investors in the Fifth Circuit, the court reversed an order of dismissal, holding that safe harbor warnings were not meaningful when the facts alleged established a strong inference that defendants knew their forecasts were false. The court also held that plaintiffs sufficiently alleged loss causation.

- ***Institutional Inv'rs Grp. v. Avaya, Inc.***, 564 F.3d 242 (3d Cir. 2009). In a victory for investors in the Third Circuit, the court reversed an order of dismissal, holding that shareholders pled with particularity why the company's repeated denials of price discounts on products were false and misleading when the totality of facts alleged established a strong inference that defendants knew their denials were false.

- ***Alaska Elec. Pension Fund v. Pharmacia Corp.***, 554 F.3d 342 (3d Cir. 2009). The Third Circuit held that claims filed for violation of §10(b) of the Securities Exchange Act of 1934 were timely, adopting investors' argument that because scienter is a critical element of the claims, the time for filing them cannot begin to run until the defendants' fraudulent state of mind should be apparent.

- ***Rael v. Page***, 222 P.3d 678 (N.M. Ct. App. 2009). In this shareholder class and derivative action, Robbins Geller attorneys obtained an appellate decision reversing the trial court's dismissal of the complaint alleging serious director misconduct in connection with the merger of SunCal Companies and Westland Development Co., Inc., a New Mexico company with large and historic landholdings and other assets in the Albuquerque area. The appellate court held that plaintiff's claims for breach of fiduciary duty were direct, not derivative, because they constituted an attack on the validity or fairness of the merger and the conduct of the directors. Although New Mexico law had not addressed this question directly, at the urging of the Firm's attorneys, the court relied on Delaware law for guidance, rejecting the "special injury" test for determining the direct versus derivative inquiry and instead applying more recent Delaware case law.

- ***Lane v. Page***, No. 06-cv-1071 (D.N.M. 2012). In May 2012, while granting final approval of the settlement in the federal component of the Westland cases, Judge Browning in the District of New Mexico commented:

> Class Counsel are highly skilled and specialized attorneys who use their substantial experience and expertise to prosecute complex securities class actions. In possibly one of the best known and most prominent recent securities cases, Robbins Geller served as sole lead counsel – *In re Enron Corp. Sec. Litig.*, No. H-01-3624 (S.D. Tex.). *See* Report at 3. The Court has previously noted that the class would "receive high caliber legal representation" from class counsel, and throughout the course of the litigation the Court has been impressed with the quality of representation on each side. *Lane v. Page*, 250 F.R.D. at 647.

Lane v. Page, 862 F. Supp. 2d 1182, 1253-54 (D.N.M. 2012).

In addition, Judge Browning stated: "'Few plaintiffs' law firms could have devoted the kind of time, skill, and financial resources over a five-year period necessary to achieve the pre- and post-Merger benefits obtained for the class here.' . . . [Robbins Geller is] both skilled and experienced, and used those skills and experience for the benefit of the class [Robbins Geller is] both skilled and experienced, and used those skills and experience for the benefit of the class." *Id.* at 1254.

- ***Luther v. Countrywide Home Loans Servicing LP***, 533 F.3d 1031 (9th Cir. 2008). In a case of first impression, the Ninth Circuit held that the Securities Act of 1933's specific non-removal features had not been trumped by the general removal provisions of the Class Action Fairness Act of 2005.

- ***In re Gilead Scis. Sec. Litig.***, 536 F.3d 1049 (9th Cir. 2008). The Ninth Circuit upheld defrauded investors' loss causation theory as plausible, ruling that a limited temporal gap between the time defendants' misrepresentation was publicly revealed and the subsequent decline in stock value was reasonable where the public had not immediately understood the impact of defendants' fraud.

- ***In re WorldCom Sec. Litig.***, 496 F.3d 245 (2d Cir. 2007). The Second Circuit held that the filing of a class action complaint tolls the limitations period for all members of the class, including those who choose to opt out of the class action and file their own individual actions without waiting to see whether the district court certifies a class – reversing the decision below and effectively overruling multiple district court rulings that *American Pipe* tolling did not apply under these circumstances.

- ***In re Merck & Co. Sec., Derivative & ERISA Litig.***, 493 F.3d 393 (3d Cir. 2007). In a shareholder derivative suit appeal, the Third Circuit held that the general rule that discovery may not be used to supplement demand-futility allegations does not apply where the defendants enter a voluntary stipulation to produce materials relevant to demand futility without providing for any limitation as to their use. In April 2007, the Honorable D. Brooks Smith praised Robbins Geller partner Joe Daley's efforts in this litigation:

  > Thank you very much Mr. Daley and a thank you to all counsel. As Judge Cowen mentioned, this was an exquisitely well-briefed case; it was also an extremely well-argued case, and we thank counsel for their respective jobs here in the matter, which we will take under advisement. Thank you.

  In re Merck & Co., Inc. Sec., Derivative & ERISA Litig., No. 06-2911, Transcript at 35:37-36:00 (3d Cir. Apr. 12, 2007).

- ***Alaska Elec. Pension Fund v. Brown***, 941 A.2d 1011 (Del. 2007). The Supreme Court of Delaware held that the Alaska Electrical Pension Fund, for purposes of the "corporate benefit" attorney-fee doctrine, was presumed to have caused a substantial increase in the tender offer price paid in a "going private" buyout transaction. The Court of Chancery originally ruled that Alaska's counsel, Robbins Geller, was not entitled to an award of attorney fees, but Delaware's high court, in its published opinion, reversed and remanded for further proceedings.

- ***Crandon Cap. Partners v. Shelk***, 157 P.3d 176 (Or. 2007). Oregon's Supreme Court ruled that a shareholder plaintiff in a derivative action may still seek attorney fees even if the defendants took actions to moot the underlying claims. The Firm's attorneys convinced Oregon's highest court to take the case, and reverse, despite the contrary position articulated by both the trial court and the Oregon Court of Appeals.

- ***In re Qwest Commc'ns Int'l***, 450 F.3d 1179 (10th Cir. 2006). In a case of first impression, the Tenth Circuit held that a corporation's deliberate release of purportedly privileged materials to governmental agencies was not a "selective waiver" of the privileges such that the corporation could refuse to produce the same materials to non-governmental plaintiffs in private securities fraud litigation.

- ***In re Guidant S'holders Derivative Litig.***, 841 N.E.2d 571 (Ind. 2006). Answering a certified question from a federal court, the Supreme Court of Indiana unanimously held that a pre-suit demand in a derivative action is excused if the demand would be a futile gesture. The court adopted a "demand futility" standard and rejected defendants' call for a "universal demand" standard that might have immediately ended the case.

- ***Denver Area Meat Cutters v. Clayton***, 209 S.W.3d 584 (Tenn. Ct. App. 2006). The Tennessee Court of Appeals rejected an objector's challenge to a class action settlement arising out of Warren Buffet's 2003 acquisition of Tennessee-based Clayton Homes. In their effort to secure relief for Clayton Homes stockholders, the Firm's attorneys obtained a temporary injunction of the Buffet acquisition for six weeks in 2003 while the matter was litigated in the courts. The temporary halt to Buffet's acquisition received national press attention.

- ***DeJulius v. New Eng. Health Care Emps. Pension Fund***, 429 F.3d 935 (10th Cir. 2005). The Tenth Circuit held that the multi-faceted notice of a $50 million settlement in a securities fraud class action had been the best notice practicable under the circumstances, and thus satisfied both constitutional due process and Rule 23 of the Federal Rules of Civil Procedure.

- ***In re Daou Sys.***, 411 F.3d 1006 (9th Cir. 2005). The Ninth Circuit sustained investors' allegations of accounting fraud and ruled that loss causation was adequately alleged by pleading that the value of the stock they purchased declined when the issuer's true financial condition was revealed.

- ***Barrie v. Intervoice-Brite, Inc.***, 397 F.3d 249 (5th Cir.), *reh'g denied and opinion modified*, 409 F.3d 653 (5th Cir. 2005). The Fifth Circuit upheld investors' accounting-fraud claims, holding that fraud is pled as to both defendants when one knowingly utters a false statement and the other knowingly fails to correct it, even if the complaint does not specify who spoke and who listened.

- ***City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.***, 399 F.3d 651 (6th Cir. 2005). The Sixth Circuit held that a statement regarding objective data supposedly supporting a corporation's belief that its tires were safe was actionable where jurors could have found a reasonable basis to believe the corporation was aware of undisclosed facts seriously undermining the statement's accuracy.

- ***Ill. Mun. Ret. Fund v. Citigroup, Inc.***, 391 F.3d 844 (7th Cir. 2004). The Seventh Circuit upheld a district court's decision that the Illinois Municipal Retirement Fund was entitled to litigate its claims under the Securities Act of 1933 against WorldCom's underwriters before a state court rather than before the federal forum sought by the defendants.

- ***Nursing Home Pension Fund, Local 144 v. Oracle Corp.***, 380 F.3d 1226 (9th Cir. 2004). The Ninth Circuit ruled that defendants' fraudulent intent could be inferred from allegations concerning their false representations, insider stock sales and improper accounting methods.

- ***Southland Sec. Corp. v. INSpire Ins. Sols. Inc.***, 365 F.3d 353 (5th Cir. 2004). The Fifth Circuit sustained allegations that an issuer's CEO made fraudulent statements in connection with a contract announcement.

Consumer Protection

- ***Dent v. National Football League***, No. 15-15143 (9th Cir.). In September 2018, the United States Court of Appeals for the Ninth Circuit issued an important decision reversing the district court's previous dismissal of the *Dent v. National Football League* litigation, concluding that the complaint brought by NFL Hall of Famer Richard Dent and others should not be dismissed on labor-law preemption grounds. The case was remanded to the district court for further proceedings.

- ***Kwikset Corp. v. Superior Court***, 51 Cal. 4th 310 (2011). In a leading decision interpreting the scope of Proposition 64's new standing requirements under California's Unfair Competition Law (UCL), the California Supreme Court held that consumers alleging that a manufacturer has misrepresented its product have "lost money or property" within the meaning of the initiative, and thus have standing to sue under the UCL, if they "can truthfully allege that they were deceived by a product's label into spending money to purchase the product, and would not have purchased it otherwise." *Id*. at 317. *Kwikset* involved allegations, proven at trial, that defendants violated California's "Made in the U.S.A." statute by representing on their labels that their products were "Made in U.S.A." or "All-American Made" when, in fact, the products were substantially made with foreign parts and labor.

- ***Safeco Ins. Co. of Am. v. Superior Court***, 173 Cal. App. 4th 814 (2009). In a class action against auto insurer Safeco, the California Court of Appeal agreed that the plaintiff should have access to discovery to identify a new class representative after her standing to sue was challenged.

- ***Consumer Privacy Cases***, 175 Cal. App. 4th 545 (2009). The California Court of Appeal rejected objections to a nationwide class action settlement benefiting Bank of America customers.

- ***Koponen v. Pac. Gas & Elec. Co.***, 165 Cal. App. 4th 345 (2008). The Firm's attorneys obtained a published decision reversing the trial court's dismissal of the action, and holding that the plaintiff's claims for damages arising from the utility's unauthorized use of rights-of-way or easements obtained from the plaintiff and other landowners were not barred by a statute limiting the authority of California courts to review or correct decisions of the California Public Utilities Commission.

- ***Sanford v. MemberWorks, Inc.***, 483 F.3d 956 (9th Cir. 2007). In a telemarketing-fraud case, where the plaintiff consumer insisted she had never entered the contractual arrangement that defendants said bound her to arbitrate individual claims to the exclusion of pursuing class claims, the Ninth Circuit reversed an order compelling arbitration – allowing the plaintiff to litigate on behalf of a class.

- ***Ritt v. Billy Blanks Enters.***, 870 N.E.2d 212 (Ohio Ct. App. 2007). In the Ohio analog to the *West* case, the Ohio Court of Appeals approved certification of a class of Ohio residents seeking relief under Ohio's consumer protection laws for the same telemarketing fraud.

- ***Haw. Med. Ass'n v. Haw. Med. Serv. Ass'n***, 148 P.3d 1179 (Haw. 2006). The Supreme Court of Hawaii ruled that claims of unfair competition were not subject to arbitration and that claims of tortious interference with prospective economic advantage were adequately alleged.

- ***Branick v. Downey Sav. & Loan Ass'n***, 39 Cal. 4th 235 (2006). Robbins Geller attorneys were part of a team of lawyers that briefed this case before the Supreme Court of California. The court issued a unanimous decision holding that new plaintiffs may be substituted, if necessary, to preserve actions pending when Proposition 64 was passed by California voters in 2004. Proposition 64 amended California's Unfair Competition Law and was aggressively cited by defense lawyers in an effort to dismiss cases after the initiative was adopted.

- ***McKell v. Wash. Mut., Inc.***, 142 Cal. App. 4th 1457 (2006). The California Court of Appeal reversed the trial court, holding that plaintiff's theories attacking a variety of allegedly inflated mortgage-related fees were actionable.

- ***West Corp. v. Superior Court***, 116 Cal. App. 4th 1167 (2004). The California Court of Appeal upheld the trial court's finding that jurisdiction in California was appropriate over the out-of-state corporate defendant whose telemarketing was aimed at California residents. Exercise of jurisdiction was found to be in keeping with considerations of fair play and substantial justice.

- ***Kruse v. Wells Fargo Home Mortg., Inc.***, 383 F.3d 49 (2d Cir. 2004), and ***Santiago v. GMAC Mortg. Grp., Inc.***, 417 F.3d 384 (3d Cir. 2005). In two groundbreaking federal appellate decisions, the Second and Third Circuits each ruled that the Real Estate Settlement Practices Act prohibits marking up home loan-related fees and charges.

ATTORNEY BIOGRAPHIES

Mario Alba Jr. | Partner

Mario Alba is a partner in the Firm's Melville office. He is a member of the Firm's Institutional Outreach Team, which provides advice to the Firm's institutional clients, including numerous public pension systems and Taft-Hartley funds throughout the United States, and consults with them on issues relating to corporate fraud in the U.S. securities markets, as well as corporate governance issues and shareholder litigation. Some of Alba's institutional clients are currently involved in securities cases involving Avalara, Inc., Clarivate plc, Dentsply Sirona Inc., Generac Holdings Inc., Globe Life Inc., Amgen, Inc., Virtu Financial, Inc., The Walt Disney Company, The Boeing Company, Merck & Co., Inc., Daimler, Novo Nordisk, and National Instruments Corporation.

Alba's institutional clients are/were also involved in other types of class actions, namely, *In re National Prescription Opiate Litigation* (over $50 billion paid to communities across the country), *In re Epipen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litigation* ($609 million total recovery), *Forth v. Walgreen Co.* ($100 million recovery), and *In re Humira (Adalimumab) Antitrust Litigation*.

Alba has served as lead counsel in numerous cases and is responsible for initiating, investigating, researching, and filing securities and consumer fraud class actions. He has recovered hundreds of millions of dollars in numerous actions, including cases against Acadia Healthcare Company, Inc. ($179 million recovery); BHP Billiton Limited ($50 million recovery), Equinix, Inc. ($41.5 million recovery), Green Dot Corporation ($40 million recovery), BRF S.A. ($40 million recovery), L3 Technologies, Inc. ($34.5 million recovery), Impax Laboratories Inc. ($33 million recovery), Waste Management, Inc. ($30 million recovery), Reckitt Benckiser Group plc ($19.6 million recovery), Super Micro Computer, Inc. ($18.25 million recovery), and NBTY, Inc. ($16 million recovery).

Education

B.S., St. John's University, 1999; J.D., Hofstra University School of Law, 2002

Honors / Awards

Super Lawyer, *Super Lawyers Magazine*, 2022-2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2024-2025; Best Lawyer in America: One to Watch, *Best Lawyers®*, 2024; Rising Star, *Super Lawyers Magazine*, 2012-2013, 2016-2017; B.S., Dean's List, St. John's University, 1999; Selected as participant in Hofstra Moot Court Seminar, Hofstra University School of Law

Michael Albert | Partner

Michael Albert is a partner in the Firm's San Diego office, where his practice focuses on complex securities litigation. Albert is a member of the Firm's Lead Plaintiff Advisory Team, which advises institutional investors in connection with lead plaintiff motions, and assists them in securing appointment as lead plaintiff.

Albert has been a member of litigation teams that have successfully recovered hundreds of millions of dollars for investors in securities class actions, including: *In re Alphabet, Inc. Securities Litigation* ($350 million recovery), *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.* ($272 million recovery), *City of Pontiac General Employees' Retirement Systems v. Wal-Mart Stores, Inc.* ($160 million recovery), and *In re LendingClub Securities Litigation* ($125 million recovery). Albert was also a member of the litigation team that obtained a $85 million cash settlement in a consumer class action against Scotts Miracle-Gro.

Education

B.A., University of Wisconsin-Madison, 2010; J.D., University of Virginia School of Law, 2014

Honors / Awards

Leading Litigator in America, *Lawdragon*, 2024-2026; Best Lawyer in America, *Best Lawyers®*, 2025-2026; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2024-2025; Impact Case Award: *In re Alphabet, Inc. Securities Litigation*, *Benchmark Litigation*, 2025; 500 X – The Next Generation, *Lawdragon*, 2023-2024; Rising Star, *Super Lawyers Magazine*, 2020-2024; Managing Board Member, *Virginia Tax Review*, University of Virginia School of Law

Matthew I. Alpert | Partner

Matthew Alpert is a partner in the Firm's San Diego office and focuses on the prosecution of securities fraud litigation. Alpert's current cases include securities fraud cases against PayPal (D.N.J.) and Shoals Technologies Group (M.D. Tenn.). Most recently, Alpert and a team of Robbins Geller attorneys obtained a $434 million settlement in *In re Under Armour Sec. Litig.* (D. Md.) after nearly seven years of hard-fought litigation and less than a month before a jury trial in Baltimore was scheduled to commence. Alpert was also a member of the litigation team that successfully obtained class certification in a securities fraud class action against Regions Financial, a class certification decision that was substantively affirmed by the United States Court of Appeals for the Eleventh Circuit in *Loc. 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp.*, 762 F.3d 1248 (11th Cir. 2014). Upon remand, the United States District Court for the Northern District of Alabama granted class certification again, rejecting defendants' post-*Halliburton II* arguments concerning stock price impact. Alpert and the Robbins Geller team litigated the case until it eventually settled for $90 million.

Some of Alpert's previous cases include: the individual opt-out actions of the AOL Time Warner class action – *Regents of the Univ. of Cal. v. Parsons* (Cal. Super. Ct., Los Angeles Cnty.) and *Ohio Pub. Emps. Ret. Sys. v. Parsons* (Ohio. Ct. of Common Pleas, Franklin Cnty.) (total settlement over $600 million); *In re Under Armour Sec. Litig.* (D. Md.); ($434 million settlement); *Loc. 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp.* (N.D. Ala.) ($90 million settlement); *In re MGM Mirage Sec. Litig.* (D. Nev.) ($75 million); *In re CIT Grp. Inc. Sec. Litig.* (S.D.N.Y.) ($75 million settlement); *Luna v. Marvell Tech. Grp., Ltd.* (N.D. Cal.) ($72.5 million settlement); *Deka Inv. GmbH v. Santander Consumer USA Holdings Inc.* (N.D. Tex.) ($47 million settlement); *In re Bridgestone Sec. Litig.* (M.D. Tenn.) ($30 million settlement); *In re Walter Energy, Inc. Sec. Litig.* (N.D. Ala.) ($25 million); *City of Hialeah Emps.' Ret. Sys. & Laborers Pension Tr. Fund for N. Cal. v. Toll Bros., Inc.* (E.D. Pa.) ($25 million settlement); *In re Molycorp, Inc. Sec. Litig.* (D. Colo.) ($20.5 million settlement); *In re Banc of Cal. Sec. Litig.* (C.D. Cal.) ($19.75 million); *Zimmerman v. Diplomat Pharmacy, Inc.* (E.D. Mich.) ($14.1 million); *Batwin v. Occam Networks, Inc.* (C.D. Cal.) ($13.9 million settlement); *Int'l Bhd. of Elec. Workers Loc. 697 Pension Fund v. Int'l Game Tech.* (D. Nev.) ($12.5 million settlement); *Kmiec v. Powerwave Techs. Inc.* (C.D. Cal.) ($8.2 million); *In re Sunterra Corp. Sec. Litig.* (D. Nev.) ($8 million settlement); and *Luman v. Anderson* (W.D. Mo.) ($4.25 million settlement).

Education

B.A., University of Wisconsin at Madison, 2001; J.D., Washington University, St. Louis, 2005

Honors / Awards

Rising Star, *Super Lawyers Magazine*, 2015-2019

Darryl J. Alvarado | Partner

Darryl Alvarado is a partner in the Firm's San Diego office. He focuses his practice on securities fraud and other complex civil litigation. Alvarado was a member of the trial team in *Smilovits v. First Solar, Inc.*, which recovered $350 million for aggrieved investors. The *First Solar* settlement, reached on the eve of trial after more than seven years of litigation and an interlocutory appeal to the U.S. Supreme Court, is the fifth-largest PSLRA recovery ever obtained in the Ninth Circuit. Alvarado recently litigated *Monroe County Employees' Retirement System v. The Southern Company*, which recovered $87.5 million for investors after more than three years of litigation. The settlement resolved securities fraud claims stemming from defendants' issuance of misleading statements and omissions regarding the construction of a first-of-its-kind "clean coal" power plant in Kemper County, Mississippi. Alvarado helped secure $388 million for investors in J.P. Morgan residential mortgage-backed securities in *Fort Worth Employees' Retirement Fund v. J.P. Morgan Chase & Co.* That settlement is, on a percentage basis, the largest recovery ever achieved in an RMBS class action. He was also a member of a team of attorneys that secured $95 million for investors in Morgan Stanley-issued RMBS in *In re Morgan Stanley Mortgage Pass-Through Certificates Litigation*.

Alvarado was a member of a team of lawyers that obtained landmark settlements, on the eve of trial, from the major credit rating agencies and Morgan Stanley arising out of the fraudulent ratings of bonds issued by the Cheyne and Rhinebridge structured investment vehicles in *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Incorporated* and *King County, Washington v. IKB Deutsche Industriebank AG*. He was integral in obtaining several precedent-setting decisions in those cases, including defeating the rating agencies' historic First Amendment defense and defeating the ratings agencies' motions for summary judgment concerning the actionability of credit ratings. Alvarado was also a member of a team of attorneys responsible for obtaining for aggrieved investors $27 million in *In re Cooper Companies Securities Litigation*, $19.5 million in *City of Pontiac General Employees' Retirement System v. Lockheed Martin Corporation*, and comprehensive corporate governance reforms to address widespread off-label marketing and product safety violations in *In re Johnson & Johnson Derivative Litigation*.

Education

B.A., University of California, Santa Barbara, 2004; J.D., University of San Diego School of Law, 2007

Honors / Awards

Best Lawyer in America: One to Watch, *Best Lawyers®*, 2023-2025; Future Star, *Benchmark Litigation*, 2024; Rising Star, *Super Lawyers Magazine*, 2015-2022; 40 & Under Hot List, *Benchmark Litigation*, 2018-2021; Top 40 Under 40, *Daily Journal*, 2021; "Outstanding Young Attorneys," *San Diego Daily Transcript*, 2011

Dory P. Antullis | Partner

Dory Antullis is a partner in the Firm's Boca Raton office. Her litigation practice focuses on complex class actions, covering consumer fraud, public nuisance, environmental litigation, privacy litigation, pharmaceuticals, RICO, and antitrust litigation. Antullis also works with the Firm's settlement department, negotiating and documenting intricate, high-stakes settlements.

Antullis is a core member of the Firm's opioids team, leading the effort on behalf of cities, counties, and third-party payors around the country in *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804 (N.D. Ohio). In addition to serving on several committees in the MDL, she was a member of the winning trial team on behalf of the People of the State of California in San Francisco's bellwether case against Allergan, Teva, Walgreens, and others in the prescription opioid supply chain. Together with a trial win against Walgreens, the case has resulted in settlements valued at over $350 million. Antullis was also part of a small group of lawyers who negotiated and drafted settlement documents for the national opioid settlements with major distributors, manufacturers, and pharmacies – now totaling more than $50 billion.

Antullis has also been an integral part of Robbins Geller's history of successful privacy and data breach class action cases. She is currently serving as Interim Co-Lead Class Counsel in *In re Luxottica of America, Inc. Data Breach Litig.*, No. 1:20-cv-00908 (S.D. Ohio), and Liaison Counsel in *DeSue v. 20/20 Eye Care Network, Inc.*, No. 21-cv-61275 (S.D. Fla.) ($3 million class settlement). Antullis's heavy lifting at every stage of the litigation in *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 5:16-md-02752 (N.D. Cal.), helped to secure a $117.5 million recovery in the largest data breach in history. Antullis successfully defeated two rounds of dispositive briefing, worked with leadership and computer privacy and damages experts to plan a winning strategy for the case, and drafted an innovative motion for class certification that immediately preceded a successful mediation with defendants in that litigation. Antullis also provided meaningful "nuts-and-bolts" support in other data breach class actions, including *In re Am. Med. Collection Agency, Inc., Customer Data Sec. Breach Litig.*, No. 2:19-md-02904 (D.N.J.) (representing class of LabCorp customers), and *In re Solara Med. Supplies Customer Data Breach Litig.*, No. 3:19-cv-02284 (S.D. Cal.) ($5.06 million settlement). And she currently represents consumers in state and federal court against North Broward Hospital District for a 2021 data breach.

Education

B.A., Rice University, 1999; J.D., Columbia Law School, 2003

Honors / Awards

Leading Litigator in America, *Lawdragon*, 2024-2026; Recommended Lawyer, *The Legal 500*, 2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2024-2025; Leading Plaintiff Consumer Lawyer, *Lawdragon*, 2022-2025; National Merit Scholar, Rice University; Golden Key National Honor Society, Rice University; Nominated for *The Rice Undergraduate* academic journal, Rice University; Michael I. Sovern Scholar, Columbia Law School; Hague Appeal for Peace, Committee for a Just and Effective Response to 9/11, Columbia Law School; Columbia Mediation and Political Asylum Clinics, Columbia Law School; Harlem Tutorial Program, Columbia Law School; Journal of Eastern European Law, Columbia Law School; Columbia Law Women's Association, Columbia Law School

Stephen R. Astley | Partner

Stephen Astley is a partner in the Firm's Boca Raton office. Astley devotes his practice to representing institutional and individual shareholders in their pursuit to recover investment losses caused by fraud. He has been lead counsel in numerous securities fraud class actions across the country, helping secure significant recoveries for his clients and investors.

Most recently, Astley obtained a $434 million settlement in *In re Under Armour Sec. Litig*. The case settled just prior to the commencement of trial in Baltimore, Maryland, and represents the second largest securities fraud settlement ever in the Fourth Circuit and is among the top 50 largest such recoveries in U.S. history. Other notable settlements include: *In re Nutanix Inc. Sec. Litig*. (N.D. Cal.) ($71 million settlement); *City of Sterling Heights Gen. Emps.' Ret. Sys. v. Hospira, Inc.* (N.D. Ill.) ($60 million settlement); *In re ADT Inc. S'holder Litig.* (Fla. Cir. Ct., 15th Jud. Cir.) ($30 million settlement); *In re Red Hat, Inc. Sec. Litig.* (E.D.N.C.) ($20 million settlement); *Eshe Fund v. Fifth Third Bancorp* (S.D. Ohio) ($16 million); *City of St. Clair Shores Gen. Emps.' Ret. Sys. v. Lender Processing Servs., Inc.* (M.D. Fla.) ($14 million); and *In re Synovus Fin. Corp.* (N.D. Ga.) ($11.75 million).

Prior to joining the Firm, Astley was with the Miami office of Hunton & Williams, where he concentrated his practice on class action defense, including securities class actions and white collar criminal defense. Additionally, he represented numerous corporate clients accused of engaging in unfair and deceptive practices. Astley was also an active duty member of the United States Navy's Judge Advocate General's Corps where he was the Senior Defense Counsel for the Naval Legal Service Office Pearl Harbor Detachment. In that capacity, Astley oversaw trial operations for the Detachment and gained substantial first-chair trial experience as the lead defense counsel in over 75 courts-martial and administrative proceedings. Additionally, from 2002-2003, Astley clerked for the Honorable Peter T. Fay, U.S. Court of Appeals for the Eleventh Circuit.

Education

B.S., Florida State University, 1992; M. Acc., University of Hawaii at Manoa, 2001; J.D., University of Miami School of Law, 1997

Honors / Awards

J.D., *Cum Laude*, University of Miami School of Law, 1997; United States Navy Judge Advocate General's Corps., Lieutenant

A. Rick Atwood, Jr. | Partner

Rick Atwood is a partner in the Firm's San Diego office. As a recipient of the *California Lawyer* Attorney of the Year ("CLAY") Award for his work on behalf of shareholders, he has successfully represented shareholders in securities class actions, merger-related class actions, and shareholder derivative suits in federal and state courts in more than 30 jurisdictions. Through his litigation efforts at both the trial and appellate levels, Atwood has helped recover billions of dollars for public shareholders, including the largest post-merger common fund recoveries on record. Atwood is also part of the Firm's Delaware Practice Group.

Atwood was a key member of the litigation team in *In re Kinder Morgan, Inc. S'holders Litig.*, where he helped obtain an unprecedented $200 million common fund for former Kinder Morgan shareholders, the largest merger & acquisition class action recovery in history. In *In re Dole Food Co., Inc. S'holder Litig.*, which went to trial in the Delaware Court of Chancery on claims of breach of fiduciary duty on behalf of Dole Food Co., Inc. shareholders, Atwood helped obtain $148 million, the largest trial verdict ever in a class action challenging a merger transaction.

Atwood also led the litigation team that obtained an $89.4 million recovery for shareholders in *In re Del Monte Foods Co. S'holders Litig.*, after which the Delaware Court of Chancery stated that "it was only through the effective use of discovery that the plaintiffs were able to 'disturb[ ] the patina of normalcy surrounding the transaction.'" The court further commented that "Lead Counsel engaged in hard-nosed discovery to penetrate and expose problems with practices that Wall Street considered 'typical.'" One Wall Street banker even wrote in *The Wall Street Journal* that "'Everybody does it, but Barclays is the one that got caught with their hand in the cookie jar . . . . Now everybody has to rethink how we conduct ourselves in financing situations.'" Atwood's other significant opinions include *Goldstein v. Denner* ($84 million recovery), *Brown v. Brewer* ($45 million recovery), and *In re Prime Hosp., Inc. S'holders Litig.* ($25 million recovery).

Education

B.A., University of Tennessee, Knoxville, 1987; B.A., Katholieke Universiteit Leuven, Belgium, 1988; J.D., Vanderbilt School of Law, 1991

Honors / Awards

Best Lawyer in America, *Best Lawyers®*, 2023-2026; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2025; Recommended Lawyer, *The Legal 500*, 2017-2019; M&A Litigation Attorney of the Year in California, *Corporate International*, 2015; Super Lawyer, *Super Lawyers Magazine*, 2014-2017; Attorney of the Year, *California Lawyer*, 2012; B.A., Great Distinction, Katholieke Universiteit Leuven, Belgium, 1988; B.A., Honors, University of Tennessee, Knoxville, 1987; Authorities Editor, *Vanderbilt Journal of Transnational Law*, 1991

Aelish M. Baig | Partner

Aelish Marie Baig is a partner in the Firm's San Francisco office and specializes in consumer and securities fraud actions. Baig has litigated a number of cases through jury trial, resulting in multi-million and billion dollar awards and settlements for her clients.

Baig was one of the originators of the national opioid litigation, filing among the earliest complaints against the opioid industry defendants and working on all aspects of that litigation. In 2022, Baig served as co-trial counsel in a federal bench trial in San Francisco in a case selected as a bellwether in the national multi-district opioid litigation. The team achieved combined settlements of over $350 million for San Francisco and contributed to securing more than $50 billion for local governments nationwide to be used for abatement of the national opioid epidemic. For her work in co-leading the trial team and securing a historic trial result against Walgreens for the City and County of San Francisco, she was honored by *The National Law Journal* as one of the "Elite Women of the Plaintiffs Bar" and she received "California Lawyer Attorney of the Year" by the *Daily Journal*.

Baig was also appointed to leadership in the *Juul* ($1.7 billion settlement) and *McKinsey* ($230 million settlement) MDL litigations. She was recently appointed to the Plaintiffs' Steering Committee of the national social media litigation MDL against the country's largest social media platforms (Meta, YouTube, Snapchat, and Tiktok) for fueling addiction and other mental health issues among youth. She represents numerous local and state governments and school districts across the country that have filed federal cases against opioids, McKinsey, Juul, and/or social media defendants. Baig has also prosecuted securities fraud and derivative actions obtaining millions of dollars in recoveries against corporations such as Wells Fargo, Celera, Pall, and Prudential.

Education

B.A., Brown University, 1992; J.D., Washington College of Law at American University, 1998

Honors / Awards

Best Lawyer in America, *Best Lawyers®*, 2024-2026; Recommended Lawyer, *The Legal 500*, 2023-2025; Ranked by *Chambers USA*, 2024-2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2025; Leading Plaintiff Consumer Lawyer, *Lawdragon*, 2022-2025; Leading Lawyer in America, *Lawdragon*, 2020-2025; Leading Commercial Litigator, *Daily Journal*, 2024; Class Action/Mass Tort Litigation Trailblazer, *The National Law Journal*, 2023; Elite Women of the Plaintiffs Bar, Elite Trial Lawyers, *The National Law Journal*, 2023; Plaintiffs' Lawyers Trailblazer, *The National Law Journal*, 2021, 2023; California Lawyer Attorney of the Year (CLAY), *Daily Journal*, 2023; Best Lawyer in America: One to Watch, *Best Lawyers®*, 2021-2023; Best Lawyer in Northern California: One to Watch, *Best Lawyers®*, 2021; Featured in "Lawyer Limelight" series, *Lawdragon*, 2020; Litigation Trailblazer, *The National Law Journal*, 2019; California Trailblazer, *The Recorder*, 2019; Super Lawyer, *Super Lawyers Magazine*, 2012-2013; J.D., *Cum Laude*, Washington College of Law at American University, 1998; Senior Editor, *Administrative Law Review*, Washington College of Law at American University

Randall J. Baron | Partner

Randy Baron is a partner in the Firm's San Diego office. He specializes in securities litigation, corporate takeover litigation, and breach of fiduciary duty actions. For almost two decades, Baron has headed up a team of lawyers whose accomplishments include obtaining instrumental rulings both at injunction and trial phases, and establishing liability of financial advisors and investment banks. With an in-depth understanding of merger and acquisition and breach of fiduciary duty law, an ability to work under extreme time pressures, and the experience and willingness to take a case through trial, he has been responsible for recovering more than a billion dollars for shareholders.

Notable achievements over the years include: *In re Kinder Morgan, Inc. S'holders Litig.* (Kan. Dist. Ct., Shawnee Cnty.), where Baron obtained an unprecedented $200 million common fund for former Kinder Morgan shareholders, the largest merger & acquisition class action recovery in history; *In re Dole Food Co., Inc. S'holder Litig.* (Del. Ch.), where he went to trial in the Delaware Court of Chancery on claims of breach of fiduciary duty on behalf of Dole Food Co., Inc. shareholders and obtained $148 million, the largest trial verdict ever in a class action challenging a merger transaction; and *In re Rural/Metro Corp. S'holders Litig.* (Del. Ch.), where Baron and co-counsel obtained nearly $110 million total recovery for shareholders against Royal Bank of Canada Capital Markets LLC. In *In re Del Monte Foods Co. S'holders Litig.* (Del. Ch.), he exposed the unseemly practice by investment bankers of participating on both sides of large merger and acquisition transactions and ultimately secured an $89 million settlement for shareholders of Del Monte. Baron was one of the lead attorneys representing about 75 public and private institutional investors that filed and settled individual actions in *In re WorldCom Sec. Litig.* (S.D.N.Y.), where more than $657 million was recovered, the largest opt-out (non-class) securities action in history. Most recently, Baron successfully obtained a partial settlement of $60 million in *In re Tesla Motors, Inc. S'holder Litig.*, a case that alleged that the members of the Tesla Board of Directors breached their fiduciary duties, unjustly enriched themselves, and wasted corporate assets in connection with their approval of Tesla's acquisition of SolarCity Corp. in 2016.

Education

B.A., University of Colorado at Boulder, 1987; J.D., University of San Diego School of Law, 1990

Honors / Awards

Fellow, Advisory Board, Litigation Counsel of America (LCA); Rated Distinguished by Martindale-Hubbell; Litigation Star, *Benchmark Litigation*, 2016-2019, 2023-2026; National Practice Area Star, *Benchmark Litigation*, 2019-2020, 2024, 2026; Lawyer of the Year: Litigation – Mergers and Acquisitions, San Diego, *Best Lawyers*®, 2026; Best Lawyer in America, *Best Lawyers*®, 2019-2026; Hall of Fame, *The Legal 500*, 2020-2025; Ranked by *Chambers USA*, 2016-2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2025; California - Litigation Star, *Benchmark Litigation*, 2024; Lawyer of the Year: Derivatives and Futures Law, *Best Lawyers*®, 2023; Plaintiffs' Lawyer Trailblazer, *The National Law Journal*, 2022; Leading Lawyer in America, *Lawdragon*, 2011, 2017-2019, 2021-2022; Southern California Best Lawyer, *Best Lawyers*®, 2019-2021; Super Lawyer, *Super Lawyers Magazine*, 2014-2016, 2018-2020; Local Litigation Star, *Benchmark Litigation*, 2018, 2020; Leading Lawyer, *The Legal 500*, 2014-2019; California Star, *Benchmark Litigation*, 2019; State Litigation Star, *Benchmark Litigation*, 2019; Winning Litigator, *The National Law Journal*, 2018; Titan of the Industry, *The American Lawyer*, 2018; Recommended Lawyer, *The Legal 500*, 2017; Mergers & Acquisitions Trailblazer, *The National Law Journal*, 2015-2016; Litigator of the Week, *The American Lawyer*, October 16, 2014; Attorney of the Year, *California Lawyer*, 2012; Litigator of the Week, *The American Lawyer*, October 7, 2011; J.D., *Cum Laude*, University of San Diego School of Law, 1990

James E. Barz | Partner

Jim Barz is a partner with the Firm and manages the Firm's Chicago office. Barz is an experienced trial lawyer who has been lead counsel in dozens of evidentiary and contested hearings, tried 18 cases to verdict, and argued 9 cases in the Seventh Circuit. Barz is a registered CPA, former federal prosecutor, and an adjunct professor at Northwestern University School of Law from 2008 to 2025, teaching courses on trial advocacy and class action litigation.

Barz has represented investors in securities fraud class actions that have resulted in recoveries of over $2 billion. Barz was the lead counsel in *In re Valeant Pharms. Int'l, Inc. Sec. Litig.*, and secured a $1.21 billion recovery for investors, a case that *Vanity Fair* reported as "the corporate scandal of its era." This is the largest securities class action settlement against a pharmaceutical manufacturer and the ninth largest securities class action settlement ever. Barz was recognized as a Litigator of the Week by *The American Lawyer* for his work in the case.

Barz has also secured substantial recoveries for investors in *HCA* ($215 million, M.D. Tenn.); *Motorola* ($200 million, N.D. Ill.); *Exelon* ($173 million, N.D. Ill.); *Sprint* ($131 million, D. Kan.); *Orbital ATK* ($108 million, E.D. Va.); *Walgreens* ($105 million, N.D. Ill.); *Nutanix* ($71 million, N.D. Cal.); *Psychiatric Solutions* ($65 million, M.D. Tenn.); *Oak Street* ($60 million, N.D. Ill.); *Hospira* ($60 million, N.D. Ill.); and other matters. Barz also handles whistleblower, antitrust, and pro bono matters and was honored by the Judges of the United States District Court for the Northern District of Illinois with an Award for Excellence in Pro Bono Service in 2021.

Education

B.B.A., Loyola University Chicago, School of Business Administration, 1995; J.D., Northwestern University School of Law, 1998

Honors / Awards

Litigation Star, *Benchmark Litigation*, 2025-2026; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2025; Super Lawyer, *Super Lawyers Magazine*, 2018-2025; Leading Lawyer in America, *Lawdragon*, 2025; Recommended Lawyer, *The Legal 500*, 2024; Best Lawyer in America: One to Watch, *Best Lawyers®*, 2023; Midwest Trailblazer, *The American Lawyer*, 2022; Award for Excellence in Pro Bono Service, United States District Court for the Northern District of Illinois, 2021; Litigator of the Week, *The American Lawyer*, 2021; Leading Lawyer, Law Bulletin Media, 2018; B.B.A., *Summa Cum Laude*, Loyola University Chicago, School of Business Administration, 1995; J.D., *Cum Laude*, Northwestern University School of Law, 1998

Lea Malani Bays | Partner

Lea Malani Bays is a partner in the Firm's San Diego office. She focuses on e-discovery issues, from preservation through production, and provides counsel to the Firm's multi-disciplinary e-discovery team consisting of attorneys, forensic analysts, and database professionals. Through her role as counsel to the e-discovery team, Bays is very familiar with the various stages of e-discovery, including identification of relevant electronically stored information, data culling, predictive coding protocols, privilege, and responsiveness reviews, as well as having experience in post-production discovery through trial preparation. Through speaking at various events, she is also a leader in shaping the broader dialogue on e-discovery issues.

Bays was recently part of the litigation team that earned the approval of a $131 million settlement in favor of plaintiffs in *Bennett v. Sprint Nextel Corp.* The settlement, which resolved claims arising from Sprint Corporation's ill-fated merger with Nextel Communications in 2005, represents a significant recovery for the plaintiff class, achieved after five years of tireless effort by the Firm. Prior to joining Robbins Geller, Bays was a Litigation Associate at Kaye Scholer LLP's New York office. She has experience in a wide range of litigation, including complex securities litigation, commercial contract disputes, business torts, antitrust, civil fraud, and trust and estate litigation.

Education

B.A., University of California, Santa Cruz, 1997; J.D., New York Law School, 2007

Honors / Awards

Law360 Distinguished Legal Writing Award, *The Burton Awards Program*, 2025; Ranked by *Chambers USA*, 2019-2022; J.D., *Magna Cum Laude*, New York Law School, 2007; Executive Editor, *New York Law School Law Review*; Legal Aid Society's Pro Bono Publico Award; NYSBA Empire State Counsel; Professor Stephen J. Ellmann Clinical Legal Education Prize; John Marshall Harlan Scholars Program, Justice Action Center

Alexandra S. Bernay | Partner

Alexandra Bernay is a partner in the Firm's San Diego office, where she specializes in antitrust and unfair competition class-action litigation. She has also worked on some of the Firm's largest securities fraud class actions, including the *Enron* litigation, which recovered an unprecedented $7.2 billion for investors.

Bernay currently serves as co-lead counsel in *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, in which a settlement of $5.5 billion was upheld by the Second Circuit Court of Appeals. This case was brought on behalf of millions of U.S. merchants against Visa and MasterCard and various card-issuing banks, challenging the way these companies set and collect tens of billions of dollars annually in merchant fees. The settlement is believed to be the largest antitrust class action settlement of all time.

Additionally, Bernay is litigating *In re American Airlines/JetBlue Antitrust Litig.*, a large antitrust case pending in the Eastern District of New York. That case is brought on behalf of airline passengers who overpaid for tickets because of alleged anticompetitive conduct between American Airlines and JetBlue. She is also part of the litigation team in a nationwide class action against LiveNation on behalf of concert ticket buyers. Other representative cases include *In re Remicade Antitrust Litig.*, a large case that settled for $25 million involving anticompetitive conduct in the biosimilars market, where the Firm was sole lead counsel for the end-payor plaintiffs, and *In re Dealer Mgmt. Sys. Antitrust Litig.*, which involves anticompetitive conduct related to dealer management systems on behalf of auto dealerships across the country. Another representative case is against Lloyd's of London. That action is a massive civil RICO case against the insurance company and its syndicates.

Bernay has also had experience in large consumer class actions, including *In re Checking Account Overdraft Litig.*, which case was brought on behalf of bank customers who were overcharged for debit card transactions and resulted in more than $500 million in settlements with major banks that manipulated customers' debit transactions to maximize overdraft fees. She also helped try to verdict a case against one of the world's largest companies who was sued on behalf of consumers. Her more recent trial experience includes a jury trial related to foreign exchange trading against one of the largest banks in the world, where the jury found that plaintiffs had proved a conspiracy as to a large network of banks. She was responsible for many of the successful trial motions in the case.

Education

B.A., Humboldt State University, 1997; J.D., University of San Diego School of Law, 2000

Honors / Awards

Super Lawyer, *Super Lawyers Magazine*, 2023-2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2024; Outstanding Antitrust Litigation Achievement in Private Law Practice, American Antitrust Institute, 2023; Distinguished Alumni, Forever Humboldt Alumni Association, 2023; Litigator of the Week, *Global Competition Review*, October 1, 2014

Kenneth J. Black | Partner

Kenneth Black is a partner in the Firm's San Francisco office, where his practice focuses on complex securities litigation and shareholder derivative litigation. Before joining the Firm, Black was a Sanctions Investigator at the Office of Foreign Assets Control, U.S. Treasury Department, where he investigated and assembled the evidentiary cases against targets of U.S. financial sanctions, and tracked the finances and assets of those targets.

Education

B.A., University of Michigan, 2004; M.A., American University, 2007; J.D., University of Michigan Law School, 2013

Honors / Awards

Leading Litigator in America, *Lawdragon*, 2024-2026; 500 X – The Next Generation, *Lawdragon*, 2023-2025; Comments Editor, *Michigan Journal of Private Equity & Venture Capital Law*, University of Michigan Law School

Erin W. Boardman | Partner

Erin Boardman is a partner in the Firm's Melville office, where her practice focuses on representing individual and institutional investors in class actions brought pursuant to the federal securities laws. She has been involved in the prosecution of numerous securities class actions that have resulted in millions of dollars in recoveries for defrauded investors, including: *Medoff v. CVS Caremark Corp*. (D.R.I.) ($48 million recovery); *Construction Laborers Pension Tr. of Greater St. Louis v. Autoliv Inc*. (S.D.N.Y.) ($22.5 million recovery); *In re Gildan Activewear Inc. Sec. Litig*. (S.D.N.Y.) (resolved as part of a $22.5 million global settlement); *In re L.G. Phillips LCD Co., Ltd., Sec. Litig*. (S.D.N.Y.) ($18 million recovery); *In re Giant Interactive Grp., Inc. Sec. Litig*. (S.D.N.Y.) ($13 million recovery); *In re Coventry HealthCare, Inc. Sec. Litig*. (D. Md.) ($10 million recovery); *Lenartz v. American Superconductor Corp*. (D. Mass.) ($10 million recovery); *Dudley v. Haub* (D.N.J.) ($9 million recovery); *Hildenbrand v. W Holding Co*. (D.P.R.) ($8.75 million recovery); *In re Doral Fin. Corp. Sec. Litig*. (D.P.R.) ($7 million recovery); and *Van Dongen v. CNinsure Inc*. (S.D.N.Y.) ($6.625 million recovery). During law school, Boardman served as Associate Managing Editor of *the Journal of Corporate, Financial and Commercial Law*, interned in the chambers of the Honorable Kiyo A. Matsumoto in the United States District Court for the Eastern District of New York, and represented individuals on a *pro bono* basis through the Workers' Rights Clinic.

Education

B.A., State University of New York at Binghamton, 2003; J.D., Brooklyn Law School, 2007

Honors / Awards

Super Lawyer, *Super Lawyers Magazine*, 2022-2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2022-2025; Rising Star, *Super Lawyers Magazine*, 2015-2018; B.A., *Magna Cum Laude*, State University of New York at Binghamton, 2003

Nicolle B. Brito | Partner

Nicolle Brito is a partner in the Firm's Boca Raton office. Her practice focuses on complex class actions and multi-district litigation, covering consumer fraud, public nuisance, environmental litigation, privacy litigation, pharmaceuticals, and RICO.

Brito was a member of the Firm's opioids team, leading the effort on behalf of cities and counties around the country in *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio). She was a member of the winning trial team on behalf of the People of the State of California in San Francisco's bellwether case against Allergan, Teva, Walgreens, and others in the prescription opioid supply chain, ultimately yielding $350 million in settlement funds after a successful liability trial.

Brito is currently a member of the Firm's PFAS litigation team, filing suit on behalf of governmental entities for PFAS contamination related to AFFF products. She is also a member of the Social Media litigation team, seeking to hold the technology industry accountable for social media youth addiction.

Before joining the Firm, Brito worked in complex arbitration, insurance, and personal injury law, where she gained significant litigation experience.

Education

B.A., Florida International University, 2003; J.D., Nova Southeastern University Shepard Broad College of Law, 2007

Honors / Awards

Best Lawyer in America: One to Watch, *Best Lawyers*®, 2026; Leading Plaintiff Consumer Lawyer, *Lawdragon*, 2025; 500 X - The Next Generation, *Lawdragon*, 2023; J.D., *Cum Laude*, Nova Southeastern University Shepard Broad College of Law, 2007

Douglas R. Britton | Partner

Doug Britton is a partner in the Firm's San Diego office. His practice focuses on securities fraud and corporate governance. Britton has been involved in settlements exceeding $1 billion and has secured significant corporate governance enhancements to improve corporate functioning. Notable achievements include *In re WorldCom, Inc. Sec. & "ERISA" Litig.*, where he was one of the lead partners that represented a number of opt-out institutional investors and secured an unprecedented recovery of $651 million; *In re SureBeam Corp. Sec. Litig.*, where he was the lead trial counsel and secured an impressive recovery of $32.75 million; and *In re Amazon.com, Inc. Sec. Litig.*, where he was one of the lead attorneys securing a $27.5 million recovery for investors.

Education

B.B.A., Washburn University, 1991; J.D., Pepperdine University School of Law, 1996

Honors / Awards

J.D., *Cum Laude*, Pepperdine University School of Law, 1996

Luke O. Brooks | Partner

Luke Brooks is a partner in the Firm's securities litigation practice group in the San Diego office. He focuses primarily on securities fraud litigation on behalf of individual and institutional investors, including state and municipal pension funds, Taft-Hartley funds, and private retirement and investment funds. Brooks served as trial counsel in *Jaffe v. Household International* in the Northern District of Illinois, a securities class action that obtained a record-breaking $1.575 billion settlement after 14 years of litigation, including a six-week jury trial in 2009 that resulted in a verdict for plaintiffs. Other prominent cases recently prosecuted by Brooks include *Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.*, in which plaintiffs recovered $388 million for investors in J.P. Morgan residential mortgage-backed securities, and a pair of cases – *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.* ("Cheyne") and *King County, Washington, et al. v. IKB Deutsche Industriebank AG* ("Rhinebridge") – in which plaintiffs obtained a settlement, on the eve of trial in Cheyne, from the major credit rating agencies and Morgan Stanley arising out of the fraudulent ratings of bonds issued by the Cheyne and Rhinebridge structured investment vehicles. *Reuters* described the settlement as a "landmark" deal and emphasized that it was the "first time S&P and Moody's have settled accusations that investors were misled by their ratings." An article published in *Rolling Stone* magazine entitled "The Last Mystery of the Financial Crisis" similarly credited Robbins Geller with uncovering "a mountain of evidence" detailing the credit rating agencies' fraud. Most recently, Brooks served as lead counsel in *Smilovits v. First Solar, Inc.*, and obtained a $350 million settlement on the eve of trial. The settlement is fifth-largest PSLRA settlement ever recovered in the Ninth Circuit.

Education

B.A., University of Massachusetts at Amherst, 1997; J.D., University of San Francisco, 2000

Honors / Awards

Litigation Star, *Benchmark Litigation*, 2023-2026; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2025; California - Litigation Star, *Benchmark Litigation*, 2024; Local Litigation Star, *Benchmark Litigation*, 2017-2018, 2020; California Star, *Benchmark Litigation*, 2019; State Litigation Star, *Benchmark Litigation*, 2019; Recommended Lawyer, *The Legal 500*, 2017-2018; Member, *University of San Francisco Law Review*, University of San Francisco

Spencer A. Burkholz | Partner

Spence Burkholz is a partner in the Firm's San Diego office and a member of the Firm's Management Committee. He has over 25 years of experience in prosecuting securities class actions and private actions on behalf of large institutional investors. Burkholz was one of the lead trial attorneys in *Jaffe v. Household International* in the Northern District of Illinois, a securities class action that obtained a record-breaking $1.575 billion settlement after 14 years of litigation, including a six-week jury trial in 2009 that resulted in a verdict for plaintiffs. Burkholz has also recovered billions of dollars for injured shareholders in cases such as *Enron* ($7.2 billion), *WorldCom* ($657 million), *Countrywide* ($500 million), *Qwest* ($445 million), *Wells Fargo* ($300 million), *Envision* ($177.5 million), *McKesson* ($141 million), *Cardinal Health* ($109 million), and *Cisco Systems* ($99.25 million).

Education

B.A., Clark University, 1985; J.D., University of Virginia School of Law, 1989

Honors / Awards

Rated AV Preeminent by Martindale-Hubbell; Litigation Star, *Benchmark Litigation*, 2023-2026; National Practice Area Star, *Benchmark Litigation*, 2020, 2024-2026; Best Lawyer in America, *Best Lawyers®*, 2018-2026; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2025; Leading Lawyer in America, *Lawdragon*, 2018-2025; California Lawyer Attorney of the Year (CLAY), *Daily Journal*, 2024; Top 20 Trial Lawyer in California, *Benchmark Litigation*, 2019, 2023-2024; Titan of the Plaintiffs Bar, *Law360*, 2024; Top Plaintiff Lawyer, *Daily Journal*, 2017, 2023; Plaintiffs' Lawyer Trailblazer, *The National Law Journal*, 2020, 2022; Top Lawyer in San Diego, *San Diego Magazine*, 2013-2022; Southern California Best Lawyer, *Best Lawyers®*, 2018-2021; Super Lawyer, *Super Lawyers Magazine*, 2015-2016, 2020; Top 100 Trial Lawyer, *Benchmark Litigation*, 2018-2020; Local Litigation Star, *Benchmark Litigation*, 2015-2018, 2020; Lawyer of the Year, *Best Lawyers®*, 2020; Recommended Lawyer, *The Legal 500*, 2017-2019; California Star, *Benchmark Litigation*, 2019; State Litigation Star, *Benchmark Litigation*, 2019; Plaintiff Attorney of the Year, *Benchmark Litigation*, 2018; B.A., *Cum Laude*, Clark University, 1985; *Phi Beta Kappa*, Clark University, 1985

Michael G. Capeci | Partner

Michael Capeci is a partner in the Firm's Melville office. His practice focuses on prosecuting complex securities class action lawsuits in federal and state courts. Throughout his tenure with the Firm, Capeci has led the litigation teams prosecuting numerous class action cases in federal and/or state court alleging violations of the Securities Exchange Act of 1934 and/or the Securities Act of 1933, such as: *Strougo v. Mallinckrodt plc* ($46 million recovery); *Gordon v. Vanda Pharmaceuticals, Inc.* ($11.5 million recovery); *Nayani v. LifeStance Health Group, Inc.* ($50 million recovery); and *Chester County Emps.' Ret. Fund v. Alnylam Pharmaceuticals, Inc.* ($7 million recovery). In addition, Capeci has played an integral role in the teams prosecuting securities class action cases such as: *In re BHP Billiton Ltd. Sec. Litig.* ($50 million recovery); *Galestan v. OneMain Holdings, Inc.* ($9 million recovery); and *City of Pontiac Gen. Emps.' Ret. Sys. v. Lockheed Martin Corp.* ($19.5 million recovery).

Education

B.S., Villanova University, 2007; J.D., Hofstra University School of Law, 2010

Honors / Awards

Super Lawyer, *Super Lawyers Magazine*, 2022-2025; 500 X – The Next Generation, *Lawdragon*, 2023-2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2025; Rising Star, *Super Lawyers Magazine*, 2014-2021; J.D., *Cum Laude,* Hofstra University School of Law, 2010

Jennifer N. Caringal | Partner

Jennifer Caringal is a partner in the Firm's San Diego office, where her practice focuses on complex securities litigation. Jennifer is a member of the Firm's Lead Plaintiff Advisory Team, which advises institutional investors in connection with lead plaintiff motions, and assists them in securing appointment as lead plaintiff.

Caringal served as lead counsel in *In re Am. Realty Cap. Props., Inc. Litig.*, a case arising out of ARCP's manipulative accounting practices, and obtained a $1.025 billion recovery. For five years, she and the litigation team prosecuted nine different claims for violations of the Securities Exchange Act of 1934 and the Securities Act of 1933, involving seven different stock or debt offerings and two mergers. The recovery represents the highest percentage of damages of any major PSLRA case prior to trial and includes the largest personal contributions by individual defendants in history.

Education

B.A., University of Illinois, 2006; J.D., Washington University in St. Louis, School of Law, 2012

Honors / Awards

Leading Litigator in America, *Lawdragon*, 2025-2026; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2022-2025; 500 X – The Next Generation, *Lawdragon*, 2023-2024; Best Lawyer in America: One to Watch, *Best Lawyers*®, 2021-2024; They've Got Next: The 40 Under 40, *Bloomberg Law*, 2022; Rising Star, *Super Lawyers Magazine*, 2021-2022; Best Lawyer in Southern California: One to Watch, *Best Lawyers*®, 2021

Rachel A. Cocalis | Partner

Rachel Cocalis is a partner in the Firm's San Diego office. She represents pension funds and class members in securities fraud class actions. Cocalis was on the team of Robbins Geller attorneys who obtained a $97.5 million recovery in *Marcus v. J.C. Penney Company, Inc*.

Most recently, Cocalis was a key member of the Robbins Geller litigation team in *Monroe County Employees' Retirement System v. The Southern Company* in which a $87.5 million settlement was reached after three years of litigation. The settlement resolved claims for violations of the Securities Exchange Act of 1934 stemming from defendants' issuance of materially misleading statements and omissions regarding the status of construction of a first-of-its-kind "clean coal" power plant that was designed to transform coal into synthetic gas that could then be used to fuel the power plant. Cocalis was also on the litigation team that obtained a settlement of up to $85 million in *In re Morning Song Bird Food Litigation*, resolving claims that Scotts Miracle-Gro knowingly sold wild bird food treated with pesticides that are hazardous to birds.

Education

B.A., Princeton University, 2010; J.D., University of California, Hastings College of the Law, 2016

Honors / Awards

Best Lawyer in America: One to Watch, *Best Lawyers®*, 2026; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2025; Rising Star, *Super Lawyers Magazine*, 2025; 500 X - The Next Generation, *Lawdragon*, 2024; J.D., *magna cum laude*, University of California, Hastings College of the Law, 2016; B.A., High Honors, Princeton University, 2010

Brian E. Cochran | Partner

Brian Cochran is a partner in the Firm's San Diego and Chicago offices. He focuses his practice on complex securities, shareholder, consumer protection, and ERISA litigation. Cochran specializes in case investigation and initiation and lead plaintiff issues arising under the Private Securities Litigation Reform Act of 1995. He has developed dozens of cases under the federal securities laws and recovered billions of dollars for injured investors and consumers. Several of Cochran's cases have pioneered new ground, such as cases on behalf of cryptocurrency investors and in blank check companies (a.k.a "SPACs"), and sparked follow-on governmental investigations into corporate malfeasance.

Cochran was a member of the litigation team that achieved a $1.21 billion settlement in the *Valeant Pharmaceuticals* securities litigation. Cochran also developed the *Dynamic Ledger* securities litigation, one of the first cases to challenge a cryptocurrency issuer's failure to register under the federal securities laws, which settled for $25 million. In addition, Cochran was part of the team that secured a historic $25 million settlement on behalf of Trump University students, which Cochran prosecuted on a *pro bono* basis. Other notable recoveries include: *Rite Aid Merger* ($192.5 million); *Exelon* ($173 million); *Alta Mesa* ($126.3 million); *Micro Focus* ($107.5 million); *Walgreens* ($105 million); *VMWare* ($102.5 million); *Scotts Miracle-Gro* (up to $85 million); *Psychiatric Solutions* ($65 million); *SQM Chemical & Mining Co. of Chile* ($62.5 million); *GE ERISA* ($61 million); *HPE-DXC Merger* ($47.5 million, subject to court approval); *Grubhub* ($42 million); *Sea, Ltd.* ($40 million); *Big Lots* ($38 million); *Credit Suisse* ($32.5 million); *Waste Management* ($30 million, subject to court approval); *GoHealth* ($29.5 million); *Reckitt Benckiser* ($19.6 million); *DouYu* ($15 million); *REV Group* ($14.25 million); *Fifth Street Finance* ($14 million); *Third Avenue Management* ($14 million); *Funko* ($14 million); *LJM* ($12.85 million); *Sealed Air* ($12.5 million); and *Camping World* ($12.5 million).

Education

A.B., Princeton University, 2006; J.D., University of California at Berkeley School of Law, Boalt Hall, 2012

Honors / Awards

Future Star, *Benchmark Litigation*, 2026; Leading Litigator in America, *Lawdragon*, 2025-2026; Best Lawyer in America, *Best Lawyers®*, 2025-2026; Leading Lawyer, *The Legal 500*, 2024-2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2024-2025; 500 X – The Next Generation, *Lawdragon*, 2023-2024; 40 & Under List, *Benchmark Litigation*, 2021, 2023-2024; Next Generation Partner, *The Legal 500*, 2020-2023; Rising Star, *Super Lawyers Magazine*, 2020-2022; Rising Star, *The Legal 500*, 2019; A.B., with Honors, Princeton University, 2006; J.D., Order of the Coif, University of California at Berkeley School of Law, Boalt Hall, 2012

Mark Conover | Partner

Mark Conover is a partner with Robbins Geller, based in the Firm's San Diego office. With over 50 felony jury trials and a distinguished career as a former federal prosecutor, Conover brings a wealth of trial experience to the Firm. He focuses on complex investigations, securities fraud litigation, and high-stakes trials, drawing on his extensive background in handling large-scale financial fraud, public corruption, and corporate misconduct cases.

Conover began his legal career as a litigation associate at Luce, Forward, Hamilton & Scripps LLP, before joining the U.S. Attorney's Office for the Southern District of California. There, he rose through the ranks to serve as second-in-command, overseeing the day-to-day administration of one of the largest U.S. Attorney's offices in the nation. At the U.S. Attorney's Office, Conover also served as Chief of the Major Frauds and Public Corruption Section, where he oversaw the prosecution of complex cases that resulted in groundbreaking convictions and exceptional outcomes. He played a key role in prosecuting high-profile cases, including the conviction of a sitting U.S. Congressman.

Throughout his tenure at the U.S. Attorney's Office, Conover prosecuted and convicted high-level executives at publicly traded companies and led investigations into violations of the Foreign Corrupt Practices Act (FCPA). His strategic collaborations with agencies such as the FBI, IRS, SEC, and DOJ have been instrumental in tackling multi-jurisdictional investigations and holding corporate and government wrongdoers accountable. These experiences gave him invaluable insights into the investigation of securities fraud by the DOJ and the SEC.

In addition to his legal practice, Conover has served as an adjunct professor at California Western School of Law for over a decade, mentoring the next generation of lawyers. He also served for many years as a DOJ mediator, successfully resolving disputes across the country.

Education

B.S., Utah Valley University, 2001; J.D., University of Southern California School of Law, 2004

Honors / Awards

Leading Litigator in America, *Lawdragon*, 2026

Sheri M. Coverman | Partner

Sheri Coverman is a partner in the Firm's Boca Raton office. Her practice focuses on complex class actions, including securities, corporate governance, and consumer fraud litigation.

Coverman is a member of the Firm's Institutional Outreach Team, which provides advice to the Firm's institutional clients, including numerous public pension systems and Taft-Hartley funds throughout the United States, on issues related to corporate fraud, shareholder litigation, and corporate governance issues. Coverman frequently addresses trustees regarding their options for seeking redress for losses due to violations of securities laws and assists in ongoing litigation involving many Firm clients. Coverman's institutional clients are also involved in other types of class actions, namely: *In re National Prescription Opiate Litigation*.

Education

B.A., University of Florida, 2008; J.D., University of Florida Levin College of Law, 2011

Honors / Awards

Best Lawyer in America: One to Watch, *Best Lawyers*®, 2026

Joseph D. Daley | Partner

Joseph Daley is a partner in the Firm's San Diego office, serves on the Firm's Securities Hiring Committee, and is a member of the Firm's Appellate Practice Group. Precedents include: *City of Birmingham Ret. & Relief Sys. v. Davis*, 806 F. App'x 17 (2d Cir. 2020); *City of Providence v. Bats Glob. Mkts., Inc.*, 878 F.3d 36 (2d Cir. 2017); *DeJulius v. New Eng. Health Care Emps. Pension Fund*, 429 F.3d 935 (10th Cir. 2005); *Fikes Wholesale, Inc. v. Visa U.S.A., Inc.*, 62 F.4th 704 (2d Cir. 2023); *Frank v. Dana Corp.* ("*Dana I*"), 547 F.3d 564 (6th Cir. 2008); *Frank v. Dana Corp.* ("*Dana II*"), 646 F.3d 954 (6th Cir. 2011); *Freidus v. Barclays Bank PLC*, 734 F.3d 132 (2d Cir. 2013); *In re HealthSouth Corp. Sec. Litig.*, 334 F. App'x 248 (11th Cir. 2009); *In re Merck & Co. Sec., Derivative & ERISA Litig.*, 493 F.3d 393 (3d Cir. 2007); *In re Quality Sys., Inc. Sec. Litig.*, 865 F.3d 1130 (9th Cir. 2017); *In re Qwest Commc'ns Int'l*, 450 F.3d 1179 (10th Cir. 2006); *Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d 1031 (9th Cir. 2008); *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012); *Rosenbloom v. Pyott* ("*Allergan*"), 765 F.3d 1137 (9th Cir. 2014); *San Diego Cnty. Emps. Ret. Ass'n v. Johnson & Johnson*, 2025 U.S. App. LEXIS 18986 (3d Cir. July 30, 2025); *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956 (7th Cir. 2013); *Siracusano v. Matrixx Initiatives, Inc.*, 585 F.3d 1167 (9th Cir. 2009), *aff'd*, 563 U.S. 27 (2011); and *Southland Sec. Corp. v. INSpire Ins. Sols. Inc.*, 365 F.3d 353 (5th Cir. 2004). Daley is admitted to practice before the U.S. Supreme Court, as well as before 12 U.S. Courts of Appeals around the nation.

Education

B.S., Jacksonville University, 1981; J.D., University of San Diego School of Law, 1996

Honors / Awards

Best Lawyer in America, *Best Lawyers*®, 2024-2026; Seven-time Super Lawyer, *Super Lawyers Magazine*; Appellate Moot Court Board, Order of the Barristers, University of San Diego School of Law; Best Advocate Award (Traynore Constitutional Law Moot Court Competition), First Place and Best Briefs (Alumni Torts Moot Court Competition and USD Jessup International Law Moot Court Competition)

Stuart A. Davidson | Partner

Stuart Davidson is a partner in the Firm's Boca Raton office. His practice focuses on complex consumer class actions, including cases involving deceptive and unfair trade practices, privacy and data breach issues, and antitrust violations.

He has served as class counsel in some of the nation's most significant privacy and consumer cases, including: *In re Facebook Biometric Information Privacy Litigation*, No. 3:15-cv-03747-JD (N.D. Cal.) ($650 million recovery in a cutting-edge class action concerning Facebook's alleged privacy violations through its collection of user's biometric identifiers without informed consent); *In re Yahoo! Inc. Customer Data Security Breach Litigation*, No. 5:16-md-02752-LHK (N.D. Cal.) ($117.5 million recovery in the largest data breach in history); *Kehoe v. Fidelity Federal Bank & Trust*, No. 9:03-cv-80593-DTKH (S.D. Fla.) ($50 million recovery in Driver's Privacy Protection Act case on behalf of half-a-million Florida drivers against a national bank); *In re Independent Living Systems Data Breach Litigation*, No. 1:23-cv-21060-KMW (S.D. Fla.) ($14 million recovery); *In re Fortra File Transfer Software Data Security Breach Litigation*, No. 1:24-md-03090-RAR (S.D. Fla.) ($20 million recovery, representing Aetna patients); *In re American Financial Resources, Inc. Data Breach Litigation*, No. 2:22-cv-01757-MCA-JSA (D.N.J.) ($2.5 million recovery); *In re Sony Gaming Networks & Customer Data Security Breach Litigation*, No. 3:11-md-02258-AJB-MDD (S.D. Cal.) (settlement valued at $15 million concerning the massive data breach of Sony's PlayStation Network); and *In re Solara Medical Supplies Data Breach Litigation*, No. 3:19-cv-02284-H-KSC (S.D. Cal.) ($5 million all-cash settlement for 114,000 victims of healthcare data breach).

Davidson currently serves as Plaintiffs' Co-Lead Counsel in *In re Perry Johnson & Associates Medical Transcription Data Security Breach Litigation*, No. 1:24-md-03096-RPK-LGD (E.D.N.Y.), *In re American Medical Collection Agency, Inc. Customer Data Security Breach Litigation*, No. 2:19-md-02904-MCA-MAH (D.N.J.) (representing class of LabCorp customers), and *Garner v. Amazon.com, Inc.*, No. 2:21-cv-00750-RSL (W.D. Wash.) (certified class of 100 million Amazon Alexa registrants alleging Amazon's deceptive advertising for Alexa-enabled devices); on Plaintiffs' Executive Committee in *In re Lakeview Loan Servicing Data Breach Litigation*, No. 1:22-cv-20955-DPG (S.D. Fla.); and on Plaintiffs' Steering Committee in *In re FTX Cryptocurrency Exchange Collapse Litigation*, No. 1:23-md-03076-KMM (S.D. Fla.). Davidson also currently represents the State of Arkansas in a major antitrust enforcement action, *State of Arkansas ex rel. Griffin v. Syngenta Crop Protection AG*, No. 4:22-cv-01287-BSM (E.D. Ark.) and a privacy enforcement action, *State of Arkansas ex rel. Griffin v. General Motors LLC*, No. 54CV-25-77 (Ark. Cir. Ct., Phillips Cnty.).

Davidson also spearheaded several aspects of *In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices & Antitrust Litigation*, No. 2:17-md-02785-DDC-TJJ (D. Kan.) ($609 million total recovery achieved weeks prior to trial in certified class action alleging antitrust claims involving the illegal reverse payment settlement to delay the generic EpiPen, which allowed the prices of the life-saving EpiPen to rise over 600% in 9 years), served as Co-Lead Class Counsel in three cases brought against Genworth Life Insurance Company on behalf of long-term care insureds, *Skochin v. Genworth Life. Ins. Co.*, No. 3:19-cv-00049-REP (E.D. Va.); *Halcom v. Genworth Life Ins. Co.*, No. 3:21-cv-00019-REP (E.D. Va.); and *Haney v. Genworth Life Ins. Co.*, No. 3:22-cv-00055-REP (E.D. Va.), recovering hundreds of millions of dollars in cash damages for policyholders, and served as Plaintiffs' Co-Lead Counsel in *In re NHL Players' Concussion Injury Litigation*, No. 0:14-md-02551-SRN-BRT (D. Minn.) (representing retired National Hockey League players in multidistrict litigation suit against the NHL regarding injuries suffered due to repetitive head trauma and concussions), and in *In re Pet Food Products Liability Litigation*, No. 1:07-cv-02867-NLH-AMD (D.N.J.) ($24 million recovery in multidistrict consumer class action on behalf of thousands of aggrieved pet owners nationwide against some of the nation's largest pet food manufacturers, distributors, and retailers). He also served as Plaintiffs' Co-Lead Counsel in *In re*

UnitedGlobalCom, Inc. Shareholder Litigation, C.A. No. 1012-VCS (Del. Ch.) ($25 million recovery weeks before trial); *In re Winn-Dixie Stores, Inc. Shareholder Litigation*, No. 16-2011-CA-010616 (Fla. Cir. Ct.) ($11.5 million recovery for former Winn-Dixie shareholders following the corporate buyout by BI-LO); and *In re AuthenTec, Inc. Shareholder Litigation*, No. 5-2012-CA-57589 (Fla. Cir. Ct.) ($10 million recovery for former AuthenTec shareholders following a merger with Apple). The latter two cases are the two largest merger and acquisition recoveries in Florida history.

Davidson is a former lead assistant public defender in the Felony Division of the Broward County, Florida Public Defender's Office. During his tenure at the Public Defender's Office, he tried over 30 jury trials and defended individuals charged with major crimes ranging from third-degree felonies to life and capital felonies.

Education

B.A., State University of New York at Geneseo, 1993; J.D., Nova Southeastern University Shepard Broad College of Law, 1996

Honors / Awards

Litigation Star, *Benchmark Litigation*, 2023-2026; Leading Litigator in America, *Lawdragon*, 2024-2026; Best Lawyer in America, *Best Lawyers®*, 2026; Recommended Lawyer, *The Legal 500*, 2023-2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2020-2025; Law360 Distinguished Legal Writing Award, *The Burton Awards Program*, 2025; Leading Plaintiff Consumer Lawyer, *Lawdragon*, 2022-2025; Leading Lawyer in America, *Lawdragon*, 2023-2025; Outstanding Antitrust Litigation Achievement in Private Law Practice, American Antitrust Institute, 2022; Super Lawyer, *Super Lawyers Magazine*, 2021-2022; One of "Florida's Most Effective Lawyers" in the Privacy category, American Law Media, 2020; J.D., *Summa Cum Laude*, Nova Southeastern University Shepard Broad College of Law, 1996; Associate Editor, *Nova Law Review*, Book Awards in Trial Advocacy, International Law, and Criminal Pretrial Practice

Jason C. Davis | Partner

Jason Davis is a partner in the Firm's San Francisco office where he practices securities class actions and complex litigation involving equities, fixed-income, synthetic, and structured securities issued in public and private transactions. Davis was on the trial team in *Jaffe v. Household Int'l, Inc.*, a securities class action that obtained a record-breaking $1.575 billion settlement after 14 years of litigation, including a six-week jury trial in 2009 that resulted in a verdict for plaintiffs. Most recently, he was part of the litigation team in *Luna v. Marvell Tech. Grp., Ltd.*, resulting in a $72.5 million settlement that represents approximately 24% to 50% of the best estimate of classwide damages suffered by investors.

Before joining the Firm, Davis focused on cross-border transactions, mergers and acquisitions at Cravath, Swaine and Moore LLP in New York.

Education

B.A., Syracuse University, 1998; J.D., University of California at Berkeley, Boalt Hall School of Law, 2002

Honors / Awards

B.A., *Summa Cum Laude*, Syracuse University, 1998; International Relations Scholar of the year, Syracuse University; Teaching fellow, examination awards, Moot court award, University of California at Berkeley, Boalt Hall School of Law

Mark J. Dearman | Partner

Mark Dearman is a partner in the Firm's Boca Raton office, where his practice focuses on consumer fraud, securities fraud, mass torts, antitrust, and whistleblower litigation.

Dearman, along with other Robbins Geller attorneys, is currently leading the effort on behalf of cities and counties around the country in *In re National Prescription Opiate Litigation*, No. 1:17-md-02804 (N.D. Ohio). He was appointed to the Plaintiffs' Steering Committee in *In re Zantac (Ranitidine) Products Liability Litigation*, No. 9:20-md-02924 (S.D. Fla.), and as Chair of the Plaintiffs' Executive Committee in *In re Apple Inc. Device Performance Litigation*, No. 5:18-md-02827 (N.D. Cal.), Dearman, along with co-counsel, obtained a $310 million settlement. His other recent representative cases include serving as class counsel in *In re Juul Labs, Inc., Marketing, Sales Practices, and Products Liability Litigation*, No. 3:19-md-02913 (N.D. Cal.); *In re McKinsey & Co., Inc. National Prescription Opiate Consultant Litigation*, No. 3:21-md-02996 (N.D. Cal.); *In re Facebook Biometric Information Privacy Litigation*, No. 3:15-cv-03747 (N.D. Cal.) ($650 million recovery in a class action concerning Facebook's alleged privacy violations through its collection of user's biometric identifiers without informed consent); *In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices & Antitrust Litigation*, No. 2:17-md-02785 (D. Kan.) ($609 million total recovery achieved weeks prior to trial in certified class action alleging antitrust claims involving the illegal reverse payment settlement to delay the generic EpiPen); *In re FieldTurf Artificial Turf Sales & Marketing Practices Litigation*, No. 3:17-md-02779 (D.N.J.); *In re Sony Gaming Networks & Customer Data Security Breach Litigation*, 903 F. Supp. 2d 942 (S.D. Cal. 2012); *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation*, 2016 U.S. Dist. LEXIS 1357 (N.D. Cal. Jan. 5, 2016); *In re Aluminum Warehousing Antitrust Litigation*, 95 F. Supp. 3d 419 (S.D.N.Y. 2015); *In re Liquid Aluminum Sulfate Antitrust Litigation*, No. 2:16-md-2687 (D.N.J.); *In re Winn-Dixie Stores, Inc. Shareholder Litigation*, No. 16-2011-CA-010616 (Fla. 4th Jud. Cir. Ct., Duval Cnty.); *Gemelas v. Dannon Co. Inc.*, No. 1:08-cv-00236 (N.D. Ohio); and *In re AuthenTec, Inc. Shareholder Litigation*, No. 05-2012-CA-57589 (Fla. 18th Jud. Cir. Ct., Brevard Cnty.).

Education

B.A., University of Florida, 1990; J.D., Nova Southeastern University, 1993

Honors / Awards

AV rated by Martindale-Hubbell; Leading Litigator in America, *Lawdragon*, 2024-2026; Best Lawyer in America, *Best Lawyers®*, 2024-2026; Super Lawyer, *Super Lawyers Magazine*, 2014-2020, 2025; Recommended Lawyer, *The Legal 500*, 2023, 2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2020-2025; Leading Plaintiff Consumer Lawyer, *Lawdragon*, 2022-2025; Leading Lawyer in America, *Lawdragon*, 2023-2025; In top 1.5% of Florida Civil Trial Lawyers in *Florida Trend*'s Florida Legal Elite, 2004, 2006

Kathleen B. Douglas | Partner

Kathleen Douglas is a partner in the Firm's Boca Raton office. She focuses her practice on securities fraud class actions and consumer fraud. Most recently, Douglas and a team of Robbins Geller attorneys obtained a $1.21 billion settlement in *In re Valeant Pharms. Int'l, Inc. Sec. Litig.*, a case that *Vanity Fair* reported as "the corporate scandal of its era" that had raised "fundamental questions about the functioning of our health-care system, the nature of modern markets, and the slippery slope of ethical rationalizations." This is the largest securities class action settlement against a pharmaceutical manufacturer and the ninth largest ever.

Douglas was also a key member of the litigation team in *In re UnitedHealth Grp. Inc. PSLRA Litig.*, in which she and team of Robbins Geller attorneys achieved a substantial $925 million recovery. In addition to the monetary recovery, UnitedHealth also made critical changes to a number of its corporate governance policies, including electing a shareholder-nominated member to the company's Board of Directors. Likewise, in *Nieman v. Duke Energy Corp.*, she and a team of attorneys obtained a $146.25 million recovery, which is the largest recovery in North Carolina for a case involving securities fraud and is one of the five largest recoveries in the Fourth Circuit. In addition, Douglas was a member of the team of attorneys that represented investors in *Knurr v. Orbital ATK, Inc.*, which recovered $108 million for shareholders and is believed to be the fourth-largest securities class action settlement in the history of the Eastern District of Virginia. Douglas has served as class counsel in several class actions brought on behalf of Florida emergency room physicians. These cases were against some of the nation's largest Health Maintenance Organizations and settled for substantial increases in reimbursement rates and millions of dollars in past damages for the class.

Education

B.S., Georgetown University, 2004; J.D., University of Miami School of Law, 2007

Honors / Awards

Future Star, *Benchmark Litigation*, 2025-2026; Leading Plaintiff Consumer Lawyer, *Lawdragon*, 2023-2025; Best Lawyer in America: One to Watch, *Best Lawyers*®, 2024-2025; 40 & Under List, *Benchmark Litigation*, 2023; 40 & Under Hot List, *Benchmark Litigation*, 2021; Rising Star, *Super Lawyers Magazine*, 2012-2017; B.S., *Cum Laude*, Georgetown University, 2004

Daniel S. Drosman | Partner

Dan Drosman is a partner in the Firm's San Diego office and a member of the Firm's Management Committee. He focuses his practice on securities fraud and other complex civil litigation and has obtained significant recoveries for investors in cases such as *Morgan Stanley*, *Cisco Systems*, *The Coca-Cola Company*, *Petco*, *PMI*, and *America West*. Drosman served as lead trial counsel in *Jaffe v. Household International* in the Northern District of Illinois, a securities class action that obtained a record-breaking $1.575 billion settlement after 14 years of litigation, including a six-week jury trial in 2009 that resulted in a verdict for plaintiffs. Drosman also helped secure a $388 million recovery for investors in J.P. Morgan residential mortgage-backed securities in *Fort Worth Employees' Retirement Fund v. J.P. Morgan Chase & Co.* On a percentage basis, that settlement is the largest recovery ever achieved in an RMBS class action. Drosman also served as lead counsel in *Smilovits v. First Solar, Inc.*, and obtained a $350 million settlement on the eve of trial. The settlement is fifth-largest PSLRA settlement ever recovered in the Ninth Circuit.

Most recently, Drosman led a team of Robbins Geller attorneys to a record-breaking $809.5 million

settlement in *In re Twitter, Inc. Sec. Litig.*, which settled the day before trial was set to commence. The settlement is the largest securities fraud class action recovery in the Ninth Circuit in the last decade and one of the top 20 shareholder class action settlements of all time. Drosman was part of the Robbins Geller litigation team in *Monroe County Employees' Retirement System v. The Southern Company* in which an $87.5 million settlement was reached after three years of litigation. The settlement resolved claims for violations of the Securities Exchange Act of 1934 stemming from defendants' issuance of materially misleading statements and omissions regarding the status of construction of a first-of-its-kind "clean coal" power plant that was designed to transform coal into synthetic gas that could then be used to fuel the power plant. In another recent case, Drosman and the Robbins Geller litigation team obtained a $62.5 million settlement in *Villella v. Chemical and Mining Company of Chile Inc.*, which alleged that Sociedad Química y Minera de Chile S.A. ("SQM") violated the Securities Exchange Act of 1934 by issuing materially false and misleading statements regarding the Company's failure to disclose that money from SQM was channeled illegally to electoral campaigns for Chilean politicians and political parties as far back as 2009. SQM had also filed millions of dollars' worth of fictitious tax receipts with Chilean authorities in order to conceal bribery payments from at least 2009 through fiscal year 2014.

In a pair of cases – *Abu Dhabi Commercial Bank, et al. v. Morgan Stanley & Co. Inc.* ("*Cheyne*" litigation) and *King County, Washington, et al. v. IKB Deutsche Industriebank AG* ("*Rhinebridge*" litigation) – Drosman led a group of attorneys prosecuting fraud claims against the credit rating agencies, where he is distinguished as one of the few plaintiffs' counsel to defeat the rating agencies' traditional First Amendment defense and their motions for summary judgment based on the mischaracterization of credit ratings as mere opinions not actionable in fraud.

Before joining the Firm, Drosman served as an Assistant District Attorney for the Manhattan District Attorney's Office, and an Assistant United States Attorney in the Southern District of California, where he investigated and prosecuted violations of the federal narcotics, immigration, and official corruption law.

Education

B.A., Reed College, 1990; J.D., Harvard Law School, 1993

Honors / Awards

Litigation Star, *Benchmark Litigation*, 2023-2026; National Practice Area Star, *Benchmark Litigation*, 2026; Leading Litigator in America, *Lawdragon*, 2026; Best Lawyer in America, *Best Lawyers®*, 2019-2026; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2025; Legend, *Lawdragon*, 2025; Leading Lawyer in America, *Lawdragon*, 2018-2025; Recommended Lawyer, *The Legal 500*, 2017-2018, 2023-2024; Lawyer of the Year, *Best Lawyers®*, 2022, 2024; West Trailblazer, *The American Lawyer*, 2022; Top Plaintiff Lawyer, *Daily Journal*, 2022; Plaintiff Litigator of the Year, *Benchmark Litigation*, 2022; Titan of the Plaintiffs Bar, *Law360*, 2022; Southern California Best Lawyers, *The Wall Street Journal*, 2021; Southern California Best Lawyer, *Best Lawyers®*, 2019-2021; Super Lawyer, *Super Lawyers Magazine*, 2017-2020; Top 100 Lawyer, *Daily Journal*, 2017; Department of Justice Special Achievement Award, Sustained Superior Performance of Duty; B.A., Honors, Reed College, 1990; *Phi Beta Kappa*, Reed College, 1990

Thomas E. Egler | Partner

Thomas Egler is a partner in the Firm's San Diego office and focuses his practice on representing clients in major complex, multidistrict litigations, such as *Lehman Brothers*, *Countrywide Mortgage Backed Securities*, *WorldCom*, *AOL Time Warner*, and *Qwest*. He has represented institutional investors both as plaintiffs in individual actions and as lead plaintiffs in class actions.

Most recently, along with co-counsel and a team of Robbins Geller attorneys, Egler led the effort on behalf of cities and counties around the country in *In re National Prescription Opiate Litigation*. In 2022, Egler served on the team of counsel in a federal bench trial in San Francisco in a case that had been selected as a bellwether in the multidistrict litigation. The team achieved combined settlements of nearly $70 million for San Francisco and more than $50 billion nationally from multiple pharmaceutical companies who were defendants in the national litigation. The Honorable Charles R. Breyer of the Northern District of California ruled that Walgreens, the only defendant remaining in the San Francisco case, was liable for its role in the opioid crisis in San Francisco.

Egler also has been a Lawyer Representative to the Ninth Circuit Judicial Conference from the Southern District of California, is a member of the Hon. William B. Enright Inn of Court in San Diego, and in the past has served on the Executive Board of the San Diego chapter of the Association of Business Trial Lawyers. Before joining the Firm, Egler was a law clerk to the Honorable Donald E. Ziegler, Chief Judge, United States District Court, Western District of Pennsylvania.

Education

B.A., Northwestern University, 1989; J.D., The Catholic University of America, Columbus School of Law, 1995

Honors / Awards

Best Lawyer in America, *Best Lawyers®*, 2024-2026; Leading Lawyer in America, *Lawdragon*, 2024; Super Lawyer, *Super Lawyers Magazine*, 2017-2018; Associate Editor, *Catholic University Law Review*

Alan I. Ellman | Partner

Alan Ellman is a partner in the Firm's Melville office, where he concentrates his practice on prosecuting complex securities fraud cases on behalf of institutional investors. Most recently, Ellman was on the team of Robbins Geller attorneys who obtained a $34.5 million recovery in *Patel v. L-3 Communications Holdings, Inc.*, which represents a high percentage of damages that plaintiffs could reasonably expect to be recovered at trial and is more than eight times higher than the average settlement of cases with comparable investor losses. He was also on the team of attorneys who recovered in excess of $34 million for investors in *In re OSG Sec. Litig.*, which represented an outsized recovery of 93% of bond purchasers' damages and 28% of stock purchasers' damages. The creatively structured settlement included more than $15 million paid by a bankrupt entity.

Ellman was also on the team of Robbins Geller attorneys who achieved final approval in *Curran v. Freshpet, Inc.*, which provides for the payment of $10.1 million for the benefit of eligible settlement class members. Additionally, he was on the team of attorneys who obtained final approval of a $7.5 million recovery in *Plymouth County Retirement Association v. Advisory Board Company*. In 2006, Ellman received a Volunteer and Leadership Award from Housing Conservation Coordinators (HCC) for his *pro bono* service defending a client in Housing Court against a non-payment action, arguing an appeal before the Appellate Term, and staffing HCC's legal clinic. He also successfully appealed a *pro bono* client's criminal sentence before the Appellate Division.

Education

B.S., B.A., State University of New York at Binghamton, 1999; J.D., Georgetown University Law Center, 2003

Honors / Awards

Super Lawyer, *Super Lawyers Magazine*, 2017-2025; Pro Bono Publico Award, *Casa Cornelia Law Center*, 2021-2022; Rising Star, *Super Lawyers Magazine*, 2014-2015; B.S., B.A., *Cum Laude*, State University of New York at Binghamton, 1999

Jason A. Forge | Partner

Jason Forge is a partner in the Firm's San Diego office. He specializes in complex investigations, litigation, and trials. As a federal prosecutor and private practitioner, Forge has conducted and supervised scores of jury and bench trials in federal and state courts, including the month-long trial of a defense contractor who conspired with Congressman Randy "Duke" Cunningham in the largest bribery scheme in congressional history. He recently obtained a $350 million settlement with Alphabet, Inc., which was made possible only by first winning a unanimous published appellate decision, reversing a district court order that had dismissed the entire case. This is the largest ever post-reversal securities fraud recovery in the Ninth Circuit.

In addition to Alphabet, Forge has secured nine-figure payouts from other corporate goliaths, including Wal-Mart ($160 million) and Pfizer ($400 million). *City of Pontiac General Employees' Retirement System v. Wal-Mart Stores, Inc.* was the first successful securities fraud case against Wal-Mart. And in the case against Pfizer, Forge led an investigation that uncovered key documents that Pfizer had not produced in discovery. Although fact discovery in the case had already closed, the district judge ruled that the documents had been improperly withheld and ordered that discovery be reopened, including reopening the depositions of Pfizer's former CEO, CFO, and General Counsel. Less than six months after

completing these depositions, Pfizer settled the case for $400 million.

Forge also was a key member of the Firm's winning trial team in *Hsu v. Puma Biotechnology, Inc.* – one of only 13 securities fraud class action verdicts for investors in nearly 30 years. After that trial victory, Forge joined a Robbins Geller litigation team that had defeated 12 motions for summary judgment against 40 defendants and was about to depose 17 experts in the home stretch to trial. Forge led the effort to use these depositions to disprove a truth-on-the-market argument that nine defense experts had embraced. After the last of these expert depositions, the defendants dropped their lead truth-on-the-market expert and the Robbins Geller team secured a $1.025 billion settlement from American Realty Capital Properties and other defendants that included a record $237 million contribution from individual defendants and represented more than twice the recovery rate obtained by several funds that had opted out of the class.

Forge was a key member of the litigation team that secured a historic recovery on behalf of Trump University students in two class actions, including a federal RICO charge, against President Donald J. Trump. The settlement returned over 90% of the money thousands of students paid to "enroll" in Trump University. He represented the class on a *pro bono* basis. Forge successfully prosecuted another federal RICO case against Scotts Miracle-Gro, resulting in full refunds (totaling over $40 million) for customers who purchased bird feed that Scotts had illegally treated with a pesticide known to be hazardous to birds. He was also a member of the litigation team that obtained a $125 million settlement in *In re LendingClub Securities Litigation*, a settlement that ranked among the top ten largest securities recoveries ever in the Northern District of California.

Education

B.B.A., The University of Michigan Ross School of Business, 1990; J.D., The University of Michigan Law School, 1993

Honors / Awards

Litigation Star, *Benchmark Litigation*, 2023-2026; National Practice Area Star, *Benchmark Litigation*, 2026; Leading Litigator in America, *Lawdragon*, 2026; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2025; Plaintiff Litigator of the Year, *Benchmark Litigation*, 2025; Impact Case Award: *In re Alphabet, Inc. Securities Litigation*, *Benchmark Litigation*, 2025; Leading Lawyer in America, *Lawdragon*, 2022-2025; Recommended Lawyer, *The Legal 500*, 2023-2024; Best Lawyer in America, *Best Lawyers®*, 2019-2023; Southern California Best Lawyer, *Best Lawyers®*, 2019-2021; Local Litigation Star, *Benchmark Litigation*, 2020; Plaintiffs' Lawyer Trailblazer, *The National Law Journal*, 2018; Top 100 Lawyer, *Daily Journal*, 2017; Litigator of the Year, *Our City San Diego,* 2017; Two-time recipient of Department of Justice's Director's Award for Superior Performance by Litigation Team; numerous commendations from Federal Bureau of Investigation (including commendation from FBI Director Robert Mueller III), Internal Revenue Service, and Defense Criminal Investigative Service; J.D., *Magna Cum Laude*, Order of the Coif, The University of Michigan Law School, 1993; B.B.A., High Distinction, The University of Michigan Ross School of Business, 1990

William J. Geddish | Partner

William Geddish is a partner with the Firm and is based in the Melville office, where his practice focuses on complex securities litigation. Before joining the Firm, he was an associate in the New York office of a large international law firm, where his practice focused on complex commercial litigation.

Since joining the Firm, Geddish has played a significant role in the following litigations*: In re Barrick Gold Sec. Litig.* ($140 million recovery); *Scheufele v. Tableau Software, Inc.* ($95 million recovery); *Landmen Partners, Inc. v. The Blackstone Grp., L.P.* ($85 million recovery); *In re Jeld-Wen Holding, Inc. Sec. Litig.* ($40 million recovery); *City of Austin Police Ret. Sys. v. Kinross Gold Corp.* ($33 million recovery); *City of Roseville Emps' Ret. Sys. v. EnergySolutions, Inc.* ($26 million recovery); *Beaver Cnty. Emps' Ret. Fund v. Tile Shop Holdings, Inc.* ($9.5 million recovery); and *Barbara Marciano v. Schell & Kampeter, Inc.* ($2 million recovery).

Education

B.A., Sacred Heart University, 2006, J.D., Hofstra University School of Law, 2009

Honors / Awards

Best Lawyer in America: One to Watch, *Best Lawyers®*, 2024-2025; Rising Star, *Super Lawyers Magazine*, 2013-2024; 500 X – The Next Generation, *Lawdragon*, 2023; J.D., *Magna Cum Laude*, Hofstra University School of Law, 2009; Gina Maria Escarce Memorial Award, Hofstra University School of Law

Paul J. Geller | Partner

Paul Geller is a founding partner of Robbins Geller and head of the Firm's Consumer Practice Group. Over the last 30 years, Geller has served as lead counsel in some of the country's most high-profile consumer, antitrust, and securities class actions and has recovered billions for communities, consumers, and investors harmed by corporate abuse.

Before devoting his practice to the representation of consumers and investors, Geller defended companies in high-stakes class action and multi-district litigation, providing him with an invaluable perspective from "both sides of the 'v.'" An experienced trial lawyer, he has tried bench and jury trials on behalf of plaintiffs and defendants and has argued before numerous state, federal, and appellate courts throughout the United States.

Geller's ability to earn respect and trust from all sides in difficult negotiations has been recognized by the bar and legal publications. *Chambers* notes that "Paul is a consummate professional who has the ability to work seamlessly and collaboratively to address daunting challenges that arise in complex mass tort litigation."

He serves as a key leader of the nationwide litigation against the companies responsible for the U.S. opioid addiction crisis. He played a key role in negotiating and architecting the complex settlements that resulted in over $50 billion being paid to communities across the country struggling with the fallout of the opioid crisis.

He has also successfully litigated and negotiated precedent-setting class recoveries in multiple practice areas, including data privacy, antitrust, products liability, and securities cases.

- **Facebook Data Privacy Case – $650 Million**: He secured the then-largest privacy class action

settlement in history – a $650 million recovery in a cutting-edge class action against Facebook. The case concerned Facebook's use of biometric identifiers through its "tag" feature, which Geller's team challenged under a new biometric privacy law that had never before been applied in a class action. The federal judge that presided over the case called it a "landmark result" and a "major win for consumers." In addition to the monetary recovery, Facebook disabled the tag feature altogether, deleting 1 billion facial profiles and discontinuing the related facial recognition program.

- **Volkswagen "Clean Diesel" Case – $17 Billion**: Geller was a member of the leadership team representing consumers in the massive Volkswagen "Clean Diesel" emissions case. The San Francisco legal newspaper *The Recorder* labeled the group that was appointed in that case, which settled for more than $17 billion, a "class action dream team."
- **"EpiPen" Antitrust Case – $609 Million**: As co-lead counsel, Geller secured a recovery of $609 million for overcharged purchasers of the "EpiPen" device in a nationwide class action alleging that the manufacturer and marketer of the EpiPen engaged in anti-competitive and unfair business conduct in their sale and marketing of the auto-injector device. The American Antitrust Institute honored Geller and the litigation team for Outstanding Antitrust Litigation Achievement in Private Law Practice for this result.

Education

B.S., University of Florida, 1990; J.D., Emory University School of Law, 1993

Honors / Awards

Senior Fellow, Litigation Counsel of America (LCA) Proven Trial Lawyers; Rated AV by Martindale-Hubbell; Leading Litigator in America, *Lawdragon*, 2024-2026; Best Lawyer in America, *Best Lawyers*®, 2017-2026; Leading Global Litigator, *Lawdragon*, 2025; Super Lawyer, *Super Lawyers Magazine*, 2007-2025; Recommended Lawyer, *The Legal 500*, 2016, 2019, 2023-2025; Ranked by *Chambers USA*, 2021-2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2025; Global Plaintiff Lawyer, *Lawdragon*, 2024-2025; Leading Plaintiff Consumer Lawyer, *Lawdragon*, 2022-2025; Leading Lawyer in America, *Lawdragon*, 2006-2007, 2009-2025; Outstanding Antitrust Litigation Achievement in Private Law Practice, American Antitrust Institute, 2022; South Trailblazer, *The American Lawyer*, 2022; Class Action MVP, *Law360*, 2022; Florida Best Lawyer in America, *Best Lawyers*®, 2017-2021; One of "Florida's Most Effective Lawyers" in the Privacy category, American Law Media, 2020; Legend, *Lawdragon*, 2020; Plaintiffs' Lawyer Trailblazer, *The National Law Journal*, 2018; Lawyer of the Year, *Best Lawyers*®, 2018; Attorney of the Month, *Attorney At Law*, 2017; Featured in "Lawyer Limelight" series, *Lawdragon*, 2017; Top Rated Lawyer, South Florida's Legal Leaders, *Miami Herald*, 2015; Litigation Star, *Benchmark Litigation*, 2013; "Legal Elite," *Florida Trend Magazine*; One of "Florida's Most Effective Lawyers," American Law Media; One of Florida's top lawyers in *South Florida Business* Journal; One of the Nation's Top "40 Under 40," *The National Law Journal*; One of Florida's Top Lawyers, *Law & Politics*; Editor, *Emory Law Journal*; Order of the Coif, Emory University School of Law

Robert D. Gerson | Partner

Robert Gerson is a partner in the Firm's Melville office, where he practices securities fraud litigation and other complex matters.

Since joining the Firm, Gerson has played a significant role in prosecuting numerous high-stakes investor litigations. Most recently, Gerson and a team of Robbins Geller attorneys obtained a $27.5 million settlement in *Luna v. Carbonite, Inc.*, following a precedent-setting decision by the U.S. Court of Appeals for the First Circuit. Gerson was also a member of the team in *In re Dell Technologies Inc. Class V Stockholders Litigation*, which settled in 2023 for $1 billion in cash – a record in the Delaware Chancery Court and the largest settlement in U.S. state court history. Other notable cases Gerson has played a critical role in at the Firm include: *UA Local 13 & Employers Group Insurance Fund v. Sealed Air Corp.* ($12.5 million recovery); *In re PPDAI Group Sec. Litig.* ($9 million recovery); and *Sponn v. Emergent BioSolutions Inc.* ($6.5 million recovery).

Education

B.A., University of Maryland, 2006; J.D., New York Law School, 2009

Honors / Awards

Super Lawyer, *Super Lawyers Magazine*, 2021-2025; Best Lawyer in America: One to Watch, *Best Lawyers®*, 2024-2025; 500 X – The Next Generation, *Lawdragon*, 2023; Rising Star, *Super Lawyers Magazine*, 2015-2020

Jonah H. Goldstein | Partner

Jonah Goldstein is a partner in the Firm's San Diego office and is responsible for prosecuting complex securities cases and obtaining recoveries for investors. He also represents corporate whistleblowers who report violations of the securities laws. Goldstein has achieved significant settlements on behalf of investors including in *In re HealthSouth Sec. Litig.* (over $670 million recovered against HealthSouth, UBS and Ernst & Young), *In re Cisco Sec. Litig.* (approximately $100 million), and *Marcus v. J.C. Penney Company, Inc.* ($97.5 million recovery). Goldstein also served on the Firm's trial team in *In re AT&T Corp. Sec. Litig.*, MDL No. 1399 (D.N.J.), which settled after two weeks of trial for $100 million, and aided in the $65 million recovery in *Garden City Emps.' Ret. Sys. v. Psychiatric Solutions, Inc.*, the fourth-largest securities recovery ever in the Middle District of Tennessee and one of the largest in more than a decade. Most recently, he was part of the litigation team in *Luna v. Marvell Tech. Grp., Ltd.*, resulting in a $72.5 million settlement that represents approximately 24% to 50% of the best estimate of classwide damages suffered by investors. Before joining the Firm, Goldstein served as a law clerk for the Honorable William H. Erickson on the Colorado Supreme Court and as an Assistant United States Attorney for the Southern District of California, where he tried numerous cases and briefed and argued appeals before the Ninth Circuit Court of Appeals.

Education

B.A., Duke University, 1991; J.D., University of Denver College of Law, 1995

Honors / Awards

Recommended Lawyer, *The Legal 500*, 2018-2019; Comments Editor, *University of Denver Law Review*, University of Denver College of Law

Benny C. Goodman III | Partner

Benny Goodman is a partner in the Firm's San Diego office. He primarily represents plaintiffs in shareholder actions on behalf of aggrieved corporations. Goodman has recovered hundreds of millions of dollars in shareholder derivative actions pending in state and federal courts across the nation. Most recently, he led a team of lawyers in litigation brought on behalf of Community Health Systems, Inc., resulting in a $60 million payment to the company, the largest recovery in a shareholder derivative action in Tennessee and the Sixth Circuit, as well as best-in-class value-enhancing corporate governance reforms that included two shareholder-nominated directors to the Community Health Board of Directors.

Similarly, Goodman recovered a $25 million payment to Lumber Liquidators and numerous corporate governance reforms, including a shareholder-nominated director, in *In re Lumber Liquidators Holdings, Inc. S'holder Derivative Litig*. In *In re Google Inc. S'holder Derivative Litig.*, Goodman achieved groundbreaking corporate governance reforms designed to mitigate regulatory and legal compliance risk associated with online pharmaceutical advertising, including among other things, the creation of a $250 million fund to help combat rogue pharmacies from improperly selling drugs online.

Education

B.S., Arizona State University, 1994; J.D., University of San Diego School of Law, 2000

Honors / Awards

Best Lawyer in America, *Best Lawyers®*, 2026; Super Lawyer, *Super Lawyers Magazine*, 2018-2025; Best Lawyer in America: One to Watch, *Best Lawyers®*, 2024-2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2021; Recommended Lawyer, *The Legal 500*, 2017

Elise J. Grace | Partner

Elise Grace is a partner in the San Diego office and counsels the Firm's institutional clients on options to secure premium recoveries in securities litigation both within the United States and internationally. Grace is a frequent lecturer and author on securities and accounting fraud, and develops annual MCLE and CPE accredited educational programs designed to train public fund representatives on practices to protect and maximize portfolio assets, create long-term portfolio value, and best fulfill fiduciary duties. Grace has routinely been named a Recommended Lawyer by *The Legal 500* and named a Leading Plaintiff Financial Lawyer by *Lawdragon*. Grace has prosecuted various significant securities fraud class actions, as well as the AOL Time Warner state and federal securities opt-out litigations, which resulted in a combined settlement of over $629 million for defrauded investors. Before joining the Firm, Grace practiced at Clifford Chance, where she defended numerous Fortune 500 companies in securities class actions and complex business litigation.

Education

B.A., University of California, Los Angeles, 1993; J.D., Pepperdine School of Law, 1999

Honors / Awards

Securities Litigation Lawyer of the Year, *Lawyer Monthly*, 2023, 2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2025; Recommended Lawyer, *The Legal 500*, 2016-2017; J.D., *Magna Cum Laude*, Pepperdine School of Law, 1999; American Jurisprudence Bancroft-Whitney Award – Civil Procedure, Evidence, and Dalsimer Moot Court Oral Argument; Dean's Academic Scholarship Recipient, Pepperdine School of Law; B.A., *Summa Cum Laude*, University of California, Los Angeles, 1993; B.A., *Phi Beta Kappa*, University of California, Los Angeles, 1993

Tor Gronborg | Partner

Tor Gronborg is a partner in the Firm's San Diego office and a member of the Firm's Management Committee. He often lectures on topics such as the Federal Rules of Civil Procedure and electronic discovery. Gronborg has served as lead or co-lead counsel in numerous securities fraud cases that have collectively recovered more than $4.4 billion for investors. Most recently, Gronborg and a team of Robbins Geller attorneys obtained an $809 million settlement in *In re Twitter, Inc. Sec. Litig.*, a case that did not settle until the day before trial was set to commence.

In addition to *Twitter*, Gronborg's work has included significant recoveries against corporations such as Valeant Pharmaceuticals ($1.21 billion), Cardinal Health ($600 million), Motorola ($200 million), Duke Energy ($146.25 million), Sprint Nextel Corp. ($131 million), and Prison Realty ($104 million), to name a few. Gronborg was also a member of the Firm's trial team in *Hsu v. Puma Biotechnology, Inc.*, No. SACV15-0865 (C.D. Cal.), a securities fraud class action that resulted in a verdict in favor of investors after a two-week jury trial and ultimately settled for 100% of the claimed damages plus prejudgment interest.

On three separate occasions, Gronborg's pleadings have been upheld by the federal Courts of Appeals (*Broudo v. Dura Pharms., Inc.*, 339 F.3d 933 (9th Cir. 2003), *rev'd on other grounds*, 544 U.S. 336 (2005); *In re Daou Sys.*, 411 F.3d 1006 (9th Cir. 2005); *Staehr v. Hartford Fin. Servs. Grp.*, 547 F.3d 406 (2d Cir. 2008)).

Education

B.A., University of California, Santa Barbara, 1991; Rotary International Scholar, University of Lancaster, U.K., 1992; J.D., University of California, Berkeley, 1995

Honors / Awards

Litigation Star, *Benchmark Litigation*, 2023-2026; National Practice Area Star, *Benchmark Litigation*, 2025-2026; Best Lawyer in America, *Best Lawyers*®, 2022-2026; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2025; Leading Lawyer in America, *Lawdragon*, 2022-2025; Recommended Lawyer, *The Legal 500*, 2023-2024; West Trailblazer, *The American Lawyer*, 2022; Super Lawyer, *Super Lawyers Magazine*, 2013-2022; Plaintiffs' Lawyer Trailblazer, *The National Law Journal*, 2019; Moot Court Board Member, University of California, Berkeley; AFL-CIO history scholarship, University of California, Santa Barbara

Ellen Gusikoff Stewart | Partner

Ellen Stewart is a partner in the Firm's San Diego office, and is a member of the Firm's Summer Associate Hiring Committee. She currently practices in the Firm's settlement department, negotiating and documenting complex securities, merger, ERISA, and derivative action settlements. Notable recent settlements include: *Evanston Police Pension Fund v. McKesson Corp.* (N.D. Cal. 2023) ($141 million); *In re Twitter Inc. Sec. Litig.* (N.D. Cal. 2022) ($809.5 million); *In re Facebook Biometric Info. Privacy Litig.* (N.D. Cal. 2021) ($650 million); *In re Am. Realty Cap. Props., Inc. Litig.* (S.D.N.Y. 2020) ($1.025 billion); *Klein v. Altria Group, Inc.* (E.D. Va. 2022) ($90 million); *KBC Asset Management v. 3D Systems Corp.* (D.S.C. 2018) ($50 million); and *Luna v. Marvell Tech. Grp.* (N.D. Cal. 2018) ($72.5 million).

Stewart has served on the Federal Bar Association Ad Hoc Committee for the revisions to the Settlement Guidelines for the Northern District of California, was a contributor to the Guidelines and Best Practices – Implementing 2018 Amendments to Rule 23 Class Action Settlement Provisions manual of the Bolch Judicial Institute at the Duke University School of Law, and speaks at conferences around country on current settlement and notice issues.

Education

B.A., Muhlenberg College, 1986; J.D., Case Western Reserve University, 1989

Honors / Awards

Rated Distinguished by Martindale-Hubbell

Robert Henssler | Partner

Bobby Henssler is a partner in the Firm's San Diego office, where he focuses his practice on securities fraud and other complex civil litigation. He has obtained significant recoveries for investors in cases such as *Under Armour*, *Blackstone*, and *J.C. Penney*.

Most recently, Henssler led a team of Robbins Geller attorneys in obtaining a $434 million settlement in *In re Under Armour Sec. Litig.* The case was previously dismissed with prejudice in 2019, but then resurrected through a highly unusual procedural maneuver, a successful motion for an indicative ruling: asking the federal judge who had dismissed the case to issue an indicative opinion informing the Fourth Circuit that he would revive the original case if it were remanded to him. Over the next five years, the Robbins Geller team defeated defendants' motions for summary judgment and to exclude plaintiffs' expert witnesses. The case settled just weeks before a jury trial was set to begin in Baltimore, Maryland. The $434 million recovery is the second largest securities-fraud settlement ever in the Fourth Circuit and is among the top 50 largest such recoveries in U.S. history.

Henssler was also lead counsel in *Schuh v. HCA Holdings, Inc.*, which resulted in a $215 million recovery for shareholders, the largest securities class action recovery ever in Tennessee. The recovery achieved represents more than 30% of the aggregate classwide damages, far exceeding the typical recovery in a securities class action. Henssler has had many other successful results, including in *In re Valeant Pharms. Int'l, Inc. Sec. Litig.* ($1.21 billion), *Marcus v. J.C. Penney Company, Inc.* ($97.5 million recovery), *Landmen Partners Inc. v. The Blackstone Group L.P.* ($85 million recovery), *In re Novatel Wireless Sec. Litig.* ($16 million recovery), *Carpenters Pension Trust Fund of St. Louis v. Barclays PLC* ($14 million settlement), and *Kmiec v. Powerwave Technologies, Inc.* ($8.2 million settlement), to name a few.

Education

B.A., University of New Hampshire, 1997; J.D., University of San Diego School of Law, 2001

Honors / Awards

Leading Litigator in America, *Lawdragon*, 2024-2026; Best Lawyer in America, *Best Lawyers®*, 2025-2026; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2020-2021, 2023-2025; Leading Lawyer in America, *Lawdragon*, 2025; Top 100 Lawyer, *Daily Journal*, 2024; California Lawyer of the Year, *Daily Journal*, 2022; Plaintiffs' Lawyer Trailblazer, *The National Law Journal*, 2020; Recommended Lawyer, *The Legal 500*, 2018-2019

Steven F. Hubachek | Partner

Steve Hubachek is a partner in the Firm's San Diego office. He is a member of the Firm's appellate group, where his practice concentrates on federal appeals. He has more than 25 years of appellate experience, has argued over 100 federal appeals, including 3 cases before the United States Supreme Court and 7 cases before en banc panels of the Ninth Circuit Court of Appeals. Prior to his work with the Firm, Hubachek joined Perkins Coie in Seattle, Washington, as an associate. He was admitted to the Washington State Bar in 1987 and was admitted to the California State Bar in 1990, practicing for many years with Federal Defenders of San Diego, Inc. He also had an active trial practice, including over 30 jury trials, and was Chief Appellate Attorney for Federal Defenders.

Education

B.A., University of California, Berkeley, 1983; J.D., University of California College of the Law, San Francisco, 1987

Honors / Awards

AV rated by Martindale-Hubbell; Top Lawyer in San Diego, *San Diego Magazine*, 2014-2022; Super Lawyer, *Super Lawyers Magazine*, 2007-2009, 2019-2021; Assistant Federal Public Defender of the Year, National Federal Public Defenders Association, 2011; Appellate Attorney of the Year, San Diego Criminal Defense Bar Association, 2011 (co-recipient); President's Award for Outstanding Volunteer Service, Mid City Little League, San Diego, 2011; E. Stanley Conant Award for exceptional and unselfish devotion to protecting the rights of the indigent accused, 2009 (joint recipient); *The Daily Transcript* Top Attorneys, 2007; J.D., *Cum Laude*, Order of the Coif, Thurston Honor Society, University of California College of the Law, San Francisco, 1987

Andrew W. Hutton | Partner

Drew Hutton is a partner in the Firm's San Diego office. Hutton has prosecuted a variety of securities actions, achieving high-profile recoveries and results. Representative cases against corporations and their auditors include *AOL Time Warner* ($2.5 billion) and *Williams Cos.* ($311 million). Representative cases against corporations and their executives include *Broadcom* ($150 million), *Bank OZK* ($45 million), and *Clarent* (class plaintiff's 10b-5 jury verdict against former CEO). Hutton is also active in shareholder derivative litigation, achieving monetary recoveries and governance changes, including *Premier* ($71 million), *Affiliated Computer Servs.* ($30 million), *KB Home* ($30 million), and *KeyCorp* (modified CEO stock options and governance). Hutton has also litigated securities cases in bankruptcy court (*WorldCom* – $15 million for individual claimant), and a complex options case before FINRA (eight-figure settlement for structured products investor).

Hutton is also experienced in complex, multi-district consumer litigation. Representative nationwide insurance cases include *Prudential* ($4 billion), *Metro. Life Ins. Co.* ($2 billion), and *Conseco Life Ins. Co.* ($200 million). Representative nationwide consumer lending cases include a $30 million class settlement of Truth-in-Lending claims against American Express, and a $24 million class settlement of RICO and RESPA claims against Community Bank of Northern Virginia (now PNC Bank).

Before joining Robbins Geller, Hutton was a public company accountant, Certified Public Accountant, and broker of stocks, options, and insurance products. Hutton has also served as an expert litigation consultant in both financial and corporate governance capacities. Hutton is often responsible for working with experts retained by the Firm in litigation and has conducted dozens of depositions of financial professionals, including audit partners, CFOs, directors, bankers, actuaries, and opposing experts.

Education

B.A., University of California, Santa Barbara, 1983; J.D., Loyola Law School, 1994

James I. Jaconette | Partner

James Jaconette is one of the founding partners of the Firm and is located in its San Diego office. He manages cases in the Firm's securities class action and shareholder derivative litigation practices. He has served as one of the lead counsel in securities cases with recoveries to individual and institutional investors totaling over $8 billion. He also advises institutional investors, including hedge funds, pension funds, and financial institutions. Landmark securities actions in which he contributed in a primary litigating role include *In re Informix Corp. Sec. Litig.*, and *In re Dynegy Inc. Sec. Litig.* and *In re Enron Corp. Sec. Litig.*, where he represented lead plaintiff The Regents of the University of California. Most recently, Jaconette was part of the trial team in *Schuh v. HCA Holdings, Inc.*, which resulted in a $215 million recovery for shareholders, the largest securities class action recovery ever in Tennessee. The recovery achieved represents more than 30% of the aggregate classwide damages, far exceeding the typical recovery in a securities class action.

Education

B.A., San Diego State University, 1989; M.B.A., San Diego State University, 1992; J.D., University of California Hastings College of the Law, 1995

Honors / Awards

Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2025; J.D., *Cum Laude*, University of California Hastings College of the Law, 1995; Associate Articles Editor, *Hastings Law Journal*, University of California Hastings College of the Law; B.A., with Honors and Distinction, San Diego State University, 1989

J. Marco Janoski Gray | Partner

Marco Janoski is a partner in the Firm's San Diego office. His practice focuses on complex securities litigation and class actions. An experienced litigator, Janoski has secured record-setting recoveries for investors, including trial verdicts and large recoveries secured on the eve of trial.

Janoski recently served on the litigation team in *In re Alphabet, Inc. Securities Litigation* representing plaintiffs in a securities fraud case where Robbins Geller achieved a $350 million recovery. The recovery is the largest ever privacy or cybersecurity-related securities class action recovery and the Ninth Circuit's largest ever securities class action recovery following a complete dismissal. Janoski also served on the litigation teams in two securities fraud cases that are among the top ten securities recoveries of 2023: *In re Envision Healthcare Corporation Securities Litigation* ($177.5 million recovery) and *Louisiana Sheriffs' Pension & Relief Fund v. Cardinal Health, Inc.* ($109 million recovery). He served on the Firm's trial team in *In re Twitter, Inc. Securities Litigation* and helped secure an $809.5 million recovery for investors. The *Twitter* case settled the day before trial was set to commence in 2021 and is the largest securities fraud class action recovery in the Ninth Circuit in the last decade. Likewise, he and a team of Firm lawyers secured a $350 million settlement on the eve of trial in 2020 in *Smilovits v. First Solar, Inc.,* the fifth-largest PSLRA settlement ever recovered in the Ninth Circuit at the time. Janoski also served on the Firm's trial team in *Hsu v. Puma Biotechnology, Inc.*, a securities fraud class action that resulted in a verdict in favor of investors after a two-week jury trial in federal court.

Education

Universidad Complutense de Madrid, 2010-2011; B.A., University of California, Santa Barbara, 2011; J.D., University of California College of the Law, San Francisco (formerly UC Hastings), 2015

Honors / Awards

Leading Litigator in America, *Lawdragon*, 2024-2026; 40 & Under List, *Benchmark Litigation*, 2023-2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2023-2025; Rising Star, *Super Lawyers Magazine*, 2024-2025; California Lawyer Attorney of the Year (CLAY), *Daily Journal*, 2024; 500 X – The Next Generation, *Lawdragon*, 2023; J.D., *Magna Cum Laude,* University of California College of the Law, San Francisco (formerly UC Hastings), 2015

Evan J. Kaufman | Partner

Evan Kaufman is a partner in the Firm's Melville office. He has recovered hundreds of millions of dollars for class members in securities, ERISA, and complex class actions.

Kaufman served as lead counsel in the *SandRidge Energy* securities litigation and obtained a $35.75 million global settlement, including $21.8 million for SandRidge common stock purchasers. As lead counsel in the *TD Banknorth* litigation, Kaufman and the Firm achieved a $50 million recovery after successfully objecting to a $3 million settlement submitted to the court on behalf of the class. The court in the *TD Banknorth* litigation stated: "This is one of the cases – there's probably been a half a dozen since I've been a judge that I handled which have – really through the sheer diligence and effort of plaintiffs' counsel – resulted in substantial awards for plaintiffs, after overcoming serious procedural and other barriers . . . it appears plainly from the papers that you and your co-counsel have diligently, and at great personal expense and through the devotion of many thousands of hours of your time, prosecuted this case to a successful conclusion."

Kaufman served as co-lead class counsel on behalf of 212,000 participants in General Electric's 401(k) plan and obtained $61 million for the class, which was the largest recovery ever in an ERISA case alleging a retirement plan improperly offered proprietary funds. During the *GE ERISA* final settlement approval hearing, the court described the case as "hard-fought" with "interesting and difficult issues." Kaufman served as lead counsel or as an integral part of the team in other ERISA actions, including on behalf of participants in the retirement plans of Invesco, JP Morgan, and Wakemed.

Kaufman achieved notable results in numerous other securities class actions, including recovering $26 million in the *EnergySolutions* litigation, and in cases against Lockheed Martin, State Street, Fidelity, Warner Chilcott, Talkspace, Third Avenue Management, and Giant Interactive, among others.

In the *Third Avenue Management* litigation, when approving the $14.25 million settlement obtained by Kaufman and the Firm, the court commended the parties for their "wisdom" and "diligence" and concluded that "lead counsel diligently and with quality represented the interests of the class." In the *Giant Interactive* litigation, the court acknowledged the efforts of Kaufman and the Firm in achieving the favorable settlement for the class: "The Court also recognizes the diligence and hard work of plaintiffs' counsel in achieving such a settlement, particularly in light of the fact that this case (unlike many other securities class actions) was independently developed by plaintiffs' counsel, as opposed to following, or piggybacking on, a regulatory investigation or settlement."

Education

B.A., University of Michigan, 1992; J.D., Fordham University School of Law, 1995

Honors / Awards

Super Lawyer, *Super Lawyers Magazine*, 2013-2015, 2017-2020, 2023-2025; Member, *Fordham International Law Journal*, Fordham University School of Law

Ashley M. Kelly | Partner

Ashley Kelly is a partner in the Firm's San Diego office, where she represents large institutional and individual investors as a member of the Firm's antitrust and securities fraud practices. Her work is primarily federal and state class actions involving the federal antitrust and securities laws, common law fraud, breach of contract, and accounting violations. Kelly's case work has been in the financial services, oil & gas, e-commerce, and technology industries. In addition to being an attorney, she is a Certified Public Accountant. Kelly was an important member of the litigation team that obtained a $500 million settlement on behalf of investors in *Luther v. Countrywide Fin. Corp.*, which was the largest residential mortgage-backed securities purchaser class action recovery in history.

Education

B.S., Pennsylvania State University, 2005; J.D., Rutgers University-Camden, 2011

Honors / Awards

500 X – The Next Generation, *Lawdragon*, 2023-2025; Best Lawyer in America: One to Watch, *Best Lawyers*®, 2024-2025; Rising Star, *Super Lawyers Magazine*, 2016, 2018-2021

Christopher R. Kinnon | Partner

Christopher Kinnon is a partner in the Firm's San Diego office, where his practice focuses on securities fraud litigation. Kinnon and a team of Robbins Geller attorneys obtained a $1.21 billion settlement in *In re Valeant Pharms. Int'l, Inc. Sec. Litig.* (D.N.J.), a case that *Vanity Fair* reported as "the corporate scandal of its era" that had raised "fundamental questions about the functioning of our health-care system, the nature of modern markets, and the slippery slope of ethical rationalizations." This is the largest securities class action settlement against a pharmaceutical manufacturer and the ninth largest ever. In addition, Kinnon and a team of Robbins Geller attorneys obtained an $809 million settlement in *In re Twitter, Inc. Sec. Litig.*, a case that did not settle until the day before trial was set to commence.

Most recently, Kinnon was a key member of a team of Robbins Geller attorneys who obtained a $434 million settlement in *In re Under Armour Sec. Litig.* The case was previously dismissed with prejudice in 2019, but then resurrected through a highly unusual procedural maneuver, a successful motion for an indicative ruling: asking the federal judge who had dismissed the case to issue an indicative opinion informing the Fourth Circuit that he would revive the original case if it were remanded to him. Over the next five years, the Robbins Geller team defeated defendants' motions for summary judgment and to exclude plaintiffs' expert witnesses. The case settled just weeks before a jury trial was set to begin in Baltimore, Maryland. The $434 million recovery is the second largest securities-fraud settlement ever in the Fourth Circuit and is among the top 50 largest such recoveries in U.S. history.

Kinnon is currently representing investors in securities fraud actions against Green Dot Corporation (C.D. Cal.) and PricewaterhouseCoopers LLP (D.N.J.).

Before law school, Kinnon was a municipal sanitation worker and an elected executive board member with the Canadian Union of Public Employees, Local 1004 (CUPE 1004). Before that, he was a recording artist signed to prominent record labels in Canada and the United States.

Education

B.A., University of British Columbia, 2008; J.D., University of Michigan Law School, 2017

Honors / Awards

Best Lawyer in America: One to Watch, *Best Lawyers*®, 2026; Rising Star, *Super Lawyers Magazine*, 2024-2025; California Lawyer of the Year, *Daily Journal*, 2022

David A. Knotts | Partner

David Knotts is a partner in the Firm's San Diego office. He focuses his practice on shareholder class action litigation in the context of mergers and acquisitions, representing both individual shareholders and institutional investors. Knotts is also part of the Firm's Delaware Practice Group and has taken multiple cases to trial in the Delaware Court of Chancery. Knotts has significant trial experience in high-stakes corporate litigation.

Knotts has been counsel of record for shareholders on a number of significant recoveries in courts throughout the country, including serving as the lead litigator on *Chabot v. Walgreens Boots Alliance, Inc.*, which culminated in a $192.5 million recovery for a class of Rite Aid investors. The *Walgreens* settlement was approved by the Middle District of Pennsylvania in February 2024 and resulted in the second largest securities recovery in Pennsylvania federal court history. That recovery represents a rarity in securities fraud litigation, whereby target-company investors obtained a significant cash recovery from an unaffiliated acquirer based on allegations that the acquirer issued misleading statements during the pendency of a merger.

Knotts also served as the lead litigator in *Murray v. EarthLink Holdings Corp.*, which, after six years of litigation, resulted in an $85 million settlement for former EarthLink stockholders in connection with the Windstream/EarthLink merger. The *EarthLink* settlement was approved by the Eastern District of Arkansas in February 2025 and, at the time, resulted in the largest securities class action recovery in the Eighth Circuit over the past five years.

In addition, Knotts served among lead counsel in *In re Rural/Metro Corp. S'holders Litig.*, which resulted in a groundbreaking $110 million post-trial recovery affirmed by the Delaware Supreme Court, as well as *In re Del Monte Foods Co. S'holders Litig.* ($89.4 million), *Websense* ($40 million), *In re Onyx S'holders Litig.* ($30 million), and *Harman* ($28 million). *Websense* and *Onyx* are both believed to be the largest post-merger class settlements in California state court history. When Knotts presented the settlement as lead counsel for the stockholders in *Joy Global*, the United States District Court for the Eastern District of Wisconsin noted that "this is a pretty extraordinary settlement, recovery on behalf of the members of the class. . . . [I]t's always a pleasure to work with people who are experienced and who know what they are doing."

Education

B.S., University of Pittsburgh, 2001; J.D., Cornell Law School, 2004

Honors / Awards

Litigation Star, *Benchmark Litigation*, 2026; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2024-2025; 40 & Under List, *Benchmark Litigation*, 2023; 40 & Under Hot List, *Benchmark Litigation*, 2018, 2020-2021; Next Generation Partner, *The Legal 500*, 2019-2021; Recommended Lawyer, *The Legal 500*, 2017-2019; Wiley W. Manuel Award for Pro Bono Legal Services, State Bar of California; Casa Cornelia Inns of Court; J.D., *Cum Laude*, Cornell Law School, 2004

Peter Ko | Partner

Peter Ko is a partner in the Firm's San Diego office focused on complex investigation, litigation, trial, and appeals.

Before joining the Firm, Ko served 27 years as a federal prosecutor in Nevada and the Southern District of California, handling cases involving fraud, corruption, racketeering, and other crimes. He tried dozens of cases and litigated scores of appeals in federal courts and was assigned to handle numerous high-profile prosecutions of national or international significance. Since 2010, Ko also served at points as First Assistant United States Attorney, Chief of Criminal, Chief of Appeals, Chief of National Security and Cybercrimes, and Senior Litigation Counsel. While at the U.S. Department of Justice (DOJ), Ko received the Attorney General's Claudia J. Flynn Award for Professional Responsibility as well as the Director's Award for Superior Performance. He has taught trial advocacy, evidence, discovery, and other litigation subjects for the DOJ and other agencies.

Education

B.A., University of California, San Diego, 1992; J.D., UCLA School of Law, 1997

Honors / Awards

Attorney General's Claudia J. Flynn Award for Professional Responsibility; Director's Award for Superior Performance, United States Attorney's Office

Laurie L. Largent | Partner

Laurie Largent is a partner in the Firm's San Diego, California office. Her practice focuses on securities class action and shareholder derivative litigation and she has helped recover millions of dollars for injured shareholders. Largent was part of the litigation team that obtained a $265 million recovery in *In re Massey Energy Co. Sec. Litig.*, in which Massey was found accountable for a tragic explosion at the Upper Big Branch mine in Raleigh County, West Virginia. She also helped obtain $67.5 million for Wyeth shareholders in *City of Livonia Emps.' Ret. Sys. v. Wyeth*, settling claims that the defendants misled investors about the safety and commercial viability of one of the company's leading drug candidates. Most recently, Largent was on the team that secured a $64 million recovery for Dana Corp. shareholders in *Plumbers & Pipefitters Nat'l Pension Fund v. Burns*, in which the Firm's Appellate Practice Group successfully appealed to the Sixth Circuit Court of Appeals twice, reversing the district court's dismissal of the action. Some of Largent's other cases include: *In re Sanofi-Aventis Sec. Litig.* (S.D.N.Y.) ($40 million); *In re Bridgepoint Educ., Inc. Sec. Litig.* (S.D. Cal.) ($15.5 million); *Ross v. Abercrombie & Fitch Co.* (S.D. Ohio) ($12 million); *Maiman v. Talbott* (C.D. Cal.) ($8.25 million); *In re Cafepress Inc. S'holder Litig.* (Cal. Super. Ct., San Mateo Cnty.) ($8 million); and *Krystek v. Ruby Tuesday, Inc.* (M.D. Tenn.) ($5 million). Largent's current cases include securities fraud cases against Dell, Inc. (W.D. Tex.) and Banc of California (C.D. Cal.).

Largent is a past board member on the San Diego County Bar Foundation and the San Diego Volunteer Lawyer Program. She has also served as an Adjunct Business Law Professor at Southwestern College in Chula Vista, California.

Education

B.B.A., University of Oklahoma, 1985; J.D., University of Tulsa, 1988

Honors / Awards

Best Lawyer in America: One to Watch, *Best Lawyers*®, 2026; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2025; California Lawyer Attorney of the Year (CLAY), *Daily Journal*, 2024; Board Member, San Diego County Bar Foundation, 2013-2017; Board Member, San Diego Volunteer Lawyer Program, 2014-2017

Kevin A. Lavelle | Partner

Kevin Lavelle is a partner in the Firm's San Diego office, where his practice focuses on complex securities litigation.

Lavelle has served on numerous litigation teams and helped obtain over $500 million for investors. His work includes several significant recoveries against corporations, including HCA Holdings, Inc. ($215 million); Altria Group and JUUL Labs ($90 million); Endo Pharmaceuticals ($63 million); and Intercept Pharmaceuticals ($55 million), among others.

Education

B.A., College of the Holy Cross, 2008; J.D., Brooklyn Law School, 2013

Honors / Awards

500 X – The Next Generation, *Lawdragon*, 2023-2025; J.D., *Cum Laude*, Brooklyn Law School, 2013; B.A., *Cum Laude*, College of the Holy Cross, 2008

Nathan R. Lindell | Partner

Nate Lindell is a partner in the Firm's San Diego office, where his practice focuses on representing aggrieved investors in complex civil litigation. He has helped achieve numerous significant recoveries for investors, including: *In re Enron Corp. Sec. Litig.* ($7.2 billion recovery); *In re HealthSouth Corp. Sec. Litig.* ($671 million recovery); *Luther v. Countrywide Fin. Corp.* ($500 million recovery); *Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.* ($388 million recovery); *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.* ($272 million recovery); *In re Morgan Stanley Mortg. Pass-Through Certificates Litig.* ($95 million recovery); *Massachusetts Bricklayers & Masons Tr. Funds v. Deutsche Alt-A Sec., Inc.* ($32.5 million recovery); *City of Ann Arbor Emps.' Ret. Sys. v. Citigroup Mortg. Loan Trust Inc.* ($24.9 million recovery); *Plumbers' Union Loc. No. 12 Pension Fund v. Nomura Asset Acceptance Corp.* ($21.2 million recovery); and *Genesee Cnty. Emps.' Ret. Sys. v. Thornburg Mortg., Inc.* ($11.25 million recovery). In October 2016, Lindell successfully argued in front of the New York Supreme Court, Appellate Division, First Judicial Department, for the reversal of an earlier order granting defendants' motion to dismiss in *Phoenix Light SF Limited v. Morgan Stanley*.

Lindell was also a member of the litigation team responsible for securing a landmark victory from the Second Circuit Court of Appeals in its precedent-setting *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.* decision, which dramatically expanded the scope of permissible class actions asserting claims under the Securities Act of 1933 on behalf of mortgage-backed securities investors, and ultimately resulted in a $272 million recovery for investors.

Education

B.S., Princeton University, 2003; J.D., University of San Diego School of Law, 2006

Honors / Awards

Rising Star, *Super Lawyers Magazine*, 2015-2017; Charles W. Caldwell Alumni Scholarship, University of San Diego School of Law; CALI/AmJur Award in Sports and the Law

Ting H. Liu | Partner

Ting Liu is a partner in the Firm's San Diego office, where she represents large institutional and individual investors. Her practice focuses on complex securities litigation. Liu was a member of the trial team that obtained a $350 million settlement on the eve of trial in *Smilovits v. First Solar, Inc.*, the fifth-largest PSLRA settlement recovered in the Ninth Circuit at the time. She was also a member of the Firm's trial team in *Hsu v. Puma Biotechnology, Inc.*, a securities fraud class action that resulted in a verdict in favor of investors after a two-week jury trial.

Education

B.A., University of Washington, 2012; J.D., University of San Diego School of Law, 2015

Honors / Awards

Best Lawyer in America: One to Watch, *Best Lawyers®*, 2026; 40 & Under List, *Benchmark Litigation*, 2024-2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2024-2025; Rising Star, *Super Lawyers Magazine*, 2023-2025; Rising Star, *Law360*, 2024

Ryan Llorens | Partner

Ryan Llorens is a partner in the Firm's San Diego office. Llorens' practice focuses on litigating complex securities fraud cases. He has worked on a number of securities cases that have resulted in significant recoveries for investors, including: *In re HealthSouth Corp. Sec. Litig.* ($670 million); *AOL Time Warner* ($629 million); *In re AT&T Corp. Sec. Litig.* ($100 million); *In re Fleming Cos. Sec. Litig.* ($95 million); and *In re Cooper Cos., Inc. Sec Litig.* ($27 million).

Education

B.A., Pitzer College, 1997; J.D., University of San Diego School of Law, 2002

Honors / Awards

Rising Star, *Super Lawyers Magazine,* 2015

Andrew S. Love | Partner

Andrew Love is a partner in the Firm's San Francisco office and a member of the Firm's Appellate Practice Group. His practice focuses primarily on appeals of securities fraud class actions. Love has successfully briefed and argued cases on behalf of defrauded investors and consumers in several U.S. Courts of Appeal, as well as in the California appellate courts. Recent published cases include *Sherman v. Abengoa, S.A.*, __ F.4th __ , 2025 WL 2825369 (2d Cir. Oct. 6, 2025), *New England Carpenters Guaranteed Annuity Pension Funds v. DeCarlo*, 122 F.4th 28 (2d Cir. 2023), *Stafford v. Rite Aid Corp.*, 998 F.3d 862 (9th Cir. 2021), *Constr. Indus. & Laborers Joint Pension Tr. v. Carbonite, Inc.*, 22 F.4th 1 (1st Cir. 2021), and *Friedman v. AARP, Inc.*, 855 F.3d 1047 (9th Cir. 2017). He was also co-counsel in *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061 (2018).

Before joining the Firm and for more than two decades, Love represented inmates on California's death row in appellate and habeas corpus proceedings, successfully arguing capital cases in both the California Supreme Court and the Ninth Circuit. He co-chaired the Capital Case Defense Seminar (2004-2013), recognized as the largest conference for death penalty practitioners in the country. Additionally, he was on the faculty of the National Institute for Trial Advocacy's Post-Conviction Skills Seminar. Love is a member of the California Academy of Appellate Lawyers.

Education

University of Vermont, 1981; J.D., University of San Francisco School of Law, 1985

Honors / Awards

J.D., *Cum Laude*, University of San Francisco School of Law, 1985; McAuliffe Honor Society, University of San Francisco School of Law, 1982-1985

Erik W. Luedeke | Partner

Erik Luedeke is a partner in the Firm's San Diego office, where he represents individual and institutional investors in breach of fiduciary duty and securities fraud litigation in state and federal courts nationwide. Luedeke is a member of the Firm's Delaware Practice Group. As corporate fiduciaries, directors and officers are duty-bound to act in the best interest of the corporation and its shareholders. When they fail to do so they breach their fiduciary duty and may be held liable for harm caused to the corporation. Luedeke's shareholder derivative practice focuses on litigating breach of fiduciary duty and related claims on behalf of corporations and shareholders injured by wayward corporate fiduciaries. Notable shareholder derivative actions in which he recently participated and the recoveries he helped to achieve include *In re Community Health Sys., Inc. S'holder Derivative Litig.* ($60 million in financial relief and unprecedented corporate governance reforms), *In re Lumber Liquidators Holdings, Inc. S'holder Derivative Litig.* ($26 million in financial relief plus substantial governance), and *In re Google Inc. S'holder Derivative Litig.* ($250 million in financial relief to fund substantial governance).

Luedeke's practice also includes the prosecution of complex securities class action cases on behalf of aggrieved investors. Luedeke was a member of the litigation team in *Jaffe v. Household Int'l, Inc.*, No. 02-C-5893 (N.D. Ill.), that resulted in a record-breaking $1.575 billion settlement after 14 years of litigation, including a six-week jury trial ending in a plaintiffs' verdict. He was also a member of the litigation teams in *In re UnitedHealth Grp. Inc. PSLRA Litig.*, No. 06-CV-1691 (D. Minn.) ($925 million recovery), and *In re Questcor Pharms., Inc. Sec. Litig.*, No. 8:12-cv-01623 (C.D. Cal.) ($38 million recovery).

Education

B.S./B.A., University of California Santa Barbara, 2001; J.D., University of San Diego School of Law, 2006

Honors / Awards

Rising Star, *Super Lawyers Magazine,* 2015-2017; Student Comment Editor, *San Diego International Law Journal*, University of San Diego School of Law

Christopher H. Lyons | Partner

Christopher Lyons is a partner in the Firm's Nashville and Wilmington offices, and manages the Wilmington office. He focuses his practice on representing institutional and individual investors in merger-related class action litigation and in complex securities litigation. Lyons has been a significant part of litigation teams that have achieved substantial recoveries for investors. Notable Delaware cases that Lyons has co-led include *Bioverativ* (*Goldstein v. Denner*) ($124 million recovery), *Good Technology* ($52 million – about 1.5 times the consideration paid to common stockholders in the challenged private-company merger), *Blackhawk Network Holdings* ($29.5 million), and *The Fresh Market* (*Morrison v. Berry*) ($27.5 million recovered). Lyons has also been part of teams litigating federal securities cases that led to substantial recoveries, including *Envision* ($177.5 million), *CoreCivic* (*Grae v. Corrections Corporation of America*) ($56 million recovered), and *Nissan* ($36 million). His *pro bono* work includes representing individuals who are appealing denial of necessary medical benefits by TennCare (Tennessee's Medicaid program), through the Tennessee Justice Center.

Both during and before his time at Robbins Geller, Lyons has litigated extensively in Delaware courts, having tried cases on behalf of both plaintiffs and defendants in the Delaware Court of Chancery. Before joining Robbins Geller, Lyons practiced at a prominent Delaware law firm, where he mostly represented corporate officers and directors defending against breach of fiduciary duty claims in the Delaware Court of Chancery and in the Delaware Supreme Court. Before that, he clerked for Vice Chancellor J. Travis Laster of the Delaware Court of Chancery. Lyons now applies the expertise he gained from those experiences to help investors uncover wrongful conduct and recover the money and other remedies to which they are rightfully entitled.

Education

B.A., Colorado College, 2006; J.D., Vanderbilt University Law School, 2010

Honors / Awards

40 & Under List, *Benchmark Litigation*, 2023-2025; Recommended Lawyer, *The Legal 500*, 2024-2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2024-2025; Rising Star, *Super Lawyers Magazine*, 2018-2020, 2022-2024; Best Lawyer in America: One to Watch, *Best Lawyers*®, 2022-2024; 500 X – The Next Generation, *Lawdragon*, 2023; 40 & Under Hot List, *Benchmark Litigation*, 2021; B.A., Distinction in International Political Economy, Colorado College, 2006; J.D., Law & Business Certificate, Vanderbilt University Law School, 2010

Mark T. Millkey | Partner

Mark Millkey is a partner in the Firm's Melville office. He has significant experience in the areas of securities and consumer litigation, as well as in federal and state court appeals.

During his career, Millkey has worked on a major consumer litigation against MetLife that resulted in a benefit to the class of approximately $1.7 billion, as well as a securities class action against Royal Dutch/Shell that settled for a minimum cash benefit to the class of $130 million and a contingent value of more than $180 million. Since joining Robbins Geller, he has worked on securities class actions that have resulted in more than $1.5 billion in settlements.

Education

B.A., Yale University, 1981; M.A., University of Virginia, 1983; J.D., University of Virginia, 1987

Honors / Awards

Super Lawyer, *Super Lawyers Magazine*, 2013-2025

David W. Mitchell | Partner

David Mitchell is a partner in the Firm's San Diego office and focuses his practice on antitrust and securities fraud litigation. He is a former federal prosecutor who has tried nearly 20 jury trials. As head of the Firm's Antitrust and Competition Law Practice Group, he has served as lead or co-lead counsel in numerous cases and has helped achieve substantial settlements for shareholders. His most notable antitrust cases include *Dahl v. Bain Cap. Partners, LLC*, obtaining more than $590 million for shareholders, and *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, in which a settlement of $5.5 billion was approved in the Eastern District of New York. This case was brought on behalf of millions of U.S. merchants against Visa and MasterCard and various card-issuing banks, challenging the way these companies set and collect tens of billions of dollars annually in merchant fees. The settlement is believed to be the largest antitrust class action settlement of all time.

Additionally, Mitchell served as co-lead counsel in the ISDAfix Benchmark action against 14 major banks and broker ICAP plc, obtaining $504.5 million for plaintiffs. Currently, Mitchell serves as court-appointed lead counsel in *In re Aluminum Warehousing Antitrust Litig.*, *City of Providence, Rhode Island v. BATS Global Markets Inc.*, *In re SSA Bonds Antitrust Litig.*, *In re Remicade Antitrust Litig.*, and *In re 1-800 Contacts Antitrust Litig.*

Education

B.A., University of Richmond, 1995; J.D., University of San Diego School of Law, 1998

Honors / Awards

Member, Enright Inn of Court; Best Lawyer in America, *Best Lawyers*®, 2018-2026; Super Lawyer, *Super Lawyers Magazine*, 2016-2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2024; Leading Lawyer in America, *Lawdragon*, 2020-2024; Top 50 Lawyers in San Diego, *Super Lawyers Magazine*, 2021; Southern California Best Lawyer, *Best Lawyers*®, 2018-2021; Honoree, Outstanding Antitrust Litigation Achievement in Private Law Practice, American Antitrust Institute, 2018; Antitrust Trailblazer, *The National Law Journal*, 2015; "Best of the Bar," *San Diego Business Journal*, 2014

Danielle S. Myers | Partner

Danielle Myers is a partner in the Firm's San Diego office and focuses her practice on complex securities litigation. Myers oversees the Portfolio Monitoring Program® and provides legal recommendations to the Firm's institutional investor clients on their options to maximize recoveries in securities litigation, both within the United States and internationally, from inception to settlement.

Myers advises the Firm's clients in connection with lead plaintiff applications and has helped secure appointment of the Firm's clients as lead plaintiff and the Firm's appointment as lead counsel in hundreds of securities class actions, which cases have yielded more than $4 billion for investors, including 2018-2024 recoveries in *In re Valeant Pharms. Int'l, Inc. Sec. Litig.*, No. 3:15-cv-07658 (D.N.J.) ($1.2 billion); *In re Am. Realty Cap. Props., Inc. Litig.*, No. 1:15-mc-00040 (S.D.N.Y.) ($1.025 billion); *In re Twitter Inc. Sec. Litig.*, No. 4:16-cv-05314 (N.D. Cal.) ($809.5 million); *In re Apple Inc. Sec. Litig.*, No. 4:19-cv-02033 (N.D. Cal.) ($490 million); *In re Under Armour Sec. Litig.*, No. 1:17-cv-00388 (D. Md.) ($434 million); *Smilovits v. First Solar, Inc.*, No. 2:12-cv-00555 (D. Ariz.) ($350 million); *Dicker v. TuSimple Holdings, Inc.*, No. 3:22-cv-01300 (S.D. Cal.) ($189 million); *Flynn v. Exelon Corp.*, No. 1:19-cv-08209 (N.D. Ill.) ($173 million); *City of Pontiac Gen. Ret. Sys. v. Wal-Mart Stores, Inc.*, No. 5:12-cv-5162 (W.D. Ark.) ($160 million); *Evellard v. LendingClub Corp.*, No. 3:16-cv-02627 (N.D. Cal.) ($125 million); *La. Sheriffs' Pension & Relief Fund v. Cardinal Health, Inc.*, No. 2:19-cv-03347 (S.D. Ohio) ($109 million); *Knurr v. Orbital ATK, Inc.*, No. 1:16-cv-01031 (E.D. Va.) ($108 million); *In re Novo Nordisk Sec. Litig.*, No. 3:17-cv-00209 (D.N.J.) ($100 million); *Karinski v. Stamps.com, Inc.*, No. 2:19-cv-01828 (C.D. Cal.) ($100 million); and *Marcus v. J.C. Penney Co., Inc.*, No. 6:13-cv-00736 (E.D. Tex.) ($97.5 million). Myers is also a frequent presenter on securities fraud and corporate governance reform at conferences and events around the world.

Education

B.A., University of California at San Diego, 1997; J.D., University of San Diego, 2008

Honors / Awards

Future Star, *Benchmark Litigation*, 2019-2020, 2023-2026; Leading Litigator in America, *Lawdragon*, 2026; Best Lawyer in America: One to Watch, *Best Lawyers®*, 2026; Leading Lawyer, *The Legal 500*, 2020-2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2022-2025; Global Plaintiff Lawyer, *Lawdragon*, 2024-2025; Leading Lawyer in America, *Lawdragon*, 2022-2025; Best Lawyer in America: One to Watch, *Best Lawyers®*, 2021-2023; Top 100 Leaders in Law Honoree, *San Diego Business Journal*, 2022; Best Lawyer in Southern California: One to Watch, *Best Lawyers®*, 2021; Next Generation Lawyer, *The Legal 500*, 2017-2019; Recommended Lawyer, *The Legal 500*, 2019; Rising Star, *Super Lawyers Magazine*, 2015-2018; One of the "Five Associates to Watch in 2012," *Daily Journal*; Member, *San Diego Law Review*; CALI Excellence Award in Statutory Interpretation

Eric I. Niehaus | Partner

Eric Niehaus is a partner in the Firm's San Diego office, where his practice focuses on complex securities and derivative litigation. His efforts have resulted in numerous multi-million dollar recoveries to shareholders and extensive corporate governance changes. Notable examples include: *In re NYSE Specialists Sec. Litig.* (S.D.N.Y.); *In re Novatel Wireless Sec. Litig.* (S.D. Cal.); *Batwin v. Occam Networks, Inc.* (C.D. Cal.); *Commc'ns Workers of Am. Plan for Employees' Pensions and Death Benefits v. CSK Auto Corp.* (D. Ariz.); *Marie Raymond Revocable Trust v. Mat Five* (Del. Ch.); and *Kelleher v. ADVO, Inc.* (D. Conn.). He most recently prosecuted a case against Stamps.com in the Central District of California that resulted in a $100 million settlement for shareholders of the company's stock. Before joining the Firm, Niehaus worked as a Market Maker on the American Stock Exchange in New York and the Pacific Stock Exchange in San Francisco.

Education

B.S., University of Southern California, 1999; J.D., California Western School of Law, 2005

Honors / Awards

Rising Star, *Super Lawyers Magazine*, 2015-2016; J.D., *Cum Laude*, California Western School of Law, 2005; Member, *California Western Law Review*

Erika Oliver | Partner

Erika Oliver is a partner in the Firm's San Diego office. Before joining the Firm, Erika served as a judicial law clerk to the Honorable Anthony J. Battaglia of the Southern District of California. At the Firm, her practice focuses on complex securities litigation. Most recently, Erika and Luke Brooks defeated defendants' motion to dismiss securities fraud claims arising from purchases on Israel's Tel Aviv Stock Exchange in *In re Teva Sec. Litig.* (D. Conn.). Erika was also a member of the litigation teams of Robbins Geller attorneys that successfully recovered hundreds of millions of dollars for investors in securities class actions, including *Purple Mountain Trust v. Wells Fargo & Co.* (N.D. Cal.) ($300 million recovery), *Evanston Police Pension Fund v. McKesson Corp.* (N.D. Cal.) ($141 million recovery), *In re Novo Nordisk Sec. Litig.* (D.N.J.) ($100 million recovery), *Fleming v. Impax Labs. Inc.* (N.D. Cal.) ($33 million recovery), and *In re Banc of California Sec. Litig.* (C.D. Cal.) ($19.75 million recovery).

Education

B.S., San Diego State University, 2009; J.D., University of San Diego School of Law, 2015

Honors / Awards

Leading Litigator in America, *Lawdragon*, 2024-2026; 40 & Under List, *Benchmark Litigation*, 2023-2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2023-2025; Rising Star, *Super Lawyers Magazine*, 2024-2025; Best Lawyer in America: One to Watch, *Best Lawyers®*, 2021-2024; Top 40 Under 40, *Daily Journal*, 2023; 500 X – The Next Generation, *Lawdragon*, 2023; Rising Star, *Law360*, 2023; Best Lawyer in Southern California: One to Watch, *Best Lawyers®*, 2021; J.D., *Magna Cum Laude*, University of San Diego School of Law, 2015; B.S., *Cum Laude*, San Diego State University, 2009

Lucas F. Olts | Partner

Luke Olts is a partner in the Firm's San Diego office, where his practice focuses on securities litigation on behalf of individual and institutional investors. Olts recently served as lead counsel in *In re Facebook Biometric Info. Privacy Litig.*, a cutting-edge class action concerning Facebook's alleged privacy violations through its collection of users' biometric identifiers without informed consent that resulted in a $650 million settlement. Olts has focused on litigation related to residential mortgage-backed securities, and has served as lead counsel or co-lead counsel in some of the largest recoveries arising from the collapse of the mortgage market. For example, he was a member of the team that recovered $388 million for investors in J.P. Morgan residential mortgage-backed securities in *Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.*, and a member of the litigation team responsible for securing a $272 million settlement on behalf of mortgage-backed securities investors in *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.* Olts also served as co-lead counsel in *In re Wachovia Preferred Sec. & Bond/Notes Litig.*, which recovered $627 million under the Securities Act of 1933. He also served as lead counsel in *Siracusano v. Matrixx Initiatives, Inc.*, in which the U.S. Supreme Court unanimously affirmed the decision of the Ninth Circuit that plaintiffs stated a claim for securities fraud under §10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. Olts also served on the litigation team in *In re Deutsche Bank AG Sec. Litig.*, in which the Firm obtained *a* $18.5 million settlement in a case against Deutsche Bank and certain of its officers alleging violations of the Securities Act of 1933. Before joining the Firm, Olts served as a Deputy District Attorney for the County of Sacramento, where he tried numerous cases to verdict, including crimes of domestic violence, child abuse, and sexual assault.

Education

B.A., University of California, Santa Barbara, 2001; J.D., University of San Diego School of Law, 2004

Honors / Awards

Future Star, *Benchmark Litigation*, 2018-2020, 2023-2026; Global Plaintiff Lawyer, *Lawdragon*, 2024; Next Generation Lawyer, *The Legal 500*, 2017; Top Litigator Under 40, *Benchmark Litigation*, 2017; Under 40 Hotlist, *Benchmark Litigation*, 2016

Steven W. Pepich | Partner

Steve Pepich is a partner in the Firm's San Diego office. His practice has focused primarily on securities class action litigation, but has also included a wide variety of complex civil cases, including representing plaintiffs in mass tort, royalty, civil rights, human rights, ERISA, and employment law actions. Pepich has participated in the successful prosecution of numerous securities class actions, including: *Carpenters Health & Welfare Fund v. Coca-Cola Co.* ($137.5 million recovery); *In re Fleming Cos. Inc. Sec. & Derivative Litig.* ($95 million recovered); *In re Boeing Sec. Litig.*($92 million recovery); *In re Louisiana-Pacific Corp. Sec. Litig.* ($65 million recovery); *Haw. Structural Ironworkers Pension Trust Fund v. Calpine Corp.* ($43 million recovery); *In re Advanced Micro Devices Sec. Litig.* ($34 million recovery); and *Gohler v. Wood*, ($17.2 million recovery). Pepich was a member of the plaintiffs' trial team in *Mynaf v. Taco Bell Corp.*, which settled after two months of trial on terms favorable to two plaintiff classes of restaurant workers for recovery of unpaid wages. He was also a member of the plaintiffs' trial team in *Newman v. Stringfellow* where, after a nine-month trial in Riverside, California, all claims for exposure to toxic chemicals were ultimately resolved for $109 million.

Education

B.S., Utah State University, 1980; J.D., DePaul University, 1983

Daniel J. Pfefferbaum | Partner

Daniel Pfefferbaum is a partner in the Firm's San Francisco office, where his practice focuses on complex securities litigation. He has been a member of litigation teams that have recovered more than $750 million for investors, including: *In re Apple Inc. Sec. Litig.* ($490 million recovery); *City of Westland Police & Fire Ret. Sys. v. Metlife Inc.* ($84 million recovery); *Garden City Emps.' Ret. Sys. v. Psychiatric Sols., Inc.* ($65 million recovery); *In re Prudential Fin., Inc. Sec. Litig.* ($35 million recovery); *In re PMI Grp., Inc. Sec. Litig.* ($31.25 million recovery); *Hessefort v. Super Micro Computer, Inc.* ($18.25 million recovery); and *Xiang v. Inovalon Holdings, Inc.* ($17 million recovery). Pfefferbaum was a member of the litigation team that secured a historic recovery on behalf of Trump University students in two class actions against President Donald J. Trump. The settlement provides $25 million to approximately 7,000 consumers. This result means individual class members are eligible for upwards of $35,000 in restitution. He represented the class on a *pro bono* basis.

Education

B.A., Pomona College, 2002; J.D., University of San Francisco School of Law, 2006; LL.M. in Taxation, New York University School of Law, 2007

Honors / Awards

Future Star, *Benchmark Litigation*, 2018-2020, 2023-2026; 40 & Under Hot List, *Benchmark Litigation*, 2016-2020; Top 40 Under 40, *Daily Journal*, 2017; Rising Star, *Super Lawyers Magazine*, 2013-2017

Theodore J. Pintar | Partner

Ted Pintar is a partner in the Firm's San Diego office. Pintar has over 20 years of experience prosecuting securities fraud actions and derivative actions and over 15 years of experience prosecuting insurance-related consumer class actions, with recoveries in excess of $1 billion. He was part of the litigation team in the AOL Time Warner state and federal court securities opt-out actions, which arose from the 2001 merger of America Online and Time Warner. These cases resulted in a global settlement of $618 million. Pintar was also on the trial team in *Knapp v. Gomez*, which resulted in a plaintiff's verdict. Pintar has successfully prosecuted several RICO cases involving the deceptive sale of deferred annuities, including cases against Allianz Life Insurance Company of North America ($250 million), American Equity Investment Life Insurance Company ($129 million), Midland National Life Insurance Company ($80 million), and Fidelity & Guarantee Life Insurance Company ($53 million). He has participated in the successful prosecution of numerous other insurance and consumer class actions, including: (i) actions against major life insurance companies such as Manufacturer's Life ($555 million initial estimated settlement value) and Principal Mutual Life Insurance Company ($380+ million), involving the deceptive sale of life insurance; (ii) actions against major homeowners insurance companies such as Allstate ($50 million) and Prudential Property and Casualty Co. ($7 million); (iii) actions against automobile insurance companies such as the Auto Club and GEICO; and (iv) actions against Columbia House ($55 million) and BMG Direct, direct marketers of CDs and cassettes. Pintar and co-counsel recently settled a securities class action for $32.8 million against Snap, Inc. in *Snap Inc. Securities Cases*, a case alleging violations of the Securities Act of 1933. Additionally, Pintar has served as a panelist for numerous Continuing Legal Education seminars on federal and state court practice and procedure.

Education

B.A., University of California, Berkeley, 1984; J.D., University of Utah College of Law, 1987

Honors / Awards

Rated AV Preeminent by Martindale-Hubbell; Top Lawyer in San Diego, *San Diego Magazine*, 2013-2022; Super Lawyer, *Super Lawyers Magazine*, 2014-2017; CAOC Consumer Attorney of the Year Award Finalist, 2015; Note and Comment Editor, *Journal of Contemporary Law*, University of Utah College of Law; Note and Comment Editor, *Journal of Energy Law and Policy*, University of Utah College of Law

Ashley M. Price | Partner

Ashley Price is a partner in the Firm's San Diego office. Her practice focuses on complex securities litigation. Price is currently serving as lead counsel in *Bucks Cnty. Emps. Ret. Sys. v. Norfolk Southern Corp.* (N.D. Ga.), a case brought on behalf of Norfolk Southern's investors following the catastrophic derailment of one of Norfolk Southern's freight trains outside of East Palestine, Ohio. Having prevailed against defendants' attempt to dismiss the case, the team is now pressing forward to obtain evidence for proving at a jury trial investors' claims that defendants fraudulently misrepresented the safety of their railroad operations.

Price also served as lead counsel in *In re Am. Realty Cap. Props., Inc. Litig.* (S.D.N.Y.), a case arising out of ARCP's manipulative accounting practices, and obtained a $1.025 billion recovery. For five years, she and the litigation team prosecuted nine different claims for violations of the Securities Exchange Act of 1934 and the Securities Act of 1933, involving seven different stock or debt offerings and two mergers. The recovery represents the highest percentage of damages of any major PSLRA case prior to trial and includes the largest personal contributions by individual defendants in history.

Price was likewise a key member of many other successful Robbins Geller litigation teams, including *Monroe Cnty. Emps.' Ret. Sys. v. Southern Co.* (N.D. Ga.) ($87.5 million recovery), *Strathclyde Pension Fund v. Bank OZK* (E.D. Ark.) ($45 million recovery), *Micholle v. Ophthotech Corp.* (S.D.N.Y.) ($29 million recovery), and *Mart v. Tactile Sys. Tech., Inc.* (D. Minn.) ($5 million recovery).

Education

B.A., Duke University, 2006; J.D., Washington University in St. Louis, School of Law, 2011

Honors / Awards

40 & Under List, *Benchmark Litigation*, 2023-2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2023-2025; Best Lawyer in America: One to Watch, *Best Lawyers®*, 2023-2025; 500 X – The Next Generation, *Lawdragon*, 2023-2024; 40 & Under Hot List, *Benchmark Litigation*, 2021; Rising Star, *Super Lawyers Magazine*, 2016-2021

Willow E. Radcliffe | Partner

Willow Radcliffe is a partner in the Firm's San Francisco office, where she concentrates her practice in securities class action litigation in federal court. She has been significantly involved in the prosecution of numerous securities fraud claims, including actions filed against Pfizer, Inc. ($400 million recovery), CoreCivic (*Grae v. Corrections Corporation of America*) ($56 million recovery), Flowserve Corp. ($55 million recovery), Santander Consumer USA Holdings Inc. ($47 million), NorthWestern Corp. ($40 million recovery), Ashworth, Inc. ($15.25 million recovery), and Allscripts Healthcare Solutions, Inc. ($9.75 million recovery). Additionally, Radcliffe has represented plaintiffs in other complex actions, including a class action against a major bank regarding the adequacy of disclosures made to consumers in California related to access checks. Before joining the Firm, she clerked for the Honorable Maria-Elena James, Magistrate Judge for the United States District Court for the Northern District of California.

Education

B.A., University of California, Los Angeles 1994; J.D., Seton Hall University School of Law, 1998

Honors / Awards

Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2025; Best Lawyer in America: One to Watch, *Best Lawyers*®, 2021-2025; Best Lawyer in Northern California: One to Watch, *Best Lawyers*®, 2021; Plaintiffs' Lawyer Trailblazer, *The National Law Journal*, 2020; J.D., *Cum Laude*, Seton Hall University School of Law, 1998; Most Outstanding Clinician Award; Constitutional Law Scholar Award

Frank A. Richter | Partner

Frank Richter is a partner in the Firm's Chicago office, where he focuses on shareholder, antitrust, and class action litigation.

Richter was an integral member of the Robbins Geller team that secured a $1.21 billion settlement in *In re Valeant Pharms. Int'l, Inc. Sec. Litig.* (D.N.J.), which is the ninth-largest securities class action settlement in history and the largest ever against a pharmaceutical manufacturer. More recently, Richter's representative matters include *Exelon* (N.D. Ill., $173 million settlement), which resolved securities claims stemming from the alleged concealment of an eight-year scheme to bribe a public official, as well as *Nutanix* (N.D. Cal., $71 million settlement), *Oak Street Health* (N.D. Ill., $60 million settlement), and *Grubhub* (N.D. Ill., $42 million settlement). In addition, Richter was a member of litigation teams that secured significant settlements in *HCA* (E.D. Tenn., $215 million), *Sprint* (D. Kan., $131 million), *Orbital ATK* (E.D. Va., $108 million), *Dana Corp.* (N.D. Ohio, $64 million), *Diplomat* (N.D. Ill., $15.5 million), *LJM Funds* (N.D. Ill., $12.85 million), and *Camping World* (N.D. Ill., $12.5 million).

Richter also works on antitrust matters, including serving on the Plaintiffs' Steering Committee in *In re Dealer Mgmt. Sys. Antitrust Litig.* (N.D. Ill.), and he represents plaintiffs as local counsel in class action and derivative shareholder litigation in Illinois state and federal courts.

Education

B.A., Truman State University, 2007; M.M., DePaul University School of Music, 2009; J.D., DePaul University College of Law, 2012

Honors / Awards

40 & Under List, *Benchmark Litigation*, 2023-2025; 500 X – The Next Generation, *Lawdragon*, 2023-2025; Rising Star, *Super Lawyers Magazine*, 2017-2022; 40 & Under Hot List, *Benchmark Litigation*, 2021; J.D., *Summa Cum Laude*, Order of the Coif, CALI Award for highest grade in seven courses, DePaul University College of Law, 2012

Darren J. Robbins | Partner

Darren Robbins is a founding partner of Robbins Geller Rudman & Dowd LLP. Over the last two decades, Robbins has served as lead counsel in more than 100 securities class actions and has recovered billions of dollars for investors. Robbins served as lead counsel in *In re Am. Realty Cap. Props., Inc. Litig.*, a securities class action arising out of improper accounting practices, recovering more than $1 billion for class members. The *American Realty* settlement represents the largest recovery as a percentage of damages of any major class action brought pursuant to the Private Securities Litigation Reform Act of 1995 and resolved prior to trial. The $1+ billion settlement included the largest personal contributions ($237.5 million) ever made by individual defendants to a securities class action settlement.

Robbins also led Robbins Geller's prosecution of wrongdoing related to the sale of residential mortgage-backed securities (RMBS) prior to the global financial crisis, including an RMBS securities class action against Goldman Sachs that yielded a $272 million recovery for investors. Robbins served as co-lead counsel in connection with a $627 million recovery for investors in *In re Wachovia Preferred Securities & Bond/Notes Litig.*, one of the largest securities class action settlements ever involving claims brought solely under the Securities Act of 1933.

One of the hallmarks of Robbins' practice has been his focus on corporate governance reform. In *UnitedHealth*, a securities fraud class action arising out of an options backdating scandal, Robbins represented lead plaintiff CalPERS and obtained the cancellation of more than 3.6 million stock options held by the company's former CEO and secured a record $925 million cash recovery for shareholders. He also negotiated sweeping corporate governance reforms, including the election of a shareholder-nominated director to the company's board of directors, a mandatory holding period for shares acquired via option exercise, and compensation reforms that tied executive pay to performance. Recently, Robbins led a shareholder derivative action brought by several pension funds on behalf of Community Health Systems, Inc. that yielded a $60 million payment to Community Health as well as corporate governance reforms that included two shareholder-nominated directors, the creation and appointment of a Healthcare Law Compliance Coordinator, the implementation of an executive compensation clawback in the event of a restatement, the establishment of an insider trading controls committee, and the adoption of a political expenditure disclosure policy.

Education

B.S., University of Southern California, 1990; M.A., University of Southern California, 1990; J.D., Vanderbilt Law School, 1993

Honors / Awards

Litigation Star, *Benchmark Litigation*, 2023-2026; Best Lawyer in America, *Best Lawyers®*, 2010-2026; Hall of Fame, *The Legal 500*, 2023-2025; Ranked by *Chambers USA*, 2014-2025; California - Litigation Star, *Benchmark Litigation*, 2024-2025; Lawyer of the Year: Litigation – Securities, *Best Lawyers®*, 2023, 2025; California Lawyer Attorney of the Year (CLAY), *Daily Journal*, 2022, 2024; Top 10 Lawyers in San Diego, *Super Lawyers Magazine*, 2024; Leading Lawyer, *The Legal 500*, 2020-2022; Top 50 Lawyers in San Diego, *Super Lawyers Magazine*, 2015, 2021; Litigator of the Week, *The American Lawyer*, 2021; Southern California Best Lawyer, *Best Lawyers®*, 2012-2021; Local Litigation Star, *Benchmark Litigation*, 2013-2018, 2020; Recommended Lawyer, *The Legal 500*, 2011, 2017, 2019; Benchmark California Star, *Benchmark Litigation*, 2019; State Litigation Star, *Benchmark Litigation*, 2019; Lawyer of the Year, *Best Lawyers®*, 2017; Influential Business Leader, *San Diego Business Journal*, 2017; Litigator of the Year, *Our City San Diego,* 2017; One of the Top 100 Lawyers Shaping the Future, *Daily Journal*; One of the "Young Litigators 45 and Under," *The American Lawyer*; Attorney of the Year, *California Lawyer*; Managing Editor, *Vanderbilt Journal of Transnational Law*, Vanderbilt Law School

Robert J. Robbins | Partner

Robert Robbins is a partner in the Firm's Boca Raton office. He focuses his practice on investigating securities fraud, initiating securities class actions, and helping institutional and individual shareholders litigate their claims to recover investment losses caused by fraud. Representing shareholders in all aspects of class actions brought pursuant to the federal securities laws, Robbins provides counsel in numerous securities fraud class actions across the country, helping secure significant recoveries for investors.

Recently, Robbins was a key member of the Robbins Geller litigation team that secured a $1.21 billion settlement in *In re Valeant Pharms. Int'l, Inc. Sec. Litig.*, a case that *Vanity Fair* reported as "the corporate scandal of its era" that had raised "fundamental questions about the functioning of our health-care system, the nature of modern markets, and the slippery slope of ethical rationalizations." This is the ninth largest securities class action settlement ever and the largest against a pharmaceutical manufacturer. Robbins has also been a member of Robbins Geller litigation teams responsible for securing hundreds of millions of dollars in securities class action settlements, including: *Hospira* ($60 million recovery); *3D Systems* ($50 million); *CVS Caremark* ($48 million recovery); *Baxter International* ($42.5 million recovery); *Grubhub* ($42 million); *R.H. Donnelley* ($25 million recovery); *Spiegel* ($17.5 million recovery); *TECO Energy* ($17.35 million recovery); *AFC Enterprises* ($17.2 million recovery); *Accretive Health* ($14 million recovery); *Lender Processing Services* ($14 million recovery); *Lexmark Int'l* ($12 million); *Imperial Holdings* ($12 million recovery); *Mannatech* ($11.5 million recovery); *Newpark Resources* ($9.24 million recovery); *CURO Group* ($8.98 million); *Gilead Sciences* ($8.25 million recovery); *TCP International* ($7.175 million recovery); *Cryo Cell International* ($7 million recovery); *Gainsco* ($4 million recovery); and *Body Central* ($3.425 million recovery).

Education

B.S., University of Florida, 1999; J.D., University of Florida College of Law, 2002

Honors / Awards

Leading Litigator in America, *Lawdragon*, 2024-2026; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2025; Best Lawyer in America: One to Watch, *Best Lawyers®*, 2024; Rising Star, *Super Lawyers Magazine*, 2015-2017; J.D., High Honors, University of Florida College of Law, 2002; Member, *Journal of Law and Public Policy*, University of Florida College of Law; Member, *Phi Delta Phi*, University of Florida College of Law; *Pro bono* certificate, Circuit Court of the Eighth Judicial Circuit of Florida; Order of the Coif

David A. Rosenfeld | Partner

David Rosenfeld, a partner in the Firm's Melville office, has focused his legal practice for more than 20 years in the area of securities litigation. He has argued in courts throughout the country, has been appointed lead counsel in dozens of securities fraud lawsuits, and has successfully recovered hundreds of millions of dollars for defrauded shareholders.

Rosenfeld works on all stages of litigation, including drafting pleadings, arguing motions, and negotiating settlements. Most recently, he led the teams of Robbins Geller attorneys in recovering $95 million for shareholders of Tableau Software, Inc., $90 million for shareholders of Altria Group, Inc., $40 million for shareholders of BRF S.A, $20 million for shareholders of Grana y Montero (where shareholders recovered more than 90% of their losses), and $34.5 million for shareholders of L-3 Communications Holdings, Inc.

Rosenfeld also led the Robbins Geller team in recovering in excess of $34 million for investors in Overseas Shipholding Group, which represented an outsized recovery of 93% of bond purchasers' damages and 28% of stock purchasers' damages. The creatively structured settlement included more than $15 million paid by a bankrupt entity. Rosenfeld also led the effort that resulted in the recovery of nearly 90% of losses for investors in Austin Capital, a sub-feeder fund of Bernard Madoff. In connection with this lawsuit, Rosenfeld met with and interviewed Madoff in federal prison in Butner, North Carolina.

Rosenfeld has also achieved remarkable recoveries against companies in the financial industry. In addition to being appointed lead counsel in the securities fraud lawsuit against First BanCorp ($74.25 million recovery), he recovered $70 million for investors in Credit Suisse Group and $14 million for Barclays investors.

Education

B.S., Yeshiva University, 1996; J.D., Benjamin N. Cardozo School of Law, 1999

Honors / Awards

Future Star, *Benchmark Litigation*, 2016-2020, 2023-2026; Super Lawyer, *Super Lawyers Magazine*, 2014-2025; Recommended Lawyer, *The Legal 500*, 2018; Rising Star, *Super Lawyers Magazine*, 2011-2013

Robert M. Rothman | Partner

Robert Rothman is a partner in the Firm's Melville office and a member of the Firm's Management Committee. He has recovered well in excess of $1 billion on behalf of victims of investment fraud, consumer fraud, and antitrust violations.

Recently, Rothman served as lead counsel in *In re Am. Realty Cap. Props., Inc. Litig.* where he obtained a $1.025 billion cash recovery on behalf of investors. Rothman and the litigation team prosecuted nine different claims for violations of the Securities Exchange Act of 1934 and the Securities Act of 1933, involving seven different stock or debt offerings and two mergers. The recovery represents the highest percentage of damages ever obtained in a major PSLRA case before trial and includes the largest personal contributions by individual defendants in history. Additionally, Rothman has recovered hundreds of millions of dollars for investors in cases against First Bancorp, Doral Financial, Popular, iStar, Autoliv, CVS Caremark, Fresh Pet, The Great Atlantic & Pacific Tea Company (A&P), NBTY, Spiegel, American Superconductor, Iconix Brand Group, Black Box, OSI Pharmaceuticals, Gravity, Caminus, Central European Distribution Corp., OneMain Holdings, The Children's Place, CNinsure, Covisint, FleetBoston Financial, Interstate Bakeries, Hibernia Foods, Jakks Pacific, Jarden, Portal Software, Ply Gem Holdings, Orion Energy, Tommy Hilfiger, TD Banknorth, Teletech, Unitek, Vicuron, Xerium, W Holding, and dozens of others.

Rothman also represents shareholders in connection with going-private transactions and tender offers. For example, in connection with a tender offer made by Citigroup, Rothman secured an increase of more than $38 million over what was originally offered to shareholders. He also actively litigates consumer fraud cases, including a case alleging false advertising where the defendant agreed to a settlement valued in excess of $67 million.

Education

B.A., State University of New York at Binghamton, 1990; J.D., Hofstra University School of Law, 1993

Honors / Awards

Super Lawyer, *Super Lawyers Magazine*, 2011, 2013-2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2022-2025; Global Plaintiff Lawyer, *Lawdragon*, 2024-2025; Leading Lawyer in America, *Lawdragon*, 2025; Northeast Trailblazer, *The American Lawyer*, 2022; New York Trailblazer, *New York Law Journal*, 2020; Dean's Academic Scholarship Award, Hofstra University School of Law; J.D., with Distinction, Hofstra University School of Law, 1993; Member, *Hofstra Law Review*, Hofstra University School of Law

Samuel H. Rudman | Partner

Sam Rudman is a founding member of the Firm, a member of the Firm's Management Committee, and manages the Firm's New York offices. His 26-year securities practice focuses on recognizing and investigating securities fraud, and initiating securities and shareholder class actions to vindicate shareholder rights and recover shareholder losses. Rudman is also part of the Firm's SPAC Task Force, which is dedicated to rooting out and prosecuting fraud on behalf of injured investors in special purpose acquisition companies. A former attorney with the SEC, Rudman has recovered hundreds of millions of dollars for shareholders, including a $200 million recovery in *Motorola*, a $129 million recovery in *Doral Financial*, an $85 million recovery in *Blackstone*, a $74 million recovery in *First BanCorp*, a $65 million recovery in *Forest Labs,* a $62.5 million recovery in *SQM*, a $50 million recovery in *TD Banknorth*, a $48 million recovery in *CVS Caremark*, a $34.5 million recovery in *L-3 Communications Holdings*, a $32.8 million recovery in *Snap, Inc*., and a $18.5 million recovery in *Deutsche Bank*.

Education

B.A., Binghamton University, 1989; J.D., Brooklyn Law School, 1992

Honors / Awards

Litigation Star, *Benchmark Litigation*, 2013, 2017-2019, 2023-2026; National Practice Area Star, *Benchmark Litigation*, 2019-2020, 2024-2026; Leading Litigator in America, *Lawdragon*, 2026; Super Lawyer, *Super Lawyers Magazine*, 2007-2025; Recommended Lawyer, *The Legal 500*, 2018-2019, 2023-2025; Ranked by *Chambers USA*, 2014-2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2025; Global Plaintiff Lawyer, *Lawdragon*, 2025; Leading Lawyer in America, *Lawdragon*, 2016-2022, 2025; Top 10 Most Influential Securities Litigation Attorney in New York, *Business Today*, 2023; New York Trailblazer, *New York Law Journal*, 2020; Plaintiffs' Lawyer Trailblazer, *The National Law Journal*, 2020; Local Litigation Star, *Benchmark Litigation*, 2013-2020; Dean's Merit Scholar, Brooklyn Law School; Moot Court Honor Society, Brooklyn Law School; Member, *Brooklyn Journal of International Law*, Brooklyn Law School

Joseph Russello | Partner

Joseph Russello is a partner in the Firm's Melville office. He began his career as a defense lawyer and now represents investors in securities class actions at the trial and appellate levels.

Rusello spearheaded the team that recovered $85 million in litigation against The Blackstone Group, LLC, a case that yielded a landmark decision from the Second Circuit Court of Appeals on "materiality" in securities actions. *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706 (2d Cir. 2011). He also led the team responsible for partially defeating dismissal and achieving a $50 million settlement in litigation against BHP Billiton, an Australia-based mining company accused of concealing safety issues at a Brazilian iron-ore dam. *In re BHP Billiton Ltd. Sec. Litig.*, 276 F. Supp. 3d 65 (S.D.N.Y. 2017).

Recently, Rusello was co-counsel in a lawsuit against Allied Nevada Gold Corporation, recovering $14.5 million for investors after the Ninth Circuit Court of Appeals reversed two dismissal decisions. *In re Allied Nev. Gold Corp. Sec. Litig.*, 743 F. App'x 887 (9th Cir. 2018). He was also instrumental in obtaining a settlement and favorable appellate decision in litigation against SAIC, Inc., a defense contractor embroiled in a decade-long overbilling fraud against the City of New York. *Ind. Pub. Ret. Sys. v. SAIC, Inc.*, 818 F.3d 85 (2d Cir. 2016). Other notable recent decisions include: *In re Qudian Sec. Litig.*,189 A.D. 3d 449 (N.Y. App. Div., 1st Dep't 2020); *Kazi v. XP Inc.*, 2020 WL 4581569 (N.Y. Sup. Ct. Aug. 5, 2020); *In re Dentsply Sirona, Inc. S'holders Litig.*, 2019 WL 3526142 (N.Y. Sup. Ct. Aug. 2, 2019); and *Matter of PPDAI Grp. Sec. Litig.*, 64 Misc. 3d 1208(A), 2019 WL 2751278 (N.Y. Sup. Ct. 2019). Other notable settlements include: *NBTY, Inc.* ($16 million); *LaBranche & Co., Inc.* ($13 million); *The Children's Place Retail Stores, Inc.* ($12 million); and *Prestige Brands Holdings, Inc.* ($11 million).

Education

B.A., Gettysburg College, 1998; J.D., Hofstra University School of Law, 2001

Honors / Awards

Super Lawyer, *Super Lawyers Magazine*, 2014-2020, 2023-2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2025; *Law360* Securities Editorial Advisory Board, 2017-2022

Scott H. Saham | Partner

Scott Saham is a partner in the Firm's San Diego office, where his practice focuses on complex securities litigation. He is licensed to practice law in both California and Michigan. Most recently, Saham was a member of the litigation team that obtained a $125 million settlement in *In re LendingClub Sec. Litig.*, a settlement that ranked among the top ten largest securities recoveries ever in the Northern District of California. He was also part of the litigation teams in *Schuh v. HCA Holdings, Inc.*, which resulted in a $215 million recovery for shareholders, the largest securities class action recovery ever in Tennessee, and *Luna v. Marvell Tech. Grp., Ltd.*, which resulted in a $72.5 million settlement that represents approximately 24% to 50% of the best estimate of classwide damages suffered by investors. He also served as lead counsel prosecuting the *Pharmacia* securities litigation in the District of New Jersey, which resulted in a $164 million recovery. Additionally, Saham was lead counsel in the *In re Coca-Cola Sec. Litig.* in the Northern District of Georgia, which resulted in a $137.5 million recovery after nearly eight years of litigation. He also obtained reversal from the California Court of Appeal of the trial court's initial dismissal of the landmark *Countrywide* mortgage-backed securities action. This decision is reported as *Luther v. Countrywide Fin. Corp.*, 195 Cal. App. 4th 789 (2011), and following this ruling that revived the action the case settled for $500 million.

Education

B.A., University of Michigan, 1992; J.D., University of Michigan Law School, 1995

Honors / Awards

Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2025; Distinguished Pro Bono Attorney of the Year, *Casa Cornelia Law Center*, 2022

Juan Carlos Sanchez | Partner

Juan Carlos "J.C." Sanchez is a partner in the Firm's San Diego office. He specializes in complex securities litigation and has extensive experience advising investors on their exposure to securities fraud and advising them on their litigation options for recovering losses. He has advised institutional and retail investors in more than 70 securities class actions that yielded more than $1.5 billion in class-wide recoveries.

Sanchez was a key member of the litigation team that secured the largest shareholder derivative recovery ever in Tennessee and the Sixth Circuit and unprecedented corporate governance reforms in *In re Community Health Sys., Inc. S'holder Derivative Litig.* More recently, Sanchez was a member of the Robbins Geller litigation team that ultimately obtained a $434 million settlement in *In re Under Armour Sec. Litig.*, a case that was previously dismissed with prejudice in 2019 but then resurrected through a highly unusual procedural maneuver – a successful motion asking the federal judge who had dismissed the case to issue an indicative opinion informing the Fourth Circuit that he would revive the original case if it were remanded to him. The $434 million recovery is the second largest securities fraud settlement ever in the Fourth Circuit and is among the top 50 largest such recoveries in U.S. history. Beyond securities litigation, Sanchez's representation of California passengers in a landmark consumer and civil rights case against Greyhound Lines, Inc. led to a ruling recognizing that transit passengers do not check their rights and dignity at the bus door. *Law360* honored Sanchez and the *Greyhound* litigation team as a Consumer Protection Group of the Year in 2019.

Before joining Robbins Geller, Sanchez served as a judicial law clerk to the Honorable Nelva Gonzales Ramos of the U.S. District Court for the Southern District of Texas.

Education

B.S., University of California, Davis, 2005; J.D., University of California, Berkeley School of Law (Boalt Hall), 2014

Honors / Awards

Leading Litigator in America, *Lawdragon*, 2024-2026; 500 X - The Next Generation, *Lawdragon*, 2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2023-2025

Vincent M. Serra | Partner

Vincent Serra is a partner in the Firm's Melville office. His practice focuses primarily on complex securities and consumer actions, but has also included antitrust, employment, insurance, and environmental litigation. His efforts have contributed to the recovery of billions of dollars on behalf of aggrieved plaintiffs and class members and significant injunctive relief for individuals and municipalities throughout the country. Notably, Serra has contributed to several noteworthy recoveries, including *Dahl v. Bain Cap. Partners, LLC* ($590.5 million recovery), an antitrust action against the world's largest private equity firms alleging collusive practices in multi-billion dollar leveraged buyouts, and *Samit v. CBS Corp.* ($14.75 million recovery), a securities action alleging that defendants made false and misleading statements about their knowledge of former CEO Leslie Moonves's exposure to the #MeToo movement.

Additionally, Serra was a member of the litigation team that obtained a $22.75 million settlement fund on behalf of route drivers in *Veliz v. Cintas Corp.*, an action asserting violations of federal and state overtime laws. He was also part of the successful trial team in *Lebrilla v. Farmers Grp., Inc.*, which involved Farmers' practice of using inferior imitation parts when repairing insureds' vehicles. Other notable cases include *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.* ($5.5 billion recovery), *In re DouYu Int'l Holdings Ltd. Sec. Litig.* ($15 million state court securities recovery) and *Kail v. Wolf Appliance, Inc.* (confidential settlement in breach of warranty actions involving faulty blue porcelain oven cavities).

Serra has litigated several actions against manufacturers and retailers alleging the improper marketing and sale of purportedly "flushable" wipes products, including consumer fraud, nuisance, and strict product liability claims. For example, in *Commissioners of Public Works of the City of Charleston (d.b.a. Charleston Water System) v. Costco Wholesale Corp.*, Serra led the prosecution of seven defendants resulting in industrywide settlements that secured commitments from the leading flushable wipes manufacturers and retailers to meet the national municipal wastewater standard for flushability and enhance "do not flush" labeling for non-flushable wipes, helping to meaningfully reduce wipes-related sewer impacts for municipalities and wastewater utilities nationwide. Serra also recently helped secure additional nationwide relief on behalf of the Charleston Water System in an analogous settlement with Dude Products Inc.

Education

B.A., University of Delaware, 2001; J.D., California Western School of Law, 2005

Honors / Awards

Best Lawyer in America: One to Watch, *Best Lawyers*®, 2024-2025; Wiley W. Manuel Award for Pro Bono Legal Services, State Bar of California

Sam S. Sheldon | Partner

Sam Sheldon is a partner in the Firm's San Diego office, where he focuses on securities fraud and other complex civil litigation. Before joining the Firm in January 2024, Sheldon served more than five years as a United States Magistrate Judge in the Southern District of Texas, primarily in Houston. He wrote opinions in almost every area of the law, including securities fraud, intellectual property, class actions, labor and employment, False Claims Act, and criminal law.

Most recently, Sheldon was a part of a team of Robbins Geller attorneys that successfully obtained a $434 million settlement in *In re Under Armour Sec. Litig*. The case settled just weeks before a jury trial was set to begin in Baltimore, Maryland. The $434 million recovery is the second largest securities fraud settlement ever in the Fourth Circuit and is among the top 50 largest such recoveries in U.S. history.

Before taking the federal bench, Sheldon was a partner with Quinn Emanuel in the Washington, D.C. office and headed the firm's Health Care Practice Group. He represented plaintiffs in landmark cases brought under the federal False Claims Act.

Sheldon previously served as Chief of the Health Care Fraud Unit in the DOJ Criminal Division in Washington, D.C., where he oversaw the prosecution of federal health care fraud throughout the United States. He also was an Assistant United States Attorney in Texas. Earlier in his career, Sheldon was a partner with Cozen O'Connor in the San Diego office. Sheldon has tried 25 cases as a federal prosecutor and civil litigator. He received numerous awards for his successful federal prosecutions from the DOJ and other federal agencies including the Special Achievement Award presented by the United States Attorney General.

Education

B.A., University of Southern California, 1992; M.A., University of Southern California, 1994; J.D., University of Houston Law Center, 1997

Honors / Awards

Leading Litigator in America, *Lawdragon*, 2026; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2024-2025; Prosecutor Leadership Award presented by the Inspector General for the United States Department of Health and Human Services, 2013; Special Award from the Director of the FBI for excellent work with the Medicare Fraud Taskforce, 2013; Exceptional Service Award presented by the United States Assistant Attorney General, 2011; Special Achievement Award presented by the United States Attorney General for Sustained Superior Performance of Duty, 2010; International Achievement Award from the Assistant Director of the Department of Homeland Security for prosecuting the first illegal exportation of goods case in the Southern District of Texas (under 18 U.S.C. §554), 2010; Special Award from the Director of the FBI for prosecuting the first agricultural fraud case in the United States (under 7 U.S.C. §7711), 2009

Arthur L. Shingler III | Partner

Arthur Shingler is a partner in the Firm's San Diego office. Shingler has successfully represented both public and private sector clients in hundreds of complex, multi-party actions with billions of dollars in dispute. Throughout his career, he has obtained outstanding results for those he has represented in cases generally encompassing shareholder derivative and securities litigation, unfair business practices and antitrust litigation, publicity rights and advertising litigation, ERISA litigation, and other insurance, health care, employment, and commercial disputes.

Representative matters in which Shingler has served as a core member of the litigation team or settlement counsel include, among others: *In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices & Antitrust Litig.*, No. 2:17-md-02785 (D. Kan.) ($609 million total recovery achieved weeks prior to trial in certified class action alleging antitrust claims involving the illegal reverse payment settlement to delay the generic EpiPen, which allowed the prices of the life-saving EpiPen to rise over 600% in 9 years); *In re Remicade Antitrust Litig.*, No. 2:17-cv-04326 (E.D. Pa.) ($25 million recovery for indirect purchasers in antitrust action); *In re Liquid Aluminum Sulfate Antitrust Litig.*, No. 2:16-md-02687 (D.N.J.) (direct purchaser class settled in excess of $100 million); *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, No. 1:08-cv-10783 (S.D.N.Y.) ($272 million recovery); *In re Royal Dutch/Shell ERISA Litig.*, No. 3:04-cv-00374 (D.N.J.) ($90 million settlement); *In re Priceline.com Sec. Litig.*, No. 3:00-cv-01884 (D. Conn.) ($80 million settlement); *In re General Motors ERISA Litig.*, No. 05-71085 (E.D. Mich.) ($37.5 million settlement, in addition to significant revision of retirement plan administration); *Wood v. Ionatron, Inc.*, No. 4:06-cv-00354 (D. Ariz.) ($6.5 million settlement); *In re Lattice Semiconductor Corp. Derivative Litig.*, No. C 043327CV (Or. Cir. Ct., Wash. Cnty.) (corporate governance settlement, including substantial revision of board policies and executive management); *In re 360networks Class Action Sec. Litig.*, No. 1:02-cv-04837 (S.D.N.Y.) ($7 million settlement); and *Rothschild v. Tyco Int'l (US), Inc.*, 83 Cal. App. 4th 488 (2000) (shaped scope of California's Unfair Practices Act as related to limits of State's False Claims Act).

In addition, Shingler is currently working on behalf of plaintiffs in several class actions, including, for example, *In re National Prescription Opiate Litig.*, No. 1:17-md-02804 (N.D. Ohio), and *In re American Airlines/JetBlue Antitrust Litig.*, No. 1:22-cv-07374 (E.D.N.Y.).

Education

B.A., Point Loma Nazarene College, 1989; J.D., Boston University School of Law, 1995

Honors / Awards

B.A., *Cum Laude*, Point Loma Nazarene College, 1989

Jessica T. Shinnefield | Partner

Jessica Shinnefield is a partner in the Firm's San Diego office. Currently, her practice focuses on initiating, investigating, and prosecuting securities fraud class actions. Shinnefield served as lead counsel in *In re Am. Realty Cap. Props., Inc. Litig.*, a case arising out of ARCP's manipulative accounting practices, and obtained a $1.025 billion recovery. For five years, she and the litigation team prosecuted nine different claims for violations of the Securities Exchange Act of 1934 and the Securities Act of 1933, involving seven different stock or debt offerings and two mergers. The recovery represents the highest percentage of damages of any major PSLRA case prior to trial and includes the largest personal contributions by individual defendants in history. Shinnefield also served as lead counsel in *Smilovits v. First Solar, Inc.,* and obtained a $350 million settlement on the eve of trial. The settlement is fifth-largest PSLRA settlement ever recovered in the Ninth Circuit.

Shinnefield was also a member of the litigation team prosecuting actions against investment banks and leading national credit rating agencies for their roles in structuring and rating structured investment vehicles backed by toxic assets in *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Incorporated* and *King County, Washington v. IKB Deutsche Industriebank AG*. These cases were among the first to successfully allege fraud against the rating agencies, whose ratings have traditionally been protected by the First Amendment. Shinnefield also litigated individual opt-out actions against AOL Time Warner – *Regents of the Univ. of Cal. v. Parsons* and *Ohio Pub. Emps. Ret. Sys. v. Parsons* (recovery more than $600 million). Additionally, she litigated an action against Omnicare, in which she helped obtain a favorable ruling for plaintiffs from the United States Supreme Court. Shinnefield has also successfully appealed lower court decisions in the Second, Seventh, and Ninth Circuit Courts of Appeals.

Education

B.A., University of California at Santa Barbara, 2001; J.D., University of San Diego School of Law, 2004

Honors / Awards

Future Star, *Benchmark Litigation*, 2023-2026; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2025; California Lawyer Attorney of the Year (CLAY), *Daily Journal*, 2024; Top Woman Lawyer, *Daily Journal*, 2024; Best Lawyer in America: One to Watch, *Best Lawyers®*, 2023; Plaintiffs' Lawyers Trailblazer, *The National Law Journal*, 2021; Litigator of the Week, *The American Lawyer*, 2020; Rising Star, *Super Lawyers Magazine*, 2015-2019; 40 & Under Hot List, *Benchmark Litigation*, 2018-2019; B.A., *Phi Beta Kappa*, University of California at Santa Barbara, 2001

Elizabeth A. Shonson | Partner

Elizabeth Shonson is a partner in the Firm's Boca Raton office. She concentrates her practice on representing investors in class actions brought pursuant to the federal securities laws. Shonson has litigated numerous securities fraud class actions nationwide, helping achieve significant recoveries for aggrieved investors. She was a member of the litigation teams responsible for recouping millions of dollars for defrauded investors, including: *In re Massey Energy Co. Sec. Litig.* (S.D. W.Va.) ($265 million); *Nieman v. Duke Energy Corp.* (W.D.N.C.) ($146.25 million recovery); *In re ADT Inc. S'holder Litig.* (Fla. Cir. Ct., 15th Jud. Cir.) ($30 million settlement); *Eshe Fund v. Fifth Third Bancorp* (S.D. Ohio) ($16 million); *City of St. Clair Shores Gen. Emps. Ret. Sys. v. Lender Processing Servs., Inc.* (M.D. Fla.) ($14 million); and *In re Synovus Fin. Corp.* (N.D. Ga.) ($11.75 million).

Education

B.A., Syracuse University, 2001; J.D., University of Florida Levin College of Law, 2005

Honors / Awards

Rising Star, *Super Lawyers Magazine*, 2016-2019; J.D., *Cum Laude*, University of Florida Levin College of Law, 2005; Editor-in-Chief, *Journal of Technology Law & Policy*; Phi Delta Phi; B.A., with Honors, *Summa Cum Laude*, Syracuse University, 2001; Phi Beta Kappa

Trig Smith | Partner

Trig Smith is a partner in the Firm's San Diego office where he focuses his practice on complex securities litigation. He has been involved in the prosecution of numerous securities class actions that have resulted in over a billion dollars in recoveries for investors. His cases have included: *In re Cardinal Health, Inc. Sec. Litig.* ($600 million recovery); *Jones v. Pfizer Inc.* ($400 million recovery); *Silverman v. Motorola, Inc.* ($200 million recovery); and *City of Livonia Emps.' Ret. Sys. v. Wyeth* ($67.5 million). Most recently, he was a member of the Firm's trial team in *Hsu v. Puma Biotechnology, Inc.*, a securities fraud class action that resulted in a verdict in favor of investors after a two-week jury trial.

Education

B.S., University of Colorado, Denver, 1995; M.S., University of Colorado, Denver, 1997; J.D., Brooklyn Law School, 2000

Honors / Awards

Best Lawyer in America, *Best Lawyers®*, 2024-2026; Member, *Brooklyn Journal of International Law*, Brooklyn Law School; CALI Excellence Award in Legal Writing, Brooklyn Law School

Mark Solomon | Partner

Mark Solomon is a founding and managing partner of the Firm and leads its international litigation practice. Over the last 32 years, he has regularly represented United States and United Kingdom-based pension funds and asset managers in class and non-class securities litigation in federal and state courts throughout the United States. He was first admitted to the Bar of England and Wales as a Barrister (he is non-active) and is an active member of the Bars of Ohio, California, and various United States federal district and appellate courts.

Since joining the practice in 1993, Solomon has spearheaded the prosecution of many significant securities fraud cases, recovering billions of dollars for defrauded investors. The recoveries are the product of multi-million and multi-hundred million dollar pre-trial settlements his teams and his clients have been able to achieve, enhanced by a track record of taking such cases successfully through jury trial where necessary. An additional feature of his practice is the significant corporate governance reforms designed to limit recidivism and promote appropriate standards that he has introduced in the resolution of major cases.

Solomon currently is counsel to a number of U.K. pension funds that are serving or have served as lead plaintiffs in cases throughout the United States in the last ten years. He represented Norfolk Pension Fund in the securities fraud class action against Apple Inc. and Apple executives in *In re Apple Inc. Sec. Litig.* in the federal district court for the Northern District of California, which resulted in a settlement shortly before trial of $490 million payable by the defendants to the investor class – the third-largest ever securities fraud recovery in the Northern District and the fifth-largest in the Ninth Circuit. He represented North East Scotland Pension Fund in the securities fraud class action against Under Armour and Under Armour executives *In re Under Armour Sec. Litig.* in the federal district court for the District of Maryland, which resulted in a settlement shortly before trial of $434 million payable by the defendants to the investor class – the second-largest ever securities fraud recovery in the Fourth Circuit. In addition, the monetary recovery was accompanied by important governance reforms, including the separation of the CEO and BOD Chair and restraints on restricted stock awards to senior executives. He represented the British Coal Staff Superannuation Scheme and the Mineworkers' Pension Scheme in *Smilovits v. First Solar, Inc.* in the federal district court for the District of Arizona in which the class recovered $350 million on the eve of trial. That settlement resulted in the largest-ever securities fraud recovery in the District of Arizona and the seventh-largest in the Ninth Circuit. He represented the U.K.'s Norfolk Pension Fund in *Hsu v. Puma Biotechnology, Inc.* where, in the federal district court for the Central District of California, after three weeks of trial, the Fund obtained a jury verdict valued at over $54 million in favor of the class against the company and its CEO. He represented Strathclyde Pension Fund in *Strathclyde Pension Fund v. Bank OZK*, a class action against Bank OZK and its CEO, in the federal district court for the Eastern District of Arkansas in which the class recovered $45 million. He represented Strathclyde Pension Fund in *In re Ply Gem Holdings, Inc. Sec. Litig.* where the class recovered $26 million. Before all of those cases, in a case in 2000 against Helionetics, Inc. and its senior executives, Solomon had presented to a jury, and won, one of the very few securities fraud class actions ever taken to trial.

In ongoing litigation, Solomon represents Los Angeles County Employees Retirement Association and the class in a securities fraud class action pending against FirstEnergy Corp. and FirstEnergy executives in the federal district court for the Southern District of Ohio and he represents Norfolk Pension Fund and the putative class in the securities fraud class action *In re Anadarko Petroleum Corp. Sec. Litig.* against Anadarko Petroleum Corporation and former Anadarko executives, pending in the federal district court for the Southern District of Texas.

Education

B.A., Trinity College, Cambridge University, England, 1985; L.L.M., Harvard Law School, 1986; Inns of Court School of Law, Degree of Utter Barrister, England, 1987

Honors / Awards

Best Lawyer in America, *Best Lawyers®*, 2025-2026; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2025; Global Plaintiff Lawyer, *Lawdragon*, 2024-2025; Litigator of the Week, *The AmLaw Litigation Daily*, 2024; Super Lawyer, *Super Lawyers Magazine*, 2017-2018; Recommended Lawyer, *The Legal 500*, 2016-2017; Lizette Bentwich Law Prize, Trinity College, 1983 and 1984; Hollond Travelling Studentship, 1985; Harvard Law School Fellowship, 1985-1986; Member and Hardwicke Scholar of the Honourable Society of Lincoln's Inn

Hillary B. Stakem | Partner

Hillary Stakem is a partner in the Firm's San Diego office, where her practice focuses on complex securities litigation. Stakem was a member of the litigation team in *Jaffe v. Household Int'l, Inc.*, a securities class action that obtained a record-breaking $1.575 billion settlement after 14 years of litigation, including a six-week jury trial in 2009 that resulted in a verdict for plaintiffs. She was also a member of the litigation teams that secured a $388 million recovery for investors in J.P. Morgan residential mortgage-backed securities in *Fort Worth Employees' Retirement Fund v. J.P. Morgan Chase & Co.*, and that obtained a $350 million settlement on the eve of trial in *Smilovits v. First Solar, Inc.*, the fifth-largest PSLRA settlement ever recovered in the Ninth Circuit. Stakem also helped secure a $131 million recovery in favor of plaintiffs in *Bennett v. Sprint Nextel Corp*, a $100 million settlement for shareholders in *Karinski v. Stamps.com*, a $97.5 million recovery in *Marcus v. J.C. Penney Company, Inc.*, and an $87.5 million settlement in *Monroe County Employees' Retirement System v. The Southern Company*.

Education

B.A., College of William and Mary, 2009; J.D., UCLA School of Law, 2012

Honors / Awards

40 & Under List, *Benchmark Litigation*, 2023-2025; 500 X – The Next Generation, *Lawdragon*, 2023-2025; California Lawyer Attorney of the Year (CLAY), *Daily Journal*, 2024; Rising Star, *Super Lawyers Magazine*, 2021-2022; 40 & Under Hot List, *Benchmark Litigation*, 2021; B.A., *Magna Cum Laude*, College of William and Mary, 2009

Jeffrey J. Stein | Partner

Jeffrey Stein is a partner in the Firm's San Diego office, where he practices securities fraud litigation and other complex matters. He was a member of the litigation team that secured a historic recovery on behalf of Trump University students in two class actions against President Donald J. Trump. The settlement provides $25 million to approximately 7,000 consumers. This result means individual class members are eligible for upwards of $35,000 in restitution. Stein represented the class on a *pro bono* basis.

Before joining the Firm, Stein focused on civil rights litigation, with special emphasis on the First, Fourth, and Eighth Amendments. In this capacity, he helped his clients secure successful outcomes before the United States Supreme Court and the Ninth Circuit Court of Appeals.

Education

B.S., University of Washington, 2005; J.D., University of San Diego School of Law, 2009

Christopher D. Stewart | Partner

Christopher Stewart is a partner in the Firm's San Diego office. His practice focuses on complex securities and shareholder derivative litigation. Stewart served as lead counsel in *In re Am. Realty Cap. Props., Inc. Litig.*, a case arising out of ARCP's manipulative accounting practices, and obtained a $1.025 billion recovery. For five years, he and the litigation team prosecuted nine different claims for violations of the Securities Exchange Act of 1934 and the Securities Act of 1933, involving seven different stock or debt offerings and two mergers. The recovery represents the highest percentage of damages of any major PSLRA case prior to trial and includes the largest personal contributions by individual defendants in history. Most recently, Stewart served as lead counsel in *Smilovits v. First Solar, Inc.,* and obtained a $350 million settlement on the eve of trial. The settlement is fifth-largest PSLRA settlement ever recovered in the Ninth Circuit.

He was also part of the litigation team that obtained a $67 million settlement in *City of Westland Police & Fire Ret. Sys. v. Stumpf*, a shareholder derivative action alleging that Wells Fargo participated in the mass-processing of home foreclosure documents by engaging in widespread robo-signing. Stewart also served on the litigation team in *In re Deutsche Bank AG Sec. Litig.*, in which the Firm obtained a $18.5 million settlement in a case against Deutsche Bank and certain of its officers alleging violations of the Securities Act of 1933.

Education

B.S., Santa Clara University, 2004; M.B.A., University of San Diego School of Business Administration, 2009; J.D., University of San Diego School of Law, 2009

Honors / Awards

California Lawyer Attorney of the Year (CLAY), *Daily Journal*, 2024; Rising Star, *Super Lawyers Magazine*, 2015-2020; J.D., *Magna Cum Laude*, Order of the Coif, University of San Diego School of Law, 2009; Member, *San Diego Law Review*

Sabrina E. Tirabassi | Partner

Sabrina Tirabassi is a partner in the Firm's Boca Raton office, where her practice focuses on complex securities litigation, including the Firm's lead plaintiff motion practice. In this role, Tirabassi remains at the forefront of litigation trends and issues arising under the Private Securities Litigation Reform Act of 1995. Further, Tirabassi has been an integral member of the litigation teams responsible for securing significant monetary recoveries on behalf of shareholders, including: *Villella v. Chemical and Mining Company of Chile Inc.*, No. 1:15-cv-02106 (S.D.N.Y.); *In re ADT Inc. S'holder Litig.*, No. 502018CA003494XXXXMB-AG (Fla. Cir. Ct., 15th Jud. Cir.); *KBC Asset Mgmt. NV v. Aegerion Pharms., Inc.*, No. 1:14-cv-10105-MLW (D. Mass.); *Sohal v. Yan,* No. 1:15-cv-00393-DAP (N.D. Ohio); *McGee v. Constant Contact, Inc.,* No. 1:15-cv-13114-MLW (D. Mass.); and *Schwartz v. Urban Outfitters, Inc.*, No. 2:13-cv-05978-MAK (E.D. Pa.).

Education

B.A., University of Florida, 2000; J.D., Nova Southeastern University Shepard Broad College of Law, 2006, *Magna Cum Laude*

Honors / Awards

Best Lawyer in America: One to Watch, *Best Lawyers*®, 2024-2025; Rising Star, *Super Lawyers Magazine*, 2010, 2015-2018; J.D., *Magna Cum Laude*, Nova Southeastern University Shepard Broad College of Law, 2006

Douglas Wilens | Partner

Douglas Wilens is a partner in the Firm's Boca Raton office. Wilens is a member of the Firm's Appellate Practice Group, participating in numerous appeals in federal and state courts across the country. Most notably, Wilens handled successful and precedent-setting appeals in *Ind. Pub. Ret. Sys. v. SAIC, Inc.*, 818 F.3d 85 (2d Cir. 2016) (addressing duty to disclose under SEC Regulation Item 303 in §10(b) case), *Mass. Ret. Sys. v. CVS Caremark Corp.*, 716 F.3d 229 (1st Cir. 2013) (addressing pleading of loss causation in §10(b) case), and *Lormand v. US Unwired, Inc.*, 565 F.3d 228 (5th Cir. 2009) (addressing pleading of falsity, scienter, and loss causation in §10(b) case).

Before joining the Firm, Wilens was an associate at a nationally recognized firm, where he litigated complex actions on behalf of numerous professional sports leagues, including the National Basketball Association, the National Hockey League, and Major League Soccer. He has also served as an adjunct professor at Florida Atlantic University and Nova Southeastern University, where he taught undergraduate and graduate-level business law classes.

Education

B.S., University of Florida, 1992; J.D., University of Florida College of Law, 1995

Honors / Awards

Book Award for Legal Drafting, University of Florida College of Law; J.D., with Honors, University of Florida College of Law, 1995

Shawn A. Williams | Partner

Shawn Williams, a founding partner of the Firm, is the managing partner of the Firm's San Francisco office and a member of the Firm's Management Committee. Williams specializes in complex commercial litigation focusing on securities litigation and has served as lead counsel in a range of precedent-setting actions that recovered billions of dollars for investors and consumers. Williams recently served as lead counsel in a globally watched securities class action case against Apple, *In re Apple Inc. Sec. Litig.* He and the trial team secured a $490 million recovery for injured investors. Williams was among lead counsel in *In re Facebook Biometric Info. Privacy Litig.*, charging Facebook with violations of the Illinois Biometric Information Privacy Act, resulting in a $650 million recovery for injured Facebook users, which was then the largest ever biometric class action.

Williams also led the team of Robbins Geller attorneys in the investigation and drafting of comprehensive securities fraud claims in *Hefler v. Wells Fargo & Co.*, alleging widespread opening of unauthorized and undisclosed customer accounts. The *Hefler* action resulted in the recovery of $480 million for Wells Fargo investors. In *City of Westland Police & Fire Ret. Sys. v. Metlife, Inc.*, Williams led the Firm's team of lawyers alleging MetLife's failure to disclose and account for the scope of its use and non-use of the Social Security Administration Death Master File and its impact on MetLife's financial statements. The *Metlife* action resulted in a recovery of $84 million. Williams also served as lead counsel in the following actions resulting in significant recoveries: *Chicago Laborers Pension Fund v. Alibaba Grp. Holding Ltd.* ($75 million recovery); *In re Krispy Kreme Doughnuts, Inc. Sec. Litig.* ($75 million recovery); *In re Medtronic, Inc. Sec. Litig.* ($43 million recovery); *In re Cadence Design Sys., Inc. Sec. Litig.* ($38 million recovery); and *City of Sterling Heights Gen. Emps'. Ret. Sys. v. Prudential Fin., Inc.* ($33 million recovery).

Williams is also a member of the Firm's Shareholder Derivative Practice Group, which has secured tens of millions of dollars in cash recoveries and comprehensive corporate governance reforms in a number of high-profile cases including: *In re McAfee, Inc. Derivative Litig.*; *In re Marvell Tech. Grp. Ltd. Derivative Litig.*; *In re KLA-Tencor Corp. S'holder Derivative Litig.*; *The Home Depot, Inc. Derivative Litig.*; and *City of Westland Police & Fire Ret. Sys. v. Stumpf (Wells Fargo & Co.)*.

Before joining the Firm in 2000, Williams served for 5 years as an Assistant District Attorney in the Manhattan District Attorney's Office, where he tried over 20 cases to New York City juries.

Education

B.A., The State of University of New York at Albany, 1991; J.D., University of Illinois, 1995

Honors / Awards

Litigation Star, *Benchmark Litigation*, 2025-2026; Best Lawyer in America, *Best Lawyers®*, 2022-2026; Super Lawyer, *Super Lawyers Magazine*, 2014-2017, 2020-2021, 2023-2025; Recommended Lawyer, *The Legal 500*, 2023-2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2025; Leading Commercial Litigator, *Daily Journal*, 2025; Leading Lawyer in America, *Lawdragon*, 2018-2025; Litigator of the Week, *The AmLaw Litigation Daily*, 2024; Top Plaintiff Lawyer, *Daily Journal*, 2022; Most Influential Black Lawyers, *Savoy*, 2022; Legend, *Lawdragon*, 2022; Top 100 Lawyer, *Daily Journal*, 2019, 2021; California Trailblazer, *The Recorder*, 2019; Titan of the Plaintiffs Bar, *Law360*, 2019; Plaintiffs' Lawyer Trailblazer, *The National Law Journal*, 2019; Board Member, California Bar Foundation, 2012-2014

Christopher M. Wood | Partner

Christopher Wood is the partner in charge of Robbins Geller Rudman & Dowd LLP's Nashville office, where his practice focuses on complex securities litigation. He has been a member of litigation teams responsible for recoveries totaling hundreds of millions of dollars for investors, including some of the largest securities class action recoveries in Tennessee history. His cases include: *In re Massey Energy Co. Sec. Litig.* ($265 million recovery); *In re Envision Healthcare Co. Sec. Litig.* ($177.5 million recovery); *In re VeriFone Holdings, Inc. Sec. Litig.* ($95 million recovery); *Garden City Emps.' Ret. Sys. v. Psychiatric Solutions, Inc.* ($65 million recovery); *Grae v. Corrections Corporation of America* ($56 million recovery); *In re Micron Tech., Inc. Sec. Litig.* ($42 million recovery); *Jackson Cnty. Emps.' Ret. Sys. v. Ghosn* ($36 million recovery); and *Winslow v. BancorpSouth, Inc.* ($29.5 million recovery).

Working together with the ACLU of Tennessee and Public Funds Public Schools (a national campaign founded by the Southern Poverty Law Center and Education Law Center), Wood is litigating an action challenging Tennessee's school voucher program, which diverts critically needed funds from public school students in Nashville and Memphis. Wood has also provided *pro bono* legal services through Tennessee Justice for Our Neighbors, Volunteer Lawyers & Professionals for the Arts, the Ninth Circuit's Pro Bono Program, and the San Francisco Bar Association's Volunteer Legal Services Program.

Education

B.A., Vanderbilt University, 2003; J.D., University of San Francisco School of Law, 2006

Honors / Awards

Future Star, *Benchmark Litigation*, 2023-2026; Best Lawyer in America, *Best Lawyers®*, 2025-2026; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2024-2025; Best Lawyer in America: One to Watch, *Best Lawyers®*, 2023-2024; 40 & Under Hot List, *Benchmark Litigation*, 2021; Rising Star, *Super Lawyers Magazine*, 2011-2013, 2015-2020

Debra J. Wyman | Partner

Debra Wyman is a partner in the Firm's San Diego office. She specializes in securities litigation and has litigated numerous cases against public companies in state and federal courts that have resulted in over $2 billion in securities fraud recoveries. Wyman served as lead counsel in *In re Am. Realty Cap. Props., Inc. Litig.*, a case arising out of ARCP's manipulative accounting practices, and obtained a $1.025 billion recovery. For five years, she and the litigation team prosecuted nine different claims for violations of the Securities Exchange Act of 1934 and the Securities Act of 1933, involving seven different stock or debt offerings and two mergers. The recovery represents the highest percentage of damages of any major PSLRA case prior to trial and includes the largest personal contributions by individual defendants in history. Most recently, Wyman was part of the litigation team in *Monroe County Employees' Retirement System v. The Southern Company* in which an $87.5 settlement was reached after three years of litigation. The settlement resolved claims for violations of the Securities Exchange Act of 1934 stemming from defendants' issuance of materially misleading statements and omissions regarding the status of construction of a first-of-its-kind "clean coal" power plant that was designed to transform coal into synthetic gas that could then be used to fuel the power plant.

Wyman was also a member of the trial team in *Schuh v. HCA Holdings, Inc.*, which resulted in a $215 million recovery for shareholders, the largest securities class action recovery ever in Tennessee. The recovery achieved represents more than 30% of the aggregate classwide damages, far exceeding the typical recovery in a securities class action. Wyman prosecuted the complex securities and accounting fraud case *In re HealthSouth Corp. Sec. Litig.*, one of the largest and longest-running corporate frauds in history, in which $671 million was recovered for defrauded HealthSouth investors. She was also part of the trial team that litigated *In re AT&T Corp. Sec. Litig.*, which was tried in the United States District Court, District of New Jersey, and settled after only two weeks of trial for $100 million. Wyman was also part of the litigation team that secured a $64 million recovery for Dana Corp. shareholders in *Plumbers & Pipefitters National Pension Fund v. Burns*, in which the Firm's Appellate Practice Group successfully appealed to the Sixth Circuit Court of Appeals twice, reversing the district court's dismissal of the action.

Education

B.A., University of California Irvine, 1990; J.D., University of San Diego School of Law, 1997

Honors / Awards

Litigation Star, *Benchmark Litigation*, 2023-2026; National Practice Area Star, *Benchmark Litigation*, 2024-2026; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2025; Leading Lawyer in America, *Lawdragon*, 2020-2025; California - Litigation Star, *Benchmark Litigation*, 2024-2025; California Lawyer Attorney of the Year (CLAY), *Daily Journal*, 2024; Top 250 Women in Litigation, *Benchmark Litigation*, 2021, 2023-2024; San Diego Litigator of the Year, *Benchmark Litigation*, 2021; Plaintiff Litigator of the Year, *Benchmark Litigation*, 2021; Top Woman Lawyer, *Daily Journal*, 2017, 2020; MVP, *Law360*, 2020; Litigator of the Week, *The American Lawyer*, 2020; Litigator of the Year, *Our City San Diego*, 2017; Super Lawyer, *Super Lawyers Magazine*, 2016-2017

Susan K. Alexander | Of Counsel

Susan Alexander is Of Counsel to the Firm and is based in the San Francisco office. Alexander's practice specializes in federal appeals of securities fraud class actions on behalf of investors. With nearly 30 years of federal appellate experience, she has argued on behalf of defrauded investors in circuit courts throughout the United States. Among her most notable cases are *Mineworkers' Pension Scheme v. First Solar Inc.* ($350 million recovery), *In re VeriFone Holdings, Inc. Sec. Litig.* ($95 million recovery), and the successful appellate ruling in *Alaska Elec. Pension Fund v. Flowserve Corp.* ($55 million recovery). Other representative results include: *Stoyas v. Toshiba Corp.*, 896 F.3d 933 (9th Cir. 2018) (reversing dismissal of securities fraud action and holding that the Exchange Act applies to unsponsored American Depositary Shares); *W. Va. Pipe Trades Health & Welfare Fund v. Medtronic, Inc.*, 845 F.3d 384 (8th Cir. 2016) (reversing summary judgment of securities fraud action on statute of limitations grounds); *In re Ubiquiti Networks, Inc. Sec. Litig.*, 669 F. App'x 878 (9th Cir. 2016) (reversing dismissal of §11 claim); *Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC*, 750 F.3d 227 (2d Cir. 2014) (reversing dismissal of securities fraud complaint, focused on loss causation); *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114 (2d Cir. 2012) (reversing dismissal of §11 claim); *City of Pontiac Gen. Emps.' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169 (2d Cir. 2011) (reversing dismissal of securities fraud complaint, focused on statute of limitations); *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049 (9th Cir. 2008) (reversing dismissal of securities fraud complaint, focused on loss causation); *Barrie v. Intervoice-Brite, Inc.*, 397 F.3d 249 (5th Cir.) (reversing dismissal of securities fraud complaint, focused on scienter), *reh'g denied and op. modified*, 409 F.3d 653 (5th Cir. 2005); and *Pirraglia v. Novell, Inc.*, 339 F.3d 1182 (10th Cir. 2003) (reversing dismissal of securities fraud complaint, focused on scienter). Alexander's prior appellate work was with the California Appellate Project ("CAP"), where she prepared appeals and petitions for writs of *habeas corpus* on behalf of individuals sentenced to death. At CAP, and subsequently in private practice, she litigated and consulted on death penalty direct and collateral appeals for ten years.

Education

B.A., Stanford University, 1983; J.D., University of California, Los Angeles, 1986

Honors / Awards

Best Lawyer in America: One to Watch, *Best Lawyers*®, 2026; Super Lawyer, *Super Lawyers Magazine*, 2015-2021; American Academy of Appellate Lawyers; California Academy of Appellate Lawyers; Ninth Circuit Advisory Rules Committee; Appellate Delegate, Ninth Circuit Judicial Conference; ABA Council of Appellate Lawyers

Laura M. Andracchio | Of Counsel

Laura Andracchio is Of Counsel in the Firm's San Diego office. Having joined the Firm in 1997, she was a Robbins Geller partner before her role as Of Counsel. As a partner with the Firm, Andracchio led dozens of securities fraud cases against public companies throughout the country, recovering hundreds of millions of dollars for injured investors. Her current focus remains securities fraud litigation under the federal securities laws.

Most recently, Andracchio was a member of the litigation team that obtained a $350 million recovery for the class in 2024 in *In re Alphabet, Inc. Sec. Litig.* (N.D. Cal.). Andracchio was also part of the litigation teams in *In re American Realty Cap. Props., Inc. Litig.* (S.D.N.Y.), in which a $1.025 billion recovery was obtained; *City of Pontiac Gen. Emps.' Ret. Sys. v. Wal-Mart Stores, Inc.* (W.D. Ark.), recovering $160 million for Wal-Mart investors; and *In re Cardinal Health, Inc. Sec. Litig.* (S.D. Ohio) ($109 million).

Andracchio was also a lead member of the trial team in *In re AT&T Corp. Sec. Litig.*, recovering $100 million for the class after two weeks of trial in district court in New Jersey. Before trial, she managed and litigated the case for four years. She also led the trial team in *Brody v. Hellman*, a case against Qwest and former directors of U.S. West seeking an unpaid dividend, recovering $50 million for the class, which was largely comprised of U.S. West retirees. Some of Andracchio's other cases include *Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.* (S.D.N.Y.) ($388 million on behalf of investors in residential mortgage-backed securities); *City of Hialeah Emps.' Ret. Sys. v. Toll Bros., Inc.*; *Ross v. Abercrombie & Fitch Co.*; *In re GMH Cmtys. Tr. Sec. Litig.*; *In re Vicuron Pharms., Inc. Sec. Litig.*; and *In re Navarre Corp. Sec. Litig.*

Education

B.A., Bucknell University, 1986; J.D., Duquesne University School of Law, 1989

Honors / Awards

Order of the Barristers, J.D., with honors, Duquesne University School of Law, 1989

Jason M. Avellino | Of Counsel

Jason Avellino is Of Counsel in the Firm's Wilmington office. He focuses his practice on corporate governance, shareholder rights, and complex securities litigation.

Before joining Robbins Geller, Avellino practiced at a prominent Delaware law firm, where he was a significant part of litigation teams that achieved substantial recoveries and meaningful governance reforms for investors. He also spent more than a decade representing major product manufacturers, contractors, marine terminal operators, retail establishments, and sports venues (including several Fortune 500 companies) in the evaluation and defense of commercial matters and civil lawsuits. During that time, Avellino was a member of the International Association of Defense Counsel (IADC), a group of approximately 2,500 invitation-only, peer-reviewed members comprised of the world's leading corporate and insurance lawyers and insurance executives.

Education

B.S., Bloomsburg University, 2007; J.D., Villanova University School of Law, 2010

Honors / Awards

B.S., *Magna Cum Laude*, Bloomsburg University, 2007

Matthew J. Balotta | Of Counsel

Matt Balotta is Of Counsel in the Firm's San Diego office, where his practice focuses on securities fraud litigation. Balotta earned his Bachelor of Arts degree in History, *summa cum laude*, from the University of Pittsburgh and his Juris Doctor degree from Harvard Law School. During law school, Balotta was a summer associate with the Firm and interned at the National Consumer Law Center. He also participated in the Employment Law and Delivery of Legal Services Clinics and served on the General Board of the Harvard Civil Rights-Civil Liberties Law Review.

Education

B.A., University of Pittsburgh, 2005; J.D., Harvard Law School, 2015

Honors / Awards

Best Lawyer in America: One to Watch, *Best Lawyers*®, 2026; B.A., *Summa Cum Laude*, University of Pittsburgh, 2005

Randi D. Bandman | Of Counsel

Randi Bandman is Of Counsel in the Firm's San Diego office. Throughout her career, she has represented and advised hundreds of clients, including pension funds, managers, banks, and hedge funds, such as the Directors Guild of America, Screen Actors Guild, Writers Guild of America, and Teamster funds. Bandman's cases have yielded billions of dollars of recoveries. Notable cases include the AOL Time Warner, Inc. merger ($629 million), *In re Enron Corp. Sec. Litig.* ($7.2 billion), Private Equity litigation (*Dahl v. Bain Cap. Partners, LLC*) ($590.5 million), *In re WorldCom Sec. Litig.* ($657 million), and *In re Facebook Biometric Info. Privacy Litig.* ($650 million).

Bandman is currently representing plaintiffs in the Foreign Exchange Litigation pending in the Southern District of New York which alleges collusive conduct by the world's largest banks to fix prices in the $5.3 trillion a day foreign exchange market and in which billions of dollars have been recovered to date for injured plaintiffs. Bandman is part of the Robbins Geller Co-Lead Counsel team representing the class in the "High Frequency Trading" case, which accuses stock exchanges of giving unfair advantages to high-speed traders versus all other investors, resulting in billions of dollars being diverted. Bandman was instrumental in the landmark state settlement with the tobacco companies for $12.5 billion. Bandman also led an investigation with congressional representatives on behalf of artists into allegations of "pay for play" tactics, represented Emmy winning writers with respect to their claims involving a long-running television series, represented a Hall of Fame sports figure, and negotiated agreements in connection with a major motion picture. Recently, Bandman was chosen to serve on the Law Firm Advisory Board of the Association of Media & Entertainment Counsel, an organization made up of thousands of attorneys from studios, networks, guilds, talent agencies, and top media companies, dealing with protecting content distributed through a variety of formats worldwide.

Education

B.A., University of California, Los Angeles; J.D., University of Southern California

Mary K. Blasy | Of Counsel

Mary Blasy is Of Counsel to the Firm and is based in the Firm's Melville and Washington, D.C. offices. Her practice focuses on the investigation, commencement, and prosecution of securities fraud class actions and shareholder derivative suits. Blasy has recovered hundreds of millions of dollars for investors in securities fraud class actions against Reliance Acceptance Corp. ($66 million); Sprint Corp. ($50 million); Titan Corporation ($15+ million); Martha Stewart Omni-Media, Inc. ($30 million); and Coca-Cola Co. ($137.5 million). Blasy has also been responsible for prosecuting numerous complex shareholder derivative actions against corporate malefactors to address violations of the nation's securities, environmental, and labor laws, obtaining corporate governance enhancements valued by the market in the billions of dollars.

In 2014, the Presiding Justice of the Appellate Division of the Second Department of the Supreme Court of the State of New York appointed Blasy to serve as a member of the Independent Judicial Election Qualification Commission, which until December 2018 reviewed the qualifications of candidates seeking public election to New York State Supreme Courts in the 10th Judicial District. She also served on the *Law360* Securities Editorial Advisory Board from 2015 to 2016.

Education

B.A., California State University, Sacramento, 1996; J.D., UCLA School of Law, 2000

Honors / Awards

Super Lawyer, *Super Lawyers Magazine*, 2016-2020, 2023-2025; *Law360* Securities Editorial Advisory Board, 2015-2016; Member, Independent Judicial Election Qualification Commission, 2014-2018

M. Lamontt Bowens | Of Counsel

Lamontt Bowens is Of Counsel to Robbins Geller in the Firm's Washington, D.C. office. He is a member of the Firm's client outreach team where his focus is working with the Firm's institutional investor clients.

Bowens began his career with Robbins Geller working in the fax and mailroom while attending college and law school at night. After his first year of law school, he worked as a summer associate with the Firm. Following his second year of law school, Bowens worked as a summer intern in the office of the San Diego County Public Defender, where he worked at the direction of his supervising attorneys representing indigent clients. After graduating from law school and passing the bar exam, Bowens was a Staff Attorney where he worked on securities, antitrust, and consumer cases in Robbins Geller's San Diego office.

Bowens has written and regularly speaks about his challenging experiences as a youth in the inner city and his unorthodox journey to becoming a lawyer. He has been a mentor to at-risk youth and is an advocate for programs designed to promote second chances for the formerly incarcerated.

Bowens is a dedicated member of the National Association of Securities Professionals (NASP) and the National Bar Association (NBA).

Education

B.S., University of Phoenix, 2004; J.D., Golden Gate University School of Law, 2010

William K. Cavanagh, Jr. | Of Counsel

Bill Cavanagh is Of Counsel in the Firm's Washington, D.C. office. Cavanagh concentrates his practice in employee benefits law and works with the Firm's Institutional Outreach Team. Prior to joining Robbins Geller, Cavanagh was employed by Ullico for the past nine years, most recently as President of Ullico Casualty Group. The Ullico Casualty Group is the leading provider of fiduciary liability insurance for trustees in both the private as well as the public sector. Prior to that he was President of the Ullico Investment Company.

Preceding Cavanagh's time at Ullico, he was a partner at the labor and employee benefits firm Cavanagh and O'Hara in Springfield, Illinois for 28 years. In that capacity, Cavanagh represented public pension funds, jointly trusteed Taft-Hartley, health, welfare, pension, and joint apprenticeship funds advising on fiduciary and compliance issues both at the Board level as well as in administrative hearings, federal district courts, and the United States Courts of Appeals. During the course of his practice, Cavanagh had extensive trial experience in state and the relevant federal district courts. Additionally, Cavanagh served as co-counsel on a number of cases representing trustees seeking to recover plan assets lost as a result of fraud in the marketplace.

Education

B.A., Georgetown University, 1974; J.D., John Marshall Law School, 1978

Honors / Awards

Rated AV Preeminent by Martindale-Hubbell

Christopher Collins | Of Counsel

Christopher Collins is Of Counsel in the Firm's San Diego office and his practice focuses on antitrust and consumer protection. Collins served as co-lead counsel in *Wholesale Elec. Antitrust Cases I & II*, charging an antitrust conspiracy by wholesale electricity suppliers and traders of electricity in California's newly deregulated wholesale electricity market wherein plaintiffs secured a global settlement for California consumers, businesses, and local governments valued at more than $1.1 billion. He was also involved in California's tobacco litigation, which resulted in the $25.5 billion recovery for California and its local entities. Collins is currently counsel on the California Energy Manipulation antitrust litigation, the Memberworks upsell litigation, as well as a number of consumer actions alleging false and misleading advertising and unfair business practices against major corporations. He formerly served as a Deputy District Attorney for Imperial County where he was in charge of the Domestic Violence Unit.

Education

B.A., Sonoma State University, 1988; J.D., Thomas Jefferson School of Law, 1995

Vicki Multer Diamond | Of Counsel

Vicki Multer Diamond is Of Counsel to the Firm and is based in the Firm's Melville office. She has over 25 years of experience as an investigator and attorney. Her practice at the Firm focuses on the initiation, investigation, and prosecution of securities fraud class actions. Diamond played a significant role in the factual investigations and successful oppositions to the defendants' motions to dismiss in a number of cases, including *Tableau*, *One Main*, *Valeant*, and *Orbital ATK*.

Diamond has served as an investigative consultant to several prominent law firms, corporations, and investment firms. Before joining the Firm, she was an Assistant District Attorney in Brooklyn, New York, where she served as a senior Trial Attorney in the Felony Trial Bureau, and was special counsel to the Special Commissioner of Investigations for the New York City schools, where she investigated and prosecuted crime and corruption within the New York City school system.

Education

B.A., State University of New York at Binghamton, 1990; J.D., Hofstra University School of Law, 1993

Honors / Awards

Member, *Hofstra Property Law Journal*, Hofstra University School of Law

Michael J. Dowd | Of Counsel

Mike Dowd was a founding partner of the Firm. He has practiced in the area of securities litigation for 20 years, prosecuting dozens of complex securities cases and obtaining significant recoveries for investors in cases such as *American Realty* ($1.025 billion), *UnitedHealth* ($925 million), *WorldCom* ($657 million), *AOL Time Warner* ($629 million), *Qwest* ($445 million), *Under Armour* ($434 million), and *Pfizer* ($400 million).

Dowd served as lead trial counsel in *Jaffe v. Household International* in the Northern District of Illinois, a securities class action that obtained a record-breaking $1.575 billion settlement after 14 years of litigation, including a six-week jury trial in 2009 that resulted in a verdict for plaintiffs. Dowd also served as the lead trial lawyer in *In re AT&T Corp. Sec. Litig.*, which was tried in the District of New Jersey and settled after only two weeks of trial for $100 million. Dowd served as an Assistant United States Attorney in the Southern District of California from 1987-1991, and again from 1994-1998, where he handled dozens of jury trials and was awarded the Director's Award for Superior Performance.

Education

B.A., Fordham University, 1981; J.D., University of Michigan Law School, 1984

Honors / Awards

Rated AV Preeminent by Martindale-Hubbell; Director's Award for Superior Performance, United States Attorney's Office; Best Lawyer in America, *Best Lawyers*®, 2015-2026; Recommended Lawyer, *The Legal 500*, 2016-2019, 2023-2025; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2025; Hon. David H. Bartick Award for Civility and Professionalism, U.S. District Court for the Southern District of California, 2024; Top Lawyer in San Diego, *San Diego Magazine*, 2013-2022; Southern California Best Lawyer, *Best Lawyers*®, 2015-2021; Super Lawyer, *Super Lawyers Magazine*, 2010-2020; Lawyer of the Year, *Best Lawyers*®, 2020; Hall of Fame, *Lawdragon*, 2018; Litigator of the Year, *Our City San Diego*, 2017; Leading Lawyer in America, *Lawdragon*, 2014-2016; Litigator of the Week, *The American* Lawyer, 2015; Litigation Star, *Benchmark Litigation* 2013; Directorship 100, NACD Directorship, 2012; Attorney of the Year, *California Lawyer*, 2010; Top 100 Lawyers, *Daily Journal*, 2009; B.A., *Magna Cum Laude*, Fordham University, 1981

Travis E. Downs III | Of Counsel

Travis Downs is Of Counsel to the Firm in the Firm's San Diego office. His areas of expertise include prosecution of shareholder and securities litigation, including complex shareholder derivative actions. Downs is a member of the Firm's Delaware Practice Group. Downs led a team of lawyers who successfully prosecuted over 65 stock option backdating derivative actions in federal and state courts across the country, resulting in hundreds of millions in financial givebacks for the plaintiffs and extensive corporate governance enhancements, including annual directors elections, majority voting for directors, and shareholder nomination of directors. Notable cases include: *In re Community Health Sys., Inc. S'holder Derivative Litig.* ($60 million in financial relief and unprecedented corporate governance reforms); *In re Marvell Tech. Grp. Ltd. Derivative Litig.* ($54 million in financial relief and extensive corporate governance enhancements); *In re McAfee, Inc. Derivative Litig.* ($30 million in financial relief and extensive corporate governance enhancements); *In re Affiliated Computer Servs. Derivative Litig.* ($30 million in financial relief and extensive corporate governance enhancements); *In re KB Home S'holder Derivative Litig.* ($30 million in financial relief and extensive corporate governance enhancements); *In re Juniper Networks Derivative Litig.* ($22.7 million in financial relief and extensive corporate governance enhancements); *In re Nvidia Corp. Derivative Litig.* ($15 million in financial relief and extensive corporate governance enhancements); and *City of Pontiac Gen. Emps.' Ret. Sys. v. Langone* (achieving landmark corporate governance reforms for investors).

Downs was also part of the litigation team that obtained a $67 million settlement in *City of Westland Police & Fire Ret. Sys. v. Stumpf*, a shareholder derivative action alleging that Wells Fargo participated in the mass-processing of home foreclosure documents by engaging in widespread robo-signing, and a $250 million settlement in *In re Google, Inc. Derivative Litig.*, an action alleging that Google facilitated in the improper advertising of prescription drugs. Downs is a frequent speaker at conferences and seminars and has lectured on a variety of topics related to shareholder derivative and class action litigation.

Education

B.A., Whitworth University, 1985; J.D., University of Washington School of Law, 1990

Honors / Awards

Rated AV Preeminent by Martindale-Hubbell; Best Lawyer in America, *Best Lawyers®*, 2018-2026; Recommended Lawyer, *The Legal 500*, 2023-2024; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2024; Top 100 Leaders in Law Honoree, *San Diego Business Journal*, 2022; Top Lawyer in San Diego, *San Diego Magazine*, 2013-2022; Southern California Best Lawyer, *Best Lawyers®*, 2018-2021; Super Lawyer, *Super Lawyers Magazine*, 2008; B.A., Honors, Whitworth University, 1985

Christopher T. Gilroy | Of Counsel

Christopher Gilroy is Of Counsel in the Firm's Manhattan office. His practice focuses on complex securities litigation. Since joining the Firm, Gilroy has played a significant role in the following litigations: *Landmen Partners, Inc. v. The Blackstone Grp., L.P* ($85 million recovery on the eve of trial); *In re OSG Sec. Litig.* ($34 million recovery, representing 87% of the maximum Section 11 damages); *City of Austin Police Ret. Sys. v. Kinross Gold Corp.* ($33 million recovery); *Citiline Holdings, Inc. v. iStar Fin. Inc.* ($29 million recovery); *City of Pontiac Gen. Emps. Ret. Sys. v. Lockheed Martin Corp.* ($19.5 million recovery); *Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC* ($14 million recovery); *Beaver Cnty. Emps' Ret. Fund v. Tile Shop Holdings, Inc.* ($9.5 million recovery); *IBEW Loc. 90 Pension Fund v. Deutsche Bank AG* (confidential settlement); *In re Ply Gem Holdings, Inc., Sec. Litig.* ($25.9 million recovery); *In re BRF S.A. Sec. Litig.* ($40 million recovery pending final approval); and *In re SandRidge Energy, Inc. Sec. Litig.* (successfully obtaining class certification in an ongoing litigation). Gilroy also performed an exhaustive factual investigation in *In re Satcon Tech. Corp.*, on behalf of Satcon's Chapter 7 Bankruptcy Trustee, resulting in a seven-figure settlement in an action alleging breaches of fiduciary duties against former Satcon directors and officers.

Education

B.A., City University of New York at Queens College, 2005; J.D., Brooklyn Law School, 2010

Honors / Awards

Rising Star, *Super Lawyers Magazine*, 2019-2021; B.A., *Cum Laude*, City University of New York at Queens College, 2005

Richard W. Gonnello | Of Counsel

Richard Gonnello is Of Counsel in the Firm's Manhattan office. He has two decades of experience litigating complex securities actions.

Gonnello has successfully represented institutional and individual investors. He has obtained substantial recoveries in numerous securities class actions, including *In re Royal Ahold Sec. Litig.* (D. Md.) ($1.1 billion) and *In re Tremont Sec. Law, State Law & Ins. Litig.* (S.D.N.Y.) ($100 million). Gonnello has also obtained favorable recoveries for institutional investors pursuing direct opt-out claims, including cases against Qwest Communications International, Inc. ($175 million) and Tyco International Ltd ($21 million).

Gonnello has co-authored the following articles appearing in the *New York Law Journal*: "*Staehr* Hikes Burden of Proof to Place Investor on Inquiry Notice" and "Potential Securities Fraud: 'Storm Warnings' Clarified."

Education

B.A., Rutgers University, 1995; J.D., UCLA School of Law, 1998

Honors / Awards

B.A., *Summa Cum Laude*, Rutgers University, 1995

Mitchell D. Gravo | Of Counsel

Mitchell Gravo is Of Counsel to the Firm and is a member of the Firm's institutional investor client services group. With more than 30 years of experience as a practicing attorney, he serves as liaison to the Firm's institutional investor clients throughout the United States and Canada, advising them on securities litigation matters.

Gravo's clients include Anchorage Economic Development Corporation, Anchorage Convention and Visitors Bureau, UST Public Affairs, Inc., International Brotherhood of Electrical Workers, Alaska Seafood International, Distilled Spirits Council of America, RIM Architects, Anchorage Police Department Employees Association, Fred Meyer, and the Automobile Manufacturer's Association. Prior to joining the Firm, he served as an intern with the Municipality of Anchorage, and then served as a law clerk to Superior Court Judge J. Justin Ripley.

Education

B.A., Ohio State University; J.D., University of San Diego School of Law

Bailie L. Heikkinen | Of Counsel

Bailie Heikkinen is Of Counsel in the Firm's Boca Raton office. Her practice focuses on complex class actions, including securities, corporate governance, and consumer fraud litigation.

Heikkinen has been an integral member of the litigation teams responsible for securing monetary recoveries on behalf of shareholders that collectively exceed $100 million. Notable cases include: *Medoff v. CVS Caremark Corp.*, No. 1:09-cv-00554 (D.R.I.); *City of Lakeland Emps. Pension Plan v. Baxter Int'l Inc.,* No. 1:10-cv-06016 (N.D. Ill.); *Wong v. Accretive Health, Inc.,* No. 1:12-cv-03102 (N.D. Ill.); and *Loc. 731 I.B. of T. Excavators & Pavers Pension Tr. Fund v. Swanson,* No. 1:09-cv-00799 (D. Del.).

Education

B.A., University of Florida, 2004; J.D., South Texas College of Law, 2007

Honors / Awards

Best Lawyer in America: One to Watch, *Best Lawyers*®, 2023-2025; Rising Star, *Super Lawyers Magazine*, 2014, 2018

Dennis J. Herman | Of Counsel

Dennis Herman is Of Counsel in the Firm's San Francisco office where he focuses his practice on securities class actions. He has led or been significantly involved in the prosecution of numerous securities fraud claims that have resulted in substantial recoveries for investors, including settled actions against Massey Energy ($265 million), Coca-Cola ($137 million), VeriSign ($78 million), Psychiatric Solutions, Inc. ($65 million), St. Jude Medical, Inc. ($50 million), NorthWestern ($40 million), BancorpSouth ($29.5 million), America Service Group ($15 million), Specialty Laboratories ($12 million), Stellent ($12 million), and Threshold Pharmaceuticals ($10 million).

Education

B.S., Syracuse University, 1982; J.D., Stanford Law School, 1992

Honors / Awards

Best Lawyer in America, *Best Lawyers*®, 2018-2026; Northern Californa Best Lawyer, *Best Lawyers*®, 2018-2021; Super Lawyer, *Super Lawyers Magazine*, 2017-2018; Order of the Coif, Stanford Law School; Urban A. Sontheimer Award (graduating second in his class), Stanford Law School; Award-winning Investigative Newspaper Reporter and Editor in California and Connecticut

Helen J. Hodges | Of Counsel

Helen Hodges is Of Counsel in the Firm's San Diego office. She specializes in securities fraud litigation. Hodges has been involved in numerous securities class actions, including: *Dynegy*, which was settled for $474 million; *Thurber v. Mattel*, which was settled for $122 million; *Nat'l Health Labs*, which was settled for $64 million; and *Knapp v. Gomez*, Civ. No. 87-0067-H(M) (S.D. Cal.), in which a plaintiffs' verdict was returned in a Rule 10b-5 class action. Additionally, beginning in 2001, Hodges focused on the prosecution of *Enron*, where a record $7.2 billion recovery was obtained for investors.

Education

B.S., Oklahoma State University, 1979; J.D., University of Oklahoma, 1983

Honors / Awards

Rated AV by Martindale-Hubbell; Hall of Fame, Oklahoma State University, 2022; Top Lawyer in San Diego, *San Diego Magazine*, 2013-2022; served on the Oklahoma State University Foundation Board of Trustees, 2013-2021; Philanthropist of the Year, Women for OSU at Oklahoma State University, 2020; Super Lawyer, *Super Lawyers Magazine*, 2007

David J. Hoffa | Of Counsel

David Hoffa is Of Counsel in the Firm's Washington D.C. office. He has served as a liaison to over 110 institutional investors in portfolio monitoring, securities litigation, and claims filing matters. His practice focuses on providing a variety of legal and consulting services to U.S. state and municipal employee retirement systems and single and multi-employer U.S. Taft-Hartley benefit funds. In addition to serving as a leader on the Firm's Israel Institutional Investor Outreach Team, Hoffa also serves as a member of the Firm's lead plaintiff advisory team, and advises public and multi-employer pension funds around the country on issues related to fiduciary responsibility, legislative and regulatory updates, and "best practices" in the corporate governance of publicly traded companies.

Early in his legal career, Hoffa worked for a law firm based in Birmingham, Michigan, where he appeared regularly in Michigan state court in litigation pertaining to business, construction, and employment related matters. Hoffa has also appeared before the Michigan Court of Appeals on several occasions.

Education

B.A., Michigan State University, 1993; J.D., Michigan State University College of Law, 2000

Nancy M. Juda | Of Counsel

Nancy Juda is Of Counsel to the Firm and is based in the Firm's Washington, D.C. office. Her practice focuses on advising Taft-Hartley pension and welfare funds on issues related to corporate fraud in the United States securities markets. Juda's experience as an ERISA attorney provides her with unique insight into the challenges faced by pension fund trustees as they endeavor to protect and preserve their funds' assets.

Prior to joining Robbins Geller, Juda was employed by the United Mine Workers of America Health & Retirement Funds, where she began her practice in the area of employee benefits law. She was also associated with a union-side labor law firm in Washington, D.C., where she represented the trustees of Taft-Hartley pension and welfare funds on qualification, compliance, fiduciary, and transactional issues under ERISA and the Internal Revenue Code.

Using her extensive experience representing employee benefit funds, Juda advises trustees regarding their options for seeking redress for losses due to securities fraud. She currently advises trustees of funds providing benefits for members of unions affiliated with North America's Building Trades of the AFL-CIO. Juda also represents funds in ERISA class actions involving breach of fiduciary claims.

Education

B.A., St. Lawrence University, 1988; J.D., American University, 1992

Francis P. Karam | Of Counsel

Frank Karam is Of Counsel to the Firm and is based in the Firm's Melville office. Karam is a trial lawyer with 30 years of experience. His practice focuses on complex class action litigation involving shareholders' rights and securities fraud. He also represents a number of landowners and royalty owners in litigation against large energy companies. He has tried complex cases involving investment fraud and commercial fraud, both on the plaintiff and defense side, and has argued numerous appeals in state and federal courts. Throughout his career, Karam has tried more than 100 cases to verdict.

Karam has served as a partner at several prominent plaintiffs' securities firms. From 1984 to 1990, Karam was an Assistant District Attorney in the Bronx, New York, where he served as a senior Trial Attorney in the Homicide Bureau. He entered private practice in 1990, concentrating on trial and appellate work in state and federal courts.

Education

A.B., College of the Holy Cross; J.D., Tulane University School of Law

Honors / Awards

Super Lawyer, *Super Lawyers Magazine*, 2019-2025; "Who's Who" for Securities Lawyers, *Corporate Governance Magazine*, 2015

Arthur C. Leahy | Of Counsel

Art Leahy is a founding partner in the Firm's San Diego office and a member of the Firm's Management Committee. He has over 20 years of experience successfully litigating securities actions and derivative cases. Leahy has recovered well over two billion dollars for the Firm's clients and has negotiated comprehensive pro-investor corporate governance reforms at several large public companies. Most recently, Leahy helped secure a $272 million recovery on behalf of mortgage-backed securities investors in *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.* In the *Goldman Sachs* case, he helped achieve favorable decisions in the Second Circuit Court of Appeals on behalf of investors of Goldman Sachs mortgage-backed securities and again in the Supreme Court, which denied Goldman Sachs' petition for certiorari, or review, of the Second Circuit's reinstatement of the plaintiff's case. He was also part of the Firm's trial team in the AT&T securities litigation, which AT&T and its former officers paid $100 million to settle after two weeks of trial. Prior to joining the Firm, he served as a judicial extern for the Honorable J. Clifford Wallace of the United States Court of Appeals for the Ninth Circuit, and served as a judicial law clerk for the Honorable Alan C. Kay of the United States District Court for the District of Hawaii.

Education

B.A., Point Loma Nazarene University, 1987; J.D., University of San Diego School of Law, 1990

Honors / Awards

Rated AV Preeminent by Martindale-Hubbell; Best Lawyer in America, *Best Lawyers*®, 2024-2026; Top Lawyer in San Diego, *San Diego Magazine*, 2013-2022; Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2021; Super Lawyer, *Super Lawyers Magazine*, 2016-2017; J.D., *Cum Laude*, University of San Diego School of Law, 1990; Managing Editor, *San Diego Law Review*, University of San Diego School of Law

Avital O. Malina | Of Counsel

Avital Malina is Of Counsel in the Firm's Melville office, where her practice focuses on complex securities litigation.

Malina has been recognized as a Rising Star by *Super Lawyers Magazine* for the New York Metro area numerous times. Before joining the Firm, she was an associate in the New York office of a large international law firm, where her practice focused on complex commercial litigations.

Education

B.A., Barnard College, 2005, J.D., Fordman University School of Law, 2009

Honors / Awards

Rising Star, *Super Lawyers Magazine*, 2015-2021; B.A., *Magna Cum Laude*, Barnard College, 2005

Jerry E. Martin | Of Counsel

Jerry Martin is Of Counsel in the Firm's Nashville office. He specializes in representing individuals who wish to blow the whistle to expose fraud and abuse committed by federal contractors, health care providers, tax cheats, or those who violate the securities laws. Martin was a member of the litigation team that obtained a $65 million recovery in *Garden City Emps.' Ret. Sys. v. Psychiatric Solutions, Inc.*, the fourth-largest securities recovery ever in the Middle District of Tennessee and one of the largest in more than a decade.

Before joining the Firm, Martin served as the presidentially appointed United States Attorney for the Middle District of Tennessee from May 2010 to April 2013. As U.S. Attorney, he made prosecuting financial, tax, and health care fraud a top priority. During his tenure, Martin co-chaired the Attorney General's Advisory Committee's Health Care Fraud Working Group. Martin has been recognized as a national leader in combatting fraud and has addressed numerous groups and associations, such as Taxpayers Against Fraud and the National Association of Attorneys General, and was a keynote speaker at the American Bar Association's Annual Health Care Fraud Conference.

Education

B.A., Dartmouth College, 1996; J.D., Stanford University, 1999

Honors / Awards

Super Lawyer, *Super Lawyers Magazine*, 2016-2019

Ruby Menon | Of Counsel

Ruby Menon is Of Counsel to the Firm and is a member of the Firm's legal, advisory, and business development group. She also serves as the liaison to the Firm's many institutional investor clients in the United States and abroad.

Menon began her legal career as an Assistant Prosecuting Attorney, gaining extensive training in trials and litigation. Later, for over 12 years, she served as the Chief Legal Counsel to two large multi-employer retirement plans, developing her expertise in many areas of employee benefits and pension administration, including legislative initiatives and regulatory affairs, investments, tax, fiduciary compliance, and plan administration. During her career as Chief Legal Counsel, Menon was a frequent instructor for several certificate and training programs and seminars for pension fund trustees, administrators, and other key decision makers of pension and employee benefits plans. She is a member of various legal and professional organizations in the United States and abroad.

Menon currently serves as a co-chair on the National Association of Public Pension Attorneys Membership Committee and as a board member on the Corporate Advisory Committee of the National Council on Teacher Retirement (NCTR). She has previously served as an advisory board member for the Sovereign Wealth Fund Institute and as a committee member on the International Pension Employee & Benefits Lawyers Association. Menon also organized and participated in the ACAP Shareholder sessions in Singapore and Hong Kong.

Education

B.A., Indiana University, 1985; J.D., Indiana University School of Law, 1988

Honors / Awards

Global Plaintiff Lawyer, *Lawdragon*, 2024-2025

Sara B. Polychron | Of Counsel

Sara Polychron is Of Counsel in the Firm's San Diego office, where her practice focuses on complex securities litigation. She is part of the litigation team prosecuting actions against investment banks and the leading credit rating agencies for their role in the structuring and rating of residential mortgage-backed securities and their subsequent collapse.

Sara earned her Bachelor of Arts degree with honors from the University of Minnesota, where she studied Sociology with an emphasis in Criminology and Law. As an undergraduate she interned with the Hennepin County Attorney's Office, where she advocated for victims of domestic violence and assisted in sentencing negotiations in Juvenile Court. Sara received her Juris Doctor degree from the University of San Diego School of Law, where she was the recipient of two academic scholarships. While in law school, she interned with the Center for Public Interest Law and was a contributing author and assistant editor to the California Regulatory Law Reporter. She also worked as a legal research assistant at the law school and clerked for two San Diego law firms.

Education

B.A., University of Minnesota, 1999; J.D., University of San Diego School of Law, 2005

Svenna Prado | Of Counsel

Svenna Prado is Of Counsel in the Firm's San Diego office, where she focuses on various aspects of international securities and consumer litigation. She was part of the litigation teams that secured settlements against German defendant IKB, as well as Deutsche Bank and Deutsche Bank/West LB for their role in structuring residential mortgage-backed securities and their subsequent collapse. Before joining the Firm, Prado was Head of the Legal Department for a leading international staffing agency in Germany where she focused on all aspects of employment litigation and corporate governance. After she moved to the United States, Prado worked with an internationally oriented German law firm as Counsel to corporate clients establishing subsidiaries in the United States and Germany. As a law student, Prado worked directly for several years for one of the appointed Trustees winding up Eastern German operations under receivership in the aftermath of the German reunification. Utilizing her experience in this area of law, Prado later helped many clients secure successful outcomes in U.S. Bankruptcy Court.

Education

J.D., University of Erlangen-Nuremberg, Germany, 1996; Qualification for Judicial Office, Upper Regional Court Nuremberg, Germany, 1998; New York University, "U.S. Law and Methodologies," 2001

Harini P. Raghupathi | Of Counsel

Harini Raghupathi is Of Counsel in the Firm's San Diego office. She is a member of the Firm's Appellate Practice Group.

Before joining the Firm, Harini represented victims of serious injury in federal and state appellate courts. Her practice areas included mass torts, consumer protection, and civil rights. Additionally, for over a decade, Harini served as a federal public defender specializing in appeals. In that role, she obtained multiple published reversals on behalf of her clients.

In 2012, *The Recorder* named Harini an "Attorney of the Year" for her successful appeal in *United States v. Leal-Del Carmen*, 697 F.3d 964 (9th Cir. 2012). Harini serves as the Chair of the Ninth Circuit Advisory Committee on Rules of Practice. She is also a member of the San Diego Appellate Inn of Court and a volunteer-mentor with The Appellate Project.

Education

B.S., Stanford University, 2004; J.D., University of California, Berkeley School of Law, 2007

Honors / Awards

Attorney of the Year, *The Recorder*, 2012

Andrew T. Rees | Of Counsel

Andrew Rees is Of Counsel in the Firm's Boca Raton office. His practice focuses on complex class actions, including securities, corporate governance and consumer fraud litigation. He was on the litigation team that successfully obtained a $146.25 million recovery in *Nieman v. Duke Energy Corp.*, which is the largest recovery in North Carolina for a case involving securities fraud and one of the five largest recoveries in the Fourth Circuit.

Before joining the Firm, Rees worked as an associate in the Washington, D.C. office of Hogan & Hartson LLP, where he practiced in the area of commercial transactions, including financings, stock purchases, asset acquisitions and mergers.

Education

B.A., Pennsylvania State University, 1997; J.D., William and Mary School of Law, 2002

Honors / Awards

Best Lawyer in America: One to Watch, *Best Lawyers*®, 2024-2025

Jack Reise | Of Counsel

Jack Reise is Of Counsel in the Firm's Boca Raton office. Devoted to protecting the rights of those who have been harmed by corporate misconduct, his practice focuses on class action litigation (including securities fraud, shareholder derivative actions, consumer protection, antitrust, and unfair and deceptive insurance practices). Reise also dedicates a substantial portion of his practice to representing shareholders in actions brought under the federal securities laws. He is currently serving as lead counsel in more than a dozen cases nationwide. Most recently, Reise and a team of Robbins Geller attorneys obtained a $1.21 billion settlement in *In re Valeant Pharms. Int'l, Inc. Sec. Litig.* (D.N.J.), a case that *Vanity Fair* reported as "the corporate scandal of its era" that had raised "fundamental questions about the functioning of our health-care system, the nature of modern markets, and the slippery slope of ethical rationalizations." This is the largest securities class action settlement against a pharmaceutical manufacturer and the ninth largest ever. As lead counsel, Reise has also represented investors in a series of cases involving mutual funds charged with improperly valuating their net assets, which settled for a total of more than $50 million. Other notable actions include: *In re NewPower Holdings, Inc. Sec. Litig.* (S.D.N.Y.) ($41 million settlement); *In re ADT Inc. S'holder Litig.* (Fla. Cir. Ct., 15th Jud. Cir.) ($30 million settlement); *In re Red Hat, Inc. Sec. Litig.* (E.D.N.C.) ($20 million settlement); and *In re AFC Enters., Inc. Sec. Litig.* (N.D. Ga.) ($17.2 million settlement).

Education

B.A., Binghamton University, 1992; J.D., University of Miami School of Law, 1995

Honors / Awards

Leading Plaintiff Financial Lawyer, *Lawdragon*, 2019-2022; American Jurisprudence Book Award in Contracts; J.D., *Cum Laude*, University of Miami School of Law, 1995; *University of Miami Inter-American Law Review*, University of Miami School of Law

Kevin S. Sciarani | Of Counsel

Kevin Sciarani is Of Counsel to the Firm and his practice focuses on complex securities litigation.

Kevin was a member of the litigation team that obtained a $300 million recovery in *Purple Mountain Trust v. Wells Fargo & Company*, which was reached while the parties were preparing for trial. He was also part of the litigation team in *Karinski v. Stamps.com, Inc.*, which secured a $100 million recovery for investors.

Kevin earned Bachelor of Science and Bachelor of Arts degrees from the University of California, San Diego. He graduated *magna cum laude* from the University of California, Hastings College of the Law with a Juris Doctor degree. During law school, Kevin interned for the U.S. Securities and Exchange Commission and the Antitrust Section of the California Department of Justice. In his final semester, he served as an extern to the Honorable Susan Illston of the United States District Court for the Northern District of California. Kevin also received recognition for his *pro bono* assistance to tenants living in bank-owned foreclosed residential properties due to the subprime mortgage crisis.

Education

B.S., B.A., University of California, San Diego, 2005; J.D., University of California, Hastings College of the Law, 2014

Honors / Awards

J.D., *Magna Cum Laude*, Order of the Coif, University of California, Hastings College of the Law, 2014; CALI Excellence Award, Senior Articles Editor, Hastings Law Journal, University of California, Hastings College of the Law

Leonard B. Simon | Of Counsel

Leonard Simon is Of Counsel in the Firm's San Diego office. His practice has been devoted to litigation in the federal courts, including both the prosecution and the defense of major class actions and other complex litigation in the securities and antitrust fields. Simon has also handled a substantial number of complex appellate matters, arguing cases in the United States Supreme Court, several federal Courts of Appeals, and several California appellate courts. He has also represented large, publicly traded corporations. Simon served as plaintiffs' co-lead counsel in *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, MDL No. 834 (D. Ariz.) (settled for $240 million), and *In re NASDAQ Market-Makers Antitrust Litig.*, MDL No. 1023 (S.D.N.Y.) (settled for more than $1 billion). He was also in a leadership role in several of the state court antitrust cases against Microsoft, and the state court antitrust cases challenging electric prices in California. He was centrally involved in the prosecution of *In re Washington Pub. Power Supply Sys. Sec. Litig.*, MDL No. 551 (D. Ariz.), the largest securities class action ever litigated.

Simon is an Adjunct Professor of Law at Duke University, the University of San Diego, and the University of Southern California Law Schools. He has lectured extensively on securities, antitrust, and complex litigation in programs sponsored by the American Bar Association Section of Litigation, the Practicing Law Institute, and ALI-ABA, and at the UCLA Law School, the University of San Diego Law School, and the Stanford Business School. He is an Editor of *California Federal Court Practice* and has authored a law review article on the PSLRA.

Education

B.A., Union College, 1970; J.D., Duke University School of Law, 1973

Honors / Awards

Rated AV Preeminent by Martindale-Hubbell; Top Lawyer in San Diego, *San Diego Magazine*, 2016-2022; Super Lawyer, *Super Lawyers Magazine*, 2008-2016; J.D., Order of the Coif and with Distinction, Duke University School of Law, 1973

Megan M. Sonney | Of Counsel

Megan Sonney is Of Counsel to the Firm and is based in the San Diego office, where her practice focuses on securities fraud litigation.

Most recently, Sonney was a member of the litigation team that obtained a $434 million settlement in *In re Under Armour Sec. Litig*. The case settled just prior to the commencement of trial in Baltimore, Maryland, and represents the second largest securities fraud settlement ever in the Fourth Circuit and is among the top 50 largest such recoveries in U.S. history.

Education

B.A., Point Loma Nazarene University, 2007; J.D., University of San Diego School of Law, 2011

Honors / Awards

B.A., *cum laude*, Point Loma Nazarene University, 2007

Laura S. Stein | Of Counsel

Laura Stein is Of Counsel in the Firm's Philadelphia office. Since 1995, she has practiced in the areas of securities class action litigation, complex litigation, and legislative law. Stein has served as one of the Firm's and the nation's top asset recovery experts with a focus on minimizing losses suffered by shareholders due to corporate fraud and breaches of fiduciary duty. She also seeks to deter future violations of federal and state securities laws by reinforcing the standards of good corporate governance. Stein works with over 500 institutional investors across the nation and abroad, and her clients have served as lead plaintiff in successful cases where billions of dollars were recovered for defrauded investors against such companies as: Alphabet, Apple, AOL Time Warner, TYCO, Cardinal Health, AT&T, Hanover Compressor, 1st Bancorp, Enron, Dynegy, Inc., Honeywell International, Bridgestone, LendingClub, Orbital ATK, Under Armour, and Walmart, to name a few. Many of the cases led by Stein's clients have accomplished groundbreaking corporate governance achievements, including obtaining shareholder-nominated directors. She is a frequent presenter and educator on securities fraud monitoring, litigation, and corporate governance.

Education

B.A., University of Pennsylvania, 1992; J.D., University of Pennsylvania Law School, 1995

Honors / Awards

Leading Plaintiff Financial Lawyer, *Lawdragon*, 2024-2025

John J. Stoia, Jr. | Of Counsel

John Stoia is Of Counsel to the Firm and is based in the Firm's San Diego office. He is one of the founding partners and former managing partner of the Firm. He focuses his practice on insurance fraud, consumer fraud, and securities fraud class actions. Stoia has been responsible for over $10 billion in recoveries on behalf of victims of insurance fraud due to deceptive sales practices such as "vanishing premiums" and "churning." He has worked on dozens of nationwide complex securities class actions, including *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, which arose out of the collapse of Lincoln Savings & Loan and Charles Keating's empire. Stoia was a member of the plaintiffs' trial team that obtained verdicts against Keating and his co-defendants in excess of $3 billion and settlements of over $240 million.

He also represented numerous large institutional investors who suffered hundreds of millions of dollars in losses as a result of major financial scandals, including AOL Time Warner and WorldCom. Currently, Stoia is lead counsel in numerous cases against online discount voucher companies for violations of both federal and state laws including violation of state gift card statutes.

Education

B.S., University of Tulsa, 1983; J.D., University of Tulsa, 1986; LL.M., Georgetown University Law Center, 1987

Honors / Awards

Rated AV Preeminent by Martindale-Hubbell; Top Lawyer in San Diego, *San Diego Magazine*, 2013-2022; Super Lawyer, *Super Lawyers Magazine*, 2007-2017; Litigator of the Month, *The National Law Journal*, July 2000; LL.M. Top of Class, Georgetown University Law Center

Michael A. Troncoso | Of Counsel

Michael Troncoso is Of Counsel to the Firm. His practice focuses on securities fraud class action litigation and other affirmative litigation. Prior to joining the Firm, Troncoso served as a prosecutor, senior in-house counsel, and legal and policy advisor across numerous sectors. He served as chief counsel and chief of public policy to then-California Attorney General Kamala D. Harris, overseeing the office's priority litigation, enforcement, and legislative matters. In this role, he served as lead counsel for the State of California in securing the National Mortgage Settlement, the largest consumer financial protection settlement in state history that brought $20 billion in loan relief and direct payments to California homeowners. He led the state's Mortgage Fraud Task Force and its investigations of securities law violations arising from the issuance of residential mortgage-backed securities. His team recovered nearly $1 billion in RMBS-related losses for California public pension funds.

Earlier in his career, Troncoso served for nearly six years as a trial attorney and assistant chief attorney for policy in the San Francisco District Attorney's office, where he tried multiple criminal cases to jury verdict and led the office's mortgage and investment fraud team, where he was responsible for investigating and prosecuting complex financial crimes from initial report through charging and trial.

Troncoso most recently served as Vice President at the Chan Zuckerberg Initiative, a philanthropic organization, where he led bipartisan policy and advocacy efforts nationwide. He also served in the University of California's Office of General Counsel as managing counsel for health affairs and technology law and chief campus counsel, where he oversaw various litigation, regulatory, and data protection matters.

Education

B.A., University of California at Berkeley, 1999; J.D., Georgetown University Law Center, 2002

Honors / Awards

Top 20 Under 40, *Daily Journal*, 2012

David C. Walton | Of Counsel

David Walton was a founding partner of the Firm. For over 25 years, he has prosecuted class actions and private actions on behalf of defrauded investors, particularly in the area of accounting fraud. He has investigated and participated in the litigation of highly complex accounting scandals within some of America's largest corporations, including Enron ($7.2 billion), HealthSouth ($671 million), WorldCom ($657 million), AOL Time Warner ($629 million), Countrywide ($500 million), and Dynegy ($474 million), as well as numerous companies implicated in stock option backdating.

Walton is a member of the Bar of California, a Certified Public Accountant (California 1992), and is fluent in Spanish. In 2003-2004, he served as a member of the California Board of Accountancy, which is responsible for regulating the accounting profession in California.

Education

B.A., University of Utah, 1988; J.D., University of Southern California Law Center, 1993

Honors / Awards

Recommended Lawyer, *The Legal 500*, 2019; Super Lawyer, *Super Lawyers Magazine*, 2015-2016; California Board of Accountancy, Member, 2003-2004; *Southern California Law Review*, Member, University of Southern California Law Center; Hale Moot Court Honors Program, University of Southern California Law Center

Jai Chandrasekhar | Counsel

Jai Chandrasekhar is Counsel in the Firm's Manhattan office. Chandrasekhar's background includes the rare combination of experience as a plaintiffs' lawyer and as a corporate lawyer. Chandrasekhar has been representing plaintiffs for 20 years in securities fraud cases that have recovered more than $1.8 billion for investors.

Chandrasekhar's cases in courts across the country have resulted in many outstanding securities litigation recoveries for shareholders, including the Refco securities litigation ($367.3 million recovered for shareholders), the MF Global Holdings securities litigation ($234.3 million recovered for shareholders), the Luckin Coffee securities litigation ($175 million recovered for shareholders), and the JPMorgan Chase ("London Whale") securities litigation ($150 million recovered for shareholders), among others.

Chandrasekhar also advises institutional and other investors about how best to enforce their rights as shareholders in the United States and abroad.

Earlier in his career, Chandrasekhar was an associate at Sullivan & Cromwell, where he represented securities issuers and underwriters in public and private offerings, Securities and Exchange Commission reporting and compliance, and corporate governance matters. He then served as a staff attorney in the Enforcement Division of the Securities and Exchange Commission's New York office.

Education

B.A., Yale University, 1987; J.D., Yale Law School, 1997

Bruce Gamble | Special Counsel

Bruce Gamble is Special Counsel to the Firm in the Firm's Washington D.C. office and is a member of the Firm's institutional investor client services group. He serves as liaison with the Firm's institutional investor clients in the United States and abroad, advising them on securities litigation matters. Gamble formerly served as Of Counsel to the Firm, providing a broad array of highly specialized legal and consulting services to public retirement plans. Before working with Robbins Geller, Gamble was General Counsel and Chief Compliance Officer for the District of Columbia Retirement Board, where he served as chief legal advisor to the Board of Trustees and staff. Gamble's experience also includes serving as Chief Executive Officer of two national trade associations and several senior level staff positions on Capitol Hill.

Education

B.S., University of Louisville, 1979; J.D., Georgetown University Law Center, 1989

Honors / Awards

Executive Board Member, National Association of Public Pension Attorneys, 2000-2006; American Banker selection as one of the most promising U.S. bank executives under 40 years of age, 1992

R. Steven Aronica | Forensic Accountant

Steven Aronica is a Certified Public Accountant licensed in the States of New York and Georgia and is a member of the American Institute of Certified Public Accountants, the Institute of Internal Auditors, and the Association of Certified Fraud Examiners. Aronica has been instrumental in the prosecution of numerous financial and accounting fraud civil litigation claims against companies that include Lucent Technologies, Tyco, Oxford Health Plans, Computer Associates, Aetna, WorldCom, Vivendi, AOL Time Warner, Ikon, Doral Financial, First BanCorp, Acclaim Entertainment, Pall Corporation, iStar Financial, Hibernia Foods, NBTY, Tommy Hilfiger, Lockheed Martin, the Blackstone Group, and Motorola. In addition, he assisted in the prosecution of numerous civil claims against the major United States public accounting firms.

Aronica has been employed in the practice of financial accounting for more than 30 years, including public accounting, where he was responsible for providing clients with a wide range of accounting and auditing services; the investment bank Drexel Burnham Lambert, Inc., where he held positions with accounting and financial reporting responsibilities; and at the SEC, where he held various positions in the divisions of Corporation Finance and Enforcement and participated in the prosecution of both criminal and civil fraud claims.

Education

B.B.A., University of Georgia, 1979

Andrew J. Rudolph | Forensic Accountant

Andrew Rudolph is the Director of the Firm's Forensic Accounting Department, which provides in-house forensic accounting expertise in connection with securities fraud litigation against national and foreign companies. He has directed hundreds of financial statement fraud investigations, which were instrumental in recovering billions of dollars for defrauded investors. Prominent cases include *Qwest*, *HealthSouth*, *WorldCom*, *Boeing*, *Honeywell*, *Vivendi*, *Aurora Foods*, *Informix*, *Platinum Software*, *AOL Time Warner*, and *UnitedHealth*.

Rudolph is a Certified Fraud Examiner and a Certified Public Accountant licensed to practice in California. He is an active member of the American Institute of Certified Public Accountants, California's Society of Certified Public Accountants, and the Association of Certified Fraud Examiners. His 20 years of public accounting, consulting, and forensic accounting experience includes financial fraud investigation, auditor malpractice, auditing of public and private companies, business litigation consulting, due diligence investigations, and taxation.

Education

B.A., Central Connecticut State University, 1985

Christopher Yurcek | Forensic Accountant

Christopher Yurcek is the Assistant Director of the Firm's Forensic Accounting Department, which provides in-house forensic accounting and litigation expertise in connection with major securities fraud litigation. He has directed the Firm's forensic accounting efforts on numerous high-profile cases, including *In re Enron Corp. Sec. Litig.* and *Jaffe v. Household Int'l, Inc.*, which obtained a record-breaking $1.575 billion settlement after 14 years of litigation, including a six-week jury trial in 2009 that resulted in a verdict for plaintiffs. Other prominent cases include *HealthSouth*, *UnitedHealth*, *Vesta*, *Informix*, *Mattel*, *Coca-Cola*, and *Media Vision*.

Yurcek has over 20 years of accounting, auditing, and consulting experience in areas including financial statement audit, forensic accounting and fraud investigation, auditor malpractice, turn-around consulting, business litigation, and business valuation. He is a Certified Public Accountant licensed in California, holds a Certified in Financial Forensics (CFF) Credential from the American Institute of Certified Public Accountants, and is a member of the California Society of CPAs and the Association of Certified Fraud Examiners.

Education

B.A., University of California, Santa Barbara, 1985

EXHIBIT B

B & R Supermarket, Inc., d/b/a Milam's Market v. VISA, Inc., et al. **No. 1:17-cv-02738-BMC-JAM**

Firm Name: Robbins Geller Rudman & Dowd LLP
Reporting Period: Inception through July 11, 2017

Categories:
(1) Factual Investigation
(2) Legal Research
(3) Litigation Strategy & Analysis
(4) Draft Initial or Amended Complaint
(5) Discovery
(6) Document Review
(7) Other Pleadings, Briefs and Pretrial Motions
(8) Fact Depositions
(9) Mediation, Settlement Negotiations, Documentation, Preliminary/Final Approval of Settlement and POA
(10) Court Appearance & Preparation
(11) Client/Shareholder Communication

Name		1	2	3	4	5	6	7	8	9	10	11	Hours	Rate	Lodestar
Bays, Lea M.	(P)			1.50		57.75							59.25	970	$ 57,472.50
Bernay, Alexandra S.	(P)	23.00	5.50	535.55	111.50	527.90	4.00	428.40		31.00	23.50	10.50	1,700.85	1045	1,777,388.25
Egler, Thomas E.	(P)			2.60		123.90	18.00						144.50	1140	164,730.00
Lau, Angel P.	(P)	34.90		5.80	54.10	249.60	34.40	112.30			9.40		500.50	760	380,380.00
Medici, Carmen Anthony	(P)	15.80	7.50	362.90	54.90	372.30	4.00	196.40		38.00	8.50	5.10	1,065.40	850	905,590.00
Lonnie Browne	(A)			9.35	37.80	395.15	0.55	238.40	4.00		33.90	2.65	721.80	625	451,125.00
Wintemute, Lion A.	(A)	4.50				46.50	169.45						220.45	490	108,020.50
Zohrabian, Armen	(A)			1,652.00		16.00		227.25			11.75		1,907.00	630	1,201,410.00
Bandman, Randi D.	(OC)	8.00		3.10	1.40	31.50		4.60			5.40		54.00	1195	64,530.00
Coughlin, Patrick J.	(OC)	33.75	36.00	330.00	39.75	3.00		64.00		3.00	14.25		523.75	1430	748,962.50
Mikolajczyk, Eugene	(OC)					663.00							663.00	460	304,980.00
Espinosa, Jorge F.	(SA)						1,397.50						1,397.50	400	559,000.00
Petix, Andrew T.	(SA)			142.10		556.80	615.90						1,314.80	400	525,920.00
Algover, Endre J.	(PA)						373.75						373.75	300	112,125.00
Chang, Jerome D.	(PA)						346.00						346.00	300	103,800.00
Dizon, Jr, Rommel D.	(PA)						1,334.80						1,334.80	300	400,440.00
Li, Michael S.	(PA)					8.00	1,394.95						1,402.95	300	420,885.00
Marasco, Laura Ann	(PA)					7.25	770.70						777.95	300	233,385.00
McCue, Charles T.	(PA)			2.20		100.90							103.10	300	30,930.00
Schaller, J. Scott	(PA)						537.75						537.75	300	161,325.00
Sterling, Voltaire R.	(PA)					8.00	1,378.70						1,386.70	300	416,010.00
Brandon, Kelley T.	(I)	36.00											36.00	250	9,000.00
Browning, Aaron C.	(LS)					49.25							49.25	250	12,312.50
Camozzi, Miranda C.	(LS)					23.00							23.00	250	5,750.00
Eivazian, Lindsay	(LS)					196.95							196.95	250	49,237.50
Guyer, Nicole	(LS)					215.25	4.00						219.25	250	54,812.50
Lee, Alexander J.	(LS)					47.00							47.00	250	11,750.00
Torres, Michael	(LS)	0.50		15.75		8.50	0.75						25.50	250	6,375.00
Bacci, Melissa A.	(PL)					0.50		27.50					28.00	350	9,800.00
Chateauneuf, Stephanie T.	(PL)				2.00	447.00		146.25					595.25	435	258,933.75
Kopko, Christina S.	(PL)			19.75		21.50		211.50					252.75	435	109,946.25
McCormack, Kirsten M.	(PL)	25.00			5.50			1.00					31.50	435	13,702.50
Morris, Sarah A.	(PL)					2.00		16.50			3.50		22.00	435	9,570.00
Wallbrett, Michele M.	(PL)	2.75		7.50		9.50		63.50		2.00			85.25	350	29,837.50

B & R Supermarket, Inc., d/b/a Milam's Market v. VISA, Inc., et al. **No. 1:17-cv-02738-BMC-JAM**

Firm Name: Robbins Geller Rudman & Dowd LLP
Reporting Period: Inception through July 11, 2017

Categories:
(1) Factual Investigation
(2) Legal Research
(3) Litigation Strategy & Analysis
(4) Draft Initial or Amended Complaint
(5) Discovery
(6) Document Review
(7) Other Pleadings, Briefs and Pretrial Motions
(8) Fact Depositions
(9) Mediation, Settlement Negotiations, Documentation, Preliminary/Final Approval of Settlement and POA
(10) Court Appearance & Preparation
(11) Client/Shareholder Communication

Name		1	2	3	4	5	6	7	8	9	10	11	Hours	Rate	Lodestar
Chandiwalla, Nazia	(DC)					25.50							25.50	165	4,207.50
Ki, Wooseok	(DC)					125.00							125.00	165	20,625.00
Mathiopoulos, Andrea A.	(DC)					46.25							46.25	165	7,631.25
Price, Amanda E.	(DC)					86.00							86.00	165	14,190.00
Santana, Andres	(DC)		2.00			20.50	15.00						37.50	165	6,187.50
Wood, Greg A.	(SR)											28.50	28.50	115	3,277.50
TOTAL:		**184.20**	**51.00**	**3,090.10**	**306.95**	**4,491.25**	**8,400.20**	**1,737.60**	**4.00**	**74.00**	**110.20**	**46.75**	**18,496.25**		**$ 9,765,555.00**

(P) Partner
(A) Associate
(OC) Of Counsel
(SA) Staff Attorney
(PA) Project Attorney
(I) Investigator
(LS) Litigation Support
(LC) Law Clerk
(PL) Paralegal
(DC) Document Clerk
(SR) Shareholder Relations

EXHIBIT C

EXHIBIT C

B & R Supermarket, Inc., d/b/a Milam's Market v. VISA, Inc., et al.,
No. 1:17-cv-02738-BMC-JAM
Robbins Geller Rudman & Dowd LLP
Expense Summary
Inception through September 30, 2018

CATEGORY		***AMOUNT***
Filing and Attorney Service Fees		$ 14,845.50
Business Wire/PR Newswire		1,350.00
Transportation, Hotels, and Meals		115,039.17
In-House Telephone		1,586.20
Postage		263.69
Messenger/Overnight Delivery		6,470.18
IT Equip. for Litigation Support Production		1,178.28
Court Hearing Transcripts and Deposition Reporting, Transcripts and Videography		47,649.00
Experts, Consultants, and Investigators		273,363.18
Litinomics, Inc.	$ 186,601.22	
Micah S. Officer	57,426.46	
Civil Action Group, Ltd.	14,808.50	
Anadyne Holdings, Inc.	10,239.00	
Mason Investigative Group, Inc.	4,288.00	
Photocopies		25,805.07
Outside	21,739.87	
In-House Black and White (26,478 copies at $0.15 per page)	3,971.70	
In-House Color (187 copies at $0.50 per page)	93.50	
Online Legal and Financial Research		18,640.53
eDiscovery Database Hosting		228,734.48
Database Analytics		27,760.50
Mediation Fees (Jams Inc.)		15,080.00
Publication and Subscriptions		4,219.45
TOTAL		***$ 781,985.23***

EXHIBIT 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

B & R SUPERMARKET, INC., d/b/a MILAM'S MARKET, a Florida corporation, et al., Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. VISA, INC., et al., Defendants.	:	Case No. 1:17-cv-02738-BMC-JAM CLASS ACTION

DECLARATION OF JOHN W. DEVINE ON BEHALF OF DEVINE, GOODMAN & RASCO, LLP IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS

I, JOHN W. DEVINE, declare as follows:

1. I am a partner with the law firm Devine Goodman & Rasco, LLP ("DG&R" or the "Firm"), and one of the counsel of record for plaintiffs B & R Supermarket, Inc. (d/b/a Milam's Market) ("B & R"), Grove Liquors LLC ("Grove"), Strouk Group LLC (d/b/a Monsieur Marcel), and Palero Food Corp. and Cagueyes Food Corp. (d/b/a Fine Fare Supermarket) (collectively, "Plaintiffs" or "Class Representatives") in the above-captioned action ("Action"). I have been a member of The Florida Bar since October 7, 1987 (Florida Bar number 708607). I am admitted, *pro hac vice*, to practice before this Honorable Court in this Action, and to the United States District Court for the Southern District of Florida, and to the United States Court of Appeals for the Second Circuit. I have personal knowledge of the matters set forth herein, based on my participation in the prosecution and settlement of this Action. If called upon, I could and would competently testify that the following facts are true and correct based on my personal involvement in the litigation.

2. I provide this declaration in support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards (the "Motion").

3. In early 2016, B & R and Grove, longtime clients of the Firm, alerted us to a growing problem. The four credit card networks—Mastercard International Incorporated ("Mastercard"), Visa, Inc. and Visa U.S.A., Inc. ("Visa"), American Express Company ("Amex"), and Discover Financial Services ("Discover") (collectively, the "Networks")—rolled out a new chip card technology in the United States aimed at reducing fraud. To realize the benefits of the new chip card technology, however, merchants had to upgrade their point-of-sale equipment to work with the new chip cards. In connection with the transition, the Networks each imposed a Fraud Liability Shift ("FLS"), effective October 2015, which shifted certain fraud losses from card

issuers to merchants. With the addition of new chip card technology in the credit cards used by their customers, and the concurrent shortage of point-of-sale devices equipped to read the chip cards, combined with the Networks' new FLS policy regarding chargebacks on unread chip cards, B & R and Grove were experiencing a manyfold increase in costly chargebacks.

4. Our research soon revealed that this problem was ubiquitous across broad swaths of the retail sector and especially affected smaller retailers who had less access to the tightly limited supply of chip-card-compatible point-of-sale devices. In short, we determined that many retailers could not make the point-of-sale equipment upgrades to work with the new chip cards prior to October 2015 and, therefore, fraud costs were shifted from the card issuers to the merchants pursuant to the FLS, which was imposed unilaterally by the Networks.

5. With our clients B & R and Grove (now Class Representatives), we determined to take action to recover for their losses.

6. Beginning in January 2016, my firm undertook the representation of Plaintiffs and the Class on an entirely contingent basis. We have been actively involved in the case since its outset, working with co-counsel—first Robbins Geller Rudman & Dowd LLP, and then Robbins LLP (now Class Counsel).

7. Over the nine and a half years of litigation on behalf of the Class, my Firm has staffed this Action with four professionals: three partners, and one paralegal. Each of the three partners working on the Action had decades of experience as did our paralegal.

8. DG&R and I have significant experience in class actions that advanced consumer and privacy rights since the Firm's founding in 1998. In the consumer area, we achieved successful results in cases involving bank overdraft charge abuses (*In Re: Checking Account Overdraft Litigation MDL No. 2036 Anderson v. Compass Bank*, Case No. 1:09-MD-02036-JLK, S.D. Fla.)

and lender and loan servicing abuses (*Coppolo v. Discover Financial Services, Inc.*, Case No. 99-0856-Civ-(Moreno/Brown), S.D. Fla.; *Spund v. Associates Financial Services Company, Inc.*, Case No. 00-19306-CA-25 in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida; *Koffler v. Fairbanks Capital Corp.*, Case No. 02-12557-CA-01 in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida; and *Curry v. Fairbanks Capital Corp*., Case No. 03-10895 DPW, D. Mass.). In addition, we protected privacy rights of Florida residents in class actions against data aggregators and Florida Department of Highway Safety and Motor Vehicles employees for obtaining, using, and conveying personal information of Florida-licensed drivers in violation of the Drivers Privacy Protection Act (*Brooks v. Softech International, Inc.*, Case No. 03-61063-Civ-Martinez/Dube, S.D. Fla.; *Collier v. Dickinson*, Case No. 04-21351-Civ-Martinez, S.D. Fla.; and *Fresco v. R.L. Polk & Co.*, Case No. 07-60695-Civ-Martinez/Brown, S.D. Fla.). In addition to my involvement in the Firm's class actions identified above, I practice in the real estate and corporate areas. I am a founding partner of DG&R.

9. I am familiar with the practice and experience of my former partners Lawrence D. Goodman, Esq. and Robert J. Kuntz, Jr., Esq., who both worked on this Action. Mr. Goodman was very involved in each of the aforementioned class action cases as well as this Action. He was admitted to The Florida Bar in 1987, and was a founding partner of DG&R. He had significant experience in class actions prior to his founding of the Firm, and his practice included commercial litigation. Mr. Goodman passed away on January 1, 2019, following a brief illness.

10. Robert J. Kuntz, Esq. is a seasoned commercial litigator who joined the Firm in 2002 from the Miami office of a national firm. He was admitted to The Florida Bar in 1996. Mr. Kuntz left the firm in 2022.

11. Our paralegal, Susan Mallet, who joined the firm in 2010, had decades of experience in commercial litigation. Her experience with ESI made Ms. Mallet ideally skilled to work on the vast amount of ESI that the Action generated. Ms. Mallet left the firm in 2022.

12. DG&R attorneys and para-professionals performed numerous tasks in this case, including but not limited to the following:

(a) Investigation of the case, including the Fraud Liability Shift, and extensive due diligence regarding the defendants and other components of the payment card industry, including issuers, acquirers, and trade groups;

(b) Review of documents produced by the defendants and third parties;

(c) Extensive legal research of relevant law, including the Sherman Antitrust Act, the Clayton Antitrust Act, and state law causes of action, and case law interpreting such laws, procedural and discovery issues, and dispositive motions;

(d) Preparation, drafting and revisions to the complaint and amended complaint;

(e) Preparation, drafting and revisions to the motions for class certification;

(f) Preparation, drafting and revisions to discovery requests made by Plaintiffs and responding to discovery requests served on Plaintiffs by defendants;

(g) Preparation, drafting and revisions to motions related to discovery and discovery disputes;

(h) Preparation, drafting and revisions to various other motions and responses filed by Plaintiffs;

(i) Preparation for and participation in the taking and defense of depositions of numerous parties and witnesses, including in Miami, New York, Washington, D.C., and San

Francisco, including defending multiple depositions of staff or former staff of the Class Representatives;

(j) Preparation for and participation in the taking of depositions of Plaintiffs' experts;

(k) Review of motions for summary judgment and other motions filed by various defendants;

(l) Participation in all but the first mediation with defendants and mediators Hon. Edward A. Infante (Ret.) (2018, 2023, and 2024) and Hon. Layn R. Phillips (Ret.) (2024 and two in 2025) over the course of approximately 8 years in San Francisco (2018), in San Diego (hybrid in-person and remote) (2023), and in New York (2024 and 2025);

(m) Preparation, drafting and revisions to documents exchanged between the parties regarding mediation and settlement proposals;

(n) Numerous conferences with co-counsel to discuss all facets of the case;

(o) Extensive consultations with experts;

(p) Preparation for and attendance at court hearings (in San Francisco and New York).

(q) Keeping Class Representatives B & R and Grove apprised of developments in and posture of the case; and

(r) Responding to merchant inquiries regarding the case.

13. Class Counsel established a set of criteria to review the attorney and professional time and expenses to be claimed as lodestar in connection with this Motion. Class Counsel provided these criteria to DG&R and instructed us to apply these criteria to our time and expense records. I have ensured that we have followed those criteria, as set forth in detail below.

14. I conducted a review of all of the time entries for each timekeeper claimed on behalf of DG&R in connection with this Motion. I reviewed each of the entries to ensure they were accurate and reasonably performed in relation to the Action. I made certain reductions throughout this process in the exercise of billing judgment. I ensured that we did not have any entries for the review of discovery over ten hours per day, as requested by Class Counsel. We had no such entries. I also ensured that entries were sufficiently detailed to describe the work done or reduced or eliminated the entry accordingly. I reduced all travel time by 50%. Any entries relating solely to fee-related work were eliminated. No work in support of this Motion was claimed.

15. In addition, I eliminated the time entries for my Firm's associate who worked on the Action, as they worked less than twenty hours on the Action. I applied my Firm's current rates to all timekeepers, with the exception of any individuals who left the firm during the pendency of the litigation—those individuals' claimed rates are the rates at the time of their departure, including the rate applicable to Lawrence D. Goodman, Esq., at the time of his passing.

16. After following the above steps, the claimed lodestar (which excludes a significant amount of time that I cut because of the above steps) for my Firm for this Action is 5,034.7 hours, amounting to $3,682,581.25. My Firm has received no payment for any of this work and has no expectation of payment for this time other than in connection with this Motion. I have provided a chart showing the hours incurred for each of my Firm's timekeepers, their position, hourly rate, and the categories of work performed as Exhibit A.

17. At the request of Class Counsel, I also engaged in a review of the expenses incurred by my Firm in connection with this Action, with the assistance of my staff. I followed the criteria established by Class Counsel, as set forth below in detail.

18. I ensured that all of the expenses my Firm incurred were incurred specifically and only for this Action and were the type of expenses appropriately claimed in connection with litigation; I removed any upgrade fees to first/business class, and reduced any first class or business class travel to an equivalent fare for economy (or reduced by 30% if the equivalent rate was not available from other travelers); I reduced meals to $100/person/meal; and removed alcohol where apparent or believed it was consumed; and I removed any room upgrade fees.

19. After following the above steps, the expenses claimed by my Firm in connection with the Motion are $47,093.49. These expenses are for the following categories:

(a) *Travel and Meals*: these expenses are for accommodations, transport (including primarily airfare, as well as ubers/taxis/rental cars), parking associated with travel, and meals;

(b) *Research and Investigation*: these expenses include legal research platform expenses and PACER charges;

(c) *Photocopies and Printing*: these expenses include black and white copies at $0.10 each and color copies at $0.25 each, along with printing services from an external vendor;

(d) *Pro Hac Vice Fees*: these expenses include *pro hac vice* fees for the Northern District of California and the Eastern District of New York; and

(e) *Communications & Messaging*: these expenses are for FedEx services and courier costs.

My Firm has not been reimbursed for any of these expenses, and, as with my Firm's lodestar, I have no expectation of repayment, other than in connection with this Motion. I have provided a chart of the expenses incurred by my Firm and the categories for such expenses as Exhibit B.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 22nd day of December, 2025.

John W. Devine

EXHIBIT A

EXHIBIT A

B & R Supermarket, Inc., et al. v. Visa, Inc., et al., No. 1:17-cv-02738-BMC-JAM (E.D.N.Y.)

Devine, Goodman & Rasco, LLP
Lodestar Summary
Inception through October 16, 2025

Categories:

(1)	Appeals	(5)	Investigation
(2)	Case File	(6)	Pleadings
(3)	Client Communication	(7)	Settlement
(4)	Discovery	(8)	Strategy

P = Partner; PI = Paralegal												
PROFESSIONAL	**Title**	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**Total Hours**	**Rate**	**Lodestar**
John W. Devine	P	34.50	5.60	20.40	538.90	55.10	379.50	218.30	654.40	1906.70	$ 850	$1,620,695.00
Lawrence D. Goodman	P	0.00	10.00	2.60	264.20	54.55	422.65	47.65	1053.60	1855.25	$ 750	$1,391,437.50
Robert J. Kuntz, Jr.	P	33.20	2.90	0.00	407.90	23.60	251.40	0.00	241.20	960.20	$ 625	$600,125.00
Susan Mallet	PI	0.00	195.75	0.00	113.05	0.00	3.75	0.00	0.00	312.55	$ 225	$70,323.75
TOTALS		**67.70**	**214.25**	**23.00**	**1324.05**	**133.25**	**1057.30**	**265.95**	**1949.20**	**5034.70**		**$3,682,581.25**

Footnotes

1) Appeals captures work associated with petitions for interlocutory review and Amex's appeal
2) Case File captures work associated with generating, preparing, and organizing documents, files, information relating to work product and court filings
3) Client Communication captures work associated with contact with the named plaintiffs
4) Discovery captures document review and production, all forms of written discovery, meet and confers, and all related communications and strategies
5) Investigation captures work associated with gathering, researching, analyzing, and organizing factual information providing the best understanding of the case
6) Pleadings captures developing, researching, drafting, reviewing, editing, and filing court documents, including preparation and attendance at hearings
7) Settlement captures work associated with case settlement from the initial negotiations through to preliminary approval
8) Strategy captures work relating to internal work product, communications, meetings, and overall case analysis, including developing, evaulating and planning

EXHIBIT B

EXHIBIT B

B & R Supermarket, Inc., et al. v. Visa, Inc., et al., No. 1:17-cv-02738-BMC-JAM (E.D.N.Y.)

Devine, Goodman & Rasco, LLP
Expense Summary
Inception through October 16, 2025

CATEGORY	***AMOUNT***
Travel & Meals	$37,126.31
Research & Investigation	$5,155.05
Photocopies and Printing	$2,315.32
Pro Hac Vice Fees	$1,665.00
Communications & Messaging	$831.81
TOTAL	***$47,093.49***

EXHIBIT 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

B & R SUPERMARKET, INC., d/b/a MILAM'S MARKET, a Florida corporation, et al., Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. VISA, INC., a Delaware corporation, et al., Defendants.	:	Case No. 1:17-cv-02738-BMC-JAM CLASS ACTION

DECLARATION OF THOMAS G. AMON IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS

I, Thomas G. Amon, declare as follows:

1. I am a partner with the Law Offices of Thomas G. Amon (the "Firm"), and Local Counsel and one of the counsel of record for plaintiffs B & R Supermarket, Inc. (d/b/a Milam's Market) ("B & R"), Grove Liquors LLC ("Grove"), Strouk Group LLC (d/b/a Monsieur Marcel), and Palero Food Corp. and Cagueyes Food Corp. (d/b/a Fine Fare Supermarket) (collectively, "Plaintiffs" or "Class Representatives") in the above-captioned action ("Action"). I have been a member of the New York Bar since 1974 (New York Bar number 1808617). I am admitted to practice before this Honorable Court in this Action, and to the Second Circuit Court of Appeals. I have personal knowledge of the matters set forth herein, based on my participation in the prosecution and settlement of this Action. If called upon, I could and would competently testify that the following facts are true and correct based on my personal involvement in the litigation.

2. I provide this declaration in support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards (the "Motion").

3. Beginning in February 2017, my firm undertook the representation of Plaintiffs and the Class on an entirely contingent basis. We have been actively involved in the case as local counsel, ably assisting lead counsel Robbins LLP ("Class Counsel").

4. My experience includes acting as local counsel and liaison counsel for the past twenty years for Class Counsel in numerous securities class action cases and derivative cases brought in this District as well as the Southern District of New York and the New York State Supreme Courts (various counties). As such, we have participated in all aspects of these cases, including preparation and submission of pleadings and motions, oral argument of related motions, liaising with co-counsel and defense counsel, and engaging in settlement and mediation discussions and proceedings.

5. I performed all of the duties required of local counsel, including consulting and assisting Class Counsel with the preparation and filing of documents with the Court, answering inquiries regarding filing requirements and rules of the Court and practices and procedures of the same, meeting and consulting with Class Counsel prior to all court hearings before this Court, preparation for and attendance at hearings before this Court, and participation in all of the mediation sessions in New York City with defendants and mediator Hon. Layn R. Phillips (Ret.) in 2024 and 2025.

6. Class Counsel established a set of criteria to review the attorney and professional time and expenses to be claimed as lodestar in connection with this Motion. Class Counsel provided these criteria to my Firm and instructed us to apply these criteria to our time and expense records. I have ensured that we have followed those criteria, as set forth in detail below.

7. I conducted a review of all of the time entries for my work in the case. I reviewed each of the entries to ensure they were accurate and reasonably performed in relation to the Action. I made certain reductions throughout this process in the exercise of billing judgment. I ensured that entries were sufficiently detailed to describe the work done or reduced or eliminated the entry accordingly. Any entries relating solely to fee-related work were eliminated. No work in support of this Motion was claimed.

8. After following the above steps, the claimed lodestar (which excludes a significant amount of time that I cut because of the above steps) for my Firm for this Action is 64.50 hours, amounting to $51,600.00. My Firm has received no payment for any of this work and has no expectation of payment for this time other than in connection with this Motion.

9. At the request of Class Counsel, I also engaged in a review of the expenses incurred by my Firm in connection with this Action. I have determined that I have no material unreimbursed expenses to include for reimbursement in connection with this Action.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 21st day of December 2025.

Thomas G. Amon

EXHIBIT 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

B & R SUPERMARKET, INC., d/b/a MILAM'S MARKET, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. VISA, INC., et al., Defendants.	:	Case No. 1:17-cv-02738-BMC-JAM CLASS ACTION

DECLARATION OF EDWARD A. INFANTE IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS AND MOTION FOR FINAL APPROVAL OF SETTLEMENTS WITH DEFENDANTS

I, EDWARD A. INFANTE, declare as follows:

1. I am the former Chief Magistrate Judge of the United States District Court, Northern District of California. I currently serve as a mediator with JAMS, the nation's largest private provider of alternative dispute resolution services. As a U.S. Magistrate Judge and then as a mediator at JAMS, I have more than 40 years of dispute resolution experience, having conducted more than 3,000 settlement conferences in all types of litigation, including antitrust, consumer, securities fraud and shareholder class actions.

2. While the above-entitled matter was pending in the U.S. District Court for the Northern District of California, Plaintiffs, then represented by Robbins Geller Rudman & Dowd LLP, and Devine Goodman & Rasco, LLP ("Devine"), and Defendants Visa and Mastercard approached me to mediate settlement negotiations to resolve claims against the two Defendants.[1] The in-person mediation occurred in San Francisco, California, on March 22, 2017. The negotiations were unsuccessful, but I believed that further negotiations could produce a resolution.

3. The case was transferred to the U.S. District Court for the Eastern District of New York on May 4, 2017. Dkt. No. 518. Plaintiffs, now represented by class counsel Robbins LLP and the Devine firm, and Defendants Visa and Mastercard retained me to mediate further negotiations. The parties met for an in-person mediation in San Franscisco, California, on May 11, 2018. Again, the negotiations were not successful. In the weeks that followed I worked with the parties to try and reach a resolution but was unable to do so.

4. Years later, I was retained again by the parties to mediate further negotiations. An in-person mediation occurred in San Diego, California, on June 23, 2023, but once again, the parties

[1] Capitalized terms not otherwise defined have the meaning set forth in the accompanying memorandum in support of the Motion.

could not reach a resolution.

5. Finally, I mediated via videoconference with the parties on September 11, 2024. Again, the negotiations did not produce a settlement.

6. During the course of these negotiations, I engaged in numerous telephonic communications with the parties in an effort to clarify positions and to bring the parties closer together. At the conclusion of the last mediation session, I did not believe that the parties were in a position to accept a mediator's proposal and, therefore, I did not issue one.

7. Prior to each of the mediation sessions, the parties submitted written briefs that were extensive and vigorously disputed by the other side. These submissions were very helpful in my understanding of the case and the issues to be negotiated.

8. I found counsel on both sides to be highly experienced antitrust and class action lawyers who demonstrated their understanding of the factual record and the relevant legal authorities during the negotiations. At all times counsel zealously represented the interests of their clients. The settlement negotiations were extended, comprehensive, professionally presented, adversarial, and always conducted at arm's-length.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 4, 2025, at Newport Coast, California.

Edward A. Infante

EDWARD A. INFANTE

EXHIBIT 5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

B & R SUPERMARKET, INC., d/b/a MILAM'S MARKET, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. VISA, INC., et al., Defendants.	:	Case No. 1:17-cv-02738-BMC-JAM CLASS ACTION

DECLARATION OF LAYN R. PHILLIPS IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS AND MOTION FOR FINAL APPROVAL OF SETTLEMENTS WITH DEFENDANTS

I, LAYN R. PHILLIPS, declare as follows:

1. I served as the mediator in the three separate in-person mediation sessions that resulted in the Settlement of the above-captioned Action.[1] While the substance of the mediation and settlement communications are confidential,[2] the Parties have authorized me to describe the mediation process and the nature of the Parties' negotiations. I make this declaration based on personal knowledge, and I am competent to testify as to the matters set forth herein.

I. MY CREDENTIALS

2. I am the founder and lead mediator at Phillips ADR Enterprises, P.C. ("PADRE"), which I founded in November 2014. From 1991 until 2014, I was a partner in the law firm of Irell & Manella LLP, where my practice focused on complex civil litigation, internal investigations, and alternative dispute resolution.

3. Before joining Irell & Manella LLP, I served as a United States District Judge in the Western District of Oklahoma from 1987 to 1991. During my years on the bench, I presided over more than 140 trials in Oklahoma, New Mexico, and Texas. I have been appointed special master by various federal courts in complex civil proceedings. I also have sat by designation for the United States Court of Appeals for the Tenth Circuit on several occasions.

4. I have successfully mediated numerous complex commercial cases involving

[1] Capitalized terms not otherwise defined have the meaning set forth in the accompanying memorandum in support of the Motion.

[2] Before the mediation process began, counsel for the Parties executed a confidentiality agreement providing that all verbal and written mediation-related communications, including documents exchanged for purposes of furthering the mediation and settlement discussions, would be kept confidential and subject to Rule 408 of the Federal Rules of Evidence and all other applicable privileges protecting such communications from disclosure. Nothing in my declaration divulges the substance of the protected communications or expressly or impliedly waives any applicable privilege or doctrine protecting those communications from disclosure.

Fortune 500 and other publicly traded companies. I have mediated hundreds of disputes referred by private parties and courts and have been appointed as Special Master by various federal courts in complex civil proceedings. I serve as a Fellow in the American College of Trial Lawyers, and I have been nationally recognized as a mediator by the Center for Public Resources Institute for Dispute Resolution ("CPR"), serving on CPR's National Panel of Distinguished Neutrals.

5. Among the significant complex matters I have mediated are the NFL concussion cases, the Michigan State and USC sexual abuse cases, the Purdue Opioid bankruptcy, the Boeing air crash derivative litigation, the United Healthcare derivative litigation, the Norfolk Southern Ohio trainwreck litigation, multiple Wells Fargo derivative and class actions, the FirstEnergy derivative litigation, the Fox News and News Corp derivative litigation, the Facebook Cambridge Analytica derivative litigation, and numerous other class action and derivative actions in numerous business sectors, including the banking sector.

II. THE MEDIATION PROCESS

6. I was retained three separate times by the Parties to mediate settlement negotiations that involved Plaintiffs and different Defendants over an eight-month period.

7. I was initially retained to mediate settlement negotiations between Plaintiffs and Defendant Discover. The mediation session occurred in-person in New York, New York on December 6, 2024. However, the negotiations throughout the day required that I present the parties with a mediator's proposal to reach a settlement of the claims against Discover. Each party accepted the mediator's proposal, and the parties contemporaneously executed a term sheet containing material terms of the settlement.

8. I was subsequently retained to mediate settlement negotiations between Plaintiffs and Defendant American Express Company ("American Express"). The mediation session

occurred in-person in New York, New York on March 28, 2025. Like with the mediation that involved Plaintiffs and Discover, the negotiations throughout the day required that I make a mediator's proposal to reach a settlement of the claims against American Express. Each party accepted the mediator's proposal, and the parties contemporaneously executed a term sheet containing material terms of the settlement.

9. Lastly, I was retained to mediate settlement negotiations between Plaintiffs and Defendants Visa and Mastercard. This mediation session occurred in-person in New York, New York on August 13, 2025. Like with the mediations before, the negotiations throughout the day required that I make a mediator's proposal to reach a settlement of the claims against Visa and Mastercard. Each party accepted the mediator's proposal, and the parties contemporaneously executed a term sheet containing material terms of the settlement.

10. For each of the mediation sessions, I carefully reviewed the relevant pleadings in the Action; the procedural history and status of the Action; detailed mediation briefs submitted by Plaintiffs and Defendants, which addressed the key facts, claims, damages, and anticipated defenses and included numerous citations to documents produced in the litigation and legal authority in support of their positions; and Plaintiffs' monetary settlement demand. Members of my mediation support team, which includes experienced attorneys and other professional staff associated with my firm, assisted me in analyzing the central legal and factual issues.

11. Before each of the mediation sessions, I sent counsel for both Plaintiffs and Defendants separate sets of detailed questions probing weaknesses I perceived in their respective positions and asking them to be prepared to explain how they would address a range of possible litigation scenarios and outcomes.

12. Each of the mediation sessions were attended by counsel for Plaintiffs and outside and in-house counsel for the Defendant(s) involved in the particular mediation session. In each of the mediation sessions, I met with the respective Parties for that particular mediation in a number of joint and separate sessions. The discussions were substantive and productive.

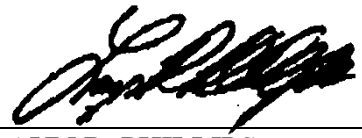
13. For each of the mediation sessions, based on my review of the materials submitted by counsel and my subsequent interactions in group and private sessions with each side, I can aver that all counsel participating in the mediation sessions were fully informed and well prepared, and that they demonstrated great skill as advocates and negotiators.

14. When the agreements were reached on all material substantive terms of the proposed Settlements, counsel for all Parties executed the varying Settlement Term Sheets, which committed them to complete negotiations on a comprehensive stipulation of settlement detailing the Settlement's operational terms. The negotiations of these Settlement Term Sheets took time and effort, reflecting the Parties' determination to diligently represent and zealously pursue their respective clients' interests at every phase of the mediation and settlement process.

III. CONCLUSION

15. Based on my first-hand observations, I am pleased to represent to the Court that the proposed Settlement was the product of challenging arm's-length and good faith negotiations by skilled, experienced, and effective counsel. The result of these efforts, is, in my view, a fair, reasonable, and pragmatic compromise.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 9, 2025, at Newport Beach, California.



LAYN R. PHILLIPS
Former U.S. District Judge

EXHIBIT 6

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

B & R SUPERMARKET, INC., d/b/a MILAM'S MARKET, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. VISA, INC., et al., Defendants.	:	Case No. 1:17-cv-02738-BMC-JAM CLASS ACTION

DECLARATION OF MAX MILAM IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS AND MOTION FOR FINAL APPROVAL OF SETTLEMENTS WITH DEFENDANTS

I, MAX EDWARD MILAM, declare as follows:

1. I, on behalf of B & R Supermarket, Inc., d/b/a Milam's Market, and Grove Liquors LLC, (collectively "B & R Supermarket"), am a plaintiff and class representative in the above-captioned antitrust class action (the "Action"). I submit this declaration in support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards and Plaintiffs' Motion for Final Approval of Settlements with Defendants. I have personal knowledge of the facts set forth in this declaration and would testify truthfully to these matters if called upon as a witness.[1]

2. I am the Chief Executive Officer ("CEO") of B & R Supermarket, Inc., and a managing member of Grove Liquors LLC ("Grove Liquors"). B & R Supermarket, Inc. operates Milam's Market in four separate locations throughout Miami-Dade County, Florida. Grove Liquors is a package liquor store operating in Miami-Dade County. I became CEO of B & R Supermarket, Inc. in 2016. Following the chargeback liability shift in October 2015, B & R Supermarket faced significant and unprecedented chargebacks due to an inability to obtain timely required certifications of newly purchased terminal equipment, as required by the credit card networks, that were supposed to be operational and compliant with the credit card networks' specifications.

3. On March 8, 2016, B & R Supermarket initiated this Action by filing suit in federal court in San Francisco, California, alleging violations of law against the defendants in connection with their collective imposition of network rules that resulted in the shift of certain chargeback liabilities onto merchants. The Action was amended on July 15, 2016, and several additional merchants joined the case as plaintiffs. B & R Supermarket has served as plaintiff and a class

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representative through the entire litigation. The United States District Court for the Eastern District of New York (the "Court") certified a class of merchants to proceed with the litigation on August 28, 2020.

4. I and B & R Supermarket sought to be a plaintiff in the Action because I believe that the shifting of chargeback liability onto merchants under the circumstances that existed at the time, and continuing from there, and the way the shift was implemented, was entirely improper and unfair, and had a significant and harmful impact on me and B & R Supermarket as a merchant and on merchants across the country. The rules, tasks, and burdens associated with the transition to the chip card method of payment imposed extraordinary financial and operational burdens on me and B & R Supermarket. B & R Supermarket was placed in a position where, although it timely obtained and installed new point of sale terminals, those terminals could not be certified before the imposed deadline, even as we attempted to do so in good faith to obtain certification. Chargebacks were imposed on B & R Supermarket to a far greater degree than had ever existed or had been anticipated prior to the shifting of chargeback liability. I and B & R Supermarket agreed to serve as plaintiffs and class representatives because I believed that we could represent the interests of the broader class of merchants who faced the same obstacles and financial harm.

5. Throughout the litigation, I have, as CEO and on behalf of B & R Supermarket, maintained continuing direct and personal communication with attorneys of record for the class, primarily John Devine and other attorneys with Devine Goodman & Rasco, LLP ("Devine Goodman"). I maintained communication with Devine Goodman to monitor the litigation, reviewed and approved various pleadings filed by Class Counsel, reviewed numerous orders, including case dispositive orders, from the Court, provided input on decisions affecting the course of the litigation, made myself available for communications and input during the various mediation

sessions through the years, and complied with numerous discovery obligations, including preparing for and attending my deposition in the Action on February 28, 2017. On behalf of the Class, I have spent substantial time and effort in the pursuit of this litigation with Devine Goodman and Class Counsel as more fully described below.

6. I and B & R Supermarket required a substantial amount of time and effort to respond to and comply with the various discovery requests submitted by Defendants in this case. Senior management and several long-time employees invested substantial time and effort to meet the obligations to comply with discovery requests, including obtaining documents for production and responding to interrogatories served by Defendants. B&R Supermarket, Inc.'s Chief IT Officer, Bill Millam was deposed by the Defendants in this case on January 23, 2018.

7. Specifically, I directed multiple employees of B&R Supermarket who assisted in responding to case obligations. Their roles were as follows:

- Marie Dixon (B & R Supermarket, Inc. – Treasurer): Assisted with identifying and gathering responsive records and coordinating communications;
- Bill Milam (B & R Supermarket, Inc. – Chief IT Officer): Handled retrieval of electronic files, system logs, merchant data, and other technical documentation; Gave a deposition in the case on January 23, 2018.
- Shella Truntz (B & R Supermarket, Inc. – Executive Assistant): Organized and searched for requested documents, managed scheduling, and supported communications with counsel;
- Chester Borge (Grove Liquors – Manager): Located store-level records, reviewed operational data, and provided factual context for Grove Liquor's experiences; and

- Jordan Abolafia (Grove Liquors – Paid Intern): Assisted with scanning, labeling, organizing, and preparing documents for production.

8. I met and spoke extensively with counsel to identify, locate, deliver, and explain documents requested in the litigation. I oversaw the document retrieval, provided institutional knowledge to assist in the efforts, and worked closely with counsel on factual explanations for responding to the interrogatories. I communicated regularly with counsel throughout the litigation to be updated on the case, and to provide context, answer follow-up questions, and assist with ongoing factual inquiries. I read all case-related filings, including depositions, and prepared for my deposition with counsel's assistance.

9. In all, B & R Supermarket produced nearly 250,000 documents to counsel, of which 12,799 were produced to Defendants to my understanding.

10. I was deposed by counsel for the Defendants on February 28, 2017, which began at 9:03 a.m. and was completed at 5:14 p.m. I was questioned extensively about the operation of B & R Supermarket, generally and specifically as it related to credit card transactions, processing, the transition to chip card purchases and how B & R Supermarket managed the changes that occurred, chargebacks, my role in the businesses, and the effect and impact of the fraud liability shift on B & R Supermarket's operations and on merchants generally, among other topics.

11. All of these efforts required significant diversion of senior leadership time and resources from daily business operations. I spent approximately 200 hours on case-related activities. My employees collectively spent approximately 1,225 hours on document collection, review, and communications. Collection of these documents necessitated retrieval at the actual store level where such records were maintained.

12. The requirements of adequately serving as a class representative represented a substantial economic burden on B & R Supermarket, especially given that many of the employees involved are senior personnel whose regular duties are critical to daily operations.

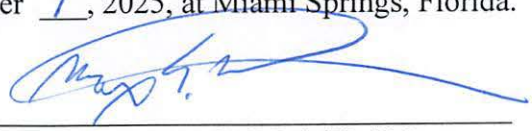
13. In addition to the work associated with the litigation of the Action, I actively helped inform and update other merchants and industry groups about the Action. I notified the Associated Grocers of Florida, Inc. (AGF)—a retailers' cooperative— of the case and informed AGF members at periodic meetings. I spoke frequently with AGF management and various AGF member stores about the case. I notified the National Grocers Association (NGA) of the case. I understand that the NGA contacted Carlos Collazo of Palero Food Corp. and Cagueyes Food Corp. (d/b/a Fine Fare Supermarket) in New York, who is also a named plaintiff and class representative in this Action. I have spoken with numerous individual class members—including Sedano's Supermarkets in South Florida—to explain the issues, answer factual questions, and ensure that impacted merchants were aware of the litigation. My goal throughout was to help other merchants understand the significance of the issues, the potential scope of the harms, and their rights as class members.

14. I was also apprised of the numerous efforts to settle the Action, including of the mediator's proposals that eventually resolved the case. Through my discussions with my counsel in this case, I feel that I have a clear understanding of the settlements reached. My counsel has also explained to me the amounts requested for attorneys' fees and the reimbursement of expenses in this case. I am in full agreement with the settlements and with the contemporaneous application for attorneys' fees and expenses, and with the application for service awards.

15. Neither I nor B & R Supermarket, has received, nor were promised or offered, and would not accept, any financial incentives or compensation for serving as a plaintiff in the Action,

except such payments as the Court expressly approves. Devine Goodman, Class Counsel, or any other counsel of record for the Class have not offered assurance that I or B & R Supermarket would receive any compensation for bringing, and continuing to serve in, the Action, and the prospect of such an award was not a factor in my decision to pursue or settle the litigation.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 7, 2025, at Miami Springs, Florida.



MAX EDWARD MILAM

EXHIBIT 7

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

B & R SUPERMARKET, INC., d/b/a MILAM'S MARKET, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. VISA, INC., et al., Defendants.	:	Case No. 1:17-cv-02738-BMC-JAM CLASS ACTION

DECLARATION OF STEPHANE STROUK IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS AND MOTION FOR FINAL APPROVAL OF SETTLEMENTS WITH DEFENDANTS

I, STEPHANE STROUK, declare as follows:

1. I, on behalf of Strouk Group LLC ("Strouk Group"), am a plaintiff and class representative in the above-captioned antitrust class action (the "Action"). I submit this declaration in support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards and Plaintiffs' Motion for Final Approval of Settlements with Defendants. I have personal knowledge of the facts set forth in this declaration and would testify truthfully to these matters if called upon as a witness.[1]

2. I am the owner, founder and Chief Executive Officer ("CEO") of Strouk Group. Founded in 1993, Strouk Group operates restaurants and specialty food locations under the name Monsieur Marcel Gourmet Market and Restaurant ("Monsieur Marcel"). I became CEO in 1993, and Strouk Group became an LLC in 2013. Monsieur Marcel's main location is in the Original Farmers Market in Los Angeles, California. Following the chargeback liability shift in October 2015, Monsieur Marcel faced significant and unprecedented chargebacks due to an inability to obtain timely required certifications of newly purchased terminal equipment, as required by the credit card networks, that were supposed to be operational and compliant with the credit card networks' specifications.

3. On July 15, 2016, Strouk Group was among the merchants who joined the Action as plaintiffs in an amended complaint. The Action alleges violations of law against the defendants in connection with their collective imposition of network rules that resulted in the shift of certain chargeback liabilities onto merchants. The Action was initiated on March 8, 2016, and Strouk Group joined as a plaintiff to the amended complaint and has served as a class representative from

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that time through the entire litigation. The United States District Court for the Eastern District of New York (the "Court") certified a class of merchants to proceed with the litigation on August 28, 2020.

4. I and Strouk Group sought to be a plaintiff in the Action because I believe that the shifting of chargeback liability onto merchants under the circumstances that existed at the time, and continuing from there, and the way the shift was implemented, was entirely improper and unfair, and had a significant and harmful impact on me and Strouk Group as a merchant and on merchants across the country. The rules, tasks, and burdens associated with the transition to the chip card method of payment were for me and Strouk Group too difficult, complex, and costly to accomplish and complete in the time provided.

5. Throughout the litigation, I have, as CEO and on behalf of Strouk Group, maintained continuing direct and personal communication with attorneys of record for the Class and Class Counsel—initially with attorneys at Robbins Geller Rudman & Dowd LLP, primarily Alexandra Bernay, and, for most of the case, with George Aguilar of Robbins LLP. I maintained communication with Class Counsel to monitor the litigation, reviewed and approved various pleadings filed by Class Counsel, reviewed numerous orders, including case dispositive orders, from the Court, provided input on decisions affecting the course of the litigation, made myself available for communications and input during the various mediation sessions through the years, and complied with numerous discovery obligations, including preparing for and attending my deposition in the Action on March 14, 2017. On behalf of the Class, I have spent substantial time and effort in the pursuit of this litigation with Class Counsel as more fully described below.

6. Specifically, I directed Strouk Group's accountant, Karen Cason, to spend approximately two and a half days identifying and gathering paper records, electronic files,

merchant data, and technical documents, and assisting in organizing and preparing the documents for production.

7. I met and spoke extensively with counsel to identify and explain the documents requested in the litigation, and also worked to locate, retrieve and deliver the documents for production. I further worked with counsel on factual explanations for responding to the interrogatories, and to verify the answers provided in responding to the interrogatories. I communicated regularly with counsel throughout the litigation to be updated on the case, and to provide context, answer follow-up questions, and assist with ongoing factual inquiries. I read certain case-related filings and prepared for my deposition with counsel's assistance.

8. In all, Strouk Group produced nearly 88,000 documents to counsel, of which 4,351 were produced to Defendants to my understanding.

9. I was deposed by counsel for Defendants on March 14, 2017, which began at 10:43 a.m. and was completed at 6:22 p.m. I was questioned extensively about the operation of Strouk Group, generally and specifically as it related to credit card transactions, processing, the transition to chip card purchases and how Strouk Group managed the changes that occurred, chargebacks, my role in the businesses, and the effect and impact of the fraud liability shift on Strouk Group's operations and on merchants generally, among other topics.

10. I spent approximately 200 hours on case-related activities. The requirements of adequately serving as a class representative represented a substantial economic burden on Strouk Group as the work took me away from my duties as CEO.

11. I was also apprised of the numerous efforts to settle the Action, including of the mediator's proposals that eventually resolved the case. Through my discussions with my counsel in this case, and my reading and understanding of the settlement agreements and the pleadings in

support of the settlement, I feel that I have a clear understanding of the settlements reached. My counsel has also explained to me the amounts requested for attorneys' fees and the reimbursement of expenses in this case. I am in full agreement with the settlements and with the contemporaneous application for attorneys' fees and expenses, and with the application for service awards.

12. Neither I nor Strouk Group received, nor were promised or offered, and would not accept, any financial incentives or compensation for serving as a plaintiff in the Action, except such payments as the Court expressly approves. Class Counsel or any other counsel of record for the Class have offered no assurance that I or Strouk Group would receive any compensation for bringing, and continuing to serve in, the Action, and the prospect of such an award was not a factor in my decision to pursue or settle the litigation.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on dec 10 , 2025, at Los angeles , California

STEPHANE STROUK

EXHIBIT 8

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

B & R SUPERMARKET, INC., d/b/a MILAM'S MARKET, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. VISA, INC., et al., Defendants.	:	Case No. 1:17-cv-02738-BMC-JAM CLASS ACTION

DECLARATION OF CARLOS COLLADO IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS AND MOTION FOR FINAL APPROVAL OF SETTLEMENTS WITH DEFENDANTS

I, CARLOS COLLADO, declare as follows:

1. I, on behalf of Palero Food Corporation ("Palero") and Cagueyes Food Corporation ("Cagueyes") d/b/a Fine Fare Supermarket ("Fine Fare"), am a plaintiff and class representative in the above-captioned antitrust class action (the "Action"). I submit this declaration in support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards and Plaintiffs' Motion for Final Approval of Settlements with Defendants. I have personal knowledge of the facts set forth in this declaration and would testify truthfully to these matters if called upon as a witness.[1]

2. I am the owner of Palero and owner and founder of Cagueyes. I have been with Palero since 1992, beginning as an assistant manager. I became owner of Palero in 2006, and I started Cagueyes as founder and owner in 2010. They are independently owned supermarkets doing business as Fine Fare, operating in the Bronx, New York. Following the chargeback liability shift in October 2015, Fine Fare faced significant and unprecedented chargebacks due to an inability to obtain timely required certifications of newly purchased terminal equipment, as required by the credit card networks, that were supposed to be operational and compliant with the credit card networks' specifications.

3. On July 15, 2016, Fine Fare was among the merchants who joined the Action as plaintiffs in an amended complaint. The Action alleges violations of law against the defendants in connection with their collective imposition of network rules that resulted in the shift of certain chargeback liabilities onto merchants. The Action was initiated on March 8, 2016, and Fine Fare joined as a plaintiff to the amended complaint and has served as a class representative from that

[1] Unless otherwise defined, all capitalized terms shall have the same meaning set forth in the accompanying memorandum in support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards.

time through the entire litigation. The United States District Court for the Eastern District of New York (the "Court") certified a class of merchants to proceed with the litigation on August 28, 2020.

4. I and Fine Fare sought to be a plaintiff in the Action because I believe that the shifting of chargeback liability onto merchants under the circumstances that existed at the time, and continuing from there, and the way the shift was implemented, was entirely improper and unfair, and had a significant and harmful impact on me and Fine Fare as a merchant and on merchants across the country. The rules, tasks, and burdens associated with the transition to the chip card method of payment, imposed uniformly and at the same time by Defendants, were for me and Fine Fare too difficult, complex, and costly to accomplish and complete in the time provided.

5. Throughout the litigation, I have, as owner and on behalf of Fine Fare, maintained continuing direct and personal communication with attorneys of record for the Class and Class Counsel—initially with attorneys at Robbins Geller Rudman & Dowd LLP, primarily Carmen Medici, and, for most of the case, with George Aguilar of Robbins LLP. I maintained communication with Class Counsel to monitor the litigation, reviewed and approved various pleadings filed by Class Counsel, reviewed numerous orders, including case dispositive orders, from the Court, provided input on decisions affecting the course of the litigation, made myself available for communications and input during the various mediation sessions through the years, and complied with numerous discovery obligations, including preparing for and attending my deposition in the Action on February 15, 2017. On behalf of the Class, I have spent substantial time and effort in the pursuit of this litigation with Class Counsel as more fully described below.

6. Specifically, I directed Fine Fare's accountants, Sandra Rodriguez and Maria Flores, and store manager Ramon Gonzalez, to spend approximately two days identifying and gathering paper records, electronic files, merchant data, and technical documents, and assisting in organizing

and preparing the documents for production.

7. I met and spoke extensively with counsel to identify and explain the documents requested in the litigation, and also worked to locate, retrieve and deliver the documents for production. I further worked with counsel on factual explanations for responding to the interrogatories, and to verify the answers provided in responding to the interrogatories. I communicated regularly with counsel throughout the litigation to be updated on the case, and to provide context, answer follow-up questions, and assist with ongoing factual inquiries. I read certain case-related filings and prepared for my deposition with counsel's assistance. I also attended hearings in the case: one in San Francisco, California, while the Action was pending in the United States District Court for the Northern District of California, and another before this Court.

8. In all, Fine Fare produced nearly 35,000 documents to counsel, of which 994 were produced to Defendants to my understanding.

9. I was deposed by counsel for Defendants on February 15, 2017, which began at 10:35 a.m. and was completed at 6:12 p.m. I was questioned extensively about the operation of Fine Fare, generally and specifically as it related to credit card transactions, processing, the transition to chip card purchases and how Fine Fare managed the changes that occurred, chargebacks, my role in the businesses, and the effect and impact of the fraud liability shift on Fine Fare's operations and on merchants generally, among other topics.

10. I spent approximately 225 hours on case-related activities. The requirements of adequately serving as a class representative represented a substantial economic burden on Fine Fare as the work took me away from my duties as the primary operator of the stores.

11. In addition to the work associated with the litigation of the Action, I actively helped inform and update other merchants and industry groups about the Action. I notified the National

Supermarket Association of the case and continually advised senior management of the status of the case and obtained relevant information about the case that I relayed to Class Counsel. I have spoken with members of the NSA and several other individual class members to explain the case, answer factual questions, and ensure that impacted merchants were aware of the litigation.

12. I was also apprised of the numerous efforts to settle the Action, including of the mediator's proposals that eventually resolved the case. Through my discussions with my counsel in this case, and my reading and understanding of the settlement agreements and the pleadings in support of the settlement, I feel that I have a clear understanding of the settlements reached. My counsel has also explained to me the amounts requested for attorneys' fees and the reimbursement of expenses in this case. I am in full agreement with the settlements and with the contemporaneous application for attorneys' fees and expenses, and with the application for service awards.

13. Neither I nor Fine Fare received, nor were promised or offered, and would not accept, any financial incentives or compensation for serving as a plaintiff in the Action, except such payments as the Court expressly approves. Class Counsel or any other counsel of record for the Class have offered no assurance that I or Fine Fare would receive any compensation for bringing, and continuing to serve in, the Action, and the prospect of such an award was not a factor in my decision to pursue or settle the litigation.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on 12/22, 2025, at New York, New York.

CARLOS COLLADO

EXHIBIT 9

ROBBINS LLP

5060 Shoreham Pl., Ste. 300
San Diego, CA 92122
619.525.3990 *phone*
619.525.3991 *fax*
www.robbinsllp.com

FIRM RESUME

Robbins LLP[1] is a nationally recognized shareholder rights law firm dedicated to the prosecution of shareholder derivative and class action lawsuits. We are committed to the principle that the directors and managers of publicly traded corporations must be held accountable to the owners of the enterprise – the shareholders. A leader in corporate governance reform, Robbins LLP has worked with individual and institutional shareholders to improve board oversight, legal compliance, transparency, and responsiveness at more than 400 Fortune 1000 companies. The firm has also helped secure several of the largest monetary recoveries in the history of shareholder derivative litigation and has helped clients to realize more than $1 billion in value for themselves and the companies in which they have invested.

For its achievements, the firm has received numerous accolades, including inclusion in the first *Chambers California Spotlight Guide for 2025*; recognition from *U.S. News & World Report*, which named the firm a Best Law Firm for 2017-2026, *Daily Journal*, which named the firm a 2015 Top 25 Boutique in California, the *Legal 500*, which named the firm a Leading Firm in Merger and Acquisition Litigation in 2013-2018, the *National Law Journal*, which included the firm on its 2012 Litigation Boutiques Hot List, and ISS's Securities Class Action Services, which has listed the firm among the nation's top shareholder plaintiffs' firms. Each year, Robbins LLP's attorneys are honored as Super Lawyers and Rising Stars. In addition, Robbins LLP's co-founder, Brian J. Robbins, is featured in Best Lawyers in America for Securities Litigation (2016-2026), in *San Diego Business Journal* as Best of the Bar (2014-2016), and in *The Daily Transcript* as a Top Attorney (2015).

Practice Areas

Robbins LLP represents individual and institutional investors in shareholder derivative actions, securities fraud class actions arising from violations of Section 10(b) of the Exchange Act, and class actions arising out of mergers and acquisitions, initial public offerings, and going private transactions that violate Section 11 of the Securities Act. Additional Robbins LLP practice areas include antitrust actions, Employee Retirement Income Security Act (ERISA) actions, whistleblower actions under the Dodd-Frank Wall Street Reform and Consumer Protection Act and the False Claims Act, and consumer class actions.

Leadership

Robbins LLP's experienced attorneys provide skilled representation to clients through all phases of complex litigation. The firm's partners include former federal prosecutors, defense counsel from top corporate law firms, in-house counsel from leading financial institutions, and career shareholder rights litigators. Collectively, they have litigated hundreds of cases in nearly every state, serving in numerous court-appointed leadership roles in complex multi-jurisdictional litigation. They currently serve as lead or co-lead counsel in dozens of cases nationwide. The firm's attorneys are supported by investigators, corporate research analysts, client relations specialists, and legal support professionals, each of whom provides exceptional client service. Our talented team has helped secure significant results for our clients. We feature below some of the firm's achievements across the nation.

- ***Pirelli Armstrong Tire Corp. Ret. Med. Benefits Trust v. Hanover Compressor Co.***, No. H-02-0410 (S.D. Tex. Feb. 6, 2004): Shareholders of Hanover Compressor Company, a

[1] "Robbins LLP" and "the firm" herein collectively refer to the firm's previous names of Robbins Arroyo LLP, Robbins Umeda LLP, and Robbins Umeda & Fink, LLP.

provider of natural gas compression services operating in the United States and select international markets, brought claims on behalf of the company against company officers and directors for breach of fiduciary duty, waste of corporate assets, abuse of control, and gross mismanagement. The claims arose out of an off-balance-sheet joint venture to build and operate a natural gas processing plant on barges off the coast of Nigeria. Robbins LLP attorneys, serving as lead negotiators for derivative plaintiffs, secured extraordinary results for Hanover, including $57.4 million in compensation (a cash payment of $26.5 million and the return of 2.5 million shares valued at approximately $30.9 million by an entity controlled by certain of the individual defendants) and corporate governance changes that have been noted as having "groundbreaking" and "unprecedented" benefits for Hanover, including the appointment of two shareholder-nominated directors and becoming one of the first companies in the United States to commit to implementing a five-year rotation rule for its outside audit firms.

- ***In re Nicor, Inc. S'holder Derivative Litig.***, No. 02 CH 15499 (Ill. Cir. Ct.-Cook Cnty. Mar. 29, 2005): The firm served as co-lead counsel for plaintiffs who brought claims for breach of fiduciary duty and unjust enrichment against several officers and directors of Nicor, Inc., one of the largest natural gas distributors in the United States. Plaintiffs alleged that Nicor's management made material misrepresentations and omitted material information from the Illinois Commerce Commission and the company's shareholders and customers, and unlawfully manipulated the company's operating results. Robbins LLP attorneys recovered $33 million for Nicor and secured personnel changes among Nicor's executive officers and board members.

- ***In re OM Group, Inc. Derivative Litig.***, No. 1:03-CV-0020 (N.D. Ohio Nov. 10, 2005): The firm served as lead counsel to plaintiffs in this derivative action arising out of a massive accounting fraud at this global solutions provider and specialty chemical manufacturer. During the litigation, our attorneys opposed and defeated defendants' motions to dismiss, reviewed thousands of documents produced during discovery, conducted expert discovery, and took over forty depositions of witnesses and defendants throughout the United States and Europe. Robbins LLP obtained a settlement that included a $29 million payment to the company, the termination of the company's chief executive officer, the addition of two shareholder-nominated directors, and the implementation of various other beneficial corporate governance procedures at the company.

- ***Lieb v. Unocal Corp.***, No. BC331316 (Cal. Super. Ct.-L.A. Cnty. Dec. 20, 2005): Robbins LLP served as co-lead counsel for the public shareholders of Unocal Corporation in this securities class action against Unocal and several of its insiders, officers, and directors for self-dealing and breach of fiduciary duty in connection with the proposed sale of Unocal to Chevron Corporation. Plaintiffs alleged that Unocal's management failed to obtain the highest share price reasonably available by tailoring the proposed acquisition terms to meet the specific needs of acquirer Chevron, and by discouraging alternative bids. After obtaining broad expedited discovery, the firm was credited for helping Unocal shareholders to realize $500 million in additional consideration as a result of Chevron's increased bid of $17.4 billion. The firm also secured supplemental proxy statement disclosures before Unocal shareholders voted on whether to accept Chevron's bid over a nominally higher bid by the Chinese National Offshore Oil Corporation.

- ***In re Titan, Inc. Sec. Litig.***, No. 04-CV-0676-LAB (NLS) (S.D. Cal. Dec. 20, 2005): The firm served as co-lead counsel in this securities fraud class action against The Titan Corporation and certain of its officers and directors for violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and breach of fiduciary duty. Robbins LLP's efforts resulted in a recovery of $61.5 million for Titan's shareholders.

- ***In re Tenet Healthcare Corp. Derivative Litig.***, No. 01098905 (Cal. Super Ct.-Santa Barbara Cnty. May 5, 2006), *aff'd*, No. B192252 (Cal. App. Sept. 20, 2007): The firm served as co-lead counsel for the plaintiffs, who alleged that Tenet Healthcare Corp.'s top executives breached their fiduciary duties to the company by failing to monitor, investigate, and oversee Tenet's patient procedures, Medicare billing, and accounting practices. After prosecuting the case for over three years, Robbins LLP's attorneys negotiated a comprehensive settlement, which included $51.5 million in cash contributions to Tenet and sweeping corporate governance reforms and other remedial measures designed to ensure the independence and accountability of the company's board of directors. The new governance regime included separation of the positions of chief executive officer and chairman of the board of directors, strict internal financial controls, enhanced guidelines for stock ownership and stock retention, and a comprehensive insider trading policy. The settlement was upheld on appeal.

- ***In re Qwest Sav. & Inv. Plan ERISA Litig.***, No. 02-cv-00464 (D. Colo. Jan. 29, 2007): Robbins LLP served on plaintiffs' executive committee in a class action brought as a civil enforcement suit for ERISA violations. The employees alleged that Qwest's management repeatedly misrepresented the financial status of the company to its employees to encourage employees to make discretionary investments in Qwest common stock. When the truth about Qwest's financial condition and egregious accounting manipulations was revealed, the price of Qwest common stock plummeted, but employees were restricted from selling their retirement fund shares under the terms of the Qwest Savings & Investment Plan. When the restriction was lifted, Qwest stock was trading at an all-time low, devastating the employees' retirement funds. After years of contentious litigation, Robbins LLP helped achieve a $37.5 million settlement for the benefit of the employees who had invested in the retirement plan.

- ***Staehr v. Walter***, No. 02-CVG-11-0639 (Ohio Ct. C.P.-Del. Cnty. Dec. 17, 2007): Robbins LLP led the charge in derivative litigation on behalf of the plaintiff who brought claims against certain Cardinal Health Inc. officers and directors arising out of Cardinal's proposed stock-for-stock acquisition of Syncor International Corp. The action forced Cardinal to reduce the previously negotiated acquisition price for Syncor, saving the company millions of dollars. During its work on the Syncor transaction, Robbins LLP and other firms discovered that Cardinal insiders had engaged in a massive revenue inflation scheme to fraudulently overstate the company's financial performance. Robbins LLP filed an amended complaint against several of Cardinal's officers and directors, defeated multiple motions to dismiss, and pursued and reviewed millions of pages of documents in discovery. The firm ultimately negotiated and resolved the matter by obtaining $70 million for the company—among the largest monetary recoveries ever in a shareholder derivative action. The settlement also required Cardinal's board of directors to implement significant corporate governance and internal accounting controls designed to improve the board's oversight of Cardinal's senior management and to prevent the recurrence of the alleged accounting manipulations.

- ***In re Juniper Networks, Inc. Derivative Litig.***, No. 1:06-CV-064294 (Cal. Super. Ct.-Santa Clara Cnty. Dec. 4, 2008): Robbins LLP served as co-lead counsel in this state shareholder derivative suit against several officers and directors of Juniper Networks, Inc., a global networking and communications technology company, for breach of fiduciary duty, abuse of control, gross mismanagement, waste of corporate assets, unjust enrichment, insider selling, accounting, and rescission in connection with a stock option backdating scheme. After extensively prosecuting the case, the firm helped secure substantive corporate governance reforms and the forfeiture of more than $22 million in stock options to the company from four executives and directors of the board.

- ***In re KB Home S'holder Derivative Litig.***,. No. 2:06-CV-05148-FMC (CTx) (C.D. Cal. Feb. 9, 2009): Robbins LLP served as co-lead counsel for the plaintiffs, who alleged that insiders of KB Home, Inc., a prominent builder of single-family homes in the United States and France,

manipulated their stock option grant dates to misappropriate millions of dollars in illicit compensation. Robbins LLP's efforts helped return nearly $50 million in value to the company, including a cash payment of over $31 million. In addition, the firm helped KB Home secure corporate governance enhancements and implement remedial measures, including separation of the chairman of the board and chief executive officer positions; declassification of the board of directors; majority voting for elections to the board; adoption of formal written procedures for the grant of stock options; and limits on future executive severance payments, among others.

- ***Overby v. Tyco Int'l Ltd.***, No. 02-CV-1357-B (D.N.H. Nov. 23, 2009): Robbins LLP represented a class of employees of Tyco International Ltd., the largest electronics security provider in the world, when employees brought claims against the company for ERISA violations. Robbins LLP helped obtain a $70 million settlement for the beneficiaries of Tyco's defined contribution retirement plan.

- ***In re Brocade Communications Systems, Inc. Derivative Litigation***, No. 1:05-CV-041683 (Cal. Super. Ct.-Santa Clara County Jan. 28, 2010): Robbins LLP represented plaintiffs in this shareholder derivative action against officers and directors of Brocade Communications Systems, Inc., an industry leader in data center networking solutions, following the announcement that Brocade would have to restate two fiscal years of financial statements to correct its improper accounting for stock-based compensation expenses. For years, Brocade's insiders had engaged in a secret stock option backdating scheme designed to reward executives and recruit engineers with stock options priced below their fair market value as of the date of the grants. Robbins LLP successfully petitioned the court to proceed with litigation to prevent an inadequate settlement of a related federal action, which would have released the officers, directors, and agents of the company responsible for the criminal backdating scheme for no money to the company nor a payment of attorney's fees, even as the U.S. Government pursued and ultimately won criminal convictions against the responsible executives. After almost three years of diligently prosecuting the case, during which Robbins LLP engaged in extensive motion practice, reviewed approximately three million pages of documents, and marshaled evidence from related cases involving the conduct at Brocade, Brocade's Special Litigation Committee retained Robbins LLP to serve as its co-counsel, and, after presentations from Robbins LLP, authorized the continued prosecution of claims against Brocade's officers and directors and on behalf of the shareholders.

- ***In re PETCO Animal Supplies, Inc. S'holder Litig.***, No. GIC 869399 (Cal. Super. Ct.-San Diego Cnty. Mar. 26, 2010): Robbins LLP served as co-lead counsel to the public shareholders of PETCO Animal Supplies, Inc., in a class action that sought to enjoin PETCO's insiders, directors, and affiliates from consummating any sale of PETCO unless and until the company implemented a procedure to ensure that PETCO's shareholders received the highest possible price for the sale. Over the course of three years, our attorneys engaged in extensive motion practice and document, expert, and witness discovery. Shortly before the case went to trial, Robbins LLP assisted in achieving a settlement that secured a $16 million settlement fund for the class.

- ***In re Am. Int'l Group, Inc. Derivative Litig.***, No. 04 Civ. 8406 (DLC) (S.D.N.Y. Mar. 14, 2011): The firm was appointed lead counsel in the consolidated federal action alleging breach of fiduciary duty claims in connection with a bid-rigging scheme with Marsh & McLennan Companies, Inc., sham reinsurance transactions with General Re Corporation, and other activities intended to falsify American International Group, Inc.'s ("AIG") financial results. As part of a global settlement of the derivative claims on AIG's behalf, Robbins LLP helped secure a $90 million payment to AIG, one of the largest monetary recoveries in the history of shareholder derivative actions.

- ***Kloss v. Kerker***, No. 50-2010-CA-018594-XXXX-MB (Fla. Cir. Ct.-Palm Beach Cnty. May 27, 2011): Robbins LLP worked with the parties to derivative litigation filed on behalf of the Internet's leading vitamin and supplement retailer, Vitacost.com, Inc., to save the $158 million market cap company from bankruptcy and to preserve the equity interests of its shareholders. Robbins LLP was instrumental in achieving a settlement that enabled the company to bring its financial statements and Security and Exchange Commission ("SEC") filings current; allowed Vitacost to hold a long overdue shareholder meeting to address fundamental defects in the corporation's formation, board composition, and past stock issuances; and helped the company to persuade NASDAQ to lift its trading moratorium and provide the company and its shareholders access to the capital markets. The firm worked with the company's new board of directors to implement a series of corporate governance best practices, including a robust insider trading policy. Vitacost hired Robbins LLP to evaluate and potentially to prosecute the company's claims against other parties relating to the defects in its formation, stock issuances, and other pre-IPO issues.

- ***Martinez v. Toll (Toll Bros., Inc.)***, No. 2:09-cv-00937-CDJ (E.D. Pa. Mar. 27, 2013); *Pfeiffer v. Toll*, No. 4140-VCL (Del. Ch. Mar. 15, 2013): Robbins LLP represented shareholders in the Toll Brothers, Inc. shareholder derivative litigation in which plaintiffs alleged that certain company officers and directors, including the co-founders, traded on inside information and grossly misled investors about company earnings projections during a housing market downturn. After four years of contentious litigation, the firm helped secure one of the largest *Brophy* (*Brophy v. Cities Serv. Co.*, 70 A.2d 5 (Del. Ch. 1949)) settlements ever, a $16.25 million cash payment to the luxury homebuilding company. The settlement included a $6.45 million payment from the executive directors—an unprecedented result in shareholder litigation of this type.

- ***Cook v. McCullough***, No. 1:11-cv-09119 (N.D. Ill. Jan. 28, 2014): Robbins LLP served as co-lead counsel in shareholder derivative litigation arising out of Career Education Corp.'s alleged publication of false statements regarding job placement and student loan repayment rates, and failure to ensure compliance with Title IV regulations. The firm played a leading role in negotiating the global resolution of a series of actions brought against and on behalf of the company, and helped secure a $20 million recovery and comprehensive board and management-level corporate governance and oversight reforms for Career Education, including enhanced compliance and whistleblower policies, new director independence standards, improved executive compensation claw-back provisions, a comprehensive director education and employee training program, and an improved regulatory risk management and disclosure regime.

- ***In re Star Scientific, Inc. Securities Litigation***, No. 3:13-CV-00183-JAG (E.D.Va.July 6, 2015): Robbins LLP served as lead counsel in this securities fraud class action against Star Scientific, Inc. alleging that the defendants made materially false and misleading statements regarding Johns Hopkins University School of Medicine's purported involvement in the clinical development and testing of the company's main product - Anatabloc® - to increase Star Scientific's stock price to the detriment of stockholders and to secure the equity financing the company needed to stay in business. The firm successfully defeated defendants' motion to dismiss, engaged in extensive settlement discussions, and ultimately secured a $5.9 million settlement fund on behalf of stockholders who purchased their shares of Star Scientific stock based on these misrepresentations.

- ***Espinoza v. Zuckerberg, C.A.*** No. 9745-CB (Del. Ch. Mar. 30, 2016): Robbins LLP served as counsel in shareholder derivative litigation on behalf of Facebook, Inc. arising from the alleged award of unfair excessive compensation by the board of directors to its non-employee members. Certain members of Facebook's board of directors attempted to circumvent corporate law procedures to obtain controlling stockholder approval of compensation awarded

by the Board to its non-employee members. After deposing Facebook's Chief Executive Officer Mark Zuckerberg and beating a motion for summary judgment, Robbins LLP convinced Facebook to impose corporate governance reforms designed to ensure the Board awards executive compensation fairly and not to the detriment of the company, including allowing stockholders to vote on non-employee directors' compensation. As such, Robbins LLP helped established that public companies with controlling stockholders must comply with corporate law procedures.

- ***In re Venoco, Inc. S'holder Litig.*****,** No. 6825-VCG (Del. Ch. Oct. 5, 2016)**:** Robbins LLP served as co-lead counsel to the public shareholders of Venoco, Inc. in this class action arising out of a scheme by the energy company's Chief Executive Officer to buy out Venoco's minority shareholders at an inadequate share price. Robbins LLP conducted extensive fact and expert discovery for two years after the closing of the acquisition. During this time, Venoco floundered due to a decline in the price of oil, a burst pipeline, and additional debt from the acquisition, which ultimately led the company to file for bankruptcy. Amidst the company's demise, the firm achieved a settlement fund of $19 million for shareholders—a significant recovery in light of Venoco's dire financial circumstances. At the final approval hearing, the Honorable Sam Glasscock III, Vice Chancellor, in the Court of Chancery of the State of Delaware, touted the settlement as a "good result for all" and "very fortunate for the class," and noted Robbins LLP as "excellent counsel." (Transcript of Proceeding at 19, 22).

- ***In re Fifth Street Finance Corp. Shareholder Derivative Litigation***, Lead Case No. 3:15-cv-01795-RNC (D. Conn. Dec. 13, 2016): Robbins LLP served as lead counsel in shareholder derivative litigation brought on behalf of Fifth Street Finance Corp. to challenge alleged conflicts of interest in Fifth Street's relationship with its investment advisor, FSAM. Plaintiffs alleged that certain Fifth Street and FSAM officers and directors caused Fifth Street to make reckless investments, use bogus accounting, and pay excessive fees to inflate FSAM's perceived value in the lead up to FSAM's initial public offering. The firm's settlement negotiations resulted in advisory fee reductions worth at least $30 million and comprehensive corporate governance, oversight, and conflicts management enhancements.

- ***In re Community Health Systems, Inc. Shareholder Derivative Litig***., No. 3:11-cv-00489 (M.D. Tenn. Jan. 20, 2017): Serving as co-lead counsel against the officers and directors of Community Health, Inc. in shareholder derivative litigation alleging that the fiduciaries systematically steered patients into medically unnecessary inpatient admissions when they should have been treated as outpatient, Robbins LLP was instrumental in obtaining what is believed to be the largest shareholder derivative recovery in the Sixth Circuit to date. After five years of contentious litigation and discovery, defendants agreed to settle the case, which included a $60 million cash payment to Community Health and the implementation of extensive corporate governance reforms, including board modifications to ensure director independence, improved internal disclosure policies to allow for the confidential reporting of suspected violations of healthcare laws, and the establishment of a Trading Compliance Committee to ensure compliance with Community Health's insider stock trading policy, among others.

- ***In re Saba Software, Inc. Stockholder Litig***., No. 10697-VCN (Del.Ch. Sept. 26, 2018): Robbins LLP served as lead counsel in this shareholder class action in the Delaware Chancery Court against the officers and directors of Saba Software, Inc. for breaches of fiduciary duties related to the buyout of Saba by Vector Capital Management. Plaintiffs alleged that because the company was facing mounting financial concerns, including delisting by the U.S. Securities and Exchange Commission and a failure to complete its internal review of the accounting treatment of certain international transactions, defendants chose to sell the company in a flawed and self-serving sales process in exchange for inadequate merger consideration of Saba shareholders. After three and a half years of litigation, including extensive discovery, mediation, and a lengthy settlement negotiation process, defendants agreed to pay Saba's

former shareholders $19.5 million. In approving the settlement, Vice Chancellor Slights called the firm's representation of the class "exemplary" and touted the settlement as a "strong recovery for the class."

- ***In re Twitter, Inc*. *Shareholder Derivative Litig.***, No. 1:18-cv-00062-VAC-MPT (D. Del. July 27, 2021): The firm served as co-lead counsel on behalf of the federal shareholder plaintiffs in a shareholder derivative action that alleged defendants breached their fiduciary duties to Twitter and its stockholders by making materially false and/or misleading statements about Twitter's user growth and user management prospects and that certain individual defendants profited on their inside information. After extensive litigation, including multiple mediations and months of settlement discussions, Robbins LLP's attorneys were instrumental in obtaining a $38 million settlement to Twitter and substantial corporate governance reforms, including enhancements to the Disclosure and Audit Committees, the creation of an independent Chief Compliance Officer position, and improved compliance training and insider trading policies.

- ***In Re Workhorse Group Inc. Stockholder Derivative Litigation***, No. A-21-833050-B (NV. Dist. Ct.-Clark Cnty June 22, 2023): The firm represented the plaintiffs in the Nevada state court derivative action who alleged that defendants made false and misleading statements regarding Workhorse's future business prospects, including its ability to win all, or a significant portion off, the United States Postal Service's multibillion dollar contract to replace its aging fleet of vehicles with electric vehicles, and sales of stock by Workhorse directors and officers while the company's stock price was allegedly inflated by those false and misleading statements. After extensive negotiations that included the parties to various derivative cases involving Workhorse, counsel reached a settlement that included $12.5 million to the company, the creation of a Disclosure Controls Committee and Chief Compliance Officer Position, and numerous other substantial reforms designed to prevent similar future wrongdoing.

- ***In re Altria Group, Inc. Derivative Litigation***, No. 3:20-cv-772 (DJN) (E.D. VA, Feb 20, 2023): Robbins LLP served as additional counsel to the federal plaintiffs in this coordinated litigation on behalf of Altria Group Inc. wherein plaintiffs alleged that Altria's $12.8 billion investment in Juul Labs, Inc. undermined the company's hard-fought reputational progress with regulators and lawmakers after decades of marketing tobacco products and funding misleading research about the harmful effects of smoking. After a yearlong negotiation, Robbins LLP was instrumental in achieving a hard-fought settlement that required multiple mediations, months of continued discussions, informal mediation conferences, and extensive document review of over 35 million pages. When achieved, the settlement contemplated a comprehensive and global resolution of the actions. As a result of the settlement, Altria committed to funding $117 million over five years, with a minimum spend of $20 million each year to address policy and governance measures relating to youth prevention and transaction oversight that may include: (i) positive youth development programs; (ii) smoking and vaping cessation treatment; and (iii) point of sale age verification technology.

- ***Yu v. RMG Sponsor, LLC, et al.***, No. 2021-0932-NAC (Del. Ch. Oct. 18, 2024): Robbins LLP served as co-lead counsel for the class that sued defendants asserting claims for breach of fiduciary duty and unjust enrichment in connection with the merger between RMG Acquisition Corp., a SPAC, and Romeo Systems, Inc., a privately held company purportedly engaged in the design and manufacture of lithium-ion battery modules and packs for commercial electric vehicles. Post-merger, Romeo revealed that it had overstated its revenue projections and understated its backlog projections. The company was ultimately acquired by Nikola Corporation in a stock-for-stock transaction that valued Romeo at $144 million ($0.74 a share). After extensive discovery, the parties reached a settlement that resulted in plaintiff securing a $11.99 million settlement for the class, nearly 100% of the damages.

- ***In Re GeneDx de-SPAC Litigation***, No. 2023-0140-PAF (Del. Ch. Dec. 2, 2024): Robbins LLP served as co-lead counsel for the class of CM Life Sciences, Inc. stockholders who were entitled to redeem their stock in connection with the company's merger with a formerly privately held company, Mount Sinai Genomics, Inc. d/b/a Sema4 Holdings Corp. The stockholders claimed that the defendants breached their fiduciary duties by issuing a misleading proxy that impaired their decision on whether to redeem their CML Life Sciences, Inc. stock when it merged with Legacy Sema4. Post-merger, GeneDx reported less revenue than projected in the Proxy Statement issued in support of the merger, lowered revenue expectations, and announced its exit from one of its core businesses. As a result, GeneDx's share price fell below $0.50 per share. After extensive and contested discovery, the parties reached an agreement that resulted in a recovery of $21 million to the class.

- ***Siseles, et al. v. Lutnick, et al.***, No. 2023-1152-JTL (Del. Ch. Dec. 6, 2024): Robbins LLP served as co-lead counsel for the class who brought claims arising from the business combination between special purpose acquisition company CF Finance Acquisition Corp. II and Legacy View, Inc., which CF II shareholders voted to approve on March 5, 2021. After reviewing corporate documents and records, plaintiffs filed a complaint against View asserting claims for breach of fiduciary duty resulting from defendants' alleged impairment of CF II stockholders' redemption rights in connection with the merger. View filed for bankruptcy relief under Chapter 11 of the Bankruptcy Code on April 2, 2024, and sought to release defendants and plaintiffs from future claims. Notwithstanding, the parties to the bankruptcy action agreed that certain causes of action of this matter would be carved out of the Chapter 11 Plan. Through mediation, the parties agreed to settle for $12 million.

- ***Walsh, et al. v. Buchholz, et al.,*** No. 0:19-cv-01856-JWB-DTS (D. Minn. Mar. 12, 2025): Robbins LLP represented a class of unitholders who challenged the fairness of the April 2019 unit-for-unit acquisition of Apollonia, LLC by St. Renatus, LLC. Plaintiffs alleged the acquisition was designed to unlawfully divest Apollonia, LLC unitholders of the company's valuable assets for grossly inadequate consideration via a flawed sales process. After five years of litigation, including multiple private mediation sessions and a settlement conference, plaintiffs achieved a settlement on the eve of trial of $11.6 million for the class of former Apollonia unit holders.

- ***In re Prudential Financial Inc. Derivative Litigation***, No. 2:20-cv-12772-SRC-CLW (Dist. NJ June 9, 2025): Robbins LLP served as co-lead counsel for plaintiffs who sued for damages in connection with oversight and disclosures regarding adverse mortality experience and corresponding reserves for life insurance policies acquired from The Hartford Financial Services Group, Inc. Plaintiffs alleged that defendants knew that adverse mortality experience would require material adjustments in the mortality exceptions, yet misled investors during its June 2019 investor conference by stating that the mortality experience was in the range of normal volatility and below previous experience. After protracted litigation, Robbins LLP obtained $10 million for the company. In approving the settlement, the Honorable Stanley R. Chesler noted that the settlement was "not only a reasonable recovery, it is a remarkable recovery and is a tribute to plaintiffs and plaintiffs' lawyer efforts in this case." (Transcript of Motion on Final Settlement Approval at 19-20).

- ***Drulias v. Apex Technology Sponsor LLC, et a***l., No. 2024-0094-LWW (Del. Ch. July 10, 2025): Robbins LLP served as co-lead counsel for the class of Apex Technology Acquisition Corporation stockholders who were entitled to redeem their shares of stock in connection with the company's merger with AvePoint, Inc. Shareholders sued for breach of fiduciary duty alleging that the Proxy contained multiple materially false and misleading representations about AvePoint's value and prospects and the extent of the director and officers' misaligned pecuniary interests. Robbins LLP was able to secure a $14.4 million recovery for the class.

- ***In re Kensington-QuantumScape De-SPAC Litigation***, No. 2022-0721-JTL (Del. Ch. July 11, 2025): Robbins LLP served as co-lead counsel for the class of Kensington Capital Acquisition Corp. stockholders wo were entitled to redeem their shares of stock in connection with the company's merger with Legacy QuantumScape Corporation. Shareholders sued for breach of fiduciary duty alleging the Proxy included misleading claims about the due diligence done by the Kensington Board, the value of Legacy QuantumScape, and the capabilities of Legacy QuantumScape's technology. After more than three of litigation, Robbins LLP secured $8.75 million for the class.

- ***In re Gores Holdings IV, Inc. Stockholder Litigation*****,** No. 2023-0284-LWW (Del. Ch. July 15, 2025): Robbins LLP served as co-lead counsel for the class who brought claims arising from the business combination between Gores IV, a special purpose acquisition company, and SFS Holdings Corp., United Wholesale Mortgage, LLC, and UWM Holdings, LLC (collectively, "Legacy UWM"). Plaintiffs alleged breach of fiduciary duty noting that the Proxy's patently unattainable financial projections dissuaded them from redeeming their stock in connection with the merger with Legacy UWM. Robbins LLP secured $17.5 million for the class.

- ***Himstreet, et al. v. Scharf, et al***., No. CGC-22-599223 (Cal. Super. Ct.-S.F. Cnty. July 24, 2025): Robbins LLP represented plaintiffs who are shareholders in Wells Fargo & Co in a derivative shareholder action alleging breaches of fiduciary duty by certain Wells Fargo officers and directors stemming from the purported mismanagement of and noncompliance with myriad consent orders and failures relating to the corporate governance and risk management framework of the company. Plaintiffs defeated numerous dispositive motions and a writ of mandate filed in a California appeals court, intervened in federal court to secure a ruling that streamlined all proceedings into the California state court, negotiated the production of two million pages of discovery, worked through complex privilege issues with federal regulators to secure additional documents, and negotiated a settlement providing for a $100 million cash payment to the company. This settlement is the largest payment made directly to a company in a derivative action in California state court history. The settlement also acknowledged that plaintiffs' allegations in the derivative action caused significant corporate governance reforms related to Wells Fargo's risk structure, programs, policies, and procedures, additional training for employees, expanded and enhanced oversight of risk management by Wells Fargo's Board of Directors, and changes to the composition of Wells Fargo's Board of Directors.

- ***In re Emergent BioSolutions Inc., Stockholder Derivative Litigation***, No. 8:21-cv-01595-DLB (D. Md. Aug. 6, 2025): Serving as lead counsel, the firm secured $15 million for Emergent BioSolutions Inc., as well as an agreement by the company to implement and maintain a package of corporate governance reforms, in shareholder derivative litigation arising from Emergent's failed internal controls at its Bayview, Maryland facility, which led to the termination of Emergent's contracts to manufacture COVID-19 vaccine bulk drug substance as part of the U.S. government's "Operation Warp Speed" pandemic response and left the company on the brink of insolvency.

- ***In re Becton Dickinson and Company Stockholder Derivative Litigation***, No. 2:20-cv-15474-SRC-CLW (D.N.J. Aug. 11, 2025): Robbins LLP served as co-lead counsel for plaintiffs in shareholder derivative litigation involving breach of fiduciary duty and other claims arising from alleged false and misleading statements concerning known issues with the company's Alaris infusion pump system. Robbins LLP led a coordinated multi-jurisdictional litigation effort that culminated in a $9 million payment to Beckton Dickinson and significant governance reforms, including enhanced oversight designed to prevent regulatory compliance violations and product-related issues, improvements to the company's disclosure controls, the addition of an independent corporate governance expert, and the implementation of strengthened vetting processes to ensure Board independence.

Awards & Recognition

For our achievements, Robbins LLP and our attorneys have received numerous accolades, including:

- Chambers *California Spotlight Guide* (2025)
- Best Law Firm, *U.S. News & World Report* (2017-2026)
- Leading Firm in Merger and Acquisition Litigation, *Legal 500* (2013-2018)
- Top 20 Settlements in California (2017)
- Top 25 Boutique Law Firm in California, *Daily Journal* (2015)
- Litigation Boutiques Hot List, *National Law Journal* (2012)
- Among Top Shareholder Plaintiffs' Firms by ISS's Securities Class Action Services
- Ten attorneys named to *Super Lawyer* lists (2025)
- Top 50 Attorney in San Diego, *Super Lawyers,* George C. Aguilar (2016-2020)
- Top 50 Attorney in San Diego, *Super Lawyers*, Brian J. Robbins (2014, 2016, 2018-2025)
- *Best Lawyers,* Brian J. Robbins (2016-2026); Gregory Del Gaizo (2020-2026); Stephen J. Oddo (2020-2026); Shane P. Sanders (2020-2026)
- *Best Lawyers*, Lawyer of the Year, Brian J. Robbins (2014-2016; 2021, 2026)
- Best of the Bar, *San Diego Business Journal,* Brian J. Robbins (2016)
- Best Overall Lawyer in San Diego, *Fine Magazine,* Brian J. Robbins (2016)
- Top Attorney, *The Daily Transcript,* Brian J. Robbins (2015)
- Attorney of the Year, *SD La Raza*, George C. Aguilar (2014)

Judicial Accolades

Robbins LLP's achievements in the courtroom have been recognized by respected jurists. We feature a selection of commendations below.

- *"The quality of representation by the Derivative Plaintiffs' Counsel was witnessed first hand by this Court through their articulate, high quality, and successful pleadings. Moreover, as shown by their excellent efforts in this case, Derivative Plaintiffs' Counsel are dedicated to vindicating the rights of shareholders …."*

  Honorable Ed Kinkeade, Judge of the U.S. District Court for the Northern District of Texas, *In re Heelys, Inc. Derivative Litig.***,** No. 3:07-CV-1682-K

- *"I think you've actually set the bar kind of high for future settlements. This looks like an excellent result for the various class members in both the derivative action and the other action.... And it's to the credit of the lawyers that they were able to achieve this result before a lot of discovery and a lot of expenses were undertaken ... And so, I would be quite delighted and satisfied to make the necessary findings that this is an excellent settlement for plaintiffs."*

  Honorable Robert S. Lasnik, Judge of the U.S. District Court for the Western District of Washington, *In re Cutter & Buck Sec. Litig.*, No. C02-1948L

- Robbins LLP's lawyers proved *"competent, experienced, [and] trustworthy."*

  Honorable Larry A. Burns, Judge of the U.S. District Court for the Southern District of California, *In re Sequenom, Inc. Derivative Litig.*, No. 09CV1341-LAB (WMC)

- *"Class counsel is highly experienced in bringing both class actions and derivative claims" and have "a nationwide reputation for handling shareholder derivative litigation, various class actions, and complex litigation…. Throughout the litigation, [class counsel] has shown themselves to be capable and qualified to represent the class."*

Honorable Darla Williamson, Judge of the Fourth Judicial District of the State of Idaho, County of Ada, *Carmona v. Bryant*, CV-OC-0601251

- *"The court also notes that the settlement appears to place the shareholders in a much better position than that which existed prior to the beginning of this litigation."*

  Honorable John A. Houston, Judge of the U.S. District Court for the Southern District of California, *In re Wireless Facilities Inc., Derivative Litig.*, No. 04-CV-1663 JAH (NLS)

- *"I have high regard for … your firm."*

  Honorable James P. Kleinberg, Judge of the Superior Court of California, County of Santa Clara, *In re Altera Corp. Derivative Litig.,* No. 1-06-CV-063537

- *"[W]e had … competent counsel who were able to reach a very handsome settlement for the shareholders who were working here on behalf of the shareholders interests."*

  Honorable Denise de Bellefeuille, Judge of the Superior Court of California, County of Santa Barbara, *In re Tenet Healthcare Corp. Derivative Litig.*, No. 01098905

- *"Thank you very much for the good work that you all did. And I think that your stockholders will appreciate it, too."*

  Honorable Sophia H. Hall, Judge of the Circuit Court of Cook County, Illinois, *In re Nicor, Inc. S'holder Derivative Litig.*, No. 02CH 15499

- *"Thank you for your good work on behalf of your clients. I appreciate it."*

  Honorable Thomas Barkdull, Circuit Judge of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, *Kloss v. Kerker*, No. 50-2010-CA-018594-XXXX-MB

- *"I want to tell you what a pleasure it is dealing with talented counsel.… Thank you very much."*

  Honorable John G. Evans, Judge of the Superior Court for the State of California, Riverside County, *Hess v. Heckmann*, No. INC10010407

- *"I think the plaintiffs and their counsel did a good job pressing forward with this action and achieving a good result…. I think that all in all, [$16.25 million] is a good value, a significant benefit for the company."*

  Honorable J. Travis Laster, Vice Chancellor in the Court of Chancery of the State of Delaware, *Toll Bros.,* No. 2:09-cv-00937-CDJ and No. 4140-VCL

- *"It seems to me to be an excellent settlement in light of all the circumstances: and "a good result for all." "[P]laintiffs' counsel [got] a result that I think is very fortunate for the class."*

  Honorable Sam Glasscock III, Vice Chancellor in the Court of Chancery of the State of Delaware, *In re Venoco, Inc. Shareholder Litigation,* C.A. No. 6825-VCG

- *"I think y'all have done a great job pulling this thing together. It was complicated, it was drawn out, and a lot of work clearly went into this…. I'll approve this settlement. I appreciate the work you all did on this. I think this is one where – I can't always say this … there is … benefit to the shareholders that are above and beyond money, a benefit to the company above and beyond money that changed hands."*

Honorable Kevin H. Sharp, U.S. Chief District Judge, U.S. District Court for the Middle District of Tennessee Nashville Division, *In re Community Health Systems, Inc., Shareholder Derivative Litigation,* No. 3:11-cv-00489

- "[T]his recovery is a strong recovery for the class. And, it's one, again, that I think counsel should be commended forer achieving.

  Honorable Joseph R. Slights, III, Vice Chancellor in the Court of Chancery of the State of Delaware, *In re Saba Software, Inc. Stockholder Litig., C.A. No. 10697-VCN*

Partners

George C. Aguilar

George C. Aguilar is a former federal prosecutor and trial lawyer who has tried more than forty federal criminal trials. Mr. Aguilar concentrates his practice on complex litigation that focuses on shareholder rights and antitrust actions. Mr. Aguilar has litigated on behalf of shareholder clients against fraudulent management and company insiders, securing meaningful corporate governance reforms at companies across the U.S, and on behalf of businesses and consumers challenging anticompetitive behavior.

In *Himstreet, et al. v. Scharf, et al*., No. GCG-22-599223 (Cal. Super. Ct.-S.F. Cnty. July 24, 2025), Mr. Aguilar led the team of attorneys that recovered a $100 million cash payment – the largest payment directly to a company in a derivative action in California state court history – for Wells Fargo & Co. in shareholder derivative litigation alleging breaches of fiduciary duty by certain Wells Fargo & Co. officers and directors stemming from the purported mismanagement of and noncompliance with myriad consent orders that resulted in the opening of deposit and credit card accounts without customer authorization. Plaintiffs defeated multiple rounds of dispositive motions, engaged in multi-jurisdictional litigation to streamline these proceedings into one court, forced the production of millions of pages of discovery, and worked through incredibly complex privilege issues with federal regulators to secure those documents. The settlement also includes significant corporate governance reforms that include improvement to Wells Fargo's risk structure, programs, policies, and procedures, additional training for employees, expanded and enhanced oversight of risk management by Wells Fargo's Board of Directors, and changes to the composition of Wells Fargo's Board of Directors. In *Warner v. Lesar*, No. 2011-09567 (Tex. Dist. Ct.-Harris Cnty. Oct. 1, 2012), Mr. Aguilar led the firm's efforts on behalf of Halliburton Company arising from defendants' mismanagement of risk, controls, and operations that led to the worst oil spill in U.S. history at the Deepwater Horizon offshore drilling rig in the Gulf of Mexico. Navigating the case through the company's internal investigation, and difficult and complex settlement discussions and mediation sessions, Mr. Aguilar secured comprehensive health, safety, and environmental governance reforms. In shareholder derivative litigation on behalf of Maxwell Technologies, Inc., *Loizides v. Schramm*, No. 37-2010-00097953-CU-BT-CTL (Cal. Super. Ct.-San Diego Cnty. Apr. 12, 2012), Mr. Aguilar helped secure a settlement in which the company adopted corporate governance and compliance measures addressing its violations of the Foreign Corrupt Practices Act (FCPA) after being investigated by federal agencies for bribery and subcontracting kickbacks. Of note is the creation of a new FCPA and Anti-Corruption Compliance department led by a Chief Compliance Officer to provide for greater effectiveness of Maxwell's board of directors in responding to FCPA compliance issues worldwide. In shareholder litigation involving Brocade Communications Systems, *In re Brocade Communications Systems, Inc., Derivative Litigation*, No. 1:05-cv-041683 (Cal. Super. Ct.-Santa Clara Cnty. Jan. 28, 2010), the firm prosecuted the shareholder action involving a criminal options backdating scheme at Brocade until the company formed a Special Litigation Committee to consider the plaintiffs' claims. A key player in the prosecution of the action, Mr. Aguilar successfully presented facts and law to the Special Litigation Committee on

behalf of the firm's shareholder clients. Brocade ultimately retained the firm as co-counsel to prosecute its claims against Brocade's officers and directors. Mr. Aguilar also led the firm's efforts as part of a consortium of plaintiff firms in a high-profile antitrust class action suit, *Dahl v. Bain Capital Partners*, No. 1:07-cv-12388 (WGY) (D. Mass. Mar. 17, 2015), against several private equity firms. The case involved allegations of conspiracy among defendants to rig bids, restrict the supply of private equity financing, fix transaction prices, and divide up the market for private equity services for leveraged buyouts. Robbins LLP played a prominent role in this litigation, bearing the responsibility for building the case against a principal defendant, one of the largest private equity firms in the world. In doing so, Mr. Aguilar conducted several depositions of some of the key private equity principals during the initial discovery phase of the case. The defendants settled for more than $590 million.

Before joining Robbins LLP, Mr. Aguilar spent 17 years as a federal prosecutor with the U.S. Attorney's Office in San Diego. During his tenure, Mr. Aguilar served as chief for the Terrorism, Violent Crimes, and General Prosecutions Section; deputy chief for the General Crimes Section; trial lawyer for the Financial Institution Fraud Task Force and the Major Frauds Sections; and as a supervising ethics officer. He led grand jury investigations and indicted and tried complex white collar criminal cases involving corporate, securities, bank, investor, tax, foreign currency and bankruptcy fraud, bank bribery, and money laundering, among others. He authored 35 appellate briefs and argued more than a dozen cases on appeal before the U.S. Court of Appeals for the Ninth Circuit. For his work, Mr. Aguilar received several awards of recognition from the U.S. Department of Justice and federal agencies, including the prestigious Director's Award of the Executive Office for U.S. Attorneys. Prior to joining the U.S. Attorney's Office, Mr. Aguilar worked on complex securities defense litigation at Morrison & Foerster LLP's San Francisco office.

Mr. Aguilar is a recognized leader in the legal and civic communities. He writes and speaks on topics related to shareholder litigation and corporate governance. He was recently appointed as a member of the U.S. District Court's Magistrate Judge's Merit Selection Panel, and is an active member of Association of Business Trial Lawyers, Public Justice Foundation, San Diego La Raza Lawyers Association, and San Diego County Bar Association. He has served in top leadership positions at La Raza Lawyers Association of California, San Diego La Raza Lawyers Association, the State Bar of California, and the City of San Diego. Mr. Aguilar was honored as a Super Lawyers Top 50 attorney in San Diego (2016-2020) and has been named a Super Lawyer for 14 consecutive years (2012-2025). He is also the recipient of the Attorney of the Year Award from San Diego La Raza Lawyers Association (2014) and has received the San Diego Mediation Center's Peacemaker Award for his community service work.

Mr. Aguilar received his law degree in 1986 from the University of California, Berkeley School of Law. While in law school, he served on the Moot Court Board and was managing editor of the *La Raza Law Journal*. Mr. Aguilar graduated from the University of Southern California in 1983 with a Bachelor of Arts in both Political Science and Journalism. He is licensed to practice law in the State of California and has been admitted to the U.S. District Courts for the Northern, Central, and Southern Districts of California, the Eastern District of Wisconsin, and the District of Colorado, as well as the U.S. Courts of Appeals for the Second, Ninth, and Tenth Circuits, and the U.S. Supreme Court.

Gregory E. Del Gaizo

Gregory E. Del Gaizo focuses his practice on shareholder rights litigation. As the head of Robbins LLP's New Matters Group, he initiates and oversees pre-litigation investigations and analysis of new cases for the firm. Mr. Del Gaizo has prosecuted shareholder litigation that has recouped over one hundred million dollars and secured extensive corporate governance reforms and other pro-investor measures at companies in which his clients invest.

Under Mr. Del Gaizo's guidance, the firm has achieved numerous successes on behalf of classes of shareholders who were misled in connection with business combinations involving special purpose

acquisition companies. These cases include: $21 million recovery for CM Life Sciences, Inc. shareholders (*In Re GeneDx de-SPAC Litigation*, No. 2023-0140-PAF (Del. Ch. Dec. 2, 2024)); $17.5 million for Gores IV shareholders (*In re Gores Holdings IV, Inc. Stockholder Litigation*, No. 2023-0284-LWW (Del Ch. July 15, 2025)); $14.4 million for Apex Technology Acquisition Corp. shareholders (*Drulias v. Apex Technology Sponsor LLC, et al.*, No. 2024-0094-LWW (Del Ch. July 10, 2025)); $12 million for CF Finance Acquisition Corp. II shareholders (*Siseles, et al. v. Lutnick, et al.*, No. 2023-1152-JTL (Del. Ch. Dec. 6, 2024)); $11.99 million for RMG Acquisition Corp. shareholders (*Yu v. RMG Sponsor, LLC, et al*., No. 2021-0932-NAC (Del. Ch. Oct. 18, 2024)); $8.75 million for Kensington Capital Acquisition Corp. shareholders (*In re Kensington-QuantumScape De-SPAC Litigation*, No. 2022-0721-JTL (Del. Ch. July 11, 2025)); and $6 million for Fortress Value Acquisition Corp. II, shareholders and $6.45 million to settle shareholder derivative claims (*In re ATI Physical Therapy, Inc. S'Holder Deriv. Litig.*, No. 1-21-cv-06415 (N.D. Ill Sept. 24, 2024)).

Mr. Del Gaizo's additional successes on behalf of clients include leading the discovery process for Robbins LLP in litigation on behalf of luxury homebuilder Toll Brothers, Inc., which resulted in a $16.25 million settlement, one of the largest *Brophy* monetary recoveries ever. *Martinez v. Toll*, No. 2:09-cv-00937-CDJ (E.D. Pa. Mar. 27, 2013). He was also a member of litigation teams in *Staehr v. Walter*, No. 02-CVG-11-0639 (Ohio Ct. C.P.-Del. Cnty. Dec. 17, 2007), which secured a payment of $70 million to Cardinal Health and *In re KB Home S'holder Derivative Litig.*, No. 2:06-CV-05148-FMC (CTx) (C.D. Cal. Feb. 9, 2009), which obtained $30 million in cash benefits and substantial corporate governance reforms for the home builder.

Mr. Del Gaizo has authored several articles on securities litigation, including *State Law Insider Trading Claims See New Light*, The Recorder, July 1, 2011; *Directors and Officers Can't Hide in Del.,* Securities Law360, Jan. 14, 2011; *Control of Forum in Derivative Actions*, The Recorder, Dec. 10, 2010; and *Clearing the Path for Double Derivative Suits*, The Recorder, Nov. 1, 2010. He also speaks to audiences about shareholder rights. Mr. Del Gaizo has been acknowledged for his hard work and dedication by Super Lawyers (2015-2016, 2022-2025), Best Lawyers for Litigation – Securities (2020-2025), and as a Recommended Attorney in M&A Litigation by Legal 500 (2016).

Mr. Del Gaizo obtained his Juris Doctor degree in 2006 from the University of San Diego School of Law. While in law school, Mr. Del Gaizo served as a research assistant to Frank Partnoy, director of the Center for Corporate and Securities Law at the University of San Diego, and as an intern at Kim & Chang, the largest law firm in Korea. Mr. Del Gaizo attended Providence College and, while there, interned for the New York City Law Department. He graduated *cum laude* in 2003 with a Bachelor of Arts degree in Political Science. Mr. Del Gaizo is licensed to practice law in the State of California and has been admitted to the U.S. District Courts for the Northern, Central, and Southern Districts of California and the District of Colorado.

Michael J. Nicoud

Michael J. Nicoud represents individuals and institutional investors in complex litigation aimed at improving corporate governance practices and recovering lost assets for shareholders of publicly traded companies, and businesses and consumers challenging anticompetitive behavior. He has litigated cases involving antitrust violations, accounting fraud, insider trading, false and misleading statements, and other types of fiduciary and corporate misconduct at public and private companies. In addition to his experience at Robbins LLP, Mr. Nicoud has worked at several boutique business litigation firms in San Diego, where he worked on trials, arbitrations, and mediations in cases before state and federal courts. For his work, Mr. Nicoud's peers have recognized him as a Super Lawyer Rising Star for ten consecutive years.

Mr. Nicoud was part of the litigation team that recovered a $100 million cash payment – the largest payment directly to a company in a derivative action in California state court history – and the implementation of significant governance reforms for Wells Fargo & Co. in shareholder derivative

litigation alleging breaches of fiduciary duty by certain Wells Fargo & Co. officers and directors stemming from the purported mismanagement of and noncompliance with myriad consent orders that resulted in the opening of deposit and credit card accounts without customer authorization. Plaintiffs achieved their success only after defeating multiple rounds of dispositive motions, engaging in multi-jurisdictional litigation to streamline these proceedings into one court, forcing the production of millions of pages of discovery, and working through incredibly complex privilege issues with federal regulators to secure those documents. *Himstreet, et al. v. Scharf, et al*., No. GCG-22-599223 (Cal. Super. Ct.-S.F. Cnty. July 24, 2025). One of Mr. Nicoud's most important contributions to the firm's success was his role in the litigation against the officers and directors of Community Health Systems, Inc. *In re Community Health Systems, Inc. Shareholder Derivative Litig.*, No. 3:11-cv-00489 (M.D. Tenn. Jan. 20, 2017). Mr. Nicoud deposed multiple hospital CEOs, a physician whistleblower, and other high-level executives. The case ultimately settled for a massive $60 million dollar payment to the company, along with extensive corporate governance reforms.

Mr. Nicoud received his Juris Doctor degree from the University of Colorado Law School. While in law school, Mr. Nicoud served as an intern at the San Diego Public Defender's Office, as an editor of the *Colorado Journal of International Environmental Law and Policy*, as president of the Student Trial Lawyers Association, and was on the Moot Court Board. As a member of the mock trial team, he earned a best advocate award at the national level and received the Melanie Ruth Vogl Memorial Scholarship for Outstanding Trial Advocacy. Mr. Nicoud received his Bachelor of Science in Environmental Science, with honors, from the University of Calgary in Alberta, Canada. Mr. Nicoud is licensed to practice law in California and has been admitted to the U.S. District Court for the Northern and Southern Districts of California, the U.S. District Court for the District of Colorado, the U.S. District Court for the Central District of Illinois, and the U.S. District Court of Appeals for the Second and Ninth Circuit.

Stephen J. Oddo

Stephen J. Oddo represents the firm's clients in complex litigation. Of particular note, Mr. Oddo spent more than a decade representing individual and institutional shareholders in corporate merger and acquisition class actions. In so doing, he has secured tens of millions of dollars of additional consideration for shareholders whose investments have been adversely impacted by corporate transactions. Mr. Oddo has also achieved disclosure of material information to shareholders so they are informed on the transaction at the time of the vote. His litigation efforts have helped preserve the integrity of the merger process in companies across the country and helped maximize value to shareholders. For his excellence in practice, Mr. Oddo was recognized as a Super Lawyer (2016-2025), by Best Lawyers for Securities Litigation (2020-2025), and as a Recommended Attorney in M&A Litigation by Legal 500 (2016, 2018).

Mr. Oddo's contributions to the firm are extensive. In *Walsh, et al. v. Buchholz, et al.*, Case No. 0:19-cv-01856-JWB-DTS (D. Minn. Mar. 12, 2025), Mr. Oddo represented a class of unitholders who challenged the fairness of the April 2019 unit-for-unit acquisition of Apollonia, LLC by St. Renatus, LLC., and achieved a $11.6 million settlement for the class on the eve of trial. Serving as lead counsel on behalf of a plaintiff who alleged certain Microchip Technology, Inc. officers and directors issued materially false and misleading statements regarding the operations and financial performance of Microsemi Corporation, which Microchip acquired for $10.15 billion, Mr. Oddo obtained a $4 million payment for Microchip from defendants' insurer and significant governance benefits for the Company. *Reid v. Sanghi*, Case No. CV2019-002389 (Sup. Ct. AZ June 14, 2023). After three years of litigation, Mr. Oddo secured an $8 million settlement for LRR Energy, L.P. unitholders who owned stock when Vanguard Natural Resources, LC acquired LRR Energy for an unfair price and as the result of a misleading proxy. Hurwitz v. Mullins, et al., C.A., No. 15-711 (Del.Ch.Dec. 19, 2018). Serving as lead counsel in *In re Saba Software, Inc. Stockholder Litig*. C.A. No. 10698-VCN, Mr. Oddo secured a $19.5 million settlement on behalf of former Saba Software shareholders in a class action alleging the company had engaged in a flawed and self-serving sales process in exchange for

inadequate merger consideration for Saba Software shareholders. The court acknowledged that the settlement was "exemplary" and a "strong recovery for the class." In *In re Venoco, Inc. S'holder Litig.*, C.A. No. 6825-VCG (Del. Ch. Oct. 5, 2016), Mr. Oddo, serving as co-lead counsel to the public shareholders of the energy company, achieved a $19 million settlement fund for shareholders – a significant recovery in light of Venoco's dire financial circumstances. Mr. Oddo earned praise from the judge for securing a "good result for all" and noted Robbins LLP as "excellent counsel." Mr. Oddo secured a $5.9 million settlement fund as lead counsel in *In re Star Scientific, Inc. Securities Litig.,* No. 3:13-CV-00183-JAG (E.D. VA July 6, 2015), a securities fraud class action alleging that defendants made materially false and misleading statements regarding one of the company's clinical trials. In *In re PETCO Animal Supplies, Inc. S'holder Litig.*, Lead Case No. GIC 869399 (Cal. Super. Ct.-San Diego Cnty. Mar. 26, 2010), Mr. Oddo helped secure a $16 million settlement fund for the shareholder class after three years of contentious litigation. At his former firm, Mr. Oddo represented shareholders of eMachines, Inc., in *In re eMachines, Inc. Merger Litigation*, No. 01-CC-00156 (Cal. Super. Ct.-Orange Cnty. July 25, 2007), in challenging the efforts of the company's founder to take the company private. Mr. Oddo's litigation efforts helped secure a $24 million common fund for shareholders. In the merger and acquisition-related securities class action *In re Electronic Data Systems Class Action Litigation*, Master File No. 366-01078-2008 (Tex. Dist. Ct.-Collin Cnty. Dec. 23, 2008), Mr. Oddo served as lead counsel and challenged the acquisition of Electronic Data Systems Corporation by Hewlett-Packard Company. Mr. Oddo negotiated a pre-closing settlement that secured for Electronic Data Systems shareholders a $25 million dividend and the disclosure of previously omitted material information concerning the transaction that allowed for an informed shareholder vote.

Prior to joining Robbins LLP, Mr. Oddo was a partner at the firm now known as Robbins Geller Rudman & Dowd LLP, where Mr. Oddo was part of a team at the forefront of litigating shareholder claims challenging unfair business combinations. Before entering the legal profession, Mr. Oddo served as Press Secretary to U.S. Representative Robert T. Matsui (D-Cal).

Mr. Oddo received his Juris Doctor in 1994 from the University of San Diego School of Law. During law school, he interned for the Honorable Eugene Lynch, U.S. District Judge in the Northern District of California. Mr. Oddo earned his Master of Science in Journalism from Northwestern University, Medill School of Journalism in 1987, and his Bachelor of Arts from Santa Clara University in 1986. Mr. Oddo is licensed to practice law in the State of California and has been admitted to the U.S. District Courts for the Northern, Central, and Southern Districts of California, the District of Colorado, the Northern District of Illinois, the Southern District of Texas, the Eastern District of Michigan, and the Eastern District of Wisconsin.

Brian J. Robbins

Brian J. Robbins is a co-founder and the managing partner of Robbins LLP and oversees the management of the firm and its practice areas. He has committed his entire career to representing shareholders, employees, consumers, and businesses in complex litigation matters. Focusing on shareholder rights litigation, Mr. Robbins has served as lead or co-lead counsel in many complex, multi-party actions across the country on behalf of U.S. and international clients. He has secured hundreds of millions of dollars in monetary recoveries and comprehensive corporate governance enhancements for shareholders and the public corporations in which they have invested.

Mr. Robbins was instrumental in achieving an extraordinary settlement on behalf of his shareholder client in *Kloss v. Kerker*, No. 50-2010-CA-018594-XXXX-MB (Fla. Cir. Ct.-Palm Beach Cty. May 27, 2011), which virtually saved vitamin and supplement retailer Vitacost.com, Inc. from bankruptcy and helped to preserve the equity interests of its shareholders. In *In re Wireless Facilities, Inc. Derivative Litigation*, No. 04-CV-1663-JAH-(NLS) (S.D. Cal. Mar. 30, 2010), Mr. Robbins was instrumental in obtaining the forfeiture of stock and/or stock options back to the company by certain officers, restricted voting rights for certain former officers and directors, monetary reimbursement to the company, and corporate governance reforms, such as the addition of two independent directors to the board and an

annual review of the chairman's performance. *In re Tenet Healthcare Corporation Derivative Litig*ation, No. 01098905 (Cal. Super Ct.-Santa Barbara Cty. May 5, 2006), *aff'd*, No. B192252 (Cal. App. Sept. 20, 2007), Mr. Robbins helped recover $51.5 million for Tenet and sweeping corporate governance enhancements and remedial measures, and in *Titan, Inc. Securities Litigation,* No. 04-CV-0676-LAB (NLS) (S.D. Cal. Dec. 20, 2005*),* Mr. Robbins helped obtain a $61.5 million recovery, one of the largest securities fraud class action recoveries in San Diego's history at the time. In *In re OM Group, Inc. Derivative Litigation*, No. 1:03-CV-0020 (N.D. Ohio Nov. 10, 2005), Mr. Robbins secured $29 million for OM Group, the removal of the company's long term chief executive officer, the addition of two shareholder-nominated directors, and other corporate governance reforms.

Mr. Robbins is recognized nationally as a leader in the plaintiffs' bar. He has authored articles in several national publications and speaks to audiences as an authority on securities litigation, corporate governance, and shareholder rights topics. For his leadership and achievements, he has been named a Super Lawyer (2007–2025), Best of the Bar by *San Diego Business Journal* (2014–2016), and a Top 50 Attorney in San Diego by Super Lawyers (2014, 2016, 2018-2025). He was also recognized by Best Lawyers in America for Securities Litigation (2016-2025), and a Top Attorney by *The Daily Transcript* (2015).

Mr. Robbins earned his Master of Laws (LL.M.) in Securities and Financial Regulation from the Georgetown University Law Center in 1998 and received his Juris Doctor from Vanderbilt Law School in 1997. While at Vanderbilt, Mr. Robbins served as research assistant for two corporate and securities law professors: Professor Donald C. Langevoort, former Special Counsel for the U.S. Securities and Exchange Commission in the Office of the General Counsel, and the late Professor Larry D. Soderquist, one of the most respected professors in the field of corporate and securities law. He earned his Bachelor of Arts in Sociology from the University of California, Berkeley in 1993 after only two and a half years of study. Mr. Robbins is licensed to practice law in the State of California and the State of Connecticut, and has been admitted to the U.S. District Courts for the Northern, Central, and Southern Districts of California, the District of Colorado, the District of Connecticut, and the Western District of Texas, as well as the U.S. Courts of Appeals for the Second, Fifth, Sixth, Ninth, and Tenth Circuits.

Shane P. Sanders

Shane P. Sanders represents individual and institutional investors in shareholder derivative actions, securities fraud class actions, and mergers and acquisitions actions. Mr. Sanders has litigated a broad range of matters, including cases addressing stock option backdating, the subprime mortgage crisis, board entrenchment and elections, executive compensation, corporate takeovers, violations of the Foreign Corrupt Practices Act and myriad forms of fraud, including violations of federal securities laws related to insider trading and companies' initial public offerings. He has played a major role in securing monetary recoveries and innovative governance reforms designed to improve the independence, rigor, and transparency of corporate governance at dozens of publicly traded companies.

Mr. Sanders served as lead counsel for the plaintiffs in the consolidated state derivative action alleging that, from the third quarter of 2015 through the first half of 2017, certain Under Armour officers and directors made or permitted the publication of statements intended to create the impression of continued strong demand that had fueled the Company’s year-over-year quarterly revenue growth with the knowledge that Under Armour had been relying on unsustainable sales practices to mask declining demand that created revenue holes in future quarters and undercut future sales and margins by damaging relationships with full-price retailers. After eight years of litigation, Robbins LLP helped to obtain $8,900,000 for Under Armour and significant corporate governance enhancements, including the creation of a disclosure committee, audit committee enhancements, and insider trading policy enhancements. *Kenney, et al. v. Plank, et al.*, Case No. 24-C-18-003939 (Balt. City Cir. Ct. Md. Aug. 14, 2025). Coordinating a multi-jurisdictional litigation effort, Mr. Sanders helped secure $9 million for Becton Dickinson and Company and an agreement by the Company to implement and maintain a

package of corporate governance reforms in shareholder derivative litigation arising from alleged false and misleading statements concerning the Company's Alaris infusion pump system. *In re Becton, Dickinson and Company Stockholder Derivative Litigation*, No. 2:20-cv-15474-SRC-CLW (D.N.J. Aug. 11, 2025). Serving as lead counsel, Mr. Saunders secured $15 million for Emergent BioSolutions Inc., as well as an agreement by the Company to implement and maintain a package of corporate governance reforms, in shareholder derivative litigation resulting from Emergent's failed internal controls at its Bayview, Maryland facility, which had led to the termination of Emergent's contracts to manufacture COVID-19 vaccine bulk drug substance as part of the U.S. government's "Operation Warp Speed" pandemic response and left the Company on the brink of insolvency. *In re Emergent BioSolutions Inc., Stockholder Derivative Litigation*, Case No. 8:21-cv-01595-DLB (D. Md. Aug. 6, 2025). In *Himstreet, et al. v. Scharf, et al.*, No. GCG-22-599223 (Cal. Super. Ct.-S.F. Cnty. July 24, 2025), Mr. Sanders was part of the team of attorneys that recovered a $100 million cash payment – the largest payment directly to a company in a derivative action in California state court history – for Wells Fargo & Co. in shareholder derivative litigation alleging breaches of fiduciary duty by certain Wells Fargo & Co. officers and directors stemming from the purported mismanagement of and noncompliance with myriad consent orders that resulted in the opening of deposit and credit card accounts without customer authorization. Plaintiffs defeated multiple rounds of dispositive motions, engaged in multi-jurisdictional litigation to streamline these proceedings into one court, forced the production of millions of pages of discovery, and worked through incredibly complex privilege issues with federal regulators to secure those documents. The settlement also includes significant corporate governance reforms that include improvement to Wells Fargo's risk structure, programs, policies, and procedures, additional training for employees, expanded and enhanced oversight of risk management by Wells Fargo's Board of Directors, and changes to the composition of Wells Fargo's Board of Directors. In *In re Prudential Financial Inc. Derivative Litigation*, No. 2:20-cv-12772-SRC-CLW (Dist. NJ June 9, 2025), Mr. Sanders served as co-lead counsel for plaintiffs in shareholder derivative litigation alleging defendants made false and misleading statements regarding oversight and disclosures of adverse mortality experience and corresponding reserves for life insurance policies acquired from The Hartford Financial Services Group, Inc. After protracted litigation, Robbins LLP obtained $10 million for the Company, which was deemed by the Honorable Stanley R. Chesler as "not only a reasonable recovery, it is a remarkable recovery and is a tribute to plaintiffs and plaintiffs' lawyer efforts in this case." (Transcript of Motion on Final Settlement Approval at 19-20).

Mr. Sanders served as part of the Robbins LLP team that represented plaintiffs who had concerns that Altria Group Inc.'s $12.8 billion investment in Juul Labs, Inc. undermined Altria's hard-fought reputational progress after decades of marketing tobacco products and funding misleading research about the harmful effects of smoking. Our hard-fought settlement requires Altria to commit to funding $117 million over five years, with a minimum spend of $20 million each year to address policy and governance measures relating to youth prevention and transaction oversight. *In re Altria Group, Inc. Derivative Litigation*, No: 3:20cv772(DJN) (E.D. VA, Feb. 20, 2023). Mr. Sanders helped secure a $38 million settlement for Twitter and substantial corporate governance reforms, including enhancements to the Disclosure and Audit Committees, the creation of an independent Chief Compliance Officer position, and improved compliance training and insider trading policies in *In re Twitter, Inc. Shareholder Derivative Litig.* No. 1:18-cv-00062-VAC-MPT (D. Del. July 27, 2021). Mr. Sanders served as co-lead counsel on behalf of the federal shareholder plaintiffs on allegations that defendants breached their fiduciary duties to the Company and its stockholders by making materially false and/or misleading statements about Twitter's user growth and user management prospects and that certain individual defendants profited on their inside information. Mr. Sanders achieved this result after extensive litigation, including multiple mediations and months of settlement discussions. Mr. Sanders helped litigate shareholder derivative litigation on behalf of Fifth Street Finance Corp., *In re Fifth Street Finance Corp. Shareholder Derivative Litigation*, Lead Case No. 3:15-cv-01795-RNC (D. Conn. Dec. 13, 2016), based on allegations that the company's officers and directors caused Fifth Street to pursue reckless asset growth strategies, employ aggressive accounting and financial reporting practices, and pay excessive fees to its investment advisor to inflate the investment advisor's perceived value in advance of its initial public offering. Mr. Sanders was instrumental in the discovery efforts and

settlement negotiations and mediations, and helped secure an outstanding settlement for Fifth Street and its stockholders, including advisory fee reductions worth at least $30 million to Fifth Street, and comprehensive corporate governance, oversight, and conflicts management enhancements to substantially improve the compliance control environment at Fifth Street and reduce the likelihood of a recurrence of similar wrongdoing in the future. Mr. Sanders was the lead associate in *In re Koss Corporation Shareholder Derivative Litigation*, No. 10-CV-2422 (Wis. Cir. Ct.-Milwaukee Cnty. Sept. 22, 2011), a shareholder derivative action that involved the theft of tens of millions of dollars from the company by one of its executive officers. In that case, Mr. Sanders and his fellow counsel defeated defendants' motion to dismiss based on demand futility and negotiated a settlement that provided for the implementation of extensive corporate governance changes, including the separation of the positions of chairman of the board of directors, chief executive officer, and chief financial officer; the appointment of a lead independent director; enhanced accounting and audit functions; and the implementation of a plan requiring the reimbursement of excess incentive-based compensation in the event of a financial restatement. In *In re Fossil, Inc. Derivative Litigation*, No. 3:06-cv-01672-F (N.D. Tex. July 6, 2011), Mr. Sanders supported a team in multi-year derivative litigation that achieved a settlement securing $8.6 million payment for Fossil from individual defendants and industry leading corporate governance reform, such as declassifying the election of directors to the board. Mr. Sanders was the lead associate in *Paschetto v. Shaich*, No. 08-SL-CC00805 (Mo. Cir. Ct.-St. Louis Cnty. April 8, 2011), a shareholder derivative action on behalf of Panera Bread Company in which Mr. Sanders helped the firm defeat defendants' motion to dismiss based on demand futility and negotiate a settlement that provided substantial benefits to the company and its shareholders. In *In re Vitesse Semiconductor Corporation*, No. Civ240483 (Cal. Sup. Ct.-Ventura Cnty. Oct. 17, 2008), Mr. Sanders was part of a team that achieved the return of more than $13 million from company insiders and valuable corporate governance improvements. In *In re Ligand Pharmaceuticals, Inc. Derivative Litigation*, No. GIC834255 (Cal. Super. Ct.-San Diego Cnty. Oct. 12, 2006), Mr. Sanders supported a team that persuaded the court that demand on the board of directors was futile and subsequently defeated all of defendants' other motions, and helped obtain a $14 million payment to the corporation and significant corporate governance improvements for the company.

For his achievements, Mr. Sanders was recognized by his peers as a Super Lawyer (2021-2025) and Super Lawyer Rising Star (2015), and by Best Lawyers in America for Securities Litigation (2020-2025).

Mr. Sanders received his Juris Doctor degree in 2004 from the University of San Diego School of Law. While in law school, Mr. Sanders served as a law clerk at the San Diego County Public Defender's Office, and he was a member of the Association of Trial Lawyers of America and USD's Sports and Entertainment Law Society. He also participated in USD's Thorsnes Closing Argument Competition and Senior Honors Moot Court Competition, receiving among the highest marks for his written briefs. Mr. Sanders graduated from the University of California, Santa Barbara in 2001 with a Bachelor of Arts degree in Sociology. He is licensed to practice law in the State of California and has been admitted to the U.S. District Courts for the Northern, Central, and Southern Districts of California and the District of Colorado, as well as the U.S. Courts of Appeals for the First, Second, Third, and Ninth Circuits.

Kevin A. Seely

Kevin A. Seely devotes his practice to representing shareholders, whistleblowers, and consumers in complex derivative, *qui tam*, and class actions throughout the U.S. A tenacious trial lawyer with more than 25 years of litigation experience in both the public and private sectors and in criminal and civil fraud prosecutions, Mr. Seely has successfully prosecuted top corporate executives, high-ranking government officials, and corporate entities for a variety of wrongdoing, including theft of government services, bribery, embezzlement, and health care fraud.

Mr. Seely has achieved significant results for his clients. Serving as co-lead counsel, Mr. Seely has been instrumental in obtaining settlements on behalf of classes of shareholders who were misled in connection with business combinations involving special purpose acquisition companies ("SPAC"). In *In re Gores Holdings IV, Inc. Stockholder Litigation*, No. 2023-0284-LWW (Del Ch. July 15, 2025), Mr. Seely helped secure $17.5 million for shareholders of Gores IV who sued for breach of fiduciary duty noting the Proxy's patently unattainable financial projections. Mr. Seely helped obtain $21 million for CM Life Sciences, Inc. shareholders in *In Re GeneDx de-SPAC Litigation*, No. 2023-0140-PAF (Del. Ch. Dec. 2, 2024) when they alleged breach of fiduciary duty resulting from defendants' impairment of their Redemption Right in connection with CM Life Science's merger with Mount Sinai Genomics, Inc. d/b/a/ Sema4 Holdings Corp. In *Yu v. RMG Sponsor, LLC, et al*., No. 2021-0932-NAC (Del. Ch. Oct. 18, 2024), Mr. Seely helped secure $11.99 million for RMG Acquisition Corp. shareholders who alleged they were misled in connection with the business combination of RMG Acquisition Corp., a SPAC, and privately held Romeo Systems, Inc., which merged to create Romeo Power, Inc., when Romeo overstated its revenue projections and understated its backlog projections.

In *In re Community Health Systems, Inc. Shareholder Derivative Litig.*, No. 3:11-cv-00489 (M.D. Tenn. Jan. 20, 2017), serving as plaintiff's co-lead counsel, Mr. Seely and his team were instrumental in obtaining a $60 million cash payment to Community Health, which is believed to be the largest shareholder derivative recovery in the Sixth Circuit to date, and extensive corporate governance reforms. The firm brought *In re Alphatec Holdings, Inc., Derivative Shareholder Litigation*, No. 37-2010-00058586-CU-BT-NC (Cal. Super. Ct.–San Diego Cnty. Aug. 21, 2014) on behalf of Alphatec Holdings, Inc. to hold the company's fiduciaries responsible for their role in depleting shareholder equity through their self-serving actions. Mr. Seely's efforts resulted in the resignation of several defendant directors and senior executives, and Alphatec's implementation of reforms providing for director independence, greater review and oversight of related party transactions, and enhanced audit committee responsibilities regarding disclosure of company financial information. In shareholder derivative litigation on behalf of Computer Sciences Corporation, *Bainto v. Laphen*, No. A-12-661695-B (Nev. Dist. Ct.-Clark Cnty. Nov. 6, 2013), arising out of senior management and board of directors' breaches of fiduciary duties, Mr. Seely obtained extensive governance enhancements, including personnel changes, implementation of a Global Ethics & Compliance Program, and finance and administration training to strengthen accounting procedures and processes. Mr. Seely's settlement in *In re SciClone Pharmaceuticals, Inc. Shareholder Derivative Litigation*, No. CIV 499030 (Cal. Super. Ct.-San Mateo Cnty. Dec. 13, 2011), was praised by the Honorable Marie S. Weaver as "the most detailed and extensive corporate governance changes I've seen in a derivative settlement," and established consequences to employees for violations of the FCPA and other criminal misconduct. The settlement also created the position of compliance coordinator and a compliance program and code, instituted a due diligence process pertaining to the hiring of all foreign agents and distributors and demanded employee compliance training, established policies for disclosure and clawback of incentive-based compensation for officers in the event of a material restatement of the company's financial statements, and modified the company's whistleblower programs. In *In re ArthroCare Corporation Derivative Litigation*, No. D-1-GN-08-003484 (W.D. Tex.); *Weil v. Baker*, No. 08-CA-00787-SS (W.D. Tex Dec. 8, 2011), Mr. Seely obtained a substantial monetary recovery for ArthroCare Corporation, as well as the implementation of enhanced internal controls and reforms designed to curtail future corporate misconduct.

Prior to joining Robbins LLP, Mr. Seely served as an Assistant U.S. Attorney ("AUSA") in the U.S. District Court for the Southern District of California where he prosecuted civil fraud claims under the federal False Claims Act. He also served as an AUSA for the Districts of Guam and Northern Mariana Islands, focusing on white collar crime and public corruption matters. In actions filed on behalf of various U.S. federal agencies, Mr. Seely led the investigation, litigation, and negotiation of numerous settlements resulting in the return of millions of dollars to the victims of complex financial, accounting, and contract fraud schemes. Before becoming a federal prosecutor, Mr. Seely was a partner at a prominent commercial litigation law firm with offices in Guam and the Commonwealth of the Northern Mariana Islands.

Mr. Seely has authored articles in leading legal publications on shareholder and consumer rights topics and was named a Super Lawyer for the past ten years (2015–2025).

Mr. Seely received his Juris Doctor in 1992 from the Northwestern School of Law of Lewis & Clark College. While in law school, he was an associate editor of the *Lewis & Clark Law Review*. Mr. Seely graduated *cum laude* from the University of California, Irvine in 1988. He is licensed to practice law in the State of California, the territory of Guam, and the Commonwealth of the Northern Mariana Islands. Mr. Seely has been admitted to the U.S. District Courts for the Northern, Central, Southern, and Eastern Districts of California, the District of Colorado, the Northern District of Florida, the District of Guam, the Northern and Central Districts of Illinois, the Eastern District of Michigan, the District of the Northern Mariana Islands, and the Western District of Texas, as well as the U.S. District Court of Appeals for the Ninth Circuit.

Craig W. Smith

Craig C. Smith represents shareholders in derivative and securities fraud class actions. His clients include shareholders invested in banking and finance, biotechnology, defense, education, information technology, leisure, consumer goods, and pharmaceutical industries. Mr. Smith also serves as the firm's general counsel.

Mr. Smith has led the firm's prosecution of a number of successful actions brought directly on behalf of shareholders and derivatively for the benefit of public corporations.

Mr. Smith served as lead counsel for the plaintiffs in the consolidated state derivative action alleging that, from the third quarter of 2015 through the first half of 2017, certain Under Armour officers and directors made or permitted the publication of statements intended to create the impression of continued strong demand that had fueled the Company's year-over-year quarterly revenue growth with the knowledge that Under Armour had been relying on unsustainable sales practices to mask declining demand that created revenue holes in future quarters and undercut future sales and margins by damaging relationships with full-price retailers. After eight years of litigation, Robbins LLP helped to obtain $8.9 million for Under Armour and significant corporate governance enhancements, including the creation of a disclosure committee, audit committee enhancements, and insider trading policy enhancements. *Kenney, et al. v. Plank, et al.*, Case No. 24-C-18-003939 (Balt. City Cir. Ct. Md. Aug. 14, 2025). Mr. Smith secured $15 million for Emergent BioSolutions Inc. and an agreement by the Company to implement and maintain a package of corporate governance reforms in the firm's role as lead counsel in shareholder derivative litigation resulting from Emergent's failed internal controls at its Bayview, Maryland facility, which had led to the termination of Emergent's contracts to manufacture COVID-19 vaccine bulk drug substance as part of the U.S. government's "Operation Warp Speed" pandemic response and left the Company on the brink of insolvency. *In re Emergent BioSolutions Inc., Stockholder Derivative Litigation*, Case No. 8:21-cv-01595-DLB (D. Md. Aug. 6, 2025). In *Himstreet, et al. v. Scharf, et al*., No. GCG-22-599223 (Cal. Super. Ct.-S.F. Cnty. July 24, 2025), Mr. Smith was part of the team of attorneys that recovered a $100 million cash payment – the largest payment directly to a company in a derivative action in California state court history – for Wells Fargo & Co. in shareholder derivative litigation alleging breaches of fiduciary duty by certain Wells Fargo & Co. officers and directors stemming from the purported mismanagement of and noncompliance with myriad consent orders that resulted in the opening of deposit and credit card accounts without customer authorization. Plaintiffs defeated multiple rounds of dispositive motions, engaged in multi-jurisdictional litigation to streamline these proceedings into one court, forced the production of millions of pages of discovery, and worked through incredibly complex privilege issues with federal regulators to secure those documents. The settlement also includes significant corporate governance reforms that include improvement to Wells Fargo's risk structure, programs, policies, and procedures, additional training for employees, expanded and enhanced oversight of risk management by Wells Fargo's Board of Directors, and changes to the composition of Wells Fargo's Board of Directors. In

shareholder derivative litigation on behalf of Prudential Financial, Inc., Mr. Smith served as co-lead counsel for plaintiffs who alleged defendants made false and misleading statements regarding oversight and disclosures of adverse mortality experience and corresponding reserves for life insurance policies acquired from The Hartford Financial Services Group, Inc. After protracted litigation, Mr. Smith achieved a $10 million settlement for the Company, which was deemed by the Honorable Stanley R. Chesler as "not only a reasonable recovery, it is a remarkable recovery and is a tribute to plaintiffs and plaintiffs' lawyer efforts in this case." (Transcript of Motion on Final Settlement Approval at 19-20). *In re Prudential Financial Inc. Derivative Litigation*, No. 2:20-cv-12772-SRC-CLW (Dist. NJ June 9, 2025).

In *In re Fifth Street Corp. Shareholder Derivative Litigation*, Lead Case No. 3:15-cv-01795-RNC (D. Conn. Dec. 13, 2016), Mr. Smith served as lead counsel in shareholder derivative litigation on behalf of Fifth Street to challenge alleged conflicts of interest in Fifth Street's relationship with its investment advisor after certain Fifth Street officers and directors caused the company to make reckless investments and pay excessive fees to inflate the investment advisor's perceived value in advance of its initial public offering. Mr. Smith led the settlement negotiations that resulted in advisory fee reductions worth at least $30 million and comprehensive corporate governance, oversight, and conflicts management enhancements. Mr. Smith and his team played a leading role in a shareholder derivative suit brought on behalf of Avon Products, Inc., *Pritika v. Jung*, No. 651479/2015 (N.Y. Sup. Ct. May 1, 2015), against certain officers and directors who plaintiffs allege turned a blind eye to bribes made in violation of the FCPA to secure the first foreign direct sales license in China. Mr. Smith led the negotiations that resulted in Avon's agreement to adopt a comprehensive corporate governance and compliance reform program. The *Wall Street Journal* praised the settlement as "a victory for shareholders looking for accountability from the business." Mr. Smith also played a leading role in shareholder derivative litigation brought on behalf of Career Education Corporation against officers and directors who plaintiffs alleged allowed its for-profit schools to falsify job placement and student loan repayment rates, fall short of accreditation standards, and jeopardize access to the Title IV federal student loan funds that account for the lion's share of its revenues. Mr. Smith and his co-counsel in *Alex v. McCullough*, No. 1:12-cv-08834 (N.D. Ill. Dec. 5, 2012); *Bangari v. Lesnik*, No. 1:11-CH-41973 (Ill. Cir. Ct.-Cook Cty. Dec. 11, 2011); and *Cook v. McCullough*, No. 1:11-cv-09119 (N.D. Ill. Dec. 22, 2011), negotiated a global settlement that secured a $20 million recovery for Career Education, as well as comprehensive board and management-level governance and oversight reforms.

Mr. Smith has played an important role in improving the quality of corporate governance and oversight at pharmaceutical and bio-technology companies. In *In re Forest Labs., Inc.*, *Derivative Litigation*, No. 1:05-cv-03489 (RJH) (S.D.N.Y. Feb. 7, 2012), Mr. Smith secured comprehensive regulatory oversight and compliance reforms to address the fallout resulting from Forest Lab's marketing of Celexa and Lexapro for off-label treatment of pediatric depression — violations that cost Forest Labs more than $313 million in fines and sanctions. The reforms included the creation of Chief of Compliance and Chief Medical Officer positions, board oversight and management-level oversight of sales and promotions compliance, comprehensive policies and procedures governing sales and promotional activities, and compliance monitoring programs, including field sampling of interactions with physicians and rigorous reporting procedures and controls. Mr. Smith spearheaded the litigation and settlements in shareholder derivative actions brought on behalf of biotechnology companies, MannKind Corporation, *In re MannKind Corp. Derivative Litigation*, No. 1:11-cv-05003-GAF-SSx (C.D. Ca. June 13, 2011), and CTI BioPharma (f.k.a. Cell Therapeutics), *In re Cell Therapeutics, Inc., Derivative Litigation*, No. 2:10-cv-00564-MJP (W.D. Wash.-Seattle Apr. 1, 2010), that led to their adoption of state-of-the-art clinical trial and disclosure oversight and internal controls programs, following costly mismanagement of clinical trials and publication of misleading disclosures.

Mr. Smith played a leading role in securing best-in-class corporate governance for Motorola, Inc. in shareholder derivative litigation arising from Motorola's publication of misleading statements about prospects for its next-generation cell phones and related revenue projections. *In re Motorola, Inc. Derivative Litigation*, No. 07-CH-23297 (Ill. Cir. Ct.-Cook Cty. Nov. 29, 2012). Mr. Smith was

instrumental in drafting and negotiating a comprehensive overhaul of board- and executive-level supervision of financial disclosures, as well as broader corporate governance reforms designed to align director and executive compensation with long-term shareholder interests and to eliminate incentives for executives to manipulate results or withhold negative information from shareholders. As lead counsel in *Monday v. Meyer*, No. 1:10-cv-01838-DCN (N.D. Ohio Aug. 17, 2012), Mr. Smith challenged the KeyCorp Board of Director's handling of an unlawful tax avoidance scheme, which exposed the bank to billions of dollars in back taxes and fines by the IRS. While the case was on appeal, Mr. Smith negotiated corporate governance reforms that strengthened KeyCorp's internal controls and Board oversight over financial transactions and legal/regulatory risk, capital planning, dividends, and stock repurchases. Mr. Smith played a key role in persuading Brocade Communication Systems, Inc.'s Board Special Litigation Committee to prosecute stock option backdating claims against former officers and directors of Brocade. *In re Brocade Communication Systems, Inc., Derivative Litigation*, No. 1:05-cv-041683 (Cal. Super. Ct.-Santa Clara Cty. Jan. 28, 2010). As part of a four-lawyer team, Mr. Smith convinced the Committee to retain the firm as co-counsel to pursue the claims. Brocade recovered tens of millions of dollars and extinguished its obligation to fund the criminal defense of its former CEO.

Mr. Smith was recognized by his peers as a San Diego Super Lawyer for ten consecutive years (2015–2025).

Before joining Robbins LLP, Mr. Smith served for four years as division and regional counsel for UBS Financial Services, Inc., a global financial services company, where he advised management regarding litigation, regulatory, and employment matters arising in the company's Northern Pacific region. Mr. Smith spent the first decade of his career at O'Melveny & Myers LLP, where he defended Fortune 500 companies and professional services firms in securities fraud class actions, shareholder derivative litigation, SEC investigations and enforcement actions, and professional malpractice and business tort matters. Mr. Smith served for five years on O'Melveny & Myers' firm-wide Pro Bono Committee.

Mr. Smith earned his Juris Doctor in 1992 from Yale Law School. At Yale, he externed for the U.S. Attorney's Office in New Haven, Connecticut. Mr. Smith graduated with highest honors in Political Science and highest distinction in Letters and Science from the University of California, Berkeley in 1988, and was initiated into Phi Beta Kappa as a junior. He is licensed to practice law in the State of California and has been admitted to the U.S. District Courts for the Northern, Central, and Southern Districts of California, as well as the U.S. Courts of Appeals for the First, Sixth, Eighth, and Ninth Circuits.

Associates

Aaron M. Dumas, Jr.

Aaron M. Dumas, Jr. is an associate of the firm. Mr. Dumas has represented individuals and institutional shareholders in a variety of complex matters. He has experience conducting extensive legal research and document review, drafting motions, settlement offers, and litigation and inspection demands. Mr. Dumas also helps analyze the firm's new matters, including on-boarding the firm's clients, maintaining relationships, and ensuring outstanding client support and engagement throughout the litigation process.

In addition to his experience at Robbins LLP, Mr. Dumas worked for another well-known shareholder rights law firm, was a solo practitioner serving a broad range of clients in criminal, civil, and family law matters, and worked for a consulting firm drafting contracts related to real estate investments and assisting in the acquisition of federal government contracts.

Mr. Dumas received his Juris Doctor from the University of San Diego School of Law. While in law school, Mr. Dumas served as a research assistant for Professor Joseph J. Darby and a summer associate for Sony Electronics Limited. He participated in moot court and studied abroad in Florence, Italy. Mr. Dumas received his Bachelor of Science in Zoology from the University of Texas. He is licensed to practice in the State of California

Grant M. Klasna

Grant M. Klasna is an associate of the firm. Mr. Klasna represents individual and institutional shareholders in a variety of complex matters. He has experience conducting legal research and drafting compliance documents in the areas of corporate, tax, and securities law.

Prior to joining Robbins LLP, Mr. Klasna worked at a boutique law firm, where he practiced corporate, tax, accounting, and estate law. In this role, he drafted and negotiated corporate contracts, assisted clients in structuring business entities, and prepared securities law compliance reports.

Mr. Klasna his received his Juris Doctor from University of San Diego School of Law. While in law school, Mr. Klasna interned at the Office of the United States Trustee, Department of Justice and served as a corporate counsel intern for a medical billing company. Mr. Klasna also participated on the Client Advocacy Negotiations Team and was a member of the Business Law and Sports and Entertainment Law Societies. Mr. Klasna received his Bachelor of Sciences in Business Administration from San Diego State University, where he graduated with honors. While in college, Mr. Klasna participated in the Pre-Law Society and was the VP of Operations for the Sports Business Initiative. Mr. Klasna is licensed in the State of California.

Lauren G. Levi

Lauren G. Levi is an associate of the firm where she represents shareholders in a variety of complex matters. Her experience includes conducting extensive legal research, document review, complaint drafting, and client communications. Ms. Levi also serves as the manager of the firm's business development department, engaging with clients on new matters and overseeing the firm's marketing efforts.

Prior to joining Robbins LLP, Ms. Levi served almost ten years as a research attorney for the Los Angeles County Superior Court where she conducted extensive research, analyzed law and motion ranging from simple discovery disputes to contested motions for summary judgment, and prepared bench memoranda reflecting the tentative rulings of the civil judges. In addition, Ms. Levi supervised and mentored attorneys new to the role and student externs.

Ms. Levi received her Juris Doctor from Pepperdine University School of Law. While in law school, Ms. Levi clerked for the Honorable Ronald S.W. Lew, U.S. District Court Judge for the Central District of California, served as a judicial extern for the Los Angeles Superior Court, and volunteered with the Legal Aid Foundation's Domestic Violence Project preparing retraining orders for domestic violence victims. Ms. Levi received her Bachelor of Arts in History from California State University, Northridge. Ms. Levi is licensed in the State of California.

Maria L. Mansur

Ms. Mansur is an associate of the firm representing shareholders in a variety of complex shareholder matters. Ms. Mansur has experience conducting complex legal research and drafting legal memoranda.

Prior to joining Robbins LLP, Ms. Mansur worked as an ADR Deputy Counsel for the International Chamber of Commerce where she gained extensive mediation experience. In her role, she analyzed complex, disputed legal issues, and facilitated mediations. Ms. Mansur also worked as a legal clerk for JAMS Mediation, Arbitration and ADR Services and as an associate in a general litigation law firm in Brazil.

Ms. Mansur received her Bachelor of Laws from Pontifical Catholic University of Sao Paulo and is currently pursuing a Master of Law in Dispute Resolution from Pepperdine University Caruso School of Law. Ms. Mansur is licensed in Brazil, Paris, and the State of California.

Ryan M. Messina

Mr. Messina represents investors harmed by corporate malfeasance through shareholder derivative litigation and securities fraud class actions. Prior to joining Robbins LLP, Mr. Messina worked for a national shareholder rights law firm where he was involved in all facets of shareholder litigation. He also has experience in real property law.

Mr. Messina received his Juris Doctor degree and Masters of Business Administration from West Virginia University College of Law and College of Business and Economics. While in law school, Mr. Messina interned at the Supreme Court of New York Commercial Division for the Honorable Justice Oing and a private law firm, served as a clinician through the Land Use and Sustainable Development Law Clinic, and worked pro bono as a volunteer income tax assistant. Mr. Messina received his Bachelor of Arts, cum laude, from West Virginia University. Mr. Messina is licensed in the State of New York.

Jacob W. Ogbozo

Jacob W. Ogbozo protects shareholder rights through complex litigation and represents business and consumers in challenging anticompetitive conduct. Mr. Ogbozo has extensive experience in large-scale class action discovery. He is a subject matter expert on multiple e-discovery platforms and his experience includes investigating and helping to develop complex theories of liability, preparing depositions and other discovery, interfacing with expert witnesses and consultants, and supervising the firm's antitrust staff attorneys.

In addition to his experience at Robbins LLP, Mr. Ogbozo worked for several non-profit agencies focusing on environmental and landlord tenant law and several law firms focusing on environmental and securities law. Mr. Ogbozo also worked as an Administrative Hearing Officer in which he conducted administrative appeal hearings on behalf of several local municipalities.

Mr. Ogbozo received his Juris Doctor from the University of San Diego School of Law where he received multiple scholarships in recognition of his academic achievements. While in law school, Mr. Ogbozo interned and clerked for the Honorable Paul A. Magnuson, U.S. District Judge for the District of Minnesota; the City of San Diego, Neighborhood Code Compliance; and the San Diego County Counsel. Mr. Ogbozo received his Bachelor of Arts from the University of Minnesota where he triple majored in Political Science, International Studies and Spanish Language. Mr. Ogbozo is licensed in the State of California.

Mario D. Valdovinos

Mario D. Valdovinos focuses his practice on protecting the rights of shareholders in complex matters involving shareholder derivative and securities fraud class actions. Prior to joining Robbins LLP as an associate, Mr. Valdovinos served as a summer law clerk for the firm. For his work, Mr. Valdovinos has been recognized by his peers as a Super Lawyers Rising Star (2024 – 2025).

Mr. Valdovinos received his Juris Doctor degree from Michigan State University College of Law. While in law school, Mr. Valdovinos participated in moot court, where he was recognized as regional champion and for writing the best brief in the Giles Sutherland Rich Patent Competition. Mr. Valdovinos received his Bachelor of Science in Business Administration from California State University, Long Beach. Mr. Valdovinos is licensed in the State of California.

Of Counsel

Ashley R. Rifkin

Ashley R. Rifkin has over 15 years' experience representing clients in complex litigation, including shareholder rights, consumer class actions, and antitrust matters. She has helped achieve significant recoveries for shareholders in connection with securities class actions involving corporate mergers and acquisitions. For example, in *Fuerstenberg v. Mid-State Bancshares*, No. CV 060976 (Cal. Super. Ct.-San Luis Obispo County Oct. 4, 2007), Ms. Rifkin was part of the litigation team that obtained waivers of the "confidentiality" and "no-shop" provisions in the sale agreement, which enabled other suitors to participate effectively in the bidding process. In *In re HCA Inc. Derivative Litigation*, No. 3:05-CV-0968 (M.D. Tenn. Dec. 20, 2007), Ms. Rifkin was part of the litigation team that forced the disclosure of material information to shareholders before they voted on the proposed buyout by a private equity group and founding member.

Ms. Rifkin has litigated shareholder derivative actions on behalf of corporations and shareholders seeking to redress various forms of corporate misconduct including backdating and springloading practices, false and misleading public disclosures, improper Medicare and Medicaid billing practices, claims of off-label marketing, violations of the FCPA, and other state and federal law violations. She has helped achieve considerable monetary recoveries and corporate governance reforms for clients and companies through these actions. In *In re Community Health Systems Inc. Shareholder Derivative Litig.*, No. 3:11-cv-00489 (M.D. Tenn. Jan. 20, 2017), Ms. Rifkin was part of the team that brought shareholder derivative litigation against the officers and directors of Community Health Systems, Inc. alleging that the fiduciaries systematically steered patients into medically unnecessary inpatient admissions when they should have been treated as outpatient. Ms. Rifkin oversaw the extensive document review process and other aspects of discovery. Ms. Rifkin's team obtained a $60 million cash payment to Community Health and the implementation of extensive corporate governance reforms. In shareholder derivative litigation arising from Motorola Inc.'s publication of allegedly misleading statements regarding its next-generation cell phones and revenue projections, *In re Motorola, Inc. Derivative Litig.,* No. 07CH23297 (Ill. Cir. Ct.-Cook Cnty. Nov. 29, 2012), Ms. Rifkin helped negotiate comprehensive governance reforms that overhauled the company's oversight of financial disclosures and achieved structural reforms that better aligned director and executive compensation with long-term shareholder interests. Ms. Rifkin served alongside a team of plaintiff firms in antitrust litigation involving allegations of conspiracy among private equity firms to rig bids, restrict the supply of private equity financing, fix transaction prices, and divide up the market for private equity services for leveraged buyouts. *Dahl v. Bain Capital Partners*, No. 1:07-cv-12388 (WGY) (D. Mass. Mar. 17, 2015). The defendants settled for more than $590 million.

Ms. Rifkin was named a Super Lawyer (2022-2025), a Super Lawyer Rising Star (2015-2016, 2019-2020), and one of the "Best Young Attorneys in San Diego County" by *The Daily Transcript* (2011).

Ms. Rifkin received her Juris Doctor in 2006 from Thomas Jefferson School of Law. She graduated *summa cum laude* second in her class, was on the Dean's List, and received the Outstanding Scholastic Achievement Award for the 2004-2005 school year. While in law school, Ms. Rifkin served as a judicial extern for the Honorable David A. Workman in the Los Angeles Superior Court. She also was chief articles editor and notes editor of the *Thomas Jefferson Law Review* and vice president of

operations of the Tax Society. Ms. Rifkin graduated from the University of California, Santa Barbara in 2002 with a Bachelor of Arts degree in Psychology. She is licensed to practice law in the State of California and has been admitted to the U.S. District Courts for the Northern, Central, and Southern Districts of California, the District of Colorado, the Eastern District of Michigan, and the U.S. Courts of Appeals for the Sixth, Seventh, Ninth, and Tenth Circuits.

Corporate Research Department

The Corporate Research Department is staffed by college graduates with degrees and/or work experience in accounting, economics, finance, health sciences, legal studies, political science, sociology, and statistics. They are trained in the use of public and proprietary databases and search engines, including Bloomberg, Capital IQ, Lexis, and Morningstar. Members of the Corporate Research Department analyze financial statements, various SEC filings, analyst reports, and other public data to prepare complex financial analyses and calculations in support of case filings.

EXHIBIT 10

EXHIBIT 10

B & R Supermarket, Inc., et al. v. Visa, Inc., et al., No. 1:17-cv-02738-BMC-JAM (E.D.N.Y.)

Robbins LLP
Lodestar Summary
Inception through October 16, 2025

Categories:

(1) Appeals
(2) Case File
(3) Client Communication
(4) Discovery
(5) Investigation
(6) Pleading
(7) Settlement
(8) Strategy

P = Partner; A=Associate; SA = Staff Attorney; PA = Project Attorney; PI = Paralegal; Cr = Corporate Research; LS = Litigation Support

Professional	Title	1	2	3	4	5	6	7	8	Total Hours	Rate	Lodestar
George Aguilar	P	79.5	1	39	593.25	0	1223.25	440.75	29.75	2406.5	$1,225	$2,947,962.50
Michael Nicoud	P	115.25	0	2.25	2611.5	1.75	2489.75	1009.75	96.25	6326.5	$975	$6,168,337.50
Jenny L. Dixon	P	0	0	0	657	8.5	427.75	28	55.75	1177	$825	$971,025.00
Brian Robbins	P	0.25	0	0	11.75	0	15.75	211.5	5	244.25	$1,225	$299,206.25
Eric M. Carrino	P	0	28	0	88.25	1.75	10.75	0	22.75	151.5	$850	$128,775.00
Jacob W. Ogbozo	A	0	0.5	0.5	5262	0	993.25	361.75	11	6629	$560	$3,712,240.00
Lindsey C. Herzik	A	0	0.5	0	561.5	0.5	28	1	1.25	592.75	$375	$222,281.25
David W. Uris	A	0	0	0	130	0	0	0	0	130	$575	$74,750.00
Matthew G. Leagre	A	0	0	0	0	0	111.25	0	0	111.25	$485	$53,956.25
Leonid Kandinov	A	0	0	0	53.5	0	0	0	3	56.5	$475	$26,837.50
Patrick J. McDonough	SA	0	0	0	2160.25	0	0	0	0	2160.25	$275	$594,068.75
Jorge F. Espinosa	SA	0	0	0	1062.25	0	0	0	0	1062.25	$300	$318,675.00
Angela J. Straley	PA	0	1.25	0	3100.5	0	0	28.25	0	3130	$300	$939,000.00
Maureen E. Forsyth	PA	0	0	0	2606	0	0	0	0	2606	$300	$781,800.00
Jonathan D. Smallwood	PA	0	0	0	2147.75	0	0	0	0	2147.75	$300	$644,325.00
Kristina M. Pedroso	PA	0	0	0	479.75	0	0	0	0	479.75	$250	$119,937.50
Voltaire R. Sterling	PA	0	0	0	571.75	0	0	0	0	571.75	$300	$171,525.00
Mike Li	PA	0	0	0	520	0	0	0	0	520	$300	$156,000.00
Rommel Dizon	PA	0	0	0	497	0	0	0	0	497	$300	$149,100.00
Endre Algover	PA	0	0	0	469.75	0	0	0	0	469.75	$300	$140,925.00
Ricardo Salazar	PI	132.25	471.5	0.25	311	0	569	227.25	2.25	1713.5	$350	$599,725.00
Jorgeanne A. Cabuhat	PI	3	3.25	0	0	0.5	83.5	0	0.5	90.75	$350	$31,762.50
Jennifer L. Silverwood	PI	0	0.5	0	28	0	9.75	0	0	38.25	$255	$9,753.75
Melanie P. Jones	PI	0	3.75	0	0	0	44	0	0	47.75	$285	$13,608.75
Michelle B. Gaulin	CR	0	0	0	0	56.25	0	0	0	56.25	$250	$14,062.50
Carlo O. Ybanez	CR	0	0	0	0	37.5	0	0	0.75	38.25	$190	$7,267.50
Jerrad Juanich	LS	0	54.5	0	93.25	0	0.75	0.5	0	149	$295	$43,955.00
Rockne B. Krebs	LS	0	53.75	0	4.25	0	0	0	0	58	$160	$9,280.00
Wesley Hasten	LS	0	0	0	76.25	0	0	0	0	76.25	$250	$19,062.50
TOTALS		**330.25**	**618.50**	**42.00**	**24,096.50**	**106.75**	**6,006.75**	**2,308.75**	**228.25**	**33,737.75**		**$19,369,205.00**

Footnotes

1) Appeals captures work associated with petitions for interlocutory review and Amex's appeal
2) Case File captures work associated with generating, preparing, and organizing documents, files, information relating to work product and court filings
3) Client Communication captures work associated with contact with the named plaintiffs
4) Discovery captures document review and production, all forms of written discovery, meet and confers, and all related communications and strategies
5) Investigation captures work associated with gathering, researching, analyzing, and organizing factual information providing the best understanding of the case
6) Pleadings captures developing, researching, drafting, reviewing, editing, and filing court documents, including preparation and attendance at hearings
7) Settlement captures work associated with case settlement from the initial negotiations through to preliminary approval
8) Strategy captures work relating to internal work product, communications, meetings, and overall case analysis, including developing, evaulating and planning

EXHIBIT 11

EXHIBIT 11

B & R Supermarket, Inc., et al. v. Visa, Inc., et al., No. 1:17-cv-02738-BMC-JAM (E.D.N.Y.)

Robbins LLP
Expense Summary
Inception through October 16, 2025

CATEGORY	***AMOUNT***
Experts	$3,019,230.83
Discovery Review Platform	$218,174.86
Mediation	$151,308.90
Travel & Meals	$132,198.95
Depositions	$86,960.31
Photocopies	$63,221.00
Research & Investigation	$38,254.95
Communications & Messaging	$5,832.87
Filing/Service Fees/Court Reporting	$4,039.52
TOTAL	***$3,719,222.19***

EXHIBIT 12

Collection of Antitrust Cases Settling Between 2011 and Now with Common Funds Between $100-250M

	Case Name	Case No.	Court	Fee Approval Date	Common Fund	Attorneys' Fees	Attys' Fees as % of Fund	Expenses Awarded	Expenses as % of Fund
1	*Sidibe, et al. v. Sutter Health*	3:12-cv-04854	N.D. Cal.	11/6/2025	$228,500,000	$75,400,000	33.0%	$28,185,752	12.3%
2	*In re HIV Antitrust Litig. (KPH Healthcare Servs., Inc. v. Gildead Scis., Inc., et al.*)	3:19-cv-02573/ 3:20-cv-06961	N.D. Cal.	1/19/2024	$246,750,000	$75,000,000	30.4%	$2,887,478	1.2%
3	*First Impressions Salon, Inc., et al. v. Nat'l Milk Producers Federation, et al.*	3:13-cv-00454	S.D. Ill.	4/27/2020	$220,000,000	$73,326,000	33.3%	$5,271,267	2.4%
4	*Dial Corp., et al. v. News Corp., et al.*	1:13-cv-06802	S.D.N.Y.	10/31/2016	$244,000,000	$48,825,000	20.0%	$7,512,915	3.1%
5	*Burnett, et al. v. Nat'l Ass'n of Realtors, et al.*	4:19-cv-00332	W.D. Mo.	5/9/2024	$208,500,000	$69,499,931	33.3%	$12,923,266	6.2%
6	*In re Capacitors Antitrust Litig.* (Direct Purchaser Class Action)	3:17-md-02801/ 3:14-cv-03264	N.D. Cal.	3/6/2023	$165,000,000	$66,000,000	40.0%	$2,459,578	1.5%
7	*In re Neurontin Antitrust Litig. (Louisana Wholesale Drug Co., et al. v. Pfizer, Inc., et al.*)	2:02-cv-01830/ 2:02-cv-02731	D.N.J.	8/6/2014	$190,416,438	$63,472,146	33.3%	$2,213,537	1.2%
8	*In re Domestic Drywall Antitrust Litig.* (Direct Purchaser Actions)	2:13-md-02437	E.D. Pa.	7/17/2018	$190,059,056	$63,353,019	33.3%	$2,925,629	1.5%

	Case Name	Case No.	Court	Fee Approval Date	Common Fund	Attorneys' Fees	Attys' Fees as % of Fund	Expenses Awarded	Expenses as % of Fund
9	*In re Broiler Chicken Antitrust Litig.* (Direct Purchaser Plaintiff Action)	1:16-cv-08637	N.D. Ill.	11/30/2021	$170,261,600	$55,228,867	32.4%	$4,500,000	2.6%
10	*In re Titanium Dioxide Antitrust Litig* .	1:10-cv-00318	D. Md.	12/13/2013	$163,500,000	$54,500,000	33.3%	$4,569,272	2.8%
11	*Standard Iron Works v. Arcelormittal, et al.*	1:08-cv-05214	N.D. Ill.	10/22/2014	$163,890,000	$54,087,000	33.0%	$5,471,759	3.3%
12	*In re Southeastern Milk Antitrust Litig.* (*Sweetwater Valley Farm, Inc., et al. v. Dean Foods Co., et al.*)	2:08-md-01000/ 2:07-cv-00208	E.D. Tenn.	5/17/2013	$158,600,000	$52,866,667	33.3%	$798,238	0.5%
13	*In re Polyurethane Foam Antitrust Litig.* (Direct Purchaser Class)	1:10-md-02196	N.D. Ohio	2/26/2015	$147,800,000	$44,340,000	30.0%	$8,113,856	5.5%
14	*In re Broiler Chicken Antitrust Litig.* (End-User Consumer Plaintiff Actions)	1:16-cv-08637	7th Cir.	10/7/2022	$181,000,000	$48,146,000	26.6%	$8,750,000	4.8%
15	*In re Opana ER Antitrust Litig.* (Direct Purchaser Class Actions)	1:14-cv-10150	N.D. Ill.	11/3/2022	$145,000,000	$50,528,471	34.8%	$4,343,137	3.0%

	Case Name	Case No.	Court	Fee Approval Date	Common Fund	Attorneys' Fees	Attys' Fees as % of Fund	Expenses Awarded	Expenses as % of Fund
16	*In re Flonase Antitrust Litig.* (Direct Purchaser Actions)	2:08-cv-03149	E.D. Pa.	6/14/2013	$150,000,000	$50,000,000	33.3%	$2,069,433	1.4%
17	*In re Southeastern Milk Antitrust Litig.* (*Sweetwater Valley Farm, Inc., et al. v. Dean Foods Co., et al.*)	2:08-md-01000/ 2:07-cv-00208	E.D. Tenn.	7/11/2012	$145,000,000	$48,333,333	33.3%	$7,408,920	5.1%
18	*In re Packaged Seafood Prods. Antitrust Litig.* (End Payer Plaintiff Actions)	3:15-md-02670	S.D. Cal.	11/22/2024	$136,000,000	$48,320,739	35.5%	$1,618,489	1.2%
19	*In re LIBOR-Based Fin. Instruments Antitrust Litig.* (OTC)	1:11-md-02262	S.D.N.Y.	10/17/2023; 1	$191,000,000	$47,100,590	24.7%	$2,597,639	1.4%
20	*In re Polyurethane Foam Antitrust Litig.* (Indirect Purchaser Class)	1:10-md-02196	N.D. Ohio	1/27/2016	$151,250,000	$36,300,000	24.0%	$5,115,812	3.4%
21	*In re LIBOR-Based Fin. Instruments Antitrust Litig.* (Exchange-Based)	1:11-md-02262	S.D.N.Y.	11/24/2020	$187,000,000	$45,346,605	24.2%	$5,613,579	3.0%
22	*In re Lidoderm Antitrust Litig.* (Direct Purchaser Actions)	3:14-md-02521	N.D. Cal.	9/20/2018	$166,000,000	$45,000,070	27.1%	$2,363,380	1.4%

	Case Name	Case No.	Court	Fee Approval Date	Common Fund	Attorneys' Fees	Attys' Fees as % of Fund	Expenses Awarded	Expenses as % of Fund
23	*Marchbanks Truck Serv., Inc., et al. v. Comdata Network, Inc., et al.*	2:07-cv-01078	E.D. Pa.	7/14/2014	$130,000,000	$43,333,333	33.3%	$6,696,857	5.2%
24	*In re Plasma-Derivative Protein Therapies Antitrust Litig.*	1:09-cv-07666	N.D. Ill.	1/22/2014; 4/16/2014	$128,000,000	$42,666,666	33.3%	$4,376,850	3.4%
25	*Precision Assocs., Inc. et al. v. Panalpina World Transport (Holding) LTD., et al.* ("*Panalpina 2* ")	1:08-cv-00042	E.D.N.Y.	11/10/2015	$168,986,724	$42,246,681	25.0%	$4,046,323	2.4%
26	*In re Novartis and Par Antitrust Litig.* (Direct Purchaser Class Actions)	1:18-cv-04361	S.D.N.Y.	7/26/2023	$126,850,000	$42,150,000	33.2%	$0	N/A
27	*In re Lithium Ion Batteries Antitrust Litig.* (Direct Purchaser Actions)	4:13-md-02420	N.D. Cal.	5/16/2018	$139,300,000	$41,790,000	30.0%	$3,354,573	2.4%
28	*In re Automotive Parts Antitrust Litig.* (End-Payor Actions) (Round 4 Settlements)	2:13-cv-02703	E.D. Mich.	9/23/2020	$183,958,000	$40,470,760	22.0%	$156,125	0.1%

	Case Name	Case No.	Court	Fee Approval Date	Common Fund	Attorneys' Fees	Attys' Fees as % of Fund	Expenses Awarded	Expenses as % of Fund
29	*The Hospital Authority of Metropolitan Government of Nashville and Davidson County, Tennessee v. Momenta Pharmaceuticals, Inc. et al.*	3:15-cv-01100	M.D. Tenn.	5/29/2020	$120,000,000	$40,000,000	33.3%	$2,269,269	1.9%
30	*Fund Liquidation Holdings LLC, et al. v. Citibank, N.A., et al.*	1:16-cv-05263	S.D.N.Y	12/1/2022	$155,458,000	$38,864,500	25.0%	$179,945	0.1%
31	*In re Loestrin 24 FE Antitrust Litig.* (Direct Purchaser Actions)	1:13-md-02472	D.R.I.	9/1/2020	$120,000,000	$38,678,147	32.2%	$3,965,558	3.3%
32	*In re Cathode Ray Tube (CRT) Antitrust Litig.* (Direct Action Plaintiffs)	4:07-cv-05944	N.D. Cal.	1/14/2016	$127,450,000	$38,235,000	30.0%	$1,534,749	1.2%
33	*In re Pharmaceutical Industry Average Wholesale Price Litig.* (Track Two)	1:01-cv-12257	D. Mass.	12/8/2011	$125,000,000	$37,500,000	30.0%	$0	N/A
34	*Dennis, et al. v. JPMorgan Chase & Co., et al.*	1:16-cv-06496	S.D.N.Y.	5/25/2023	$185,875,000	$36,789,307	19.8%	$845,472	0.5%

	Case Name	Case No.	Court	Fee Approval Date	Common Fund	Attorneys' Fees	Attys' Fees as % of Fund	Expenses Awarded	Expenses as % of Fund
35	*Gibson, et al. v. The Nat'l Ass'n of Realtors, et al.*	4:23-cv-00788	W.D. Mo.	11/4/2024	$110,600,000	$36,866,630	33.3%	$13,147,775	11.9%
36	*In re Lidoderm Antitrust Litig.* (End-Payor Actions)	3:14-md-02521	N.D. Cal.	9/20/2018	$104,750,000	$34,916,000	33.3%	$3,948,118	3.8%
37	*Laydon v. Mizuho Bank, Ltd., et al.* ; *Sonterra Capital Master Fund Ltd., et al. v. UBS AG. et al.*	1:12-cv-03419 1:15-cv-05844	S.D.N.Y.	12/7/2017	$148,000,000	$34,880,000	23.6%	$0	N/A
38	*Sullivan, et al. v. Barclays PLC, et al.* (JPMorgan, Chase & Citi Settlements)	1:13-cv-02811	S.D.N.Y.	5/17/2019	$182,500,000	$34,675,000	19.0%	$1,074,650	0.6%
39	*In re Peanut Farmers Antitrust Litig.*	2:19-cv-00463	E.D. Va.	8/10/2021	$102,750,000	$34,250,000	33.3%	$1,875,615	1.8%
40	*In re Automotive Parts Antitrust Litig.* (Automobile Dealership Actions) (Round 3 Settlements)	2:12-cv-00502	E.D. Mich.	11/5/2018	$115,180,800	$33,317,881	28.9%	$358,125	0.3%
41	*In re Municipal Derivatives Antitrust Litig.*	1:08-cv-02516	S.D.N.Y.	7/8/2016	$100,515,000	$33,000,000	32.8%	$2,484,198	2.5%
42	*In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*	4:14-md-02541	N.D. Cal.	12/6/2017	$208,664,445	$41,732,889	20.0%	$3,184,274	1.5%

	Case Name	Case No.	Court	Fee Approval Date	Common Fund	Attorneys' Fees	Attys' Fees as % of Fund	Expenses Awarded	Expenses as % of Fund
43	*In re Optical Disk Drive Prods. Antitrust Litig.*	3:10-md-02143	N.D. Cal.	12/19/2016	$124,500,000	$31,125,000	25.0%	$3,704,324	3.0%
44	*In re Broiler Chicken Antitrust Litig.* (Commercial & Institutional Indirect Purchaser Plaintiff Actions)	1:16-cv-08637	N.D. Ill.	4/19/2022	$104,890,000	$31,000,833	29.6%	$10,407,500	9.9%
45	*In re Pharmaceutical Industry Average Wholesale Price Litig.* (Mass. and Non-Mass. Class Actions Concerning Classes 2 & 3)	1:01-cv-12257	D. Mass.	2/11/2011	$103,000,000	$30,900,000	30.0%	$0	N/A
46	*In re Aggrenox Antitrust Litig.* (Direct Purchaser Actions)	3:14-md-02516	D. Conn.	12/18/2017	$146,000,000	$29,200,000	20.0%	$988,679	0.7%
47	*In re Ranbaxy Generic Drug Application Antitrust Litig.*	1:19-md-02878	D. Mass.	9/19/2022	$145,000,000	$29,000,000	20.0%	$2,268,846	1.6%
48	*In re Commodity Exchange, Inc. Gold Futures and Options Trading Litig.*	1:14-md-02548	S.D.N.Y.	5/4/2022	$102,000,000	$28,200,000	27.6%	$8,027,283	7.9%

	Case Name	Case No.	Court	Fee Approval Date	Common Fund	Attorneys' Fees	Attys' Fees as % of Fund	Expenses Awarded	Expenses as % of Fund
49	*In re Automotive Parts Antitrust Litig.* (Dealership Actions) (Round 4 Settlements)	2:12-cv-00602	E.D. Mich.	12/29/2019	$103,520,160	$31,210,859	30.1%	$153,720	0.1%
50	*Cameron, et al. v. Apple Inc.*	4:19-cv-03074	N.D. Cal.	6/10/2022	$100,000,000	$26,000,000	26.0%	$3,500,000	3.5%
51	*In re Automotive Parts Antitrust Litigation* (Automobile Dealership Actions)	2:13-cv-00702	E.D. Mich.	8/21/2017; 8/07/2020	$124,730,980	$37,419,294	30.0%	$450,047	0.4%
52	*Sullivan, et al. v. Barclays PLC, et al.* (Société Générale Settlement)	1:13-cv-02811	S.D.N.Y.	11/1/2023	$105,000,000	$16,800,000	16.0%	$98,568	0.1%
53	*Nitsch, et al. v. Dreamworks Animation SKG Inc., et al.*	5:14-cv-04062	N.D. Cal.	6/5/2017	$168,950,000	$18,538,159	11.0%	$2,051,741	1.2%
54	*Precision Assocs., Inc. et al. v. Panalpina World Transport (Holding) LTD., et al.* ("*Panalpina 1* ")	1:08-cv-00042	E.D.N.Y.	12/27/2013	$112,356,912	$16,853,537	15.0%	$613,386	0.5%
55	*In re Disposable Contact Lens Antitrust Litigation*	3:15-md-02626	M.D. Fla.	6/1/2021; 10/12/2022	$118,200,000	$38,649,294	32.7%	$2,401,819	2.0%

	Case Name	Case No.	Court	Fee Approval Date	Common Fund	Attorneys' Fees	Attys' Fees as % of Fund	Expenses Awarded	Expenses as % of Fund
56	*In re Dealer Management Sys. Antitrust Litig.* (Dealership Class Action)	1:18-cv-00864	N.D. Ill.	2/25/2025	$129,500,000	$42,735,000	33.0%	$7,192,134	5.6%
57	*Precision Assocs., Inc. et al. v. Panalpina World Transport (Holding) LTD., et al.* ("*Panalpina 3* ")	1:08-cv-00042	E.D.N.Y.	11/7/2016	$117,774,617	$29,443,654	25.0%	$1,757,082	1.5%
						Average Fee	**28.51%**	Average Expenses as % of Fund	**2.8%**
						Median Fee	**30.00%**	Median Expenses as % of Fund	**2.0%**
						Requested Fee	**28.31%**	**Requested Expenses as % of Fund**	**1.96%**

Chart Supporting Documents
Part I: Tabs 1-27

EXHIBIT 13

TAB 1A

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

San Francisco Division

DJENEBA SIDIBE, et al.,

Plaintiffs,

v.

SUTTER HEALTH, et al.,

Defendants.

Case No. 12-cv-04854-LB

FINAL APPROVAL ORDER

Re: ECF Nos. 1754, 1761

INTRODUCTION

This antitrust consumer class action involved multiple motions to dismiss, extensive discovery, two class-certification motions, a Rule 23(f) petition, three summary-judgment motions, a four-week trial that resulted in a defense verdict, and three appeals to the Ninth Circuit. In March 2025, after jury selection for a second trial but before opening statements, the parties reached a settlement. On May 22, 2025, the court approved the settlement preliminarily. The plaintiffs move for final approval of the settlement and for attorney's fees and costs. After a fairness hearing on November 6, 2025, the court grants the motion for final approval and awards the requested fees and costs.

STATEMENT

1. The Lawsuit

The named plaintiffs are individuals who purchased health insurance and employers who provided health insurance for their employees.[1] The plaintiffs filed their first complaint on September 17, 2012, represented solely by The Mehdi Firm. After multiple rounds of motions to dismiss and orders dismissing earlier complaints, Constantine Cannon and other firms joined as plaintiffs' counsel.[2] Following dismissal of the third amended complaint for failure to allege relevant geographic markets, the plaintiffs appealed, and the Ninth Circuit reversed.[3] Discovery spanned 2016 to 2021 and was coordinated with two related state-court cases: *UFCW & Employers Benefit Trust v. Sutter Health*, CGC-14-538451 (Cal. Super. Ct. Apr. 7, 2014) (the UEBT action), and *California ex rel. Xavier Becerra v. Sutter Health*, CGC-18-565398 (Cal. Super. Ct. Mar. 29, 2018).[4] Discovery was extensive, involving over 2.5 million documents from parties, nonparty health plans, and third parties and 155 depositions over 223 deposition days. Obtaining discovery from the nonparty health plans was particularly time-consuming, requiring additional counsel, economists, and data analysts.[5]

Expert discovery was substantial. The plaintiffs retained three experts, including Dr. Tasneem Chipty, who issued eleven expert reports on class certification, relevant markets, liability, antitrust impact, and damages.[6] Sutter retained seven experts and produced twenty-three reports.[7] Expert depositions spanned twenty-eight days.[8]

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[1] Order – ECF No. 962 at 1. Citations refer to the Electronic Case File (ECF); pinpoint citations are to the ECF-generated page numbers at the top of documents.

[2] Dismissal Orders – ECF Nos. 35, 64.

[3] Order – ECF No. 83; *Sidibe v. Sutter Health*, 667 F. App'x 641 (9th Cir. 2016).

[4] Order – ECF No. 158.

[5] Kim Decl. – ECF No. 1754-1 at 10 (¶¶ 45–48).

[6] *Id.* at 11 (¶ 49).

[7] *Id.* (¶ 50).

[8] *Id.* (¶ 51).

Two rounds of class-certification occurred. Initially, the court certified a Rule 23(b)(2) injunctive-relief class but denied a Rule 23(b)(3) damages class, finding Dr. Chipty's analysis insufficient for class-wide antitrust injury and damages.[9] For the second motion, Dr. Chipty expanded her analysis, incorporating data from all five health plans, regression analyses using Center for Medicare and Medicaid Services (CMS) data, and other sources. On July 30, 2020, the court certified a Rule 23(b)(3) class of premium payers.[10] On August 30, 2020, the court appointed Constantine Cannon as lead trial counsel and The Mehdi Firm as co-lead class counsel.[11] On November 5, 2020, the court approved the plaintiffs' notice plan, executed by mail, email, and print and digital publication. The opt-out deadline was March 8, 2021.[12]

Three summary-judgment motions were filed. On April 12, 2019, Sutter's early summary-motion was denied (except for the Davis market).[13] The motion involved substantial expert discovery from Dr. Chipty and Sutter's expert, Dr. Gautam Gowrisankaran.[14]After fact discovery ended on July 27, 2020, the plaintiffs moved for partial summary judgment on the distinct-products element of their tying claim, which the court granted.[15] Sutter's summary-judgment motion argued that its practices were not anticompetitive, it did not willfully maintain monopoly power in tying markets or pose a dangerous probability of monopolization in tied markets, and the plaintiffs lacked class-wide damages for the 2008–2010 claims. The court granted Sutter summary judgment on the Sherman Act § 2 claim and 2008–2010 damages, denying the remainder.[16] These motions involved extensive briefing and hundreds of exhibits.[17]

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[9] Order – ECF No. 698 at 50–53.

[10] Order – ECF No. 823.

[11] Kim Decl. – ECF No. 1754-1 at 12 (¶¶ 53–54).

[12] Order – ECF No. 901.

[13] Order – ECF No. 673.

[14] Kim Decl. – ECF No. 1754-1 at 13 (¶¶ 58–59).

[15] Order – ECF No. 886.

[16] Order – ECF No. 962.

[17] Kim Decl. – ECF No. 1754-1 at 13–14 (¶ 61).

In late 2019, Sutter settled the state cases, which involved direct purchasers, for damages and injunctive relief relating to Sutter's contracting practices with insurers, benefitting the indirect purchasers in this action through a monitored injunction.[18] Preparation for trial in this case occurred three times: for October 4, 2021, December 2021/January 2022, and the actual four-week trial in February 2022.[19] Pretrial filings exceeded 18,000 pages, including *Daubert* and in limine motions.[20] After a defense verdict, the plaintiffs appealed. The appellate record included thirty-three volumes of trial materials.[21] The Ninth Circuit reversed on two issues: exclusion of pre-2006 evidence and a revised CACI jury instruction. *Sidibe v. Sutter Health*, 103 F.4th 675 (9th Cir. 2024). It affirmed the "relevant purchaser" instruction and denial of sanctions. *Sidibe*, No. 22-15634, 2024 WL 2826520 (9th Cir. June 4, 2024). It denied Sutter's petition for rehearing and rehearing en banc.[22] After the mandate issued, the parties updated pretrial filings, and the court issued a final pretrial order.[23] Jury selection occurred on February 27, 2025.[24] On March 2, 2025, the parties settled.[25]

2. The Settlement Process

The parties engaged Gregory Lindstrom of Phillips ADR Enterprises for mediation over five weeks, executing the settlement agreement on April 24, 2025.[26] The plaintiffs moved for preliminary approval on April 25, 2025, which the court granted on May 22, 2025.[27] A final fairness hearing was held on November 6, 2025.

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[18] *Id.* at 14 (¶ 62).

[19] Docket. The parties picked a jury in December 2021, with a trial date of January 6, 2021. Because of the Omicron surge, the Northern District of California cancelled all jury trials in January.

[20] Orders – ECF No. 1166–67, 1282, 1318, 1363, 1382, 1420.

[21] Kim Decl. – ECF No. 1754-1 at 17 (¶ 77).

[22] Order – ECF No. 1624.

[23] Order – ECF No. 1734.

[24] Minute Entry – ECF No. 1733.

[25] Notice of Settlement – ECF No. 1737.

[26] Settlement Agreement, Ex. A to Kim Decl. – ECF No. 1761-2 at 6–36.

[27] Order – ECF No. 1750.

3. The Settlement Agreement

The certified and settlement class is "All entities in California Rating area 1, 2, 3, 4, 5, 6, 8, 9 or 10 (the 'Nine Rating Areas' or 'Nine RAs'), and all individuals that either live or work in one of the Nine RAs, that paid premiums for a fully insured health insurance policy from Blue Shield, Anthem Blue Cross, Aetna, Health Net or UnitedHealthcare from January 1, 2011 to March 8, 2021."[28]

The settlement amount is $228.5 million, to be deposited into a court-approved escrow account within twenty calendar days of this order. Interest from deposit to the Effective Date will be split evenly between the class and Sutter. Proceeds will be distributed pro rata.[29] The release covers:

> Sutter, its past or present parents, subsidiaries, divisions, affiliates, providers (including, but not limited to, hospitals, foundations, doctors, ambulatory surgery centers and any other providers), officers, directors, employees, agents, attorneys, and any of their legal representatives (and the predecessors, heirs, executors, administrators, successors, purchasers, and assigns of each of the foregoing) from any and all claims, whether federal or state, known or unknown, asserted or unasserted, regardless of legal theory, arising from or related to the facts, activities, or circumstances that were alleged in the complaints filed by Plaintiffs, including in the Fourth Amended Complaint, or otherwise alleged in this Action including during the first trial of this matter in 2022, or arising from or related to any purported anticompetitive effect resulting from the conduct alleged by Plaintiffs in this Action, including conduct alleged during the first trial of this matter in 2022.[30]

The release includes a waiver of unknown claims under Cal. Civ. Code § 1542.[31]

Class Counsel's requested fees and costs (to be deducted from the fund) require court approval and include approximately $10 million for notice and administration of the Settlement (discussed below), $28,185,752 in expenses (including $17 million for experts), attorney's fees (without a multiplier and not exceeding one-third of the settlement fund), service awards to Class Representatives ($20,000 each for testifying Class Representatives, $15,000 each for non-testifying Representatives, totaling $95,000 for five representatives).[32]

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[28] Settlement Agreement, Ex. A to Kim Decl. – ECF No. 1761-2 at 10.

[29] *Id.* at 18–21 (§ III.A.1, 5).

[30] *Id.* at 24 (§ VI.A.1).

[31] *Id.* at 24–25 (§ VI.A.2).

[32] *Id.* at 25 (§ VII.1); Mot. – ECF No. 1754; Mot. – ECF No. 1761-1 at 15; Kim. Suppl. Decl. – ECF No. 1762.

The court previously established an opt-out period for Class Members from December 15, 2020, to March 8, 2021, stating that any members who did not opt out would be bound by the outcome of the lawsuit, would receive the benefits of any settlement, and would not be able to exclude themselves from the Class in the future.[33]

4. Settlement Administration

JND, a nationally recognized administrator, managed the notice and distribution plan, consistent with the court-approved November 5, 2020, plan. It mailed 6,624,714 Post Card Notices from June 2 to June 24, 2025, using updated addresses from health plans, skip-trace databases, and the U.S. Postal Service. Undeliverable notices were re-mailed to forwarding addresses.[34] It emailed 1,994,468 notices from June 2, 2025, to June 28, 2025, with three follow-up campaigns.[35] Digital ads on LinkedIn, Facebook, Instagram, programmatic advertising (through OMTrade Desk); SHRM.org (the largest trade-association site), Google Display Network (GDN, the leading digital network), and Demand Gen (an AI-powered advertising method) generated 1,885,534 digital impressions from June 2 to July 13, 2025.[36] A press release reached 139.7 million, with 13.5 million via regional outlets.[37] The website, www.SutterHealthPremiumLawsuit.com, provided case details and claim forms.[38] JND's toll-free line received 25,345 calls, and it received 6,169 emails.[39] 206,546 claims were filed by the claim-filing deadline of September 12, 2025.[40] Administration costs are approximately $10 million.[41]

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[33] Order – ECF No. 955; Settlement Agreement, Ex. A to Kim Decl. – ECF No. 1761-2 at 15–16 (§ II.D).

[34] Kim Decl. – ECF No. 1761-2 at 2–3 (¶ 9); Keough Decl. – ECF No. 1761-3 at 1–3 (¶¶ 2, 5, 9); Order – ECF No. 901.

[35] Keough Decl. – ECF No. 1761-3 at 3–4 (¶¶ 12, 14).

[36] *Id.* at 4–5 (¶¶ 16–20); Digital Ads, Ex. D to *id.* at 24–45.

[37] Keough Decl. – ECF No. 1761-3 at 7 (¶¶ 30–31).

[38] *Id.* at 7–8 (¶¶ 32–33, 35).

[39] *Id.* at 8 (¶¶ 37–38).

[40] *Id.* (¶ 40).

[41] *Id.* (¶ 47) ($4 million for notice and $6 million for claims administration).

5. Objections

Two objections were filed. On August, 26, 2025, William Legler objected to calculating fees on the gross fund.[42] Hao Tze Wang's objection, alleging inadequate notice and discrimination, was withdrawn (after a September 10, 2025, hearing, per Fed. R. Civ. P. 23(e)(5)(B)), with a $900 payment (predicated on his claim that he paid $15,000 in premiums during the class period) and (2) provision of the public opt-out list.[43]

6. Efforts of Class Representatives

Class Representatives, some involved since 2012, contributed significantly through discovery, depositions, and trial preparation.[44]

7. Additional Costs

Since preliminary approval, the plaintiffs and class counsel incurred additional costs for data expert analysis in connection with assisting certain large Class Members (such as CalPERS). The revised costs total $28,185,752.[45]

ANALYSIS

1. Jurisdiction

The court has jurisdiction under the Class Action Fairness Act (CAFA). 28 U.S.C. § 1332(d)(2).

2. Certification of the Settlement Class

The court previously certified the class under Rule 23(a) and (b)(3).[46] The class remains appropriate, with no changed circumstances. Numerosity is satisfied with over three million

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[42] Obj. – ECF No. 1757.

[43] Minute Entry – ECF No. 1759; Order – ECF No. 1760.

[44] *See* Pls.' Decls. – ECF Nos. 1754-10–15.

[45] Kim Decl. – ECF No. 1761-2 at 4 (¶ 17); Kim. Suppl. Decl. – ECF No. 1762; Reimbursement Costs, Ex. D to *id.* – ECF No. 1761-2.

[46] Orders – ECF Nos. 823, 1750.

members. *Nelson v. Avon Prods., Inc.*, No. 14-cv-02276-BLF, 2015 WL 1778326, at *5 (N.D. Cal. Apr. 17, 2015). Commonality exists in questions about Sutter's contracting practices. Typicality is met, as the plaintiffs' claims arise from the same conduct. Adequacy is satisfied: there are no conflicts and counsel is qualified. Fed. R. Civ. P. 23(a); *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003); *In re Hyundai and Kia Fuel Econ. Litig.*, 926 F.3d 539, 566 (9th Cir. 2019). A class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3); *Brown v. Hain Celestial Grp., Inc.*, No. 11-cv-03082-LB, 2014 WL 6483216, at *15–20 (N.D. Cal. Nov. 18, 2014).

3. Approval of Settlement

A court may approve a proposed class-action settlement only "after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether":

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> > (i) the costs, risks, and delay of trial and appeal;
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). These factors "are substantially similar to those articulated" in *Hanlon v. v. Chrysler Corp.*, 150 F. 3d 1011, 1027 (9th Cir. 1998), *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). *Student A v. Berkeley Unified Sch. Dist.*, No. 17-cv-02510-JST, 2021 WL 6332353, at *2 n.2 (N.D. Cal. July 8, 2021). In *Hanlon*, the Ninth Circuit identified factors relevant to assessing a settlement proposal: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class-action status throughout trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceeding; (6) the experience and views of counsel;

(7) the presence of a government participant; and (8) the reaction of class members to the proposed settlement. 150 F.3d at 1026.

The settlement is fair, reasonable, and adequate.

First, representation is adequate. Class counsel and the representatives litigated vigorously over thirteen years, navigating motions, discovery, trial, and appeals.

Second, mediation with Mr. Lindstrom, together with experienced and knowledgeable counsel, ensured a non-collusive process. Fed. R. Civ. P. 23(e)(2)(B) advisory committee's note (2018) ("[T]he involvement of a neutral . . . in negotiations may bear on whether they were conducted in a manner that would protect and further the class interests."); *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA (EMC), 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (private mediation "tends to support the conclusion that the settlement process was not collusive").

Third, the relief is adequate, providing class members with a recovery of over fifty-five percent of single damages, exceeding typical settlements. *See, e.g.*, *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 963 (9th Cir. 2009) (approximately thirty percent of the estimated damages before trebling was fair, adequate, and reasonable); *Roe v. SFBSC Mgmt., LLC*, No. 14-cv-03616-LB, 2022 WL 17330847, at *12 (N.D. Cal. Nov. 29, 2022) ("[T]welve percent of the best-case scenario is within the range courts approve."); *Reynolds v. Direct Flow Med., Inc.*, No. 17-cv-00204-KAW, 2019 WL 4168959, at *3 (N.D. Cal. Sept. 3, 2019) (approving settlement representing thirteen percent of the plaintiffs' estimated damages); *Edwards v. Nat'l Milk Producers Fed'n*, No. 11-cv-04766-JSW, 2017 WL 3616638, at *3 (N.D. Cal. June 26, 2017) (settlement of approximately thirty percent of the estimated single damages); *In re Lithium Ion Batteries Antitrust Litig.*, No. 4:13-md-02420-YGR (DMR), 2017 WL 1086331, at 4* (N.D. Cal. Mar. 20, 2017) (settlement of "11.2% of the single damages attributable to Sony sales"); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 14-cv-2058 JST, 2017 WL 565003, at *4, *6 (N.D. Cal. Feb. 13, 2017) (preliminary approval of twenty-four percent of single damages). The settlement is in line with the monetary settlement in the related state-court cases (UEBT and the California AG's affirmative lawsuit), where the direct-

purchaser class obtained approximately fifty-seven percent of single damages.[47] The risks of trial, appeal delays, and costs support approval.

Fourth, the settlement is equitable. Pro rata and prompt distribution ensures fairness. *See In re: Cathode Ray Tube (CRT) Antitrust Litig.*, No. 14-cv-2058 JST, 2017 WL 2481782, at *5 (N.D. Cal. June 8, 2017) (approving settlement distribution plan that "fairly treats class members by awarding a pro rata share to the class members based on the extent of their injuries").

Finally, the *Hanlon* factors overall support approval: strong results, high litigation risk, completed discovery, experienced counsel, and minimal objections (one withdrawn). *Ching v. Siemens Indus.*, No. 11-cv-04838-MEJ, 2014 WL 2926210, at *6 (N.D. Cal. June 27, 2014) (a court "may appropriately infer that a class action settlement is fair, adequate, and reasonable when few class members object to it" (cleaned up)); *cf. Staton*, 327 F.3d at 959 (the court should consider "reaction of the class members to the proposed settlement").

In sum, the settlement is fair, adequate, and reasonable. *Officers for Justice v. Civil Serv. Comm'n of the City and Cty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982).

4. Attorney's Fees and Costs

Class Counsel's $75.4 million fee request (thirty-three percent of the settlement fund) and $28,185,752 in costs are approved.[48]

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). The court must ensure that the award is reasonable. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). The court is not bound by the parties' settlement agreement as to the amount of fees. *Id.* at 941–43. The court must review fee awards with special rigor:

> Because in common fund cases the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage, courts have stressed that when awarding attorneys' fees from a common fund, the district court must assume the role of

[47] Mot. – ECF No. 1761-1 at 19 (citing settlement in state cases).

[48] Mot. – ECF No. 1754 at 29–30; Mot. – ECF No. 1761-1 at 15; Kim. Suppl. Decl. – ECF No. 1762.

> fiduciary for the class plaintiffs. Accordingly, fee applications must be closely scrutinized. Rubber-stamp approval, even in the absence of objections, is improper.

Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1052 (9th Cir. 2002) (cleaned up). When counsel recovers a common fund that confers a "substantial benefit" on a class, counsel is "entitled to recover their attorney's fees from the fund." *Fischel v. Equitable Life Assurance Soc'y of U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002). In common-fund cases, courts may calculate a fee award under either the "lodestar" or "percentage of the fund" method. *Id.*; *Hanlon*, 150 F.3d at 1029.

The "percentage of the fund" method is typically used. The Ninth Circuit's benchmark is twenty-five percent of the settlement, but courts diverge based on factors that include the results obtained, risks undertaken by counsel, the complexity of the issues, the length of the professional relationship, the market rate, and similar awards. *Morales v. Stevco, Inc.*, No. CIV-F-09-0704-AWI-JLT, 2013 WL 1222058, at *2 (E.D. Cal. Mar. 25, 2013); *Morris v. Lifescan, Inc.*, 54 F. App'x 663, 664 (9th Cir. 2003) (thirty-three-percent fee award); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (same).

If the court applies the percentage method, it calculates the lodestar as a cross-check to assess the reasonableness of the fees. *See, e.g.*, *Weeks v. Kellogg Co.*, No. CV-09-8102-MMM-RZx, 2013 WL 6531177, at *25 (C.D. Cal. Nov. 23, 2013); *see also Serrano v. Priest*, 20 Cal. 3d 25, 48–49 (1977); *Fed-Mart Corp. v. Pell Enters.*, 111 Cal. App. 3d 215, 226–27 (1980). The lodestar is the number of hours reasonably expended multiplied by a reasonable hourly rate. *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 26 (2000). The court has discretion to apply a multiplier to take into account other factors, "including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented." *Id.*; *accord Laffitte v. Robert Half Int'l Inc.*, 1 Cal. 5th 480, 503–06 (2016) (California standard).

The fees are appropriate as a percentage of the common fund, supported by a lodestar cross-check, the complexity and results, and the lack of objections to the settlement amount.[49] *See, e.g.*, *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 259–65 (N.D. Cal. 2015) (approving

[49] *See* Mot. – ECF No. 1754 at 24–28; Pearl Decl. – ECF No. 1754-16 at 10–30 (¶¶ 15–26); Kim Decl. – ECF No. 1754-1 at 2–5 (¶¶ 5–22), 7 (¶ 32); Report, Ex. E to Kim Decl. – ECF No. 1754-1 at 46.

benchmark twenty-five percent of the common fund); *Burden v. SelectQuote Ins. Servs.*, No. C 10-5966-LB, 2013 WL 3988771, at *4–5 (N.D. Cal. Aug. 2, 2013) (thirty-three percent, given extensive litigation, successful results, and contingency risk); *Villalpando v. Exel Direct Inc.*, Nos. 12-cv-04137-JCS, 13-cv-03091-JCS, 2016 WL 7740854, at *2 (N.D. Cal. Dec. 12, 2016) (same). Class counsel collects cases supporting the conclusion that the inherent complexity of antitrust cases is a factor that courts consider in awarding a one-third fee award.[50] The lodestar exceeds the fees sought, and counsel did not seek enhanced rates, which supports the reasonableness of the percentage fee request.[51] *Taylor v. Shutterfly, Inc.*, No. 5:18-CV-00266-BLF, 2021 WL 5810294, at *9 (N.D. Cal. Dec. 7, 2021) (counsel sought less in fees than they reasonably incurred). The objection to the gross-fee calculation is overruled because precedent supports gross-fund calculations. *In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2018 WL 3960068, at *8–9 (N.D. Cal. Aug. 17, 2018); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 953 (9th Cir. 2015); *Powers v. Eichen*, 229 F.3d 1249, 1258 (9th Cir. 2000); *Hermosillo v. Davey Tree Surgery Co.*, No. 18-CV-00393-LHK, 2021 WL 2826697, at *5 (N.D. Cal. July 7, 2021).

The expenses are reasonable and compensable, involving experts and other categories routinely charged to paying clients. Fed. R. Civ. P. 23(h) (compensable expenses include "nontaxable costs that are authorized by law or by the parties' agreement"); *Harris v. Marhoefer*, 24 F.3d 16, 20 (9th Cir. 1994) (can recover reasonable expenses that would be billed to paying clients in non-contingency matters); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995) (approving reasonable expenses in class action settlement).[52]

[50] Mot. – ECF No. 1754 at 23–24 (citing *In re Flonase Antitrust Litig.*, 291 F.R.D. 93, 104 (E.D. Pa. 2013) and collecting other cases).

[51] Report, Ex. E to Kim Decl. – ECF No. 1754-1 at 46 (attorney's fees of $81,368,771.00 at historical rates).

[52] Mot. – ECF No. 1761-1 at 34 at 23–24 & n.5 (collecting cases).

5. Service Awards

The court approves the service awards, which reflect the representatives' significant time and effort during this protracted litigation. *See, e.g.*, *Bernstein v. Virgin Am., Inc.*, No. 15-cv-02277-JST, 2023 WL 7284158, at *3–4 (N.D. Cal. Nov. 3, 2023) (service awards of $25,000 and $12,000); *Rabin v. PricewaterhouseCoopers LLP*, No. 16-cv-02276-JST, 2021 WL 837626, at *10 (N.D. Cal. Feb. 4, 2021) ($20,000); *In re Wells Fargo & Co. S'holder Derivative Litig.*, 445 F. Supp. 3d 508, 534 (N.D. Cal. 2020), *aff'd*, 845 F. App'x 563 (9th Cir. 2021) ($25,000); *Perez v. Rash Curtis & Assocs.*, No. 4:16-cv-03396-YGR, 2020 WL 1904533, at *22 (N.D. Cal. Apr. 17, 2020) ($25,000 where the plaintiff held regular meetings with class counsel for more than three years, sat for a lengthy deposition, traveled multiple times from Sacramento to Oakland to appear at trial, testified live at trial, and worked with class counsel to pursue collection efforts); *Vietnam Veterans of Am. v. Cent. Intel. Agency*, No. 09-cv-00037-CW, 2018 WL 4827397, at *1 (N.D. Cal. Oct. 4, 2018) ($20,000); *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 4:14-md-2541 CW, 2017 WL 6040065, at *11 (N.D. Cal. Dec. 6, 2017), *aff'd*, 768 F. App'x 651 (9th Cir. 2019) ($20,000).

6. Class Representative, Class Counsel, and Claims Administrator

The court confirms its appointment of the class representative, class counsel, and JND as administrator and approves $10 million in administrative costs.[53] Fed. R. Civ. P. 23(a), (g)(1).

7. Class Notice

The notice plan, executed by JND under the court-approved notice plan, satisfied Rule 23(c)(2) and due process, providing the best notice practicable with information via mail, email, digital mail, and a website. It adequately advised class members of their rights and provided all required information, including (1) a summary of the lawsuit and claims asserted, (2) a clear

[53] Order – ECF No. 901 at 2–3; Settlement Agreement, Ex. A to Kim Decl. – ECF No. 1761-2 at 12 (§ I.A.17).

definition of the class, (3) a description of the material terms of the settlement, (4) a disclosure of the release of the claims, (5) an explanation of class members' opt-out rights, a date by which they must opt out, and information about how to do so, (6) the date, time, and location of the final fairness hearing, and (7) the identity of class counsel and the provisions for attorney's fees, costs, and class-representative service awards.

8. Compliance with CAFA

The defendants complied with CAFA notice requirements under 28 U.S.C. § 1715(b), with the fairness hearing held over ninety days after service.[54]

CONCLUSION

The court approves the class-action settlement, including the fees and costs, and will separately enter the plaintiffs' proposed order and proposed form of judgment.

IT IS SO ORDERED.

Dated: November 6, 2025

LAUREL BEELER
United States Magistrate Judge

[54] Settlement Agreement, Ex. A to Kim Decl. – ECF No. 1761-2 at 14 (§ II.B.3).

TAB 1B

CONSTANTINE CANNON LLP
JEAN KIM (*pro hac vice*)
6 East 43rd Street
New York, NY 10017
(212) 350-2700
(212) 350-2701 (fax)
jkim@constantinecannon.com

Lead Counsel for Plaintiffs and the Class

THE MEHDI FIRM, PC
AZRA Z. MEHDI (220406)
95 Third Street
2nd Floor #9122
San Francisco, CA 94103
(415) 293-0070
(415) 293-0070 (fax)
azram@themehdifirm.com

Co-Lead Counsel for Plaintiffs and the Class

SHINDER CANTOR LERNER LLP
MATTHEW L. CANTOR (*pro hac vice)*
14 Penn Plaza, Ste. 1900
New York, NY 10122
(646) 960-8601
matthew@scl-llp.com
esnider@scl-llp.com

JAMES J. KOVACS (*pro hac vice*)
J. WYATT FORE (*pro hac vice*)
600 14th St NW, 5th Floor
Washington DC 20005
(646) 960-8601
james@scl-llp.com
wyatt@scl-llp.com

(*Additional counsel listed on signature page*)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DJENEBA SIDIBE, JERRY JANKOWSKI, SUSAN HANSEN, DAVID HERMAN, OPTIMUM GRAPHICS, INC., and JOHNSON POOL & SPA, on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

vs.

SUTTER HEALTH,

Defendant.

Case No. 3:12-cv-4854-LB

CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS; NOTICE OF MOTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: November 6, 2025
Time: 9:30 AM
Judge: The Honorable Laurel Beeler

NOTICE OF MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS

Please take notice that Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards, will be heard on November 6, 2025 at 9:30 a.m. Pacific Time, or as soon thereafter as the Motion may be heard, in Courtroom B on the 15th Floor of the United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, before the Honorable Laurel Beeler.

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I. PRELIMINARY STATEMENT

Class Counsel obtained an outstanding result for the Class in this hard-fought and grueling indirect purchaser antitrust class action against Sutter Health ("Sutter"). After more than 12 years of litigation, Sutter agreed to settle the case for $228.5 million. Class Counsels' recovery of 56% of the claimed single damages far exceeds the percentage recovery in many of the indirect purchaser class actions settled in this district. As a result of Class Counsel's ingenuity, hard work, and perseverance, millions of Californians will receive compensation from the settlement fund.

Class Counsel overcame substantial challenges to achieve this remarkable result for the Class. They prosecuted a novel indirect purchaser class action on behalf of health insurance subscribers who claimed they were overcharged for their premiums due to Sutter's alleged conduct. Class Counsel's development of the Class's Cartwright Act antitrust tying and course of conduct claims broke new ground in both antitrust and health care law. Indeed, the *UFCW & Employers Benefit Trust v. Sutter Health*, CGC-14-538451 (Cal. Super. Ct. S.F. *filed* April 7, 2014) (the "*UEBT*" action) litigation followed the filing of this case and obtained injunctive relief on behalf of a different class that also benefited the class here.

Class Counsel made a huge investment of time (132,739 hours) and money for expenses ($28,132,680) and shouldered an immense workload for more than 12 years. This included the investigation of Sutter's conduct and conception of claims, several motions to dismiss, four amended complaints, 17 million pages of documents, 223 deposition days, analysis of millions of lines of premium and claims data, 14 expert reports, two rounds of class certification motions and a Rule 23(f) petition, two rounds of summary judgment, two rounds of trial preparation, three rounds of jury selection, a four-week trial, and two trips to the Ninth Circuit. Much of the discovery resided with non-party insurance companies and involved massive amounts of health care claims data that is notoriously expensive and difficult to wrangle and analyze.

The risks in bringing this suit were significant and many. In Sutter, Class Counsel faced a formidable defendant with tremendous financial resources. It was represented by outstanding, and well-staffed counsel. The healthcare industry is multi-tiered and complex, and presents unique

challenges in applying antitrust laws and concepts. Class members here are indirect purchasers and never before this case had a class of premium payers been certified to maintain suit against a provider like Sutter. Despite the substantial risks, hurdles and setbacks, Class Counsel never wavered in their advocacy for the Class.

Class Counsel are a dedicated group of attorneys from a handful of small firms specializing in antitrust and class action law. Each firm invested a massive amount of resources in litigating and trying this case. Given the excellent result achieved, and the length and complexity of the case, Class Counsel seek attorneys' fees of 33% of the gross settlement ($75,405,000) and costs totaling $28,132,680. Based on historical rates (rather than current rates, as the Ninth Circuit permits), Class Counsel's total lodestar is $81,368,771. A $75,405,000 recovery would provide Class Counsel with only 93% of their lodestar, a *negative* multiplier that is well below the norm for high-risk antitrust class actions. The accompanying declaration of Richard Pearl, an expert on attorneys' fees in California, attests to the reasonableness of Class Counsel's rates.

In consideration of the substantial common fund obtained, and tremendous resources devoted by Class Counsel and their respective firms over these many years of litigation, they respectfully request that their motion for fees and costs be granted in full.

II. PROCEDURAL BACKGROUND

A. The Pleading Stage (2012-2016)

Plaintiffs filed their first complaint on September 17, 2012, alleging that Sutter was engaging in anticompetitive conduct in Northern California in violation of state and federal antitrust laws and California's Unfair Competition Law. Initially, there was only one law firm representing Plaintiffs, The Mehdi Firm. Plaintiffs amended their complaint as of right on December 10, 2012. Declaration of Jean Kim in Support of Class Counsel's Motion for Attorneys' Fees, Costs and Service Awards ("Kim. Decl."), submitted herewith, ¶ 33.

Sutter moved to dismiss the First Amended Complaint in March 2013. On June 3, 2013, the Court found that Plaintiffs had standing but dismissed the complaint for failure to allege relevant product and geographic markets. Plaintiffs filed their Second Amended Complaint on

July 1, 2013. *Id.* ¶ 34.

On August 12, 2013, Constantine Cannon LLP ("CC") joined the action as co-lead counsel for Plaintiffs. CC attorneys, Matthew L. Cantor and Jean Kim (and later James Kovacs and Wyatt Fore), entered appearances. In September 2013, the law firms of Steyer Lowenthal Boodrookas Alvarez & Smith LLP ("Steyer Lowenthal") and Farmer Brownstein Jaeger LLP ("Farmer Brownstein") joined the action as counsel for Plaintiffs. Allan Steyer, D. Scott Macrae (and later Jill M. Manning and Suneel Jain), of Steyer Lowenthal and David Brownstein (and later David M. Goldstein) of Farmer Brownstein, among others, entered appearances. *Id.* ¶ 36. These attorneys constituted the core Class Counsel team throughout the litigation.[1]

On August 2, 2013, Sutter Health filed a Motion to Dismiss the Second Amended Complaint. On November 7, 2013, the Court granted the motion for failure to allege harm in the tied market for Plaintiffs' tying claim and market power and relevant geographic market on Plaintiffs' monopolization and attempted monopolization claims. *Id.* ¶ 37.

On December 9, 2013, Plaintiffs filed the Third Amended Complaint, alleging that Sutter had engaged in tying arrangements and a course of conduct that violated federal and state antitrust laws. Plaintiffs alleged tying and tied markets for the sale of inpatient hospital services to commercial insurers in several hospital services areas ("HSAs"), based on the Dartmouth Atlas on Health Care, an industry authority.

On January 8, 2014, Sutter moved for the third time to dismiss the complaint. On June 20, 2014, the Court dismissed the Third Amended Complaint with prejudice for failure to allege relevant geographic markets. Plaintiffs appealed and litigated the appeal from December 2014 through July of 2016. *Id.* ¶ 39. On July 18, 2016, the Ninth Circuit reversed the Court's dismissal and remanded for further proceedings. *Id.* ¶ 41.

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[1] On October 1, 2024, Mr. Cantor and other CC attorneys, including Mr. Kovacs and Mr. Fore, founded Shinder Cantor Lerner LLP ("SCL"). They and other SCL attorneys have worked on this matter since that time on behalf of the Class. *See* Declaration of Matthew L. Cantor ("Cantor Decl."), submitted herewith, ¶¶ 8-9. On November 1, 2024, Ms. Manning founded The Manning Law Firm and continued to prosecute the action on behalf of the Class at her new firm. *See* Declaration of Jill M. Manning ("Manning Decl."), submitted herewith.

B. Fact and Expert Discovery (2016-2021)

Upon remand, the parties commenced six years of extensive discovery. While the parties litigated Sutter's motions to dismiss and the appeal of the Court's dismissal, a different group of plaintiffs on April 7, 2014, filed a complaint on behalf of a putative class of direct purchasers in California Superior Court challenging similar conduct challenged here. *UFCW & Employers Benefit Trust v. Sutter Health*, CGC-14-538451 (Cal. Super. Ct. S.F. *filed* April 7, 2014) (the "*UEBT*" action). The *UEBT* action had entered the discovery phase by the time this case was remanded. Given the similarity of the facts and claims between the cases, discovery was consolidated and coordinated. On March 29, 2018, the California Attorney General sued Sutter in California Superior Court, also based upon conduct similar to that at issue here, alleging violations of antitrust law. *California ex rel. Xavier Becerra v. Sutter Health*, CGC-18-565398 (Cal. Super. Ct. S.F. *filed* March 29, 2018) (the "AG" action, and together with *UEBT*, the "State Actions"). Thereafter, discovery was coordinated across all three actions. *Id.* ¶¶ 42-43.

Plaintiffs propounded and responded to significant discovery that ran from 2016 through 2021. Over 2.5 million documents (over 17 million pages) were produced by the parties and non-party health plans and other third parties. Much of the discovery sought, including paid claims and premium data required to analyze liability and damages, was from non-party health plans who negotiated with Sutter for the provision of inpatient hospital services. Negotiating and obtaining discovery from Anthem Blue Cross, Blue Shield, United Healthcare, Health Net and Aetna (the "Health Plans") was difficult and very time consuming. *Id.* ¶ 45.

To review the substantial discovery produced by Sutter and the Health Plans, Plaintiffs retained additional law firms, including Keller Grover, Schneider Wallace and Scott & Scott. Class Counsel led discovery efforts and oversaw the review of millions of documents. *Id.* ¶ 46. Plaintiffs also retained economists and health care data analysists from Berkeley Research Group ("BRG") to "clean" and prepare the millions of lines of paid claims and premium data for economic analysis. This was a huge and expensive undertaking given the size and nature of the data sets from each of the five Health Plans. *Id.* ¶ 47. Once discovery had been reviewed and

analyzed, the parties conducted 155 depositions of fact witnesses, the vast majority in-person, many of them multi-day, amounting to 223 deposition days. *Id.* ¶ 48.

The parties also engaged in substantial expert work and discovery. Plaintiffs retained three experts: 1) Dr. Tasneem Chipty, an esteemed Ph.D. economist who has testified on behalf of the United States in health care antitrust matters and who, in this case, opined on the issues of class certification, relevant markets, liability, antitrust impact, and damages; 2) Dr. Kenneth Kizer, a former Undersecretary of the U.S. Department of Health and Human Services, who served as Plaintiffs' health care industry expert, opining on hospital quality and competition, integration of care and industry background; and 3) Mr. David Axene, a health care actuarial expert with over 50 years of experience in California, who opined on premium construction, an actuarial approach to tracing the impact of alleged overcharges through to health insurance premiums, and other issues relevant to class certification and common impact. Class Counsel worked with each of these experts in preparing their reports: Dr. Chipty issued eleven different expert reports. Class Counsel also prepared these experts for and defended them in deposition. Dr. Chipty was deposed for a total of five different days over the span of the case. *Id.* ¶ 49.

Sutter retained seven experts: 1) Dr. Robert Willig, Ph.D., an economist on the Princeton University faculty who previously served as the head of the economics bureau of the Antitrust Division of the U.S. Department of Justice; 2) Dr. Gautam Gowrisankaran, Ph.D., an economist on the Columbia University faculty; 3) Jonathan Orzag, an economist who founded Compass Lexecon; 4) Dr. Jonathan Skinner, Ph.D., a health care economist; 5) Patrick Pilch, a health care industry expert; 6) Shannon Keller, a health care actuarial expert; and 7) Patrick Travis, a health care industry executive with expertise in purchasing and pricing of health insurance. Class Counsel reviewed and analyzed all the reports prepared by these experts – Willig and Orszag produced 9 reports alone – and prepared for and took depositions of the defense experts. *Id.* ¶ 50.

Plaintiffs' experts, with Class Counsel assistance, produced 14 expert reports and Sutter's produced 23 reports. In total, Class Counsel defended or took 28 days of expert deposition testimony. *Id.* ¶ 51.

C. Class Certification (2018-2020)

Class Counsel prosecuted two substantial class certification motions between 2018 and 2020. Plaintiffs moved to certify an indirect purchaser class of premium payers on July 27, 2018. Thereafter, the Court issued its opinion certifying a Federal Rule of Civil Procedure 23(b)(2) injunctive class only on October 18, 2019. The Court denied the motion with respect to a Rule 23(b)(3) damages class, concluding that Dr. Chipty's analysis was insufficient to show antitrust injury and damages on a class-wide basis. *Id.* ¶ 52.

Plaintiffs moved again to certify a Rule 23(b)(3) damages class on January 27, 2020. Dr. Chipty expanded her analysis to include data from all five Health Plans, specified regression analyses based upon Center for Medicare and Medicaid Services (CMS) data, and used other available data that supported her opinions on class-wide injury and damages. Class Counsel worked closely with Dr. Chipty in her development of a rigorous analysis that would support certification of the indirect purchaser premium payer class. On July 30, 2020, the Court granted Plaintiffs' motion and certified a Rule 23(b)(3) class of premium payers. The Court appointed CC as Lead Class Counsel and The Mehdi Firm as Co-Lead Class Counsel on August 3, 2020. *Id.* ¶¶ 53-54.

Upon certification, Class Counsel vetted claims administrators to prepare and send notice to the Class. Plaintiffs retained JND Legal Administration based on its experience, reputation, and the strength of its proposal. Counsel worked with JND on a proposed notice plan and supporting papers and submitted them for the Court's consideration. *Id.* ¶ 55. The Court issued an Order approving Plaintiffs' Notice Plan on November 5, 2020.

Thereafter, Class Counsel worked with JND to effectuate notice between November 2020 and March 2021. Notice was provided to class members via mail, email, and print and digital publication. *Id.* ¶ 56. The deadline to opt out of the Class was March 8, 2021.

D. Summary Judgment (2017-2019; 2020-2021)

On October 5, 2017, Sutter moved for early summary judgment, claiming that Plaintiffs lacked sufficient evidence to prove their alleged relevant geographic markets for inpatient hospital

services. *Id.* ¶ 57.

The parties submitted substantial expert reports and conducted expert discovery of Dr. Chipty's and Dr. Gowrisankaran's geographic market opinions. Dr. Chipty's analysis supported Plaintiffs' market definition allegations for 11 out of the 12 geographic markets alleged for inpatient hospital services in Northern California. *Id.* ¶ 58. Market definition is a costly and expert-heavy exercise in antitrust litigation. In a typical antitrust case, one or two markets may be contested. Here, Plaintiffs had the burden of supporting the market definition for twelve geographic markets.

Briefing submitted in connection with summary judgment, and for motions to exclude both Dr. Chipty and Dr. Gowrisankaran was voluminous and fully fleshed out each side's arguments and the evidence gathered in discovery. On April 12, 2019, the Court, in a 70-page opinion, denied Sutter's motion for summary judgment with respect to eleven of Plaintiffs' twelve alleged geographic markets and granted Sutter's motion with respect to the Davis market. *Sidibe v. Sutter Health*, No. 12-cv-04854-LB, 2019 WL 2078788 (N.D. Cal. May 9, 2019) (ECF No. 673). The Court's decision left for trial the complicated and dense fact dispute regarding the scope of the alleged relevant markets. Although the parties stipulated that the product market was inpatient hospital services, they litigated through trial whether the market included or excluded Kaiser Permanente. Kim Decl. ¶ 59.

After fact discovery ended on July 27, 2020, Plaintiffs moved for partial summary judgment on the distinct products element of their tying claim. On October 23, 2020, the Court granted that motion. *Id.* ¶ 60. On August 22, 2020, Sutter moved for summary judgment on several potentially dispositive issues, including whether Sutter's contracting practices constituted tying arrangements. On March 9, 2021, the Court, denied Sutter's motion aimed at Plaintiffs' *per se* and rule of reason tying claims and their course of conduct claim. *Sidibe et al. v. Sutter Health*, No. 12-cv-04854-LB, 2021 WL 879875 (N.D. Cal. Mar. 9, 2021) (ECF No.962). The Court granted Sutter's motion regarding Plaintiffs' Sherman Act Section 2 claims and damages claims from 2008 to 2010. *Id.* ¶ 61. The summary judgment motions involved exhaustive

briefing, hundreds of exhibits, and substantial expert declarations. *Id*.

E. Settlement in the State Actions (2019-2020)

In late 2019, Sutter settled with the AG and *UEBT* plaintiffs in the State Actions for monetary relief and significant injunctive relief relating to Sutter's contracting practices with insurers. The injunctive relief also benefitted the Class here. It included terms that prohibit conduct challenged in this case related to Sutter's contracting practices with Health Plans concerning network participation, steering, tiering, out-of-network pricing, and availability of pricing information. The injunction also appointed a monitor to ensure Sutter's compliance. *See Id.* ¶ 62. The release in the settlement agreement in the State Actions explicitly carved out the claims in this matter. *Id.* Class Counsel had worked closely and productively with the AG and *UEBT* plaintiffs' counsel throughout the litigation through the settlement of those actions – that work benefitted the prosecution of the State Actions. Kim Decl. ¶ 63.

F. Pretrial Work (2021-2022)

Due to delays caused by the COVID-19 pandemic and witness availability, the parties prepared for the first trial three separate times. *Id.* ¶ 64.

Trial was scheduled to commence on October 4, 2021. Starting in January 2021, the parties began working diligently for months to prepare exhibit lists, trial witness lists, and designations of deposition testimony. The parties exchanged those materials and held extensive meet and confers for months regarding exhibits and deposition designations. Collectively, there were thousands of exhibits on the parties' exhibit lists and many hours of deposition designations. *Id.* ¶ 65. Class counsel spent many hundreds of hours culling the record to identify relevant testimony and exhibits for trial, responding to objections, and meeting and conferring with Sutter's counsel. *Id.* ¶ 66.

The parties also submitted thirteen *in limine* and additional *Daubert* motions to exclude expert evidence under Fed. R. Evid. 702. On August 30, 2021, the Court issued an order denying all seven of Plaintiffs' *in limine* motions and granting all six of Sutter's *in limine* motions. The order precluded Plaintiffs from offering any evidence from before January 1, 2006, unless the

Court ordered otherwise. In response, Plaintiffs made an offer of proof relating to 23 pieces of evidence otherwise precluded by the Court's pre-2006 *in limine* ruling: that Offer of Proof was denied as to all 23. The Court also largely denied the parties' Rule 702 motions. *Id.* ¶ 67.

On September 23, 2021, the Court continued the October 4, 2021 trial date until January 6, 2022. On December 16, 2021, after Class Counsel reviewed scores of completed jury questionnaires, the parties conducted *voir dire* and selected a jury. But on January 5, 2022, the day before trial was scheduled to commence, the Northern District suspended all jury trials due to the outbreak of another strain of COVID. Trial was rescheduled to commence on February 10, 2022. After Class Counsel again reviewed scores of jury questionnaires, the parties conducted *voir dire* and selected a jury on February 9, 2022. *Id.* ¶ 68.

G. Jury Trial (2022)

From February 10, 2022 to March 11, 2022, the Court conducted a four-week trial. Class Counsel spent hundreds of hours preparing Plaintiffs' witnesses for trial, including Plaintiffs' experts. Class Counsel also spent hundreds of hours preparing cross-examinations for numerous witnesses that Sutter would eventually call and a number that Sutter did not. *Id.* ¶ 69.

During 19 full trial days, over four weeks, Class Counsel examined and elicited testimony from 50 witnesses, including six expert witnesses. Three hundred and fifty-one exhibits were entered into evidence. *Id.* ¶ 70. Class Counsel secured the testimony from non-party Health Plan witnesses regarding Sutter's contracting practices and the impact of Sutter's conduct on premiums. Three of the six Class Representatives (Djeneba Sidibe, David Herman and Susan MacAusland for Optimum Graphics, Inc.) testified on behalf of the Class regarding their premium payments and the relief they hoped to achieve from the lawsuit. Sutter called 22 witnesses in its case – all of whom Class Counsel cross-examined. Six experts testified at trial. *Id.* ¶ 71. Dr. Chipty testified to her liability and damages opinions (asserting that the Class had incurred damages of approximately $411 million between January 1, 2011 and March 31, 2020) and explained how the overcharges resulting from Sutter's conduct were passed on through higher premiums to Class Members. Sutter's experts opined that the Class was not injured by Sutter's

conduct and did not incur damages. *Id.* ¶ 72.

On March 11, 2022, the jury rendered a verdict in Sutter's favor. Final judgment was entered on March 29, 2022. *Id.* ¶ 74.

H. Appeal of Jury Verdict (2022-2024)

Plaintiffs appealed the Final Judgment and *in limine* and other rulings that precluded Plaintiffs from presenting any pre-2006 evidence at trial. Class Counsel argued that evidence of Health Plan negotiations before and after Sutter's systemwide contracting and anticompetitive contract terms had been forced on health plans supported their tying claims. Class Counsel argued that they were prejudiced at trial as the result of preclusion of this evidence. *Id.* ¶ 75.

Plaintiffs also appealed the Court's revision of CACI jury instructions on their course of conduct claim, arguing that instruction eliminated consideration of the history and purpose of Sutter's restraints. Lastly, Plaintiffs appealed the Court's Orders denying their request to define the "relevant purchaser" as the health plans and their motion for sanctions. *Id.* ¶ 76.

The appellate record consisted of 33 volumes of supporting materials culled from the 20 trial transcripts, 351 trial exhibits, and 1,500+ docket entries, including dozens of excluded documents, trial court transcripts and other materials. Class Counsel facilitated and coordinated efforts of several amici who filed *amicus curiae* briefs in support of the Class. *Id.* ¶ 77.

On August 24, 2023, the Ninth Circuit heard oral argument on the appeal. On June 4, 2024, the Ninth Circuit, in a 2-1 decision, reversed the jury verdict based on the revisions to the CACI jury instructions and preclusion of pre-2006 evidence. *Sidibe v. Sutter Health*, 103 F.4th 675 (9th Cir. 2024) (ECF No. 147-1). In a separate memorandum, the Ninth Circuit affirmed the Court's "relevant purchaser" instruction and its denial of Plaintiffs' motion for sanctions (ECF No. 148-1).

On July 18, 2024, Sutter filed a Petition for Rehearing and Rehearing *En Banc* in the Ninth Circuit (ECF No. 152). Class Counsel prepared an Answer to that Petition, but, ultimately, did not need to file it, as that Petition was denied on August 12, 2024 (ECF No. 153). The Ninth Circuit thereafter issued its mandate reversing and remanding on August 19, 2024 (ECF No. 154).

I. Re-Trial and Settlement (2024-2025)

Plaintiffs immediately sought to schedule a re-trial and began preparations for it. Kim Decl. ¶ 80. On November 6, 2024, the Court ordered a re-trial to commence on March 3, 2025 and the parties began preparing for the second trial. The parties made supplemental pretrial exchanges and met and conferred regarding the witnesses, exhibits, and testimony designations. They also subpoenaed and prepared witnesses for trial testimony. The parties appeared at several pre-trial hearings to argue new *in limine* motions and jury instructions and coordinate on logistics for trial. *Id.*

Class Counsel again spent many hours preparing direct and cross exams, preparing witnesses, creating demonstratives, making and opposing motions *in limine* and briefing verdict form and jury instruction issues. On February 27, 2025, after Class Counsel again reviewed scores of jury questionnaires, the parties conducted *voir dire* and selected a jury. They finalized trial logistics and prepared to give opening statements a few days later, on March 3, 2025. *Id.* ¶ 81.

Counsel facilitated and participated in settlement discussions throughout this litigation, including a formal mediation session and follow-up conversations from 2019 through 2021. *Id.* ¶ 82. In the lead up to the re-trial, the parties retained Gregory Lindstrom of Phillips ADR to mediate their dispute. They had numerous communications with Mr. Lindstrom and held an in-person mediation with him in January 2025. Counsel also participated in direct settlement communications. After the jury was selected, but the day before opening statements, the parties reached an agreement in principle to settle the matter for $228.5 million. The parties informed the Court of their agreement and filed a notice of settlement on March 2, 2025. *Id.*

Class Counsel and counsel for Sutter thereafter negotiated a settlement agreement over five weeks. These were arms-length negotiations involving multiple rounds of comments and back and forth regarding the terms of settlement. On April 24, 2025, the parties executed the settlement agreement. Class Counsel also prepared a plan of distribution in consultation with the claims administrator, JND. *Id.* ¶ 20. Plaintiffs submitted their motion for preliminary approval on April 25, 2025. The Court heard the motion and granted preliminary approval and a schedule through

the final approval hearing on May 22, 2025. *Id.* ¶ 21.

J. Class Counsel's Lodestar and Expense Reports

Throughout this case, Class Counsel worked diligently and efficiently to prosecute this matter. Unlike many antitrust class actions of this magnitude, they had no need of a leadership committee because only a handful of law firms were involved. CC, SCL, Farmer Brownstein, Steyer Lowenthal, The Mehdi Firm and The Manning Law Firm are each small law firms with only a few attorneys working on the case. Together, they ran a lean and collegial legal team. Virtually all the senior lawyers litigated this case since almost the very beginning. Kim Decl. ¶ 36. That continuity eliminated the waste and duplication caused by having new attorneys cycling through and billing hours to get up to speed and learn the case. CC, as Lead counsel, conducted regular team calls to coordinate and organize the workflow. *Id.* ¶ 6.

The Lodestar report of each firm is based upon contemporaneously maintained time records and tracks the attorney hours during this long-running case.[2] CC attorneys had the largest lodestar given their leadership of the strategy, briefing, expert work, appeals, and trial presentation since they joined the case in 2013. Mr. Cantor, is a seasoned healthcare antitrust litigator, and conducted both appellate oral arguments, as well as oral argument on virtually all dispositive motions. He led strategy throughout the litigation and was lead trial counsel. *Id.* ¶ 10. Ms. Kim is an experienced antitrust litigator with over 20 years of experience; she led all aspects of the litigation and oversaw much of the trial preparation. *Id.* ¶ 11.

CC provided much of the associate, staff attorney, paralegal and secretarial support in the case. CC's IT staff set up and hosted the discovery, review and trial preparation platforms that were utilized by the plaintiff team. CC's experienced electronic discovery personnel managed the

[2] Each Class Counsel firm provides summary hour and lodestar information in declarations submitted herewith. *See* Kim Decl. for CC; Cantor Decl. for SCL; Declaration of David Brownstein ("Brownstein Decl.") for Farmer Brownstein Jaeger Goldstein Klein & Siegel LLP; Declaration of Azra Mehdi ("Medhi Decl.") for the Mehdi Firm; and Manning Decl. for Ms. Manning's time at Pearson Warshaw and The Manning Law Firm. Scott & Scott LLP, Schneider Wallace Cotrell Kim LLP, and Keller Grover LLP each also submitted declarations in support of their lodestar and expense reports ("Scott Decl.," "JHK Decl." and "Grover Decl." respectively).

review of millions of documents and the preparation of deposition kits, exhibit lists and provided a full suite of litigation support. *Id.* ¶¶ 8, 20.

Importantly, over $27.5 million of the $28,132,680 of costs were borne by CC alone. *Id.* ¶ 22 & Ex. C. A large portion of those costs was for the significant economic expert work. *Id.* Reports of expert fees and expenses, broken out annually, track the work that Dr. Chipty, BRG, Matrix Economics, and Alix Partners did to support Dr. Chipty's opinions on 12 geographic markets, market power, market analysis, class certification, liability and damages and to respond to the opinions of Dr. Willig, Mr. Orszag and Dr. Gowrisankaran on these subjects. *Id.* Ex. D. Dr. Kizer and Mr. Axene also provided expert opinions and responsive expert materials and were compensated for their work. Discovery costs, including for depositions, transcripts and video, document database storage, and office services costs were borne predominantly by CC. All trial vendor and trial-related costs too were paid by CC. *Id.* ¶ 22-29 & Ex. C. Funding the costs of this massive litigation for 12.5 years was a huge and risky undertaking for a boutique firm like CC.

Mr. Cantor, after starting his own firm, SCL, in October 2024, continued to act as Lead Trial Counsel. *See* Cantor Decl. ¶ 8. The Mehdi Firm undertook the initial investigation and filed the original lawsuit, and Ms. Mehdi handled much of the defensive plaintiff discovery and participated in preparing plaintiffs for deposition and trial. *See* Mehdi Decl. ¶¶ 8-13. Farmer Brownstein participated in all aspects of the litigation and worked closely with the senior team on strategy, briefing, discovery and trial. Mr. Brownstein and Mr. Goldstein brought to the team their experience (predominantly on the defense side) in specialized areas of antitrust law, such as tying claims, as well as their wealth of complex litigation and class action experience. *See* Brownstein Decl. ¶¶ 2-12. Steyer Lowenthal brought its local expertise in class action and antitrust law and participated in discovery, briefing, legal research, strategy and trial. Mr. Steyer brought his trial expertise and Mr. Macrae was invaluable in supporting the briefing and many written submissions in the litigation. *See* Steyer Decl. ¶¶ 1-12. Ms. Manning handled Plaintiff defensive discovery, offensive discovery, and participated actively in trial preparation and trial for the first and second trials, including drafting trial documents, negotiating the admission of trial exhibits, and preparing

Class Representatives to testify. *See* Manning Decl. ¶¶ 5, 17.

Daily time and expense records for the 12 years of litigation are not being submitted due to their size but are available for review upon the Court's request. Class Counsel's lodestars are based upon historical rates charged at each firm and are broken out on an annual basis to enable more granular review. As evident from these reports and confirmed by Richard Pearl, a well-regarded fee expert, Class counsels' rates were consistently in line with historical market rates for antitrust litigators of their experience and skill. *See* Declaration of Richard M. Pearl in Support of Class Counsel's Motion for Attorneys' Fees, submitted herewith.

Had Class Counsel calculated lodestars based upon current rates, the total lodestar would be $97,445,991. Kim Decl. ¶ 32 & Ex. E.

K. Class Representative Participation

Class representatives Djeneba Sidibe and Jerry Jankowski each participated in the litigation during its 12.5 years and diligently represented the interests of the Class. Class Representatives David Herman, Susan Hansen, Optimum Graphics, Inc., through Susan MacAusland, and Johnson Pool & Spa, through Tina Feeney, joined the case in September 2017, when the Fourth Amended Complaint was filed. Ms. Sidibe, Mr. Herman, and Ms. MacAusland testified in person at the first trial in 2022 and all class representatives, with the exception of Mr. Herman, due to health reasons, prepared to provide testimony at the second trial. In preparing for trial testimony, each plaintiff gave many hours of their time to refresh themselves regarding the facts surrounding their claims for relief.

Each Class Representative produced documents, responded to discovery requests and sat for deposition. And each, through Ms. Mehdi or Ms. Manning, kept abreast of major developments in the case. Each has provided a declaration submitted herewith that provides additional detail regarding their involvement and time devoted to maintaining this suit as plaintiffs and fulfilling their duties as class representatives.[3]

[3] The declarations of Djeneba Sidibe, David Herman, Susan Hansen, Susan MacAusland, Jerry Jankowski and Tina Feeney are submitted herewith.

III. ARGUMENT

A. Legal Standard

Counsel who represent a class and produce a benefit for the class members are entitled to be compensated for their services. As the Supreme Court has held, "this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("*Boeing*"); *see also Mills v. Elec. Auto-Lite Co*., 396 U.S. 375, 393 (1970) ("*Mills*"). In *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), the U.S. Supreme Court recognized that, under the common fund doctrine, a reasonable fee may be based "on a percentage of the fund bestowed on the class." The purpose of this doctrine is that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Wash. Pub. Power Supply Sys. Sec. Litig*., 19 F.3d 1291, 1300 (9th Cir. 1994) ("*WPPSS*").

This doctrine applies equally and specifically to antitrust litigation. The Supreme Court repeatedly has recognized the importance of private antitrust litigation as a necessary and desirable tool to ensure the effective enforcement of the antitrust laws. *See*, *e.g*., *Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983); *Reiter v. Sonotone Corp*., 442 U.S. 330, 331 (1979); *State of Haw. v. Standard Oil Corp*., 405 U.S. 251, 266 (1972). Substantial fee awards in successful cases encourage meritorious class actions and thereby promote private enforcement of, and compliance with, antitrust laws. *Perma Life Mufflers, Inc. v. Int'l Parts Corp*., 392 U.S. 134, 139 (1968) ("[T]he purposes of the antitrust laws are best served by ensuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.").

Courts in the Ninth Circuit regularly award fees as a percentage-of-the-recovery in common fund cases. *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). "Many courts and commentators have recognized that the percentage of the available fund analysis is the preferred approach in class action fee requests because it more closely aligns the interests of the counsel and the class, *i.e.*, class counsel directly benefit from increasing the

size of the class fund and working in the most efficient manner." *Khoja v. Orexigen Therapeutics, Inc.*, No. 15-cv-00540-JLS-AGS, 2021 WL 5632673, at *8 (S.D. Cal. Nov. 30, 2021); *Aichele v. City of L.A.*, 2015 WL 5286028, at *5 (C.D. Cal. Sept. 9, 2015).

Under the percentage-of-the-fund approach, the district court awards a percentage of the fund created by the attorneys' efforts as their reasonable attorneys' fee. *Stanger v. China Elec. Motor, Inc*., 812 F.3d 734, 738 (9th Cir. 2016). The percentage-of-recovery for fee computation purposes is based on the total amount of that fund made available. *Boeing*, 444 U.S. at 479-80; *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997). Ninth Circuit cases often treat 25% as a benchmark percentage. *See*, *e.g.*, *In re Google Inc. Street View Elec. Commc'ns Litig.*, 21 F.4th 1102, 1120 (9th Cir. 2021).

However, "[a] one-third fee award is standard in complex antitrust cases[,]" such as this one. *In re Flonase Antitrust Litig*., 291 F.R.D. 93, 104 (E.D. Pa. 2013). Many courts, in this Circuit and others, provide for an upward departure due to the inherent complexity of the legal issues involved and the risk assumed by the attorneys involved in complex antitrust cases. *See In re Capacitors Antitrust Litig*., No. 3:17-md-02801-JD, 2023 WL 2396782 at *1 (N.D. Cal. Mar. 6, 2023) ($66,000,000 attorneys' fees award amounted to 40% of the Settlement Fund created by that round of settlements, and a cumulative 31% of the total settlements); *In re Lidoderm Antitrust Litig*., MDL No. 2521, 2018 WL 4620695, at **1, 4 (N.D. Cal. Sept. 20, 2018) (awarding fees of $34,916,000 and finding that "a fee award of one-third is within the range of awards in this Circuit."); *Meijer, Inc. v. Abbott Lab'ys*, No.: No C. 07-5985 CW, 2011 WL 13392313, at *2 (N.D. Cal. Aug. 11, 2011) (awarding 33 1/3% of $52,000,000 recovery); *In re Pork Antitrust Litig*., No. 18-1776 (JRT/JFD), 2022 WL 4238416, at *7 (D. Minn. Sept. 14, 2022) (awarding 33% of settlement fund as attorneys' fees in consumer indirect purchaser action); *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig*., 14-md-02542 (VSB), 2021 WL 2328431, at *1 (S.D.N.Y. June 7, 2021) (awarding 33 1/3% of a $31 million settlement fund as attorneys' fees in indirect purchaser action); *In re Aggrenox Antitrust Litig*., No. 3:14 MD 2516 (SRU), 2018 WL 10705542, at *5 (D. Conn. July 19, 2018) (awarding 33 1/3% of a $50 million settlement fund as

attorneys' fees in indirect purchaser action); *In re Polyurethane Foam Antitrust Litig*., No. 1:10 MD 2196, 2015 WL 1639269, at *7 (N.D. Ohio Feb. 26, 2015) (awarding 30% fee on $147.8 million settlement fund); *In re Linerboard Antitrust Litig*., No. MDL 1261, Civ.A. 98–5055, 2004 WL 1221350 (E.D. Pa. June 2, 2004) (30% fee on $202.5 million settlement fund); *In re Buspirone Antitrust Litig*., 2003 U.S. Dist. LEXIS 26538 (S.D.N.Y. Apr. 11, 2003) (33.3% fee of a $220 million dollar fund); *In re Vitamins Antitrust Litig*., 2001 U.S. Dist. LEXIS 25067 (D.D.C. July 13, 2001) (34% fee on $365 million settlement fund).

Other class actions in this district awarding 33% or more include *Koeppen v. Carvana, LLC*, No. 21-cv-01951-TSH, 2024 WL 3925703, at *9-10 (N.D. Cal. Aug. 22, 2024) (awarding attorneys' fees of 35% of recovery); *Suarez v. Bank of Am., Nat'l Ass'n*, No. 18-cv-01202-LB, 2024 WL 150721, at *2 (N.D. Cal. Jan. 11, 2024) (awarding one third of settlement amount) *Roe v. SFBSC Mgmt., LLC*, No. 14-cv-03616-LB, 2022 WL 17330847, at *19 (N.D. Cal. Nov. 29, 2022); *Nucci v. Rite Aid Corp.*, No. 19-CV-01434-LB, 2022 WL 1693711, at *8 (N.D. Cal. May 26, 2022) (awarding 33% of settlement amount); *see also In re Pac. Enters. Sec. Litig*., 47 F.3d 373, 379 (9th Cir. 1995) (affirming award of 33%) *Morris v. Lifescan, Inc*., 54 F. App'x 663, 664 (9th Cir. 2003) (same).

B. The Requested 33% Fee Award Is Reasonable Under the Percentage-of-Recovery Method

Class Counsel's request of 33% of the gross settlement is more than reasonable given the magnitude, duration, complexity and risks of this litigation, as well as the substantial settlement achieved. In common fund cases, "[s]election of the benchmark or any other rate must be supported by findings that take into account all of the circumstances of the case." *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1048 (9th Cir. 2002). Relevant circumstances of the case include the results counsel achieved for the class, the risk of litigation, counsel's performance, the contingent nature of the representation and the financial burden of the litigation. *Id*. at 1050-51; *see also Stanger*, 812 F.3d at 740.

1. Class Counsel Obtained Outstanding Relief for the Class

The $228.5 million cash Settlement provides the Class Members with significant relief. It provides them with approximately 56% of their $411 million in single damages.[4] As the Court has observed, "the quality of relief to the class was extremely strong." Hr'g Tr. 5/22/2025 at 14:2-15:1. Particularly coming back from a jury verdict rendered against them in the first trial, and defeating multiple dispositive motions seeking to defeat Plaintiffs' claims, the amount and fact of the settlement is an outstanding result for the Class. Many class members, especially large employers like CalPERS, the University of California and the City and County of San Francisco stand to recover substantial damages. Others in the over three million member class will also recover from the Settlement Fund. None of these recoveries would have been possible without this litigation. The expense and magnitude of prosecuting the antitrust claims here would have made it highly improbable for any one Class Member to have obtained a similar recovery.

2. There Were Many Risks in This Case

As outlined above, Class Counsel endured and overcame substantial risk in pursuing this litigation *Stanger*, 812 F.3d at 740 (including risk of litigation as a factor in determining whether the requested attorneys' fees are reasonable); *Koeppen*, 2024 WL 3925703, at *12 ("the risk that further litigation might result in not recovering at all is a significant factor in the award of fees."); *Suarez*, 2024 WL 150721, at *3 (Class Counsel "obtained excellent benefits for the class despite a vigorous and skillful defense, and there were significant risks involved with the litigation.) *In re Heritage Bond Litig*., No. 02–ML–1475 DT, CV 01–5752 DT (RCX), 2005 WL 1594403, at *20

[4] This is a significantly higher percentage than other settlements the courts in this District readily approve. *See, e.g*., *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 954, 956 (9th Cir. 2009) (settlement of approximately 30% of the estimated single damages); *In re Lithium Ion Batteries Antitrust Litig*., No. 4:13-md-02420-YGR (DMR), 2017 WL 1086331, at 4* (N.D. Cal. Mar. 20, 2017) ("settlement represents 11.2% of the single damages attributable to Sony sales"); *In re Cathode Ray Tube (CRT) Antitrust Litig*., No. 14-cv-2058 JST, 2017 WL 565003, at *4, *6 (N.D. Cal. Feb. 13, 2017) (settlement representing 24% of single damages); *Roe,* 2022 WL 17330847, at *12 ("twelve percent of the best-case scenario is within the range courts approve."); *Reynolds v. Direct Flow Med., Inc.*, No. 17-cv-00204-KAW,2019 WL 4168959 *3 (N.D. Cal. Sept. 3, 2019) (settlement representing 13% of plaintiffs' estimated damages).

(C.D. Cal. June 10, 2005) ("the novelty, difficulty and complexity of the issues involved are significant factors in determining a fee award.").

Antitrust cases typically are risky and high-stakes and this one was no different. The issues of market definition, market power, liability and damages were not easy to prove. Plaintiffs' claims involved 12 geographic markets and the hotly contested issue of market power within each of those markets. The pervasiveness of Kaiser Permanente in Northern California posed a high degree of risk in proving Sutter's market power. Health care markets are inherently complex with its overlay of regulation and multi-tiered stages of distribution. The presence of managed care, added a layer in the chain of distribution that further complicated the analysis, as it is the health insurer who negotiates and pays providers for the care provisioned for its members. Nonetheless, Class Counsel defeated summary judgment motions and moved the case to trial.

Class Counsel also faced the risk of the class not being certified. A premium-payor indirect purchaser class against a provider had never, before this case, been certified. Class counsel had to work through two rounds of class certification motion practice. Dr. Chipty performed two tranches of analyses in support of certification. The briefing was exhaustive and the amount of data analyzed massive. Thousands of attorney hours were expended on developing the predicate for class certification, the Rule 23 briefing, and the expert work in support.

Class Counsel was able to achieve a retrial when the Ninth Circuit reversed the Final Judgment. Convincing an appellate court to order retrial of a four-week jury trial, particularly an antitrust class action that resulted in a defense verdict, was no easy task. This was critical in this case, as the Class would have achieved no recovery had the verdict stood. Finally, the importance of that appellate ruling is demonstrated by the fact that Sutter agreed to settle on the eve of the second trial.

3. The Skill Required and the Quality of the Work Justifies the Request

As noted above, this case involved factual investigation and research, complex and detailed analyses of antitrust law and economics, difficult and protracted discovery, a vast evidentiary record, two successful appeals, and a full jury trial, with a second one imminent at the

time of settlement. The settlement was hard-fought and negotiated against formidable and skilled opposing counsel at Jones Day. Both David Kiernan and Jeffrey LeVee, lead counsel for Sutter, are excellent antitrust attorneys who have led numerous successful defenses over their years of practice. Their co-counsel at Bartko Pavia (formerly Bartko Bunzel), were also highly skilled.

Courts also consider "the quality of opposing counsel as a measure of the skill required to litigate the case successfully." *In re Apple Inc. Device Performance Litig*., No. 5:18-md-02827-EJD, 2023 WL 2090981, at *14 (N.D. Cal. Feb. 17, 2023); *Heritage Bond*, 2005 WL 1594403, at *20 (noting that quality of opposing counsel is important in evaluating the quality of plaintiff's counsel's work, and stating "[t]here is also no dispute that the plaintiffs in this litigation were opposed by highly skilled and respected counsel with well-deserved local and nationwide reputations for vigorous advocacy in the defense of their clients.") (internal quotations omitted).

Class Counsel are experienced antitrust and class action attorneys. Kim Decl. ¶¶ 5-22. The Court has witnessed the caliber of their written submissions, oral advocacy, and trial presentation. At the preliminary approval hearing, the Court commended both sides for their "extraordinary" representation. 5/22/25 Hr'g Tr. at 14:14-17. Such qualifications should also be taken into account when evaluating an appropriate fee award. *See Fernandez v. CoreLogic Credco, LLC*, No.: 20cv1262 JM (SBC), 2024 WL 3209391, at *16 (S,D,. Cal. June 24, 2024) (approving a fee award based in part on the experience of counsel); *see also In re Vitamins Antitrust Litig*., No. 99-197 (TFH), MDL 1285, 2001 WL 34312839, at *11 (D.D.C. July 16, 2001) ("The experience, skill and professionalism of counsel and the performance and quality of opposing counsel all weigh in favor of the requested fee.").

4. The Contingent Fee Nature of the Case and the Financial Burden Carried by Class Counsel

The contingent nature of Class Counsel's representation also supports their fee request. Class Counsel took on this case and the out-of-pocket costs to prosecute it, with the understanding that they would be compensated only if they succeeded. CC alone bore the vast majority of the over $28 million in expenses for many years and devoted enormous attorney and staff resources

throughout. The much smaller firms—including the Mehdi firm (one attorney), Steyer Lowenthal (twelve attorneys), and Farmer Brownstein (five attorneys)—devoted a disproportionate percentage of their firm's billable hours to this case for years without any compensation.

Courts have recognized the need to reward Class Counsel who accept a case on a contingent fee basis because of the risk of non-payment. It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. *See* Richard Posner, *Economic Analysis of Law* § 21.9, at 534-35 (3d ed. 1986). Here, Counsel's requested fees have a negative multiplier, and provide only 93% of their fees. If calculated at current rates, Class Counsel's requested fees provide only 77% of their fees. *See* Kim Decl. ¶ 32 & Ex. E.

The Court should not overlook the real risks that Class Counsel incur by accepting contingent fee cases, such as this one. Large-scale antitrust actions are, by their very nature, expensive and time-consuming. Any law firm undertaking a case such as this must inevitably be prepared to make a tremendous investment of time, energy, and resources. Class Counsel made this investment with the very real possibility of an unsuccessful outcome and no fee available. Indeed, that was exactly the result after the jury verdict.

Class Counsel prosecuted this case for 12.5 years before achieving the settlement. The fact that substantial financial burden was carried for such a long period, with no premium requested, supports the reasonableness of the requested fee request. See *Vizcaino*, 290 F.3d at 1050 ("These burdens [years of litigation, significant financial expense, foregoing other work] are relevant circumstances."); *Torrisi v. Tucson Elec. Power Co*., 8 F.3d 1370, 1377 (9th Cir. 1993).

C. The Requested Fee Is Reasonable Under Lodestar Cross-Check

The Ninth Circuit has held that the lodestar method "provides a check on the reasonableness of the percentage award. Where such investment is minimal, as in the case of an early settlement, the lodestar calculation may convince a court that a lower percentage is reasonable. Similarly, the lodestar calculation can be helpful in suggesting a higher percentage when litigation has been protracted." *Vizcaino*, 290 F.3d at 1050. The 12.5 years of litigation here,

along with the fact that the 33% recovery results in total fees that are almost $6 million less than Class Counsel's lodestar based upon historical rates (and $22 million less based on current), demonstrates that the requested fee percentage is appropriate. "Using counsel's current rates to calculate the fee award is an appropriate mechanism to compensate counsel for the delay in receiving payment for their services." *Overbo v. Loews California Theatres, Inc.*, No. C 07-05368 MHP (LB), 2010 WL 11719051, at *5 (N.D. Cal. Aug. 17, 2010) (Beeler, J.).[5] Had Class Counsel calculated fees based upon current rates, as counsel in similarly protracted litigation have been awarded, the total lodestar would be significantly higher, and the shortfall even greater.

The lodestar method is a two-step process. The first step requires ascertaining the "lodestar" figure by multiplying the number of hours reasonably worked by the hourly rate of counsel. *Stanger*, 812 F.3d at 738. In the second step, a court adjusts the lodestar to account for, among other things, the risk of non-payment, the result achieved, the quality of representation, the complexity and magnitude of the litigation, and public policy considerations. *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 583 (3d Cir. 1984). To account for the foregoing factors, the court then applies an appropriate multiplier to the lodestar number.

The lodestar for the services performed by Class Counsel in this case results in a negative lodestar multiplier. Class Counsel expended a total of 132,739 hours litigating this case for a total lodestar of $81,368,711. This lodestar is based on historical rates. Kim Decl. ¶ 21. Even so, the total lodestar is greater than the percentage fee award that Class Counsel requests.[6] The requested fee of 33% of $228,500,000 is $75,405,000 which is approximately 92.8% of the lodestar. Had

[5] Courts in the Ninth Circuit have consistently awarded attorneys' fees based on current rates to account for the delay in payment. *See, e.g., Downes v. Unum Life Ins. Co. of Am.*, No. 23-cv-01643-RS, 2024 WL 4876940, at *2 (N.D. Cal. Nov. 22, 2024) *United States v. J-M Mfg. Co., Inc.*, No. EDCV 06-55-GW-PJWx, 2025 WL 1148344, at *10 (C.D. Cal. Mar. 13, 2025) ("With this case nearing its second decade, there can be no honest assertion that historical rates without any adjustment to present value represents full compensation today for the work [] Counsel has successfully performed.").

[6] In the *UEBT* action, class counsel was awarded attorneys' fees of $152,375,000 which represented a positive multiplier of about 1.63 on their lodestar calculated at current rates.

current rates been used, the fee would be a substantially lower percentage of their lodestar. A negative lodestar multiplier supports the reasonableness of the percentage fee request. *Taylor v. Shutterfly, Inc.*, No. 5:18-CV-00266-BLF, 2021 WL 5810294, at *9 (N.D. Cal. Dec. 7, 2021) ("The fact that Plaintiff's counsel are seeking substantially less in fees than they reasonably incurred further demonstrates the reasonableness of the fee award.").[7]

Attorney's fees expert, Richard Pearl, has opined that the historical rates charged by Class Counsel were in line with the market and reasonable. Pearl Decl. ¶¶ 15-27. In short, the lodestar cross-check confirms that the 33% fee requested by Class Counsel is eminently reasonable.

D. The Expenses Are Reasonable and Should Be Reimbursed

Class Counsel also respectfully request that they be reimbursed for the litigation costs and expenses in the amount of $28,132,680. Kim Decl. Ex. E. Under the common fund doctrine, Class Counsel are entitled to all reasonable out-of-pocket expenses and costs in prosecution of the claims and in obtaining a settlement. *See In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 786 (9th Cir. 2022). Over the many years of this litigation, Class Counsel incurred significant expenses, all of which would have been covered by a fee-for-service client in private litigation.

It is common and appropriate for Class Counsel to be reimbursed out of the common fund for all reasonable litigation expenses, including expenses for: experts and consultants, depositions and transcripts, travel, document production, legal research, printing and copying, and Class administration expenses, including the mailing of class notices. *See* H. Newberg, Attorney Fee Awards § 2.19 at 69 (1986); *Mills*, 396 U.S. at 391-92; *see also In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996) ("Reasonable costs and expenses incurred by an

[7] *See also Schuchardt v. Law Office of Rory W. Clark*, 314 F.R.D. 673, 690-91 (N.D. Cal. 2016) (holding fractional lodestar multiplier to be indication of reasonableness of fee request); *Johnson v. Triple Leaf Tea Inc.*, No. 3:14-cv-01570-MMC, 2015 WL 8943150 at *6 (N.D. Cal. Nov. 16, 2015); *Lusby v. GameStop Inc.*, No. C12–03783 HRL, 2015 WL 1501095 at *4 (N.D. Cal. Mar. 31, 2015); *Covillo v. Specialtys Café*, No. C–11–00594 DMR, 2014 WL 954516 at *7 (N.D. Cal. Mar. 6, 2014) ("Plaintiffs' requested fee award is approximately 65% of the lodestar, which means that the requested fee award results in a so-called negative multiplier, suggesting that the percentage of the fund is reasonable and fair."); *Wehlage v. Evergreen at Arvin LLC*, No. 4:10–cv–05839–CW, 2012 WL 4755371, at *1, (N.D. Cal. Oct. 4, 2012) (same); *Lymburner v. U.S. Fin. Funding, Inc.*, No. C–08–00325 EDL, 2012 WL 398816 at *6 (N.D. Cal. Feb. 7, 2012) (same).

attorney who creates or preserves a common fund are reimbursed proportionately by those class members who benefit by the settlement."). Expenses are compensable in a common fund case if the expense is of the type typically billed by attorneys to paying clients in the marketplace. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (approving expenses normally charged to a fee-paying client); *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1023-24 (E.D. Cal. 2019).

A large portion of the expenses incurred by CC went to economist expert fees in the amount of approximately $18.5 million. To put this figure into context, Sutter expended over $20 million on economist expert fees for Dr. Willig and Mr. Orzag and support from Compass Lexicon. *Id.* ¶ 25. There were three expert firms involved, Matrix Economics, BRG and Alix Partners. As described above, Dr. Chipty was supported by economists, healthcare data analysts and specialists across all three firms in producing her 11 expert reports, and providing many days of deposition and trial testimony. An annual accounting of economist expert expenses has been provided to allow for a careful review of the expert fees incurred. *Id.* Ex. D.

The other categories of expenses for which Class Counsel seek payment are also of the type routinely charged to paying clients. Details concerning the expenses incurred by each firm are listed in their accompanying declarations. Invoices and further detail regarding expenses are available for inspection upon the Court's request. Accordingly, it is respectfully requested that the out-of-pocket expenses of Class Counsel of $28,132,680 be reimbursed. Again, for context, plaintiffs in the State Actions, which were filed after this case in 2014 and 2018 and settled before trial in 2019, were awarded over $21 million in litigation expenses.

E. The Requested Service Awards are Reasonable and Should be Approved

Plaintiffs also request service awards of $20,000 for the Class Representatives who testified at trial and $15,000 for the Class Representatives who did not testify at trial. Class Representatives who did not testify at the first trial prepared to testify at the second. Given the extent of time and work that the Class Representatives have put into this case over the almost thirteen years it has been litigated, the requested awards are appropriate and well deserved.

It is well-established in the Ninth Circuit that named plaintiffs in a class action are eligible for reasonable service awards. *Stanton v. Boeing Co*., 327 F.3d 938, 976-77 (9th Cir. 2003). *Harris v. Vector Mktg. Corp*., No. C–08–5198 EMC, 2012 WL 381202, at *6 (N.D. Cal. Feb. 6, 2012). The requested awards are within the range of awards routinely granted in the Northern District. *See*, *e.g*., *Bernstein v. Virgin Am, Inc.,* No. 15-cv-02277-JST, 2023 WL 7284158, at *3-4 (N.D. Cal. Nov. 3, 2023) (approving service awards of $25,000 and $12,000); *Rabin v. PricewaterhouseCoopers LLP*, No. 16-cv-02276-JST, 2021 WL 837626 *10 (N.D. Cal. Feb. 4, 2021) (approving a $20,000 service award); *In re Wells Fargo & Co. S'holder Derivative Litig*., 445 F. Supp. 3d 508, 534 (N.D. Cal. 2020), *aff'd*, 845 F. App'x 563 (9th Cir. 2021) (granting $25,000); *Perez v. Rash Curtis & Assocs*., No. 4:16-cv-03396-YGR, 2020 WL 1904533, at *23 (N.D. Cal. Apr. 17, 2020) (awarding $25,000); *Vietnam Veterans of Am. v. Cent. Intel. Agency*, No. 09-cv-00037-CW, 2018 WL 4827397, at *1 (N.D. Cal. Oct. 4, 2018) ($20,000 per representative); *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig*., No. 4:14-md-2541 CW, 2017 WL 6040065, at *11 (N.D. Cal. Dec. 6, 2017), *aff'd,* 768 F. App'x 651 (9th Cir. 2019) (granting $20,000 per plaintiff).

IV. CONCLUSION

For the foregoing reasons, Class Counsel respectfully request that the Court grant their application for an award of attorneys' fees in the amount of $75,405,000, reimbursement of litigation expenses in the amount of $28,132,680, and the requested service awards for Class Representatives.

Dated: July 29, 2025

Respectfully submitted,

/s/ *Jean Kim*

CONSTANTINE CANNON LLP
JEAN KIM (*pro hac vice*)
6 East 43rd Street
New York, NY 10017
(212) 350-2700
(212) 350-2701 (fax)
jkim@constantinecannon.com

THE MEHDI FIRM, PC
AZRA Z. MEHDI (220406)
95 Third Street
2nd Floor #9122
San Francisco, CA 94103
(415) 293-0070
(415) 293-0070 (fax)
azram@themehdifirm.com

FARMER BROWNSTEIN JAEGER
GOLDSTEIN KLEIN & SIEGEL LLP
DAVID C. BROWNSTEIN (141929)
DAVID M. GOLDSTEIN (142334)
155 Montgomery Street, Suite 301
San Francisco, CA 94104
(415) 795-2050
(415) 520-5678 (fax)
dbrownstein@fbjgk.com
dgoldstein@fbjgk.com

THE MANNING LAW FIRM
JILL M. MANNING (178849)
50 California St., Ste. 1500
San Francisco, CA 94111
(415) 439-5393
jill@manning-lawfirm.com

SHINDER CANTOR LERNER LLP
MATTHEW L. CANTOR (*pro hac vice)*
ELLISON A. SNIDER (*pro hac vice*)
14 Penn Plaza, Ste. 1900
New York, NY 10122
(646) 960-8601
matthew@scl-llp.com
ellison@scl-llp.com

JAMES J. KOVACS (*pro hac vice*)
J. WYATT FORE (*pro hac vice*)
600 14th St NW, 5th Floor
Washington DC 20005
(646) 960-8601
james@scl-llp.com
wyatt@scl-llp.com

STEYER LOWENTHAL
BOODROOKAS
ALVAREZ & SMITH LLP
ALLAN STEYER (100318)
D. SCOTT MACRAE (104663)
235 Pine Street, Fifteenth Floor
San Francisco, CA 94104
(415) 421-3400
(415) 421-2234 (fax)
asteyer@steyerlaw.com
smacrae@steyerlaw.com

Counsel for Plaintiffs and the Class

TAB 1C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DJENEBA SIDIBE et al

Plaintiffs,

vs.

SUTTER HEALTH

Defendant.

Case No. 3:12-cv-4854-LB

DECLARATION OF RICHARD M. PEARL IN SUPPORT OF CLASS COUNSEL'S MOTION FOR ATTORNEY'S FEES, COSTS AND SERVICE AWARD

Date: November 6, 2025
Time: 9:30AM
Judge: Hon. Laurel Beeler

DECLARATION OF RICHARD M. PEARL

I, Richard M. Pearl, declare as follows:

1. I am a member in good standing of the California State Bar. I am in private practice as the principal of my own law firm, the Law Offices of Richard M. Pearl, in Berkeley, California. I specialize in issues relating to court-awarded attorney fees, including: the representation of parties in fee litigation and appeals; serving as an expert witness; and serving as a mediator and arbitrator in disputes concerning attorney fees and related issues. I have personal knowledge of the facts set forth herein, and if called as a witness, I could and would competently testify thereto. I make this declaration in support of Plaintiffs' Motion for Attorney's Fees in the instant action.

2. Specifically, I have been asked by Plaintiffs' Counsel – Constantine Cannon LLP, The Mehdi Firm, Shinder Cantor Lerner LLP, Steyer Lowenthal Boodrookas, Alvarez & Smith LLP, Farmer Brownstein Jaeger Goldstein Klein & Siegel LLP, and The Manning Law Firm -- "Plaintiffs' Counsel" or just "Counsel" -- to render my opinion as to the reasonableness of the hourly rates submitted in support of Counsel's lodestar cross-check in this case.

3. To form my opinion as to the reasonableness of the hourly rates that Plaintiffs' Counsel submit, I have reviewed and considered numerous documents that describe the history of this matter, counsel's qualifications and experience, their time records, the nature and quality of the work required by this case, the results achieved, and the requested attorney fees. I also have consulted with Plaintiffs' Counsel about this motion and the underlying facts of the case.

MY BACKGROUND AND EXPERIENCE

4. I am now in my 56th year of legal practice. I graduated in 1969 from Berkeley School of Law (then Boalt Hall), University of California, Berkeley. A true and correct copy of my Resume is attached as **Exhibit A**.

5. Since 1982, my legal work has focused on general civil litigation and appellate practice. More recently, my focus has been almost exclusively on cases and

appeals involving court-awarded attorney fees. I have lectured and written extensively on both court-awarded and attorney-client fee disputes. I am the author of *California Attorney Fee Awards* (3d ed., Cal. Cont. Ed. Of Bar 2010) ("Cal. Fee Awards") and its cumulative annual Supplements and Updates between 2011 and April 2025. I also was the author of *California Attorney Fee Awards* (2d Ed., Cal. Cont. Ed. of Bar 1994), and its 1995 through 2008 annual Supplements. Several courts have referred to this treatise as "[t]he leading California attorney fee treatise." *Calvo Fisher & Jacob LLP v. Lujan*, 234 Cal.App.4th 608, 621 (2015); *see also, e.g.*, *Int'l Billing Servs., Inc. v. Emigh*, 84 Cal.App.4th 1175, 1193 (2000) ("the leading treatise"); *Stratton v. Beck*, 30 Cal.App.5th 901, 911 (2018) ("a leading treatise"); *Orozco v. WPV San Jose, LLC*, 36 Cal.App.5th 375, 409 (2019) ("a leading treatise on California attorney's fees"). My treatise also has been cited by the California Supreme Court and the California Court of Appeal on numerous occasions. *See, e.g.*, *Graham v. DaimlerChrylser Corp.*, 34 Cal.4th 553, 576, 584 (2004); *Lolley v. Campbell*, 28 Cal.4th 367, 373 (2002); *In re Conservatorship of Whitley*, 50 Cal.4th 1206, 1214–15, 1217 (2010); *Sonoma Land Trust v. Thompson*, 63 Cal.App.5th 978, 986 (2021); *Yost v. Forestiere*, 51 Cal.App.5th 509, 530 n.8 (2020); *Highland Springs Conference & Training Ctr. v. City of Banning*, 42 Cal.App.5th 416, 428 n.11 (2019); *Sweetwater Union High Sch. Dist. v. Julian Union Elementary Sch. Dist.*, 36 Cal.App.5th 970, 988 (2019); *Hardie v. Nationstar Mortg. LLC*, 32 Cal.App.5th 714, 720 (2019); *Syers Props III, Inc. v. Rankin*, 226 Cal.App.4th 691, 698, 700 (2014). California Superior Courts also cite my treatise with approval. *See, e.g., Davis v. St. Jude Hosp.*, No. 30201200602596CUOECX, 2018 WL 7286170, at *4 (Orange Cnty. Super. Ct. Aug. 31, 2018); *Hartshorne v. Metlife, Inc.*, No. BC576608, 2017 WL 1836635, at *10 (Los Angeles Super. Ct. May 02, 2017). Federal courts also have cited my treatise with approval. *See, e.g.*, *In re Hurtado*, No. 09-16160-A-13, 2015 WL 6941127, at *4 n.1 (E.D. Cal. Nov. 6, 2015); *TruGreen Companies LLC v. Mower Brothers, Inc.,* 953 F. Supp. 2d 1223, 1236 nn.50, 51 (D. Utah 2013). I also authored the 1984 through 1993 annual

Supplements to the predecessor treatise, CEB's *California Attorney's Fees Award Practice*. In addition, I authored a federal manual on attorney fees entitled, "Attorneys' Fees: A Legal Services Practice Manual," published by the Legal Services Corporation. I also co-authored the chapter on "Attorney Fees" in Volume 2 of CEB's Wrongful Employment Termination Practice, 2d Ed. (1997).

6. More than 98% of my current practice is devoted to issues involving court-awarded attorney fees. I have appeared as an attorney of record in connection with over 200 attorney fee applications in state and federal courts, both trial and appellate. I have served as a consultant and expert witness in hundreds more. I also have been a member of the California State Bar's Attorneys' Fees Task Force and have testified before the State Bar Board of Governors and the California Legislature on attorney fee issues.

7. I have briefed and argued more than 40 appeals, at least 30 of which have involved attorney fees issues.

8. I have won five cases in the California Supreme Court involving court-awarded attorney fees: (1) *Maria P. v. Riles*, 43 Cal.3d 1281 (1987), which upheld a C.C.P. section 1021.5 fee award based on a preliminary injunction obtained against the State Superintendent of Education, despite the fact that the case ultimately was dismissed under C.C.P. section 583; (2) *Delaney v. Baker*, 20 Cal.4th 23 (1999), which held that heightened remedies, including attorney fees, are available in suits against nursing homes under California's Elder Abuse Act; (3) *Ketchum v. Moses*, 24 Cal.4th 1122 (2001), which reaffirmed that contingent risk multipliers are an essential consideration under California attorney fee law; (4) *Flannery v. Prentice*, 26 Cal.4th 572 (2001), which held that under California law, in the absence of an agreement to the contrary, statutory attorney fees belong to the attorney whose services they are based upon; and (5) *Graham v. DaimlerChrylser Corp.*, 34 Cal.4th 553 (2004), which held, *inter alia,* that the "catalyst" theory of fee recovery remained viable under California law and that lodestar multipliers could be applied to fee motion work. I also

represented and argued on behalf of *amicus curiae* in *Conservatorship of McQueen*, 59 Cal. 4th 602 (2014), which held that attorney fees incurred for appellate work were not "enforcement fees" subject to California's Enforcement of Judgments law. Along with Richard Rothschild of the Western Center on Law and Poverty, I also prepared and filed an *amicus curiae* brief in *Vasquez v. State of California*, 45 Ca1. 4th 243 (2009). An expanded list of some of the reported decisions in cases I have handled is set out in **Exhibit A** at pages 4–8.

MY EXPERT WITNESS EXPERIENCE

9. I am frequently called upon to opine as an expert witness on attorney fee issues, most often regarding the reasonableness of the attorneys' fees requested from a court or arbitrator. I estimate that I have prepared opinions and/or live testimony on attorney fee matters in over two hundred cases.

10. Numerous federal and state courts have relied expressly on my testimony on attorney fee issues. For example:

a. In *Wit v. United Behavioral Health*, 578 F.Supp.3d 1060, 1079 (N.D. Cal. Jan. 5, 2022), *vacated and remanded on the merits*, 2023 U.S. App. LEXIS 33343 (9th Cir. 2023), the Court's Fee Order stated that "the Court place[d] significant weight on Pearl's opinion that the rates charged by all of the timekeepers listed above are reasonable and 'in line with the standard hourly noncontingent rates charged by Bay Area law firms that regularly engage in civil litigation of comparable complexity.' . . . Pearl has extensive experience in the area of attorney billing rates in this district and has been widely relied upon by both federal and state courts in Northern California (including the undersigned) in determining reasonable billing rates."

b. In *Human Rights Defense Center v. County of Napa*, No. 20-cv-01296, 2021 WL 1176640, at *11 (N.D. Cal. Mar. 28, 2021), the Court expressly stated that it had "place[d] significant weight on the opinion of Mr. Pearl

that the rates charged by all of the timekeepers listed above are reasonable and in line with the rates charged by law firms that engage in federal civil litigation in the San Francisco Bay Area. Mr. Pearl has extensive experience in the area of attorney billing rates in this district and has been widely relied upon by both federal and state courts in Northern California [] in determining reasonable billing rates."

c. Subsequently, in *Andrews v. Equinox Holdings, Inc.,* No. 20-cv-00485 (N.D. Cal. Nov. 9, 2021), Dkt. 110 (Order on Motion for Attorney Fees and Costs) at 4, the court quoted the above language from the *Human Rights Defense Center* case and concluded the same: "This Court similarly finds Pearl's opinions well supported and persuasive."

d. California state courts also have recognized my expertise. For example, in *Sonoma Land Trust,* 63 Cal.App.5th at 986, the Court of Appeal expressly held that my expert declaration provided evidentiary support for the trial court's fee determination.

e. My declaration also was cited favorably by the Second District of the California Court of Appeal in *Wood v. Los Angeles County Waterworks Dist. No. 40 (Antelope Valley Groundwater Cases)*, 2021 Cal.App. Unpub. LEXIS 5506 (2nd Dist. Div. 2021).

11. In addition to the *Wit*, *HRDC*, and *Andrews* awards, the following reported federal decisions also have referenced my testimony favorably:

- *Prison Legal News v. Ryan*, No. 19-17449 (9th Cir. Mar. 21, 2023), Order filed March 21, 2023, at 4;
- *Antoninetti v. Chipotle Mexican Grill, Inc.*, No. 08-55867 (9th Cir. 2012), Order filed Dec. 26, 2012, at 6;
- *Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 455 (9th Cir. 2010) (the expert declaration referred to is mine);

- *Roe v. SFBSC Mgmt., LLC*, 2022 U.S. Dist. LEXIS 215122 (N. D. Cal. Nov. 29, 2022);
- *Independent Living Center of S. Cal. v. Kent*, 2020 U.S. Dist. LEXIS 13019, at *11-12 (C.D. Cal. Jan. 24, 2020);
- *Ridgeway v. Wal-Mart Stores, Inc.*, 269 F. Supp. 3d 975 (N.D. Cal. 2017), *aff'd*, 269 F.3d 1066 (9th Cir. 2020);
- *Beaver v. Tarsadia Hotels*, 2017 U.S. Dist. LEXIS 160214, at *40 (S.D. Cal. Sep. 28, 2017);
- *Notter v. City of Pleasant Hill*, 2017 WL 5972698, at *3 (N.D. Cal. Nov. 30, 2017);
- *Villalpondo v. Exel Direct, Inc.*, 2016 U.S. Dist. LEXIS 182521, at *3(N.D. Cal. Dec. 12, 2016);
- *State Compensation Insurance Fund v. Khan et al.*, No. 12-cv-01072 (C.D. Cal. July 6, 2016),Dkt. 408 (Order Granting in Part and Denying in Part the Zaks Defendants' Motion for Attorneys' Fees);
- *In re Cathode Ray Tube Antitrust Litig.*, 2016 U.S. Dist. LEXIS 24951 (N.D. Cal. Jan. 28, 2016) (Report And Recommendation Of Special Master Re Motions (1) To Approve Indirect Purchaser Plaintiffs' Settlements With the Phillips, Panasonic, Hitachi, Toshiba, Samsung SDI, Technicolor, And Technologies Displays Americas Defendants, and (2) For Award Of Attorneys' Fees, Reimbursement Of Litigation Expenses, And Incentive Awards To Plaintiffs' Representative), *adopted in relevant part*, 2016 U.S. Dist. LEXIS 88665;
- *Gutierrez v. Wells Fargo Bank*, 2015 U.S. Dist. LEXIS 67298, at *14 (N.D. Cal. May 21, 2015);
- *Holman v. Experian Information Solutions, Inc.*, 2014 U.S. Dist. LEXIS 173698, at *13 (N.D. Cal. Dec. 12, 2014);

- *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 U.S. Dist. LEXIS 49885 (N.D. Cal. Nov. 9, 2012) (Report and Recommendation of Special Master Re Motions for Attorneys' Fees And Other Amounts By Indirect-Purchaser Plaintiffs' Plaintiffs And State Attorneys General);
- *Walsh v. Kindred Healthcare*, 2013 U.S. Dist. LEXIS 176319 (N.D. Cal. 2013);
- *A.D. v. California Highway Patrol*, 2009 U.S. Dist. LEXIS 110743, at *4 (N.D. Cal. 2009), *rev'd on other grounds*, 712 F.3d 446 (9th Cir. 2013), *reaffirmed and additional fees awarded on remand*, 2013 U.S. Dist. LEXIS 169275 (N.D. Cal. 2013);
- *Hajro v. United States Citizenship & Immigration Service*, 900 F.Supp.2d 1034, 1054 (N.D. Cal. 2012);
- *Rosenfeld v. United States Dep't of Justice*, 904 F. Supp. 2d 988, 1002 (N.D. Cal. 2012);
- *Stonebrae, L.P. v. Toll Bros., Inc.*, 2011 U.S. Dist. LEXIS 39832, at *9 (N.D. Cal. 2011) (thorough discussion), *aff'd*, 2013 U.S. App. LEXIS 6369 (9th Cir. 2013);
- *Armstrong v. Brown*, 2011 U.S. Dist. LEXIS 87428 (N.D. Cal. 2011);
- *Lira v. Cate,* 2010 WL 727979, at *3 (N.D. Cal. Feb. 26, 2010);
- *Californians for Disability Rights, Inc. v. California Dep't of Transp.*, 2010 U.S. Dist. LEXIS 141030 (N.D. Cal. 2010);
- *Nat'l Federation of the Blind v. Target Corp.*, 2009 U.S. Dist. LEXIS 67139 (N.D. Cal. 2009);
- *Prison Legal News v. Schwarzenegger,* 561 F.Supp.2d 1095, 1106 (N.D. Cal. 2008) (an earlier motion);
- *Bancroft v. Trizechahn Corp.,* No. 02-cv-02373 (C.D. Cal. Aug. 14, 2006), Dkt. 278 (Order Granting Plaintiffs Reasonable Attorneys' Fees and Costs In the Amount of $168,886.76);

- *Willoughby v. DT Credit Corp.,* No. 05-cv-05907 (C.D. Cal. July 17, 2006), Dkt. 65 (Order Awarding Attorneys' Fees After Remand);
- *Oberfelder v. City of Petaluma,* 2002 U.S. Dist. LEXIS 8635 (N.D. Cal. 2002), *aff'd*, 2003 U.S. App. LEXIS 11371 (9th Cir. 2003).

12. In addition to the *Sonoma Land Trust* and *Antelope Valley Groundwater* cases, the following California appellate and reported trial court cases also have referenced my testimony favorably:

- *Gajanan v. City & County of San Francisco,* No. A168328, 2025 WL 1076796, at *3, *17 (Cal. Ct. App. Apr. 10, 2025);
- *Kerkeles v. City of San Jose*, 243 Cal.App.4th 88, 96 (2015);
- *Laffitte v. Robert Half Int'l Inc*., 231 Cal.App.4th 860 (2014), *aff'd*, 1 Cal.5th 480 (2016);
- *Habitat and Watershed Caretakers v. City of Santa Cruz*, 2015 Cal. App. Unpub. LEXIS 7156 (2015);
- *In re Tobacco Cases I*, 216 Cal.App.4th 570 (2013);
- *Heritage Pacific Financial, LLC v. Monroy*, 215 Cal.App.4th 972 (2013);
- *Wilkinson v. South City Ford*, 2010 Cal. App. Unpub. LEXIS 8680 (2010);
- *Children's Hospital & Medical Center v. Bonta*, 97 Cal.App.4th 740 (2002);
- *Church of Scientology v. Wollersheim*, 42 Cal.App.4th 628 (1996).
- *Kaku v. City of Santa Clara*, No. 17CV319862, 2019 WL 331053, at *3 (Santa Clara Cnty. Super. Ct. Jan. 22, 2019), *aff'd*, 59 Cal. App. 5th 385, 431 (2020);
- *Davis v. St. Jude Hosp.*, No. 30201200602596CUOECX, 2018 WL 7286170, at *4 (Orange Cnty. Super. Ct. Aug. 31, 2018);
- *Hartshorne v. Metlife, Inc.*, No. BC576608, 2017 WL 1836635, at *10 (Los Angeles Super. Ct. May 2, 2017).

PLAINTIFFS' COUNSEL'S HOURLY RATES ARE REASONABLE

13. Plaintiffs' attorney's fee request and my opinion on the hourly rates requested are based on the lodestar-adjustment method provided for under federal law. Under that law, the hourly rates Plaintiffs' Counsel request are reasonable if they are "in line with" the non-contingent market rates charged by San Francisco Bay Area attorneys of reasonably comparable experience, skill, and expertise for reasonably comparable services. *See Blum v. Stenson*, 465 U.S. 886, 895 n. 11 (1984); *Davis v. City and Cnty. of San Francisco*, 976 F.2d 1536, 1545-46 (9th Cir. 1992).

14. The backgrounds, specific hourly rates, and time spent for each biller are set out in Counsel's declarations. *See* Declaration of Jean Kim in Support of Class Counsel's Motion for Attorneys' Fees, Costs and Service Awards ("Kim Decl."); Declaration of Allan Steyer in Support of Plaintiffs' Motion for Attorneys' Fees and Reimbursement of Costs/Expenses ("Steyer Decl."); Declaration of David C. Brownstein in Support of Plaintiffs' Motion for Attorney's Fees and Reimbursement of Costs and Expenses ("Brownstein Decl."); Declaration of Matthew L. Cantor in Support of Plaintiffs' Motion for Attorneys' Fees and Reimbursement of Costs/Expenses ("Cantor Decl."); Declaration of Azra Z. Mehdi in Support of Class Counsel's Motion for Attorneys' Fees, Costs and Service Awards ("Mehdi Decl."); Declaration of Jill Manning in Support of Class Counsel's Motion for Attorneys' Fees, Reimbursement of Expenses and Service Awards ("Manning Decl."); Declaration of Eric Grover ("Grover Decl."); Declaration of Daryl Scott ("Scott Decl.").; Declaration of Jason Kim ("JHK Decl.") As indicated in those declarations, for purposes of Counsel's lodestar cross-check, Plaintiffs' total adjusted lodestar based upon historical rates is **$81,368,771**.

15. In my opinion, the hourly rates submitted by Plaintiffs' Counsel as part of their lodestar cross-check are well in line with the hourly rates charged and awarded in the Bay Area for comparably complex, vigorously contested, and highly successful

litigation. The following chart summarizes the rates Plaintiffs' Counsel submit to support their lodestar cross check:

Firm	Role	Year	Range of Hourly Rates
CONSTANTINE CANNON LLP	Partners	2013	$425-$1,150
		2014	$425-$865
		2015	$445-$805
		2016	$465-$855
		2017	$655-$875
		2018	$685-$905
		2019	$725-$1,300
		2020	$760 - $1,300
		2021	$830 - $1,350
		2022	$650 - $1,,400
		2023	$725 - $1,450
		2024	$675 - $1,500
		2025	$1,350 - $1,550
	Associates/Staff Attorneys	2013	$325
		2014	$325
		2015	$305
		2016	$285-$315
		2017	$295-$340
		2018	$305-$375
		2019	$325-$405
		2020	$335-440
		2021	$350-$550
		2022	$420-$565
		2023	$450-$625

Firm	Role	Year	Range of Hourly Rates
		2024	$480-$500
		2025	$500-$550
	Other Professionals	2014	$235
		2015	$225-$230
		2016	$175-$350
		2017	$175-$375
		2018	$250-$295
		2019	$295-$410
		2020	$300-$450
		2021	$310-465
		2022	$345-$515
		2023	$370-$400
		2024	$400-590
		2025	$425-$625
STEYER LOWENTHAL BOODROOKAS ALVAREZ & SMITH LLP	Partners	2013	$780-$840
		2014	$790-$860
		2015	$810-$880
		2016	$750-$895
		2017	$800-$980
		2018	$820-$980
		2019	$880-$995
		2020	$910-$1,060
		2021	$960-$1,100
		2022	$1,000-$1,180
		2023	$1,350
		2024	$1,350
		2025	$1,350

Firm	Role	Year	Range of Hourly Rates
	Associates	2016	$240-$300
		2017	$300-$340
		2018	$360
		2019	$390
		2020	$440
		2021	$480
		2022	$540
		2023	$720
	Other Professionals	2016	$195
		2017	$195-$260
		2018	$195-$260
		2019	$220-$260
		2020	$295
		2021	$240-$295
		2022	$295
		2024	$295
		2025	$295
FARMER BROWNSTEIN JAEGER GOLDSTEIN KLEIN & SIEGEL LLP	Partners	2013	$800
		2014	$800
		2015	$850
		2016	$850
		2017	$900
		2018	$900
		2019	$950
		2020	$950
		2021	$1,000
		2022	$1,050

Firm	Role	Year	Range of Hourly Rates
		2023	$1,150
		2024	$1,200
		2025	$1,250
	Other Professionals	2017	$300
		2018	$150-$210
		2019	$150-$210
		2020	$150
		2021	$150-$300
		2022	$250
		2023	$250
		2024	$250
		2025	$250
THE MEHDI FIRM	Partners	2012	$725
		2013	$725
		2014	$775
		2015	$775
		2016	$775
		2017	$775
		2018	$825
		2019	$825
		2020	$825
		2021	$825
		2022	$825
		2023	$900
		2024	$975
		2025	$1,075

	Other Professionals	2012	$285
		2013	$285
		2014	$315
		2018	$350
SHINDER CANTOR LERNER LLP	Partners	2024	$675-$1,400
		2025	$675-$1,400
	Associates	2024	$475-$575
		2025	$475-$575
	Other Professionals	2024	$425
		2025	$425
PEARSON WARSHAW LLP	Partner	2022	$1,000
		2023	$1,000
		2024	$1,000
THE MANNING LAW FIRM	Founder	2024	$1,200
		2025	$1,200

In addition, Daryl Scott's, Eric Grover's, and Jason H. Kim's law firms were retained solely for document review work at the beginning of discovery. Their rates were capped at $350 per hour and totaled approximately $5 million.

16. Through my writing and practice, I have become familiar with the non-contingent market rates charged by attorneys in the San Francisco Bay Area and elsewhere. I have developed this familiarity by: (a) handling attorney fee litigation; (b) discussing fees with other attorneys; (c) obtaining declarations regarding prevailing market rates in cases in which I represent attorneys seeking fees; and (d) reviewing attorney fees applications and awards in other cases, as well as articles on attorney fees in the legal newspapers and treatises. I also have testified before trial courts and arbitrators on numerous occasions and have submitted expert testimony by declaration on hundreds of occasions. Each of these efforts required me to be

aware of the hourly rates being charged in the relevant community, especially in the San Francisco Bay Area where I have practiced since 1974.

17. Based on that experience and expertise, and having reviewed Counsel's qualifications, backgrounds, experience, work product, invoices, and the results Counsel have achieved, in my expert opinion, Plaintiffs' Counsel's hourly rates are well in line with the hourly rates charged by and awarded to comparably qualified San Francisco Bay Area attorneys for comparable work and results. Given my extensive background and experience with Bay Area rates, my opinion that Counsel's rates are reasonable is based on four factors:

(1) The exceptional qualifications, experience, and reputations of Plaintiffs' law firms, all of which are top-of-the-line law firms;

(2) The expertise and skill Counsel employed to develop and win this high stakes, complex, hard-fought antitrust case and recover $228.5 million for the Plaintiff class;

(3) The hourly rates found reasonable in other cases for comparably qualified Bay Area attorneys providing similar services; and

(4) The rates stated and charged by numerous other San Francisco Bay Area law firms, as confirmed, *inter alia*, by the legal media and by well-respected surveys of local hourly rates.

Factor One: Counsel's Top of the Line Qualifications.

19. In addition to my own experience and expertise, my opinion is based on the fact that each of Plaintiffs' six principal law firms – Constantine Cannon LLP, Shinder Cantor Lerner LLP, Steyer Lowenthal Boodrookas, Alvarez & Smith LLP, Farmer Brownstein Jaeger Goldstein Klein & Siegel LLP, The Mehdi Firm, and The Manning Law Firm -- are highly-respected law firms with well-recognized top-of-the-line qualifications, expertise, and reputations for complex antitrust litigation. Hiring such top-rate law firms was perfectly appropriate because the stakes involved here were enormous: Sutter Health's practices allegedly caused the Plaintiffs to pay millions of

dollars more for health care than the market reasonably would have required. Given these stakes, it was both reasonable and appropriate for Plaintiffs to retain such top-of-the-line firms who also were willing to litigate this case on a contingent fee basis.

Factor Two: The Skill and Expertise Shown in Litigating this Case and the Excellent Result Achieved.

18. My opinion also is based on my perception of Counsel's performance in this complex, hotly-contested litigation and the excellent results they achieved. Antitrust cases are inherently among the most complex and difficult types of litigation. This case was no different: to prevail in this action, Plaintiffs' Counsel were opposed by savvy and well-resourced opposing counsel who vigorously defended Sutter Health's position, requiring Counsel to try the case over a 19-day period, appeal the adverse decision to the Ninth Circuit and obtain a reversal, then to prepare for a second trial only to settle after a second trial was imminent.

Factor Three: The Rates Found Reasonable by the Courts

19. Counsel's rates here are in line with rates found reasonable by this and other Bay Area courts for comparable attorneys handling complex cases. Those findings are entitled to significant weight. See *United Steelworkers of America v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir., 1990). . The judicial rate determinations I rely on include the following:

2024 Rates

- In *Sutter' Place, Inc. dba Bay 101 v. S.J. Bayshore Development, Inc.*, Santa Clara Superior Ct. No. 22CV397119, Order After Hearing on Plaintiff/Cross-Defendants' Motion for Attorney Fees, filed Dec. 23, 2024, a business contract dispute in which the fee award was based on a contractual fee clause, the following hourly rates were determined to be reasonable:

Firm	Role	Law School Grad. Year	Rate
Coblentz, Patch Duffy & Bass LLP	Overall lead attorney and lead for trial	1979	$1225 (2022); $1310 (2023); and $1450 (2024)

Firm	Role	Law School Grad. Year	Rate
	Partner and second chair	1994	$990 (2022); $1090 (2023); and $1200 (2024)
	Partner	2011	$775 (2023); $870 (2024)
		2013	$680 (2022); $775 (2023); and $870 (2024)
	Associate and Partner	2015	$565 (2022); $650 (2023); and $770 (2024)
	Associate	2017	$535 (2022); $600 (2023); and $680 (2024)
	Senior associate	2018	$550 (2023); and $640 (2024)
		2018	$465 (2022); $525 (2023); and $630 (2024)
	Associate	2020	$600 (2024)
	Senior Paralegal	N/A	$340 (2022); $400 (2023); and $450 (2024)
		N/A	$320 (2022); $400 (2023); and $450 (2024)
		N/A	$285 (2023); and $400 (2024)
	Trial technician	N/A	$270 (2023); and $300 (2024)

2023 Rates

- In *United States of America v. Academy Mortgage Corp.*, N.D. Cal. No. 16-cv-02120-EMC, Order Granting in Part Relator Gwen Thrower's Motion re Accrual of Interest and for Supplemental Attorneys' Fees (Doc. No 519), filed September 13, 2024, a qui tam action, the court found the following 2023 hourly rates reasonable for counsel's fee motion work:

Firm	Role	Law School Grad. Year	Rate
Rosen Bien Galvan & Grunfeld LLP	Attorney	1962	$1,475
		2008	$875
		2005	$925
		2018	$525
		2008	$825
	Paralegal	N/A	$435
		N/A	$405
		N/A	$435

- In *Prison Legal News v. Ryan*, United States Court of Appeal for the Ninth Circuit, Order filed March 21, 2023, the Appellate Commissioner found the following hourly rates reasonable for the Plaintiff-Appellee's appellate work:

Firm	Title	Law School Grad. Year	Rate
Rosen Bien Galvan & Grunfeld LLP	Partner	1962	$1,350
		2006	$850
	Associate	2016	$575
	Paralegal	N/A	$400

2022 Rates

- In *Richmond Compassionate Care Collective v. Richmond Patient's Group et al.*, Contra Costa Superior Ct. No. MSC16-01426, Order Granting Plaintiff RCCC's Motion for Attorneys' Fees etc., filed November 1, 2022, an antitrust case, as part of its lodestar cross-check, the court found that the following hourly rates billed by the prevailing Plaintiff's attorneys were reasonable:

Firm	Title	Years of Experience	Rate
Alioto Law Firm	Joseph M. Alioto	53	$1,500
Foreman & Brasso	Ronald D. Foreman	48	$1,050

2021 Rates

- In *Yo LLC v. Krucker*, Santa Clara Superior Ct. No. 17CV306261, Fee Order filed February 9, 2022, a contractual fee case involving a disputed lease, the court found the following hourly rates billed by the prevailing Defendant's attorneys reasonable:

Firm	Title	Law School Grad. Year	Rate
Cooley LLP	Partner	1994	$1,275
	Special Counsel	1994	$1,090
	Associate (2020 rate)	2009	$1,010

- In *Kang v. Wells Fargo Bank NA*, 2021 U.S. Dist. LEXIS 235254, at *53 (N.D. Cal. Dec. 8, 2021), a consumer class action, the court found that plaintiffs' appellate attorneys' rates of $640-$1,150 and trial counsel's rates of $325-$950 were "in line with other fee awards in this district for similarly experienced attorneys".

- In *Andrews v. Equinox Holdings, Inc.*, No. 20-cv-00485 (N.D. Cal. Nov. 9, 2021), Dkt. 110 (Order on Motion for Attorney Fees and Costs), an individual age discrimination case that settled by acceptance of the defendant's Fed. R. Civ. P. Rule 68 offer, the court found the following 2021 rates reasonable (before applying a 1.3 lodestar multiplier):

Firm	Title	Law School Grad. Year	Rate
Rosen Bien Galvan & Grunfeld LLP	Partner	1962	$1,250
		1997	$875
	Senior Counsel	2010	$600
	Associate	2018	$350
	Summer Associates	N/A	$300
	Paralegals	N/A	$240-$275

2020 Rates

- In *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, No. 16-CV-00236-WHO, 2020 WL 7626410, at *3 & n.4 (N.D. Cal. Dec. 22, 2020), a RICO action challenging the Defendants' invasive tactics, the court found that Plaintiffs' counsel's 2020 hourly rates were "reasonable given the scope and complexity of this case, as well as in light of rates approved in this District for partners, associates, and paralegals for similarly experienced counsel and staff at similar firms."

Firm	Title	Bar Admission Date	Rate
Arnold & Porter Kaye Scholer LLP	Partner	1974	$1,280
		1993	$1,150
		1990	$1,085
		2005	$1,015
		2002	$925
	Senior Associate	2005	$910
		2012	$910
		2015	$815
	Associate	2018	$675
	Staff Attorney	2008	$545
	Paralegal	N/A	$405
		N/A	$390
Planned Parenthood	General Counsel	1982	$1,115
	Sr. Staff Attorney	2012	$910

- In *Schneider v. Chipotle Mexican Grill*, 336 F.R.D. 588, 601 (N.D. Cal. 2020), a consumer class action, the court found that counsel for the putative class's 2020 hourly rates listed below were "on the high end, although in line with prevailing rates in this district for personnel of comparable experience, skill, and reputation."

Firm	Title	Bar Admission Date	Rate
Kobre & Kim LLP	Partner	1993	$1,275
		1987	$1,275
		1997	$995
	Associate	2011	$695
	Analyst	N/A	$495
	Legal Assistant	N/A	$195
		N/A	$195

2019 Rates

- In *In re National Collegiate Athletic Assn. Athletic Grant-In-Aid Antitrust Litigation*, an antitrust class action, the court found the following 2019 "hourly rates are reasonable." *See* Order Granting in Part and Denying in Part Plaintiffs' Motion for Attorneys' Fees, Expenses, Service Awards, and Taxed Costs, Doc. 1259, at 4, No. 14-md-02541 (N.D. Cal. Dec. 6, 2019):

Firm	Title	Bar Admission	Rate
Winston & Strawn LLP	Partner	1978	$1,515
	Partner	1985	$1,245
	Partner	2002	$1,105
	Partner	1996	$1,025
	Associate	2012	$825
	Associate	2016	$660
	Associate	2017	$615

2017 Rates

- In an earlier decision in the *In re National Collegiate Athletic Assn. Athletic Grant-In-Aid Antitrust Litigation* , the court also found the following 2017 hourly rates were "in line with market rates in this District." *See id.* at Doc. 745 (N.D. Cal. Dec. 6, 2017):

Firm	Title	Bar Admission	Rate
Hagens Berman Sobol Shapiro LLP	Partner	1982	$950
	Associate	1999	$630
	Associate	2014	$475
	Contract Attorney	2013	$350
	Contract Attorney	2006	$300
Pearson, Simon & Warshaw LLP	Partner	1983	$1,035
	Partner	1981	$1,035
	Of Counsel	2001	$900
	Associate	2006	$635
	Associate	2008	$520

2016 Rates

- In *Animation Workers Antitrust Litigation*, a class action alleging defendants violated the antitrust laws by engaging in a fraudulent conspiracy to fix wages, the court found the following 2016 hourly rates were "fair, reasonable, and market-based, particularly for the 'relevant community' in which counsel work." *See* Order Granting Plaintiff's Motion for Attorneys' Fees, Expenses, and Service Awards, Doc. 347, at 10, No. 14-CV-4062 (N.D. Cal. Nov. 11, 2016):

Firm	Title	Bar Admission	Rate
Susman Godfrey LLP	Partner	1969	$1,200
	Partner	1998	$700
	Partner	2005	$550
	Associate	2013	$325
	Associate	2008	$475
	Associate	2011	$375
	Associate	2010	$425
	Staff Attorney	2006	$275
	Staff Attorney	2007	$275
	Staff Attorney	2014	$275
	Paralegals	NA	$230-270
Hagens Berman Sobol Shapiro LLP	Partner	1980	$950
	Partner	1994	$735
	Partner	2001	$605
	Partner	1993	$605
	Of Counsel	2002	$575
	Associate	2010	$425
	Associate	2015	$420
	Associate	2008	$400
	Contract Attorney	2007	$250
	Paralegal	NA	$265
	Paralegal	NA	$265
	Paralegal	NA	$190
	Paralegal	NA	$158

20. In my opinion, the foregoing court awards clearly establish that the hourly rates submitted here for the entire length of this litigation in support of Plaintiffs' Counsel's lodestar cross-check are readily in line with the range of Bay Area rates charged and awarded over this period.

21. Plaintiffs' Counsel's hourly rates and rate increases over the years also are consistent with reported rates and rate increases in the legal services marketplace generally. For example, Wells Fargo's Legal Specialty Group reports that its 2023 year-end survey of 130 law firms' rates showed an 8.3% increase for 2023 and 9% for

the first half of 2024. As the following reports show, numerous sources confirm these increases and the resulting $2,100-plus rates:

- David Thomas & Mike Scarcella, *More lawyers join the $3,000-an-hour club, as other firms close in*, Reuters (Feb. 27, 2025), https://www.reuters.com/legal/legalindustry/3000-an-hour-lawyer-isnt-unicorn-anymore-2025-02-27/ (top partners at Quinn Emanuel Urquhart & Sullivan and Susman Godfrey charging $3,000 an hour, with several other firms charging hourly rates above $2,500)
- Matt Hamilton & David Zahniser, *DWP secures law firm, at up to $1,975 an hour, to defend against Palisades fire lawsuits*, LA Times (Feb. 14, 2025), https://www.latimes.com/california/story/2025-02-14/law-firm-1975-an-hour-defend-against-palisades-fire-lawsuits (Los Angeles Department of Water and Power approved $10-million contract with Munger, Tolles & Olson to defend against lawsuits from residents of homes destroyed in Palisades fire, with partners charging $1,975 an hour);
- Debra Cassens Weiss, *Some top partners in BigLaw will bill nearly $3,000 per hour next year, data says*, ABA Journal (Sept. 26, 2024), https://www.abajournal.com/news/article/some-top-partners-in-biglaw-will-bill-nearly-3000-an-hour-next-year-report-saysd (listing BigLaw 2024 rates for partners that range up to $2,720 per hour at California's Wilson Sonsini Goodrich & Rosati);
- Dan Roe, *Top Big Law Partners Are Earning More Than $2,400 Now, As Rates Continue to Climb*, Law.com (Jan. 10, 2024), https://www.law.com/americanlawyer/2024/01/10/top-restructuring-partners-are-earning-more-than-2400-per-hour-as-rates-continue-to-climb/?slreturn=20250329-35134 (listing numerous Big Law firm rates, some approaching $2,600 per hour). Similarly, Wells Fargo's Legal Specialty Group reports that its 2023 year-end survey of 130 law firms' rates

showed an 8.3% increase for 2023; its most recent survey showed average rate increases of 9.1% over the first six-months of 2024. *See* Debra Cassens Weiss, *'Very strong performance' reported for law firms in 2024, with revenue increasing 12.5%*, ABA Journal (Jan. 29, 2025) https://www.abajournal.com/news/article/very-strong-performance-reported-for-law-firms-in-2024-with-revenue-increasing-12.5. [new article

- Roy Strom, Bloomberg Law, *Rising Rates Are Law Firms' Salve as Layoffs and Pay Cuts Surge* (Jan. 19, 2023), https://news.bloomberglaw.com/business-and-practice/rising-rates-are-law-firms-salve-as-layoffs-and-pay-cuts-surge (showing 9%–10% increases in 2023 hourly rates);
- Debra Weiss, *This BigLaw firm charges nearly $2,500 per hour for top billers' bankruptcy work*, ABA Journal (Dec. 19, 2023), https://www.abajournal.com/news/article/this-biglaw-firm-charges-nearly-2500-an-hour-for-top-billers-bankruptcy-work (referring to Kirkland & Ellis's rates);
- Vaidehi Mehta, *Billing Rates Surge Past $2k in the World of High-Stakes Litigation*, FindLaw (Sept. 27, 2023), https://www.findlaw.com/legalblogs/practice-of-law/billing-rates-surge-past-2k-in-the-world-of-high-stakes-litigation/ (noting that billing rates among attorneys in high-stakes litigation have "surge[d] past" $2,000 per hour); Andrew Maloney, *Aggressive Billing Rate Increases Appear Likely, but Can Clients Stomach It?*, The American Lawyer (Jan. 24, 2022) (rates rose "nearly 4%" in 2021).

Factor Four: The Rates Stated by Bay Area Law Firms

22. My opinion that Counsel's rates are in line with the local legal marketplace for comparable services also is based on the standard non-contingent hourly rates for complex litigation charged by many Bay Area law firms or law firms with offices or practices in the Bay Area. I pride myself on keeping up to date on hourly rates being charged and awarded in California, and that expertise has been recognized by this Court. See, e.g., *Human Rights Defense Center v. County of Napa*, No. 20-cv-01296, 2021 WL 1176640, at *11 (N.D. Cal. Mar. 28, 2021) (stating that it had "place[d] significant weight on the opinion of Mr. Pearl that the rates charged by all of the timekeepers listed above are reasonable and in line with the rates charged by law firms that engage in federal civil litigation in the San Francisco Bay Area. Mr. Pearl has extensive experience in the area of attorney billing rates in this district and has been widely relied upon by both federal and state courts in Northern California [] in determining reasonable billing rates". The following examples illustrate this point:

Firm – Year	Level	Rates
Boies Schiller & Flexner LLP – 2023	Partners	Up to $2,110
	Paralegals	$350
	Staff	$430-$500
	Litig. Support	$350-$380
Kirkland & Ellis LLP – 2024	Partners	$1,195 - $2,465
	Associates	$745 - $1,495
Kirkland & Ellis LLP – 2021	Partners	$1,085-$1,895
	Of Counsel	$625-1,895
	Associates	$625-$1,195
	Paraprofessional	$255-475
	Paraprofessional	$255-475
Morrison & Foerster LLP – 2021	Attorney (2002 graduate)	$1,200
	Attorney (2011 graduate)	$1,075
	Attorney (2014 graduate)	$925
	Attorney (2018 graduate)	$745
	Paralegal	$295

Morrison & Foerster LLP – 2020	Attorney (2002 graduate)	$1,125
	Attorney (2011 graduate)	$975
	Attorney (2014 graduate)	$810
	Attorney (2018 graduate)	$640
	Paralegal	$275
Wilson Sonsini Goodrich & Rosati P.C. – 2023	Attorney (1992 graduate)	$1,430
	Attorney (2013 graduate)	$1,010
	Attorney (2010 graduate)	$1,010
	Attorney (2017 graduate)	$875
	Support Staff	$250-$500
Wilson Sonsini Goodrich & Rosati P.C. – 2022	Members	$975-$2,220
	Associates	$550-$1,175
	Of Counsel	$640-$1,875
	Staff	$225-$935
	Library Personnel	$200-$300

Historical hourly rates reported by other top firms are in accord:

- In 2022, Munger, Tolles & Olson, billed a 19-year attorney at $1,210 per hour and a 9-year attorney at $850. *See Campbell v. Barnes, Orange County Superior Court* No. 30-2020-01141117-CU-WM-CXC, Order Granting Petitioners' Motion for an Award of Attorneys' Fees, filed January 20, 2022.
- In 2021, Morrison Foerster LLP billed $1,200 for a 2002 law school grad, $1,075 for a 2011 law school grad, and $745 for a 2018 law school grad.
- In 2021, Cooley LLP billed $1,415 for a partner with 27 years of experience. And in 2020, Cooley billed $1,275 for a partner with 26 years' experience and $1,120 for an associate with 12 years of experience.
- In 2020, Paul Hastings LLP billed a 25-year attorney at $1,425 per hour and a 7-year associate at $885 per hour.

23. The filings of PG&E's law firm in the PG&E Bankruptcy case, N.D. Bankr. Case No. 19-30088, also support my opinion. The attached **Exhibit B** shows that in July 2020, PG&E's attorneys billed two attorneys with 31 years' experience at $1,640 per hour, an attorney with 21 years' experience at $1,535, and an attorney with 15 years' experience at $1,220 per hour. By comparison, and factoring in four years of rate increases, described further in paragraph 30 below, the hourly rates Plaintiffs has paid certainly are in line with those rates.[1]

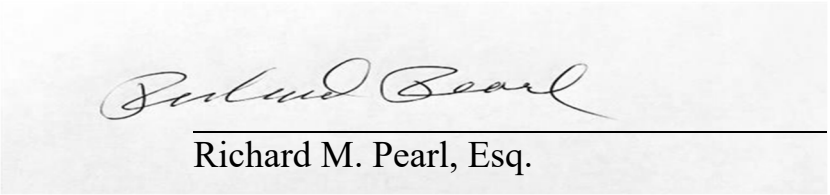
24. I also am aware that in 2020, Gibson Dunn & Crutcher LLP was billing its senior partners at $1,395 to $1,525 per hour, senior associates at $960 per hour, and paralegals at $480 per hour. In June 2021, it was reported that Gibson Dunn had offered to represent the California Redistricting Commission at rates ranging from $775 to $1,625 per hour. *See* Tiffany Steckler, *Gibson Dunn Layers Hired by California Redistricting Commission* (June 30, 2021), https://news.bloomberglaw.com/business-and-practice/gibson-dunn; *see also Herring Networks, Inc. v. Maddow*, 2021 U.S. Dist. LEXIS 23163, at *15-16 (S.D. Cal. Feb. 5, 2021) (anti-SLAPP action in which Gibson Dunn stated that its 2020 Los Angeles area rates were $1,525 and $1,395 for attorneys with "over 30 years of legal experience" and $960 for an attorney with "over ten years of legal experience"). Adjusted for the passage of time during an inflationary period, these Gibson Dunn rates are significantly higher than the rates Plaintiffs has paid here.

25. Lastly, the 2018 Peer Monitor Public Rates survey attached as **Exhibit C** shows that even as far back as 2018, the rates Plaintiffs' Counsel request here were well in line with the range of hourly rates billed by comparable Northern California law firms at that time.

[1] Bankruptcy rates are relevant here because under Bankruptcy Court rules, attorneys claiming fees must attest that the rates being charged are their regular hourly rates charged to non-bankruptcy clients. *See supra* Ex. C (Summary Sheet) Doc. #6331 ¶ 17 (attesting that pursuant to applicable Guidelines, rates charged for PG&E case are same rates charged for comparable bankruptcy and non-bankruptcy services).

26. In sum, it is my opinion that in the legal services marketplace, for the reasons stated above, the hourly rates submitted to support Counsel's lodestar cross-check are reasonable.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 29th day of July 2025, in Berkeley, California.



Richard M. Pearl, Esq.

TAB 2A

Francis O. Scarpulla (Cal. Bar 41059)
LAW OFFICES OF FRANCIS O. SCARPULLA
3708 Clay Street
San Francisco, CA 94118
Telephone: (415) 751-4193
Facsimile: (415) 751-0889
fos@scarpullalaw.com
pbc@scarpullalaw.com

Liaison Counsel for the Direct Purchaser Classes

Michael L. Roberts
ROBERTS LAW FIRM, P.A.
1920 McKinney Avenue, Suite 700
Dallas, TX 75201
Telephone: (501) 952-8558
mikeroberts@robertslawfirm.us

Dianne M. Nast
NASTLAW LLC
1101 Market Street, Suite 2801
Philadelphia, PA 19107
Telephone: (215) 923-9300
Fax: (215) 923-9302
dnast@nastlaw.com

Co-Lead Counsel for the Direct Purchaser Classes

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE : HIV ANTITRUST LITIGATION	Case No. 3:19-cv-02573-EMC (lead case)
	~~[PROPOSED]~~ ORDER GRANTING DIRECT PURCHASER CLASS PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT WTH GILEAD AND ATTORNEYS' FEES, COSTS AND EXPENSES, AND SERVICE AWARD
THIS DOCUMENT RELATES TO : KPH Healthcare Services, Inc. v. Gilead Sciences, Inc. *et al.*, 3:20-cv-06961-EMC	

Upon review and consideration of the Settlement Agreement by and between Plaintiff KPH Healthcare Services, Inc. a/k/a Kinney Drugs, Inc. ("KPH"), individually and on behalf of the Direct Purchaser Classes ("DPPs"), and Defendants Gilead Sciences, Inc.; Gilead Holdings, LLC; Gilead Sciences, LLC; Gilead Sciences Ireland UC (collectively, "Gilead"), dated July 24, 2023, and the Direct Purchaser Plaintiffs' Motion for Final Approval of Class Action Settlement with Gilead and Attorneys' Fees, Costs and Expenses, and Service Award (the "Motion"), along with its supporting memorandum and exhibits, IT IS HEREBY ORDERED that the motion is GRANTED as follows:

1. This Court incorporates by reference the definitions in the Settlement Agreement between KPH, on behalf of itself and the Direct Purchaser Classes, and Gilead, filed with this Court (ECF No. 2086-2, Ex. 1), and all capitalized terms used in this Order shall have the meaning set forth in the Settlement Agreement.

2. This Court finds that the Settlement, including the Plan of Allocation attached as Exhibit H thereto, is fair, reasonable, and adequate within the meaning of Fed. R. Civ. P. 23.

3. This Court finds that notice of the Settlement has been given to the Direct Purchaser Classes in substantially the manner approved by this Court in its Preliminary Approval Orders (ECF Nos. 2108, 2109).

4. This Court finds that the manner and forms of notice given constituted the best notice practicable under the circumstances. The manner and forms of notice were due, adequate, and sufficient and met the requirements of due process and the Federal Rules of Civil Procedure.

5. This Court finds that the Members of the Direct Purchaser Classes had a full and fair opportunity to exclude themselves from the Classes, object to the Settlement, and/or participate in the Final Approval Hearing.

6. This Court finds that all Direct Purchaser Class Members that did not timely exclude themselves from the Direct Purchaser Classes shall be bound by the Settlement Agreement and all its terms.

///

7. This Court finds that DPPs shall be bound by the release set forth in Paragraph 13 of the Settlement and shall be forever barred from asserting any Released Claims, as defined in Paragraph 1(o) of the Settlement, against Gilead Release Parties, as defined in Paragraph 1(l) of the Settlement.

8. This Court finds that Gilead Release parties shall be bound by the release set forth in Paragraph 13 of the Settlement and shall be forever barred from asserting any Released Claims against DPPs.

9. This Court directs that this action be dismissed with prejudice as to Gilead, without costs, as provided in the Settlement Agreement. This Court determines under Fed. R. Civ. P. 54(b) that there is no just reason for delay, and thereby directs that the judgment of dismissal with prejudice as to Gilead shall immediately be final and appealable in accordance with Fed. R. Civ. P. 54(b). The Clerk of the Court is directed to enter this Order and Final Judgment as to DPPs' claims against Gilead.

10. This Court directs the parties to consummate the Settlement pursuant to its terms.

11. This Court authorizes Counsel for the Parties and the Settlement Administrator, KCC, to use all reasonable procedures that are not materially inconsistent with this Order or the Settlement Agreement to carry out all remaining aspects of the administration of the Settlement.

12. This Court retains exclusive jurisdiction over the Settlement, including administration and consummation of the Settlement.

13. This Court approves and finds as fair and reasonable the allocation of $75 million of the Gilead Settlement Fund for attorneys' fees to be paid to Co-Lead Class Counsel, as requested in the Motion, in accordance with the terms of the Settlement.

14. This Court approves and finds as fair and reasonable the allocation of $2,887,478.45 million of the Gilead Settlement Fund for to be paid to Co-Lead Class Counsel for reimbursement of their out-of-pocket costs, as requested in the Motion, in accordance with the terms of the Settlement.

15. This Court approves and finds as fair and reasonable the allocation of $40,000 of the Gilead Settlement Fund to KPH for its service in litigating this case on behalf of the Direct Purchaser Classes, as requested in the Motion, in accordance with the terms of the Settlement.

IT IS SO ORDERED.

Dated: January 19, 2024

Hon. Edward M. Chen
United States District Judge

CERTIFICATE OF SERVICE

I certify that on November 21, 2023, I electronically filed the following:

DIRECT PURCHASER CLASS PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT WITH GILEAD AND ATTORNEYS' FEES, COSTS AND EXPENSES, AND SERVICE AWARD;

DECLARATION OF MICHAEL L. ROBERTS IN SUPPORT OF DIRECT PURCHASER CLASS PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT WITH GILEAD DEFENDANTS, AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF COSTS AND EXPENSES, AND A CLASS REPRESENTATIVE SERVICE AWARD;

[PROPOSED] ORDER GRANTING DIRECT PURCHASER CLASS PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT WITH GILEAD AND ATTORNEYS' FEES, COSTS AND EXPENSES, AND SERVICE AWARD;

and

CERTIFICATE OF SERVICE

using the CM/ECF system, which will send notification of each filing to all attorneys of record in this matter. I certify under penalty of perjury that the foregoing is true and correct.

DATED this 21st day of November, 2023.

/s/ Francis O. Scarpulla
Francis O. Scarpulla

General Information

Case Name	In re HIV Antitrust Litigation
Court	U.S. District Court for the Northern District of California
Date Filed	Tue May 14 00:00:00 EDT 2019
Judge(s)	Edward Milton Chen
Federal Nature of Suit	Other Statutes: Antitrust [410]
Docket Number	3:19-cv-02573
Parties	Akros Pharma Inc.; Jason Walker; Peter Staley; Josh McDonald; John Carroll; Troy Vazquez-Cain; Andrew R. Spieldenner, PhD; Janssen R&D Ireland; Designating non-party Aurobindo USA, Inc.; Zydus Pharmaceuticals (USA) Inc.; Walgreen Co.; United HealthCare Services, Inc.; Gilead Holdings, LLC; Health Options, Inc.; State of New Mexico ex rel. Hector H. Balderas, New Mexico Attorney General; The Kroger Co.; Japan Tobacco Inc.; John F Cogan; John Doe; Japan Tobacco International U.S.A. Inc; Robert J. Vazquez; Michael Warner; Brenda Emily Goodrow; E. R. Squibb & Sons, LLC; CVS Pharmacy, Inc.; Janssen Products LP; Bristol-Myers Squibb Company; Cipla USA, Inc.; Albertsons Companies, Inc.; Teamsters Local 237 Welfare Fund; Ivy Kwan Arce; Michael Snipe; Gilead Sciences, LLC; Jacob Zydonis; BlueChoice HealthPlan of South Carolina, Inc.; Johnson & Johnson Inc.; Centene Corporation; Triple-S Salud, Inc.; Aetna Inc.; HIV Organizations; Amneal Pharmaceuticals, Inc.; Gabriel Molina; FWK Holdings, LLC; Fraternal Order of Police, Miami Lodge 20, Insurance Trust Fund; Steve Fuller; KPH Healthcare Services, Inc.; Federal Trade Commission; Rite Aid Hdqtrs. Corp.; Blue Cross and Blue Shield of

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Florida, Inc.; Gilead Sciences, Inc.; Blue Cross and Blue Shield of Kansas City; Strides Pharma, Inc.; Gilead Sciences Ireland UC; H-E-B LP; Kaiser Foundation Health Plan, Inc.; Humana Inc.; Jacksonville Police Officers and Fire Fighters Health Insurance Trust; MSP Recovery Claims, Series LLC; Rite Aid Corporation; Health Care Service Corporation, a Mutual Legal Reserve Company; Blue Cross and Blue Shield of South Carolina; Mylan Pharmaceuticals Inc.; Pipe Trades Services MN Welfare Fund; Service Employees International Union, Local No. 1 Health Fund; Blue Cross Blue Shield Association; Teva Pharmaceuticals USA, Inc.; Gregg S. Gonsalves, PhD; Teamsters Local 237 Retirees' Benefit Fund

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TAB 2B

Francis O. Scarpulla (Cal. Bar 41059)
LAW OFFICES OF FRANCIS O. SCARPULLA
3708 Clay Street
San Francisco, CA 94118
Telephone: (415) 751-4193
Facsimile: (415) 788-0706
fos@scarpullalaw.com

Liaison Counsel for the Direct Purchaser Classes

Michael L. Roberts
ROBERTS LAW FIRM US, PC
1920 McKinney Avenue, Suite 700
Dallas, TX 75201
Telephone: (501) 821-5575
mikeroberts@robertslawfirm.us

Dianne M. Nast
NASTLAW LLC
1101 Market Street, Suite 2801
Philadelphia, PA 19107
Telephone: (215) 923-9300
Facsimile: (215) 923-9302
dnast@nastlaw.com

Co-Lead Counsel for the Direct Purchaser Classes

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE HIV ANTITRUST LITIGATION
THIS DOCUMENT RELATES TO : KPH Healthcare Services, Inc. v. Gilead Sciences, Inc. *et al.*, 3:20-cv-06961-EMC

Case No. 3:19-cv-02573-EMC (lead case)

DIRECT PURCHASER CLASS PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT WITH GILEAD AND ATTORNEYS' FEES, COSTS AND EXPENSES, AND SERVICE AWARD

Date: January 18, 2024
Time: 1:30 p.m.
Ctrm: 5 – 17th Floor
Judge: Honorable Edward M. Chen

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 18, 2024, at 1:30 p.m., before the Honorable Edward Chen, United States District Judge, in Courtroom 5 of the United States District Court for the Northern District of California in San Francisco, CA, Plaintiff KPH Healthcare Services, Inc. a/k/a Kinney Drugs, Inc. ("KPH"), on behalf of itself and the Direct Purchaser Classes, will and hereby does move the Court pursuant to Federal Rule of Civil Procedure 23(e) for entry of an Order: (1) finding the Settlement Agreement (ECF No. 2086-2) and Allocation Plan to be fair, reasonable, and adequate, and granting final approval of the Settlement; (2) awarding DPP Counsel $75,000,000 for attorneys' fees and reimbursement of $2,887,478.45 for costs and litigation expenses incurred in the reasonable prosecution of this matter; and approving a $40,000 class representative service award to KPH.

This motion is based on the Notice of Motion, the Supporting Memorandum of Points and Authorities, the supporting declarations and exhibits, and all papers and records on file in this matter.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

KPH Healthcare Services, Inc. ("KPH" or "Plaintiff"), through its counsel, began investigating this case over four years ago. After years of complex case work and hard-fought litigation and just hours before opening statements, KPH, on behalf of itself and the certified Direct Purchaser Classes ("DPPs" or "DPP Classes"), reached agreement on the material terms of a class action settlement with Gilead.[1] KPH and Gilead subsequently executed the long-form Settlement Agreement after additional negotiations regarding the language of the agreement (including a binding mediation with Kenneth Feinberg).[2] Under the terms of the Settlement, Gilead is required to pay $246,750,000 into a non-reversionary Settlement Fund for the benefit of the DPP Classes.

The Settlement is fair, reasonable, and adequate. It represents an excellent recovery for the DPP Classes, given the novel and complex nature of the antitrust claims at issue and the significant risks DPP Class Members faced of receiving no recovery had their claims proceeded to verdict. *See* Preliminary Approval Order, ECF No. 2108 at 3 ("with hindsight, it is clear that there were significant risks given that the indirect purchasers chose to proceed to trial and lost"). To receive a cash payment under the Settlement, DPP Class Members need only complete and submit a pre-populated claim form.

The Court-approved notice program is substantially complete. The direct notice, publication notice, and initial reminder notice aspects of the notice program have been fully implemented, and DPP Counsel have already begun the process of contacting DPP Class Members that have not yet filed claims. To complete the notice program, DPP Counsel will finish contacting DPP Class Members, and a second reminder notice will be mailed by December 4, 2023. While DPP Class Members have until January 1, 2024 to submit claim forms, 16 claim forms have already been received from known DPP Class Members, and DPP Co-Lead Class Counsel ("Class Counsel") fully

[1] "Gilead" collectively refers to Defendants Gilead Sciences, Inc., Gilead Holdings, LLC, Gilead Sciences, LLC, and Gilead Sciences Ireland UC.

[2] The Settlement Agreement ("Settlement" or "S.A.") was previously submitted to the Court as Exhibit 1 to the DPPs' Motion for Preliminary Approval. ECF No. 2086-2.

expect a robust claims rate similar to the BMS Settlement's claims rate. DPPs respectfully submit that final approval of the Settlement should be granted.

For the substantial results DPP Counsel achieved for the Classes, and for the extensive work required to secure those results, Class Counsel seek an attorneys' fee award of $75,000,000, reimbursement of incurred costs and expenses in the amount of $2,887,478.45, and a $40,000 class representative service award for KPH. The requested fee award translates to 30.39% of the Gilead Settlement Fund (or 29.1% of the total benefits DPP Counsel secured during the litigation from Gilead and BMS), compares favorably to attorneys' fee awards entered in similar cases, and is reasonable and justified, given the results DPP Counsel secured, the risky and complex nature of this case, and the tremendous resources—in the form of 39,091 hours[3] and $5,387,478.45 in total costs and expenses—DPP Counsel devoted to litigating this matter on a contingent basis for more than three years. *See* Decl. of Brian T. Fitzpatrick ("Fitzpatrick Decl.") ¶¶ 9-33, attached as Exhibit 7 to the Decl. of Michael L. Roberts ("Roberts Decl."), attached hereto as Exhibit A. A lodestar cross-check, which yields a multiplier of 2.19, further confirms the reasonableness of the requested fee award. *Id.* ¶¶ 18, 32.

Class Counsel's request for reimbursement of $2,887,478.45 for costs and litigation expenses incurred to advance the matter is reasonable and consistent with what the market would award in a private setting. The requested service award of $40,000 is likewise reasonable given that KPH was the sole class representative in this DPP litigation, the significant time and effort KPH's employees put into the litigation, and the fact that without KPH's tireless representative work, the DPP Classes would receive none of the sizeable benefits they will enjoy through the Settlement.

DPPs respectfully request that the Court grant this motion.

[3] The 39,091 hours Class Counsel refer to herein excludes the 520 hours DPP Counsel collectively spent between inception and October 31, 2023 on this filing, BMS Settlement administration, and time from attorneys with less than $20,000 in lodestar on the case. Roberts Decl. ¶ 6 n. 2.

II. BACKGROUND AND PROCEDURAL HISTORY

A. The Parties Reached an Agreement on the Eve of Trial After Years of Hard-Fought Litigation.

On the eve of trial, as opening statements were slated to begin the following morning, and after approximately four years of factual investigation, intense litigation, and several rounds of contentious negotiations before one of the most respected mediators in the industry, Kenneth Feinberg, KPH and Gilead reached an agreement to resolve the DPPs' claims against Gilead. *See* Roberts Decl. ¶¶ 3–5. By the time KPH and Gilead executed a Memorandum of Understanding ("MOU"), KPH had defeated arbitration and a dismissal motion, reviewed millions of pages of discovery, participated in 90 depositions of fact and expert witnesses, successfully moved for certification of two direct purchaser classes, successfully defended the certification before the Ninth Circuit Court of Appeals, collaborated with more than a dozen experts to prepare and submit reports supporting the DPPs' case-in-chief, prepared dozens of pretrial briefs and submissions, held multiple DPP-only jury focus exercises including a two-day mock trial, substantively participated in an all-Plaintiffs' mock trial, rigorously prepared for a challenging trial, and participated in jury selection after which a jury was empaneled. *See generally* Roberts Decl. ¶¶ 5, 8–154. DPPs were prepared to give their opening statement and had exchanged with the other plaintiff groups and Defendants their witness lists and exhibits for the first substantive days of trial. *Id.* ¶¶ 115, 152.

Each segment of the litigation was hard fought. In the early segment of the litigation, after KPH filed its complaint in October 2020, Defendants responded with motions to compel arbitration, to dismiss, and to stay and for costs. *Id.* ¶¶ 12, 15. KPH fully briefed and presented oral argument defending against a motion to compel arbitration and a motion to dismiss; it successfully defended against the motion to stay and for costs on the papers alone. *Id.* ¶¶ 16–17. Defendants raised issues of applicable state law, standing, and damages. *Id.* ¶ 16. After successfully defeating those motions in large part, KPH dove into discovery efforts in cooperation with the EPPs, which consisted of months of intense negotiations with Defendants, scores of fact depositions, and the review of millions of documents. *Id.* ¶¶ 26–42. Successfully conducting discovery in this case required DPP Counsel to

understand not only complicated patent, pharmaceutical, and regulatory matters, but also the nuances of legal complexities across plaintiff groups and claims.

Between May 26, 2021 and December 17, 2021, DPPs and EPPs (and sometimes Retailers) deposed 42 fact witnesses. *Id.* ¶ 38. In early October 2021, DPP Counsel were also engaged in settlement negotiations with defendant BMS and preparing their class certification submission. On October 19, 2021, DPPs and BMS reached agreement on the material terms of a proposed class action settlement. *Id.* ¶ 51. DPPs and BMS notified the Court of that fact the next day. *Id.* And just hours later, DPPs filed a motion requesting certification of three direct purchaser classes—a Truvada Class, an Atripla Class, and a Complera Class. *Id.* ¶ 43. DPPs submitted the expert reports of Dr. Russell L. Lamb, Ph.D. (regarding class-wide impact and damages) and Professor Thomas G. McGuire (regarding market power) and approximately two dozen other exhibits in support of their class certification motion. *Id.*

In connection with EPPs' request for leave to amend their complaint to add an additional plaintiff, on December 14, 2021, the Court extended the time for Gilead to file its opposition to DPPs' class certification motion until June 2022. *Id.* ¶ 44. But the winter and spring of 2022 were not idly spent in this litigation; far from it. In addition to wrapping up fact discovery depositions in January 2022, DPP Counsel spent this period beginning to collaborate with two new plaintiff groups (IHPPs and United), working on ten expert merits reports, and negotiating the language of the BMS Settlement. *Id.* ¶¶ 30, 38, 52, 59-60. After months of negotiations, DPPs' motion for preliminary approval of the $10,800,000 BMS Settlement was filed on May 13, 2022. *Id.* ¶ 52.

On June 2, 2022, approximately two weeks after deposing Dr. Lamb the first of four times in this case, Gilead filed its opposition to DPPs' motion for class certification and moved to exclude Dr. Lamb's opinions in support. *Id.* ¶ 45. DPPs filed their opposition to Gilead's *Daubert* motion just twelve days later. *Id.* On June 23, 2022, DPPs (in coordination with other plaintiff groups) served the merits reports of nine experts. *Id.* ¶ 59. The next day, June 24, 2022, DPPs deposed Gilead's class certification expert, Dr. Bruce Strombom. *Id.* ¶ 64. On June 28, 2022, DPPs served the merits expert report of Dr. Russell L. Lamb, Ph.D. on Gilead. *Id.* ¶ 59. And finally, on June 30, 2022, DPPs filed a

reply brief in support of their motion for class certification supported, the supporting expert rebuttal report of Dr. Russell Lamb, Ph.D., and over a dozen other supporting exhibits. *Id.* ¶ 45.

Intense expert discovery occurred between July 1 and September 15, 2022. On July 22, 2022, Defendants served 12 merits experts reports. *Id.* ¶¶ 59, 63. Defendants served their expert report on damages five days later. *Id.* Plaintiffs' 13 merits rebuttal reports were served on August 12, 2022, and Dr. Lamb's merits rebuttal report on DPP damages was served on August 17, 2022. *Id.* ¶ 59. Additionally, between July 13, 2022 and September 15, 2022, Defendants conducted 20 depositions of Plaintiffs' shared and DPP-only experts, and the plaintiff groups deposed eight of Defendants' experts. *Id.* ¶¶ 61, 64. The Court also heard arguments on DPPs' and EPPs' motions for class certification on August 25, 2022, which DPP counsel prepared for and successfully argued on behalf of the DPP Classes. *Id.* ¶ 45.

This Court granted in substantial part DPPs' motion for class certification on September 27, 2022, certifying a class of Atripla Direct Purchasers and a class of Truvada Direct Purchasers and appointing Michael L. Roberts and Dianne Nast as Co-Lead Class Counsel and Francis Scarpulla as Liaison Counsel. *Id.* ¶¶ 46, 47; ECF No. 1388. Defendants' petition for permission to appeal that order under Rule 23(f) followed, against which DPP Counsel deftly defended, again on the papers. Roberts Decl. ¶ 48. DPPs proceeded to provide notice to the Classes pursuant to the Court's orders. *Id.* ¶¶ 49-50.

Motions for summary judgment and *Daubert* motions were under way by early September 2022, when Defendants filed three separate motions for summary judgment against Plaintiffs. *Id.* ¶ 65. DPPs worked tirelessly in coordination with the other plaintiff groups to oppose those motions, including the identification of over 200 exhibits, and to file Plaintiffs' own motion for partial summary judgment and six *Daubert* motions against Defendants' experts. *Id.* ¶¶ 65-66. DPPs and the other plaintiff groups immediately proceeded to defend against Defendants' omnibus *Daubert* motion against several of Plaintiffs' key experts. *Id.* ¶ 67. DPPs were prepared to argue a portion of the summary judgment and *Daubert* briefing. *Id.* ¶ 68. On January 9, 2023, the Court gave Plaintiffs the green light as to their MFE/MFEP claims, that is, the reverse payment claims. *Id.* ¶ 69.

The summary judgment and *Daubert* motion practice transitioned into grueling pretrial motions and submissions. *See generally id.* ¶¶ 70-125. DPPs' pretrial motions and submissions—in extensive cooperation with the other plaintiff groups, when necessary—included several drafts of witness lists and summaries, multiple drafts of trial exhibits, several rounds of deposition designations, seven motions *in limine* and oppositions to Defendants' seven motions *in limine*, a trial structure brief, several iterations of jury instructions and a verdict form, a pretrial conference statement, a trial brief, and several drafts of a joint juror questionnaire. *Id.* DPPs participated in extensive meet-and-confer meetings with Defendants and other plaintiff groups in the process of developing these pretrial submissions. *Id.* DPPs further represented the DPP Classes at multiple pretrial conference hearings ahead of trial as well as at voir dire the day before DPPs reached agreement with Gilead. *Id.*

At the same time that DPPs were preparing pretrial motions and submissions and gearing up for a complex and lengthy trial, they prepared and executed three jury exercises working with trial consultants they had engaged, including an in-person meeting regarding that mock trial and trial strategy and a two-day mock trial in person in the Bay Area. *Id.* ¶¶ 129-33. In addition, DPPs represented the DPP Classes at the additional all-plaintiffs' mock trial which also took place in the Bay Area during other dates. *Id.* ¶¶ 5, 128.

By the time the parties reached an agreement, after a jury was empaneled and just before opening statements were to begin, and after months of negotiations with the guidance of Mr. Feinberg, counsel for both sides were keenly aware of the strengths and weaknesses of their respective case and the significant risks in continuing to litigate. *Id.* ¶ 3. After signing the MOU, DPPs and Gilead continued to negotiate the long-form Settlement Agreement until the parties agreed on all but one of the major provisions, such as the scope of the Classes, the terms of the release, and the timing for funding. *Id.* ¶ 160. To resolve the one remaining issue, KPH and Gilead engaged mediator Kenneth Feinberg, who issued a decision following a round of binding mediation. *Id.* ¶ 161. KPH and Gilead thereafter executed the Settlement on July 24, 2023. *Id.*

KPH moved for preliminary approval of the Settlement on August 9, 2023. ECF No. 2086. The Court heard oral argument on September 21, 2023, and granted preliminary approval on

September 25, 2023. ECF Nos. 2109, 2110. The notice plan approved by the Court, which was designed to provide robust notice of the Settlement to the Classes and to satisfy the requirements of Fed. R. Civ. P. 23 and due process, was immediately implemented by the Court-approved claims administrator, KCC[4]: within fourteen days of the preliminary approval order, direct notice consisting of the long-form notice and a pre-populated claim form was mailed to all known Class Members, press releases were published in *PR Newswire and Business Wire*, and a case-specific website was published. *See* Decl. of Carla Peak ("Peak Decl.") ¶¶ 4, 8-9, 13, attached as Exhibit 6 to the Roberts Decl. By October 24, 2023, the remainder of the media portion of the notice plan was complete, with banners and leaderboards being published twice each in e-newsletters *Becker's Pharmacy Report*, *NAW SmartBrief*, and *Pharmaceutical Commerce Direct*. *Id.* ¶¶ 10-12. In the meantime, the first reminder notices were mailed, and Class Members began filing claims. *Id.* ¶¶ 5, 15. DPP Counsel have already begun directly contacting by phone and email all known Class Members who had not yet submitted claims. Roberts Decl. ¶ 173. The second reminder notice will be mailed by December 4, 2023. Peak Decl. ¶ 7. Class Members have until January 1, 2024 to file their claims. *See* Preliminary Approval Order ¶ 20, ECF No. 2109.

B. This Settlement Provides Significant Monetary Relief to the DPP Classes

Pursuant to the terms of the Settlement, Gilead paid $246,750,000 into the Gilead Settlement Fund, which will be used to pay valid claims submitted by DPP Class Members in accordance with the Plan of Allocation, all Notice and Administration Expenses and Court-approved attorneys' fees, costs, expenses, and a representative-plaintiff service award. S.A. ¶¶ 1(q), 7. The Gilead Settlement Fund is placed in an interest-bearing, QSF escrow account. The Plan of Allocation provides that the Net Gilead Settlement Fund shall be distributed *pro rata* to each DPP Class Member that submits a valid claim based on the units of brand and generic Truvada and Atripla purchased, with weights applied based on the drug purchased and whether the drug was brand or generic. S.A. Ex. H, ECF No. 2086-2. Under the Settlement, none of the Settlement Fund shall revert to Gilead. *Id.* ¶ 16(b), .

[4] *See* ECF No. 2109 ¶ 12.

KPH entered into the Settlement on behalf of the following previously certified Direct Purchaser Classes:

> **Truvada Class**: All persons or entities in the United States and its territories who purchased Truvada or generic Truvada directly from any of Defendants or any brand or generic drug manufacturer from February 1, 2018, until the date of the class certification order, September 27, 2022.
>
> **Atripla Class**: All persons or entities in the United States and its territories who purchased Atripla or generic Atripla directly from any of Defendants or any brand or generic drug manufacturer from February 1, 2018, until the date of the class certification order, September 27, 2022.

S.A. ¶ 1(e). The certification order excludes the following persons and entities from the Classes: (1) Defendants, named co-conspirators, and their officers, directors, employees, subsidiaries, and affiliates; (2) federal, state, and local governmental entities; (3) any judicial officer presiding over the litigation and members of their immediate family and judicial staff; (4) the Retailer Plaintiffs;[5] and (5) United Healthcare Services Inc. *Id.*

Pursuant to the terms of the Settlement, the members of the DPP Classes:

> [R]elease and forever discharge, and covenant not to sue, Gilead and each and every Gilead Release Party (collectively, the "Releasees"), from all manner of claims, debts, obligations, demands, actions, suits, causes of action, damages whenever incurred, liabilities of any nature whatsoever, including costs, expenses, penalties and attorneys' fees, under federal or state laws, whether known or unknown, foreseen or unforeseen, suspected or unsuspected, contingent or non-contingent, assigned or otherwise, in law or equity, that arise out of or relate, in whole or in part in any manner, to all conduct, acts, or omissions alleged in the Action and/or that could have been alleged in the Action (or arising out of substantially the same subject matter), regardless of legal theory.

S.A. ¶ 13(a).[6]

[5] The Retailer Plaintiffs are: Walgreen Co.; The Kroger Co.; Albertsons Companies, Inc.; H-E-B, L.P.; Rite Aid Corporation; Rite Aid Hdqtrs. Corp.; and CVS Pharmacy, Inc. The Retailer Plaintiffs and United Healthcare Services Inc.("United") opted out of the DPP Classes.

[6] Except as otherwise provided in the Settlement, the release does not extend to any claims arising in the ordinary course of business with Gilead under the Uniform Commercial Code, the laws of negligence, product liability, implied warranty, contract, or personal injury, aside from breach of warranty or contract based in whole or in part on any conduct challenged by DPPs in the Action. *Id.* Pursuant to the Settlement, Gilead releases "all claims related to the allegations made in letters to KPH's assignor, McKesson, dated: June 2, 2021 and others, relating to alleged noncompliance with ADR provisions contained in the McKesson/Gilead distribution agreement." *Id.* ¶ 13(b). "For the

III. ARGUMENT

A. The Settlement Is Fair, Reasonable, and Adequate

Federal Rule of Civil Procedure 23(e) requires the Court to approve a class-wide resolution of claims. In doing so, courts are mindful of the Ninth Circuit's "'strong judicial policy' that favors the settlement of class actions." *Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d 959, 966 (N.D. Cal. 2019) (quoting *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)). The Court may approve a settlement that is "fair, reasonable, and adequate." *Briseño v. Henderson*, 998 F.3d 1014, 1023 (9th Cir. 2021). The factors that support that analysis are set forth in the December 1, 2018 amendments to Fed. R. Civ. P. 23(e)(2):

> (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorneys' fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.

The Court additionally may consider the Ninth Circuit's *Churchill* factors:

> (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of future litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the state of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

Churchill Vill., L.L.C. v. Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004); *see also Cottle v. Plaid Inc.*, No. 20-cv-03056-DMR, 2021 WL 5415252, at *11 (N.D. Cal. Nov. 19, 2021) (court examines Rule 23(e)(2) and *Churchill* factors in deciding whether to grant preliminary approval). The Court also should consider the extent to which the Settlement complies with the Northern District of

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avoidance of doubt, Gilead shall not seek indemnification from Direct Purchaser Class member McKesson Corporation as to any and all claims arising out of the Direct Purchaser Class settlement of the above-captions antitrust dispute." *Id.* Finally, the Settlement provides, generally, that Gilead and the DPPs each release the provisions, rights, and/or benefits conferred by Section 1542 of the California Civil Code and by any similar, comparable, or equivalent law or principle of common law. *Id.* ¶ 13(c). The scope of the released claims is virtually identical to the claims certified on behalf of the DPPs for class-wide treatment. *See* Class Certification Order, ECF No. 1388.

California's *Procedural Guidance for Class Action Settlements*. Evaluating the Settlement against these factors demonstrates that the Settlement is fair, reasonable, and adequate and warrants final approval.

1. KPH and Class Counsel Have Zealously Represented the DPP Classes, Including Reaching a Settlement Following Good-Faith, Informed, and Arms'-Length Negotiations.

In evaluating Rule 23(e)(2)(A) and (B)'s requirement that the Class be well represented and that the settlement be reached as a result of arm's length negotiations, the focus is on "the conduct of the litigation and of the negotiations leading up to the proposed settlement," including whether counsel "had an adequate information base" and the "the involvement of a neutral . . . mediator." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment. The involvement of a neutral mediator "supports the conclusion that Plaintiffs were armed with sufficient information about the case to broker a fair settlement." *Uschold v. NSMG Shared Servs., LLC*, 333 F.R.D. 157, 170 (N.D. Cal. 2019) (internal quotation marks omitted). Given the involvement of highly respected mediator Kenneth Feinberg and the hard-fought litigation preceding the Settlement—including multiple rounds and months of mediation and negotiations—there is no question that these factors favor final approval.

The DPP Classes have been well represented in this case work and litigation by KPH and Class Counsel for over four years and will continue to be so represented through administration of the Settlement. As described above and in detail in the accompanying Roberts Declaration, DPP Counsel litigated strenuously against sophisticated and well-prepared defense counsel. DPP Counsel defeated motions to dismiss and to compel arbitration, motions for summary judgment, and *Daubert* motions; successfully certified two DPP Classes; defeated a petition to appeal to the Ninth Circuit Court of Appeals; briefed numerous pretrial matters; and comprehensively and thoroughly prepared for trial. Roberts Decl. ¶¶ 8–154. This vigorous advocacy demonstrates the absence of any fraud or collusion underlying the Settlement. DPP Counsel have extended 39,091 hours and incurred total costs and expenses of $5,387,478.45 in litigating this case. *Id.* ¶¶ 179, 181. The negotiations to settle this matter before the mediator were extensive and contentious. *Id.* ¶¶ 157-8. By the time the parties entered into an agreement to resolve the matter literally on the eve of trial as opening statements

were scheduled to begin on the following morning, each side was intimately familiar with the strengths and weaknesses of its case.

The single class representative KPH has enthusiastically supported DPPs' claims from before the case was even filed, having communicated regularly with Class Counsel, reviewed the complaint and discovery requests, produced over 26,000 pages of internal documents, prepared and sat for a lengthy deposition, and spent numerous hours preparing to testify at trial. Roberts Decl. ¶¶ 36–37, 41, 148, 182.

Class Counsel have extensive experience litigating complex antitrust cases such as this and believe the recovery provided by the Settlement is an excellent result for the DPP Classes in light of the risks of continuing to litigate, which are detailed throughout this Motion. Roberts Decl. ¶¶ 3–5 and Ex. 1 (Roberts Law Firm Resume); Decl. of Dianne Nast ("Nast Decl.") Ex. 1 (NastLaw LLC Firm Resume), attached as Exhibit 3 to the Roberts Decl. "The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *See In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) (internal quotation marks and citation omitted); *see also In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995) ("Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation.").

Finally, as discussed below, Class Counsel's request for a fee award, reimbursement for their out-of-pocket costs and expenses, and a service award for KPH, was negotiated and is intended to be considered by the Court separately from the Court's evaluation of the Settlement. S.A. ¶ 12(a). Any amounts requested by counsel but not awarded will be allocated to DPP Class Members and will not be returned to Gilead.

The Classes have been and continue to be well represented by Class Counsel and KPH. This factor supports final approval.

2. The Relief provided for the Classes is Adequate, Especially Considering the Risks of Continued Litigation.

The Settlement provides $246,750,000 for the benefit of the DPP Classes. This relief is adequate when taking into account the following factors under Fed. R. Civ. P. 23(e)(2)(C):

> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> (iii) the terms of any proposed award of attorneys' fees, including timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3).

"The risks and certainty of recovery in continued litigation are factors for the Court to balance in determining whether the Settlement is fair." *Nobles v. MBNA Corp*., No. 06-cv-03723-CRB, 2009 WL 1854965, at *2 (N.D. Cal. June 29, 2009).

The risks of continuing to litigate in this case are well-documented at this point. "Antitrust cases are particularly risky, challenging, and widely acknowledge[d] to be among the most complex actions to prosecute." *In re Lithium Ion Batteries Antitrust Litig.*, 13-md-02420-DMR, 2020 WL 7264559, at *15 (N.D. Cal. Dec. 10, 2020). The estimated settlement value cannot be viewed in a vacuum; the court must evaluate the strengths and weaknesses of the case to determine the likelihood of recovering that value. *See Cuzick v. Zodiac U.S. Seat Shells, LLC,* No. 16-cv-03793-HSG, 2017 WL 4536255, at *6 (N.D. Cal. Oct. 11, 2017); *see also Smith v. Am. Greetings Corp.*, No. 14-cv-02577-JST, 2015 WL 4498571, at *7 (N.D. Cal. July 23, 2015) (evaluating recovery in view of risks).

KPH, on behalf of DPPs, was one of five plaintiff groups proceeding to trial, and the plaintiff groups' claims often required diverging interests and trial strategies, not to mention different proofs at trial. The fact witnesses expected at trial were mostly experts and adverse defense witnesses. In addition, the subject matter was highly academic and complex. Roberts Decl. ¶¶ 4, 120. Although they believed mightily in their case, DPPs understood that there were significant risks in proving that Defendants violated the rule of reason, proving that DPP Class Members suffered damages, and proving that Gilead had market power, particularly after the Court denied Plaintiffs' motion for summary judgment and related motions *in limine* and *Daubert* motions on the topic. *See* ECF Nos. 1599 at 1, 27, (Summary Judgment Order), 1716 at 29-30 (Order re Motions *in Limine*), 1694 at 12-17 (Order re Plaintiffs' *Daubert* motions). As this Court has recognized, the jury verdict in favor of Defendants Gilead and Teva in the End Party Payer ("EPP"), Individual Health Plan Plaintiff ("IHPP"), and United trial underscores the seriousness of those risks. *See* Order Denying Set Aside,

ECF No. 2136 at 8 n.5 (observing that "the reason why the Retailer Plaintiffs achieved success was because their counsel prepared for trial and made a good risk assessment, and not simply because they were effortlessly free riding on the coattails of the EPPs who made a different risk assessment"); *see also* Hrg. Tr. at 5, ECF No. 2114 (N.D. Cal. Sept. 21, 2023) ("there were obviously, [it] has become evident, that there were significant litigation risks. Particularly in light of the experience of the actual trial in this case of the EPPs, I think it underscores the fact that the litigation risks here warrant the recovery rate . . . ; it is nonetheless, still substantial and will yield substantial relief to the plaintiff class.").

The DPP Classes' recovery compares favorably to their potential recovery at trial. Before the Settlement, DPPs' economist, Dr. Russell Lamb, estimated the certified Classes' damages at approximately $2,080,000,000. *See* Roberts Decl. ¶ 14. Dr. Lamb's analysis calculated the difference between the amount Class Members paid for brand Truvada and Atripla that they purchased directly from Gilead against the amount they would have paid for lower-priced generic versions of Truvada and Atripla as early as May 2019—when generic Truvada and Atripla likely would have entered the market, based upon Plaintiffs' expert testimony, had Gilead not engaged in the anticompetitive conduct that delayed those generic versions. Dr. Lamb's analysis also calculated the difference between the amount Class Members paid for generic equivalents of Truvada and Atripla and the amount they would have paid for the same drugs had robust generic entry occurred as early as May 2019. The monetary relief of $246,750,000 to the Classes is 11.9% of the claimed damages the Classes stood to receive at trial if they successfully prosecuted their claim against Gilead.

Although Class Counsel still believe in the strength of DPPs' claims, the value and certainty of recovery here outweighed the obvious and serious risk of no recovery or a substantially reduced recovery. *See Bellinghausen v. Tractor Supply Co.*, 303 F.R.D. 611, 624 (N.D. Cal. 2014) ("The Court considers that even if 'Plaintiffs were to prevail, they would be required to expend considerable additional time and resources potentially outweighing any additional recovery obtained through successful litigation,' and these delays will affect 'payment to the Class Members and increase the amount of attorneys' fees.'") (quoting *Collins v. Cargill Meat Solutions Corp.*, 274 F.R.D. 294, 302 (E.D. Cal. 2011)). This factor weighs in favor of final approval.

a. The Settlement Treats Class Members Equitably Relative to One Another and the Claims Process is Straightforward.

The standard for approval of a proposed allocation plan is the same as the standard for approval of a class action settlement; each must be "fair, reasonable and adequate." *See In re Citric Acid Antitrust Litig.*, 145 F. Supp. 2d 1152, 1154 (N.D. Cal. 2001) (citations omitted). An allocation plan is reasonable if it "reimburses class members based on the type and extent of their injuries." *Id.*

Per the Court's preliminary approval order, the first steps of the notice plan have been implemented: direct notice has been mailed along with pre-populated claims forms, a reminder notice has been mailed, media notice has been published, and a Settlement-specific settlement website has gone live. Peak Decl. ¶¶ 4-5, 6-13. Class Members can submit a claim through an online portal on the Settlement-specific website or by mailing their completed claim form. Class Members submitting their claims by either method that believe they have purchased different amounts than the pre-populated figures may submit documentation showing these purchases, subject to review by KCC with assistance from DPPs' economist Dr. Lamb as necessary. Plan of Allocation, S.A. Ex. H, ECF No. 2086-2 at 65 ¶ 9.

The Plan of Allocation provides a standardized method of calculating each Class Member's *pro rata* share of the Settlement based on the member's purchases, S.A. Ex. H, ECF No. 2086-2, as was previously approved in this case and has been approved in other antitrust cases brought by direct purchasers to recover overcharges. *See*, *e.g.,* Order Granting DPPs' Mot. for Final Approval of Class Action Settlement with BMS ¶ 2, ECF No. 1524; *see also In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 07-cv-05944-JST, 2016 WL 721680, at *21 (N.D. Cal. Jan. 28, 2016) (quoting *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-md-01827-SI, 2011 WL 7575004, at *4 (N.D. Cal. Dec. 27, 2011)) ("[I]n this District, a '*pro-rata* [plan] for allocation has been used in many antitrust cases.'"); *In re Lidoderm Antitrust Litig.,* No. 14-md-02521-WHO, 2018 WL 11375216, at *2 (N.D. Cal. Sept. 20, 2018).[7] The *pro rata* share is determined based on the Class Members' total volume of

[7] *See also In re Glumetza Antitrust Litig.*, No. 19-cv-05822-WHA, 2022 WL 327707 (N.D. Cal. Feb. 3, 2022); *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, No. 18-md-02819, 2020 WL 6193857, at *1 (E.D.N.Y. Oct. 7, 2020) ("*Restasis*"); *In re Loestrin 24 Fe Antitrust Litig.*, No. 13-md-2472 (D.R.I. Jan. 22, 2020), ECF Nos. 1396-8, 1462 (approved Sept. 1, 2020); *In re Lidoderm Antitrust Litig.,* No. 14-md-02521-WHO (N.D. Cal.), ECF Nos. 1004-5, 1004-6, 1054 (approved Sept. 20, 2018); *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 14-md-

purchases of generic and brand Truvada and Atripla, weighted based on the drug purchased and whether it was generic or brand. S.A. Ex. H ¶¶ 12-14, ECF No. 2086-2. No set of Class Members are singled out for preferential or advantageous treatment; rather, all Class Members' share is calculated the same way. This factor weighs in favor of final approval.

b. Class Counsel's Requested Attorneys' Fees, Costs and Expenses, and Representative Plaintiff Service Award Are Reasonable.

Class Counsel's fee request is detailed below, but it is worth emphasizing that the parties agreed that the Court's resolution of Class Counsel's request for attorneys' fees, costs and expenses, and representative plaintiff service awards is not a precursor to the fairness, reasonableness, and adequacy of the Settlement. S.A. ¶ 12(b). Nor does the request impact whether any amount of the $246,750,000 will ever revert to Gilead, as the fund is non-reversionary. *See Moreno v. Beacon Roofing Supply, Inc.*, No. 19-cv-00185-GPC(LL), 2020 WL 3960481, at *5 (S.D. Cal. July 13, 2020) (holding that non-reversionary aspect of settlement supported final approval under Rule 23(e)(2)(C)(ii)). The Settlement contains no "clear sailing arrangements," and Class Counsel do not request a disproportionate share of the Settlement. *See Briseno*, 998 F.3d at 1023. In other words, there are no red flags suggestive of collusion. When negotiating the Settlement, KPH and Gilead discussed that the Settlement would include a common fund; they otherwise did not discuss attorneys' fees, costs, and expenses or a representative-plaintiff service award until after all substantive elements of the Settlement were agreed upon. *See* Roberts Decl. ¶ 162. Furthermore, Class Counsel did not seek an award of attorneys' fees in connection with the $10.8 million BMS Settlement. *See* Roberts Decl. ¶ 56. This factor weighs in favor of final approval.

02503 (D. Mass.), ECF Nos. 1163-4, 1179 (approved July 18, 2018); *In re Celebrex (Celecoxib) Antitrust Litig.*, No. 14-cv-00361 (E.D. Va.), ECF Nos. 609-4, 630 (approved Apr. 18, 2018); *In re Aggrenox Antitrust Litig.*, No. 14-md-02516 (D. Conn.), ECF Nos. 733-1, 740 (approved Dec. 19, 2017); *In re Asacol Antitrust Litig.*, No. 15-cv-12730 (D. Mass.), ECF Nos. 419-9, 648 (approved Dec. 7, 2017); *King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, No. 06-cv-01797 (E.D. Pa.), ECF Nos. 864-17, 870 (approved Oct. 15, 2015).

3. Class Members' Reaction to the Settlement Has Been Positive.

As noted above, the direct notice, publication notice, and initial reminder notice aspects of the notice program have been fully implemented.[8] While DPP Class Members have until January 1, 2024 to submit claim forms, 16 claim forms have already been received from known DPP Class Members and Class Counsel fully expect a robust claims rate similar to that experienced with the BMS Settlement. While DPP Class Members have until December 28, 2023 to object to the Settlement or DPPs' request for attorneys' fees, costs, and a service award, no objections have been filed to date.

This factor supports final approval, and Class Counsel expect DPP Class Members' positive response to the Settlement to continue.[9]

B. The Requested Attorneys' Fee Award Is Fair and Reasonable.

"In a certified class action, the court may award reasonable attorney's fees . . . that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). The Supreme Court has recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). In deciding whether the requested fee amount is appropriate, the Court's role is to determine whether such amount is "fundamentally fair, adequate, and reasonable." *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003) (quoting Fed. R. Civ. P. 23(e)).

Where a settlement creates a common fund, courts have discretion to use either the percentage-of-recovery method or the lodestar method to determine what constitutes a fair and

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[8] Five notices were returned as undeliverable, and KCC conducted advanced address research and could not locate a different address. Peak Decl. ¶ 6. Once alerted that these notices had been returned as undeliverable, Class Counsel caused PDFs of the notice and relevant pre-populated claim form to be emailed to the respective counsel for four of these entities. Roberts Decl. ¶ 172. Class Counsel also emailed PDFs of the notice and pre-populated claim form to an employee of the fifth entity that Class Counsel had communicated with in connection with the BMS Settlement and confirmed by with a follow-up telephone call that the employee had received the email. Roberts Decl. ¶ 172.

[9] Because the Court did not order a second opt-out period following the opt-out period in connection with class certification, there are no further opt-outs to report. Once the notice plan concludes and the relevant deadlines have passed, Class Counsel will provide a full accounting of the number of claims received.

reasonable attorney fee award. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) ("*Bluetooth*"). "The use of the percentage-of-the-fund method in common-fund cases is the prevailing practice in the Ninth Circuit for awarding attorneys' fees and permits the Court to focus on showing that a fund conferring benefits on a class was created through the efforts of plaintiffs' counsel." *In re Apple Inc. Device Performance Litig.*, No. 18-md-02827-EJD, 2023 WL 2090981, at *12 (N.D. Cal. Feb. 17, 2023) ("*Apple Device Performance Litig.*") (quoting *In re Korean Air Lines Co., Ltd. Antitrust Litig.*, No. 02-cv-05107, 2013 WL 7985367, at *1 (C.D. Cal. Dec. 23, 2013)); *see In re Robinhood Outage Litig.,* No. 3:20-cv-01626-JD, 2023 WL 5321525, at *1 (N.D. Cal. July 28, 2023) (same). Courts employing the percentage-of-recovery method are also encouraged to "perform a cross-check by applying the lodestar method to confirm that the percentage-of-recovery amount is reasonable." *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d 922, 929-30 (9th Cir. 2020).

Although DPPs gave Class Members notice of their intent to seek an attorneys' fee request of up to 33 ⅓%, DPPs request a fee award of $75,000,000, which translates to 30.39% of the $246,750,000 Settlement Fund (or 29.1% of the total recovery DPP Counsel secured for the DPP Classes, including the BMS Settlement).[10] Application of the percentage-of-recovery method demonstrates the requested award compares favorably to awards in similar cases and is reasonable and appropriate considering the facts and circumstances of this litigation. A lodestar crosscheck further confirms the reasonableness of the requested award.

1. The Percentage-of-Recovery Method Supports the Requested Award.

"In common fund cases, the 25 percent benchmark for fee awards is merely a 'starting point for analysis' . . . [and] '[s]election of the benchmark or any other rate must be supported by findings that take into account all of the circumstances of the case.'" *Senne v. Kansas City Royals Baseball Corp.*, No. 14-cv-00608-JCS, 2023 WL 2699972, at *14 (N.D. Cal. Mar. 29, 2023) (quoting *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002), *aff'd sub nom, Senne v. Concepcion*, 2023 WL 4824938 (9th Cir. June 28, 2023). As the Court recognized in approving a

[10] DPP Counsel did not request a fee award in connection with the $10,800,000 BMS Settlement. Roberts Decl. ¶ 56.

33% fee award in *Hernandez v. Dutton Ranch Corporation*, "[d]istrict courts within this circuit, including this Court, routinely award attorneys' fees that are one-third of the total settlement fund." No. 19-cv-00817-EMC, 2021 WL 5053476, at *6 (N.D. Cal. Sept. 10, 2021) (collecting authorities); *see also In re Lidoderm Antitrust Litig.*, No. 14-md-0521-WHO, 2018 WL 4620695, at *4 (N.D. Cal. Sept. 20, 2018) ("*Lidoderm*") (recognizing in awarding a 33% fee award to DPP counsel in a pay-for-delay case that "a fee award of one-third is within the range of awards in this Circuit") (collecting authorities).

When determining the appropriate percentage to award, courts consider:

> [W]hether class counsel achieved exceptional results for the class, whether the case was risky for class counsel, whether counsel's performance generated benefits beyond the cash settlement fund, the market rate for the particular field of law (in some circumstances), the burdens class counsel experienced while litigating the case (*e.g.*, cost, duration, foregoing other work), and whether the case was handled on a contingency basis.

Apple Device Performance Litig., 2023 WL 2090981, at *12 (citing *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 954–55 (9th Cir. 2015)) ("*Online DVD*") (internal quotations omitted).

Here, DPP Counsel obtained an excellent result for the DPP Classes and took on tremendous risk in expending 39,091 hours and advancing $5,387,478 in total costs and expenses prosecuting this novel and complex antitrust case on a contingent basis, in the face of a vigorous defense mounted by some of the nation's top defense lawyers on behalf of deep-pocketed pharmaceutical companies. DPPs' requested award of 30.39% of the recovery (or 29.1% of the total recovery from both Gilead and BMS) is less than the average fee award of 32.11% of the recovery in direct purchaser pay-for-delay class actions and well below the average fee award of 36% of the recovery in class actions that proceeded to trial. *See* Fitzpatrick Decl. ¶¶ 18, 20. These facts support approval of the requested award.

a. The Settlement Is an Excellent Result for the Classes.

The first factor, that is, the result achieved, is the "most critical" factor to consider. *Apple Device Performance Litig.,* 2023 WL 2090981, at *12 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)). DPP Counsel secured a $246,750,000 non-reversionary settlement fund for the DPP

Classes, which equates to 11.9% of the single damages DPPs were seeking at trial.[11] This result is exceptional, considering the tremendous risks the DPP Class Members faced. Those risks were not theoretical, as three other plaintiff groups that went to trial against Gilead lost and received no recovery.

DPP Class Members' reactions support the reasonableness of the request. The DPP Classes are comprised of sophisticated drug wholesalers and their assignees— a group that has not been shy in the past about objecting to fee requests in reverse payment cases. *See, e.g., In re Glumetza Antitrust Litig.*, No. 19-cv-5822-WHA, 2022 WL 327707, at *7 (Feb. 3, 2022) ("*Glumetza*") (three national wholesalers "likely represent[ing] over 90% of the subject purchases" objected to direct purchaser counsel's fee request equating to a 4.99 multiplier as "constitute[ing] a windfall"). While the deadline to object has not yet passed, no objections have been filed, and not a single DPP Class Member has informed Class Counsel that they intend to object to the Settlement or the fee request. To the contrary, Class Counsel has spoken with counsel of various DPP Class Members regarding the fee request (including the three largest DPP Class Members, that is, the three largest national wholesalers, which comprise over 90% of Truvada and Atripla purchases). No objections were made by any Class Members with whom Class Counsel spoke. Class Counsel was specifically authorized by counsel of the national wholesalers to confirm in this Motion that they do not object to the fee requested.

The absence of objections supports approval of the requested award. *See Foster v. Adams & Assocs., Inc.*, No. 18-cv-02723-JSC, 2022 WL 425559, at *10 (N.D. Cal. Feb. 11, 2022); *see also* Fitzpatrick Decl. ¶¶ 16, 24 (noting that DPP Class Members had a strong incentive to object to the fee request and that if they thought the request "was unjustified they would object to it, as they have done in a small number of cases"). This factor supports the reasonableness of the requested award.

b. The Litigation Was Challenging and Posed a High Risk.

"Risk is a relevant circumstance" in analyzing a fee request. *Vizcaino*, 290 F.3d at 1048. "Antitrust cases are particularly risky, challenging, and widely acknowledge[d] to be among the most

[11] $246,750,000 / $2,079,900,000 = .0119.

complex actions to prosecute." *In re Lithium Ion Batteries Antitrust Litig.*, 2020 WL 7264559, at *15. As the Second Circuit once recognized, "the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) (internal quotations omitted). Given the defense verdict entered against other plaintiff groups, it cannot reasonably be disputed that prosecuting this case was a complex, risky, and challenging endeavor.

In contrast to certain other high-profile antitrust cases, no government agency prosecuted Defendants for the misconduct at issue in this case. As a result, DPPs did not have the luxury of utilizing or leveraging a preexisting investigation, indictments, or guilty pleas all but guaranteeing a massive recovery. *See In re Nat'l Collegiate Athletic Ass'n ("NCAA") Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-2541-CW, 2017 WL 6040065, at *6–7 (N.D. Cal. Dec. 6, 2017) (referencing cases in which "mere disclosure of a government investigation all but guarantees the creation of a megafund, notwithstanding what counsel does or does not do"). Instead, DPP Counsel dedicated 39,091 hours and spent $5,387,478 advancing this litigation on a contingent fee basis in the face of a vigorous defense mounted by attorneys from some of the nation's top law firms on behalf of their deep-pocketed clients. Throughout the litigation, DPP Counsel were faced with the real prospect that they may never receive any recovery for their efforts.

There were significant challenges to prosecuting this case. A number of legal theories were dismissed at the pleadings stage (overarching conspiracy) or the summary judgment phrase (conspiracy to monopolize based on reverse payments, no-generic restraints, the shelving of TAF, and other alleged misconduct), and the Court denied the DPPs' request to certify a class of Complera purchasers on numerosity grounds. The surviving reverse payment claim was based on the novel theory that the most-favored-entrant ("MFE") and most-favored-entrant-plus ("MFEP") clauses included the FTC settlement between Gilead and Teva constituted an illegal reverse payment. While DPP Counsel believed in this claim, there was no guarantee it would survive at trial or that they would be able to persuade a jury that the MFE/MFEP clauses constituted an illegal reverse payment to delay generic entry.

Complicating matters further, Teva waived privilege as to its internal assessments of Gilead's patents, the FTC patent litigation, and the FTC settlement, while Gilead cloaked itself in privilege to prevent its internal assessments seeing the light of day. Another obstacle was introduced when Defendants' market power expert took the view that traditional economic tests are inapplicable to the facts of this case, ensuring a battle of the experts on the issue of market power.

DPPs faced significant obstacles to prevailing while staring down the upcoming trial. At the time DPPs and Gilead agreed on the material terms of the Settlement, only two reverse payment cases had been tried to verdict before a jury, and a defense verdict was returned in both instances. DPP Counsel's trial preparation (including a DPP-only mock trial, two DPP-only focus group sessions, an all-plaintiffs' mock trial, and extensive discussions with their trial consultants) revealed that the highly complex terminology and concepts in this case were very likely to confuse many jurors. The trial was further complicated by the reality that DPPs were required to try the case in coordination with four other plaintiff groups (with many times diverging interests and trial strategy), the fact that key fact witnesses were current or former employees of Gilead or Teva or their outside counsel (that is, there were no whistleblowers), and the possibility that a jury could enter a verdict in favor of DPPs on liability but award no damages to DPPs. These risks were compounded by the fact that Gilead—one of the nation's largest and most profitable pharmaceutical companies—would be represented at trial by two of the nation's most well-regarded law firms. *Vizcaino v. Microsoft Corp.*, 142 F. Supp. 2d 1299, 1303 (W.D. Wash. 2001) ("Class Counsel's risk was even greater, and their work made more difficult, because Microsoft is one of the nation's largest and most formidable companies and it, and several law firms, defended the case vigorously for several years."), *aff'd* 290 F.3d 1043 (9th Cir. 2002). This factor supports approval of the requested award.

c. The Skill and Experience of DPP Counsel Support the Requested Fee Award.

The Classes benefited from DPP Counsel's skill and expertise in prosecuting complex antitrust class actions. DPP Counsel shepherded DPPs' claims through multiple motions to dismiss and to compel arbitration; exhaustive discovery; class certification, a Rule 23(f) petition for leave to appeal certification of two DPP Classes, summary judgment and *Daubert* proceedings; pretrial

briefings; and extensive trial preparation. Throughout that entire lengthy and complex process, DPP Counsel coordinated extensively with counsel from the other four plaintiff groups, DPPs' expert economist, Dr. Russell Lamb, Ph.D., and more than a dozen shared experts and consultants. Leveraging their expertise, DPP Counsel engaged in prolonged and hard-fought negotiations, assisted by Kenneth Feinberg, culminating in their securing the $246,750,000 Settlement for the benefit of the DPP Classes. This factor supports approval of the requested award. *See, e.g., In re Capacitors Antitrust Litig.*, No. 3:14-cv-03264-JD, 2023 WL 2396782, at *1 (N.D. Cal. Mar. 6, 2023) (finding $66,000,000 proposed attorneys' fee award "amount[ing] to 40% of the Settlement Fund created by the present round of settlements, and a cumulative 31.01% of the total settlements reached for the Class . . . [to be] well within the range of reasonable fee[] awards, especially in light of the complexity of these antitrust cases, and the degree of work and skill required to obtain highly beneficial results for the class") (collecting authorities).

The quality of opposing counsel is a further testament to DPP Counsel's skill and expertise. *See Apple Device Performance Litig.*, 2023 WL 2090981, at *14 (recognizing that courts "consider the quality of opposing counsel as a measure of the skill required to litigate the case successfully") (citation and internal quotations omitted). Here, DPP Counsel faced Gilead, BMS and, for all intents and purposes, third party Teva (after the Retailers entered the case). That Gilead, BMS, and Teva had tremendous financial resources at their disposal and were each represented by one or more highly-respected law firms with a history of mounting a vigorous defense on behalf of its clients— Gilead (White & Case, Kirkland & Ellis LLP, Proskauer Rose LLP), BMS (Arnold & Porter), Teva (Goodwin Procter)— evidences DPP Counsel's substantial skill in achieving the nearly quarter billion Settlement for the benefit of the DPP Classes. This factor supports approval of the requested award.

d. The Burden of Prosecuting this Litigation on a Contingent Basis Was Significant.

"When counsel takes cases on a contingency fee basis, and litigation is protracted, the risk of non-payment after years of litigation justifies a significant fee award." *Apple Device Performance Litig.*, 2023 WL 2090981, at * 15 (internal quotation marks and citation omitted). With no guarantee

of any recovery for their efforts, DPP Counsel dedicated 39,091 hours and $5,387,478.45 total to litigating this high-risk antitrust case for three years. Roberts Decl. ¶ 181. During the prosecution of this case, there were multiple and lengthy periods of time where litigation was so intense that a number of highly experienced attorneys from DPP Counsel firms were working full-time on this case alone. The resources required of this matter were so significant that Class Counsel were forced to turn down opportunities to work on other cases to devote the resources required to effectively advance this matter. *See id.* ¶ 70. This factor further supports the reasonableness of the DPPs' requested fee award. *See, e.g. Davis v. Yelp, Inc.*, No. 18-cv-00400-EMC, 2023 WL 3063823, at *2 (N.D. Cal. Jan. 27, 2023) (recognizing that "a larger award of 33% is warranted because counsel risked significant amounts of their own funds and dedicated time and effort to litigate through the class certification process, the motion for summary judgment, expert retention, trial preparation, and the nearly $1 million counsel put at risk in advancing costs").

e. Awards in Similar Cases Support the Reasonableness of the Requested Award.

The requested award compares favorably to awards in similar cases. DPPs have retained Professor Brian T. Fitzpatrick, who is an expert in federal class action settlements and attorneys' fees. *See* Fitzpatrick Decl. attached as Exhibit 7 to the Roberts Decl. Professor Fitzpatrick's analysis demonstrates the requested award of 30.39% (or 29.1% taking the BMS Settlement into consideration) is substantially less than the 32.11% average fee award in pharmaceutical direct purchaser cases. *See* Fitzpatrick Decl. ¶ 18 (empirical analysis of fees awarded in connection with 38 direct purchaser pharmaceutical class actions shows that the average fee award in such cases was 32.11% and the median was 33.3%). The requested award is also well below the 36% average fee award in class actions that went to trial. *Id.* ¶ 20 (referencing William B. Rubenstein declaration recognizing that a 36% average fee award for the class action cases in his study that went to trial). As a result, this factor favors approval of the requested award.

DPPs recognize the $246,750,000 Settlement falls within the definition of settlements frequently referred to as mega-funds (which is of course a positive thing for the DPP Classes). The Ninth Circuit has repeatedly "declined to adopt a bright-line rule requiring the use of sliding-scale

fee awards in megafund cases." *In re Optical Disk Drive Prod. Antitrust Litig.*, 959 F.3d at 933 (citing *Vizcaino*, 290 F.3d at 1047)); *see also In re Lidoderm Antitrust Litig.*, 2018 WL 4620695, at *4 ("There is no rule in the Ninth Circuit that requires a court to decrease the percentage of the fee award as the size of the settlement increases.") (internal quotation marks and citation omitted). "[T]he size of the fund is simply one factor courts look to when determining a reasonable fee . . . [and f]ederal district courts across the country have, in the class action settlement context, routinely awarded class counsel fees in excess of the 25% benchmark, even in so-called mega-fund cases." *In re Lidoderm Antitrust Litig.*, 2018 WL 4620695, at *4 (collecting authorities).

Professor Fitzpatrick's empirical analysis demonstrates that the median and average awards in the direct purchaser pharmaceutical class actions with settlements between $100 million and $250 million were 32.78% and 30.7%, respectively. Fitzpatrick Decl. ¶ 22. Accordingly, the requested award is on par with awards entered in connection with similarly sized mega-fund settlements in direct purchaser pharmaceutical cases.

Importantly, none of the rationales put forth as justifying a sliding-scale approach in mega-fund cases are present. There is no windfall—DPP Counsel spent 39,091 hours litigating this case and the requested fee award equates to a reasonable lodestar multiplier of 2.19. *Compare In re Lidoderm Antitrust Litig.*, 2018 WL 4620695, at *4 ("The rationales for awarding fees at or below the 25% benchmark in some cases – *i.e.,* to avoid a windfall for class counsel – do not apply here."), *with Glumetza*, 2022 WL 327707, at *12 (concluding that a requested award translating to a 4.99 "would unfairly award class counsel a financial windfall").

The size of the Settlement is also not simply attributable to a large class size. *See Gutierrez v. Wells Fargo Bank, N.A.*, 07-cv-05923-WHA, 2015 WL 2438274, at *5-7 (N.D. Cal. May 21, 2015). Instead, the opposite is true. As a result of their expertise and the incredible resources they devoted to this case, DPP Counsel were able to secure a massive recovery despite the small size of the DPP Classes. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 2017 WL 6040065, at *6–7 ("A megafund was created in this case despite the size of the classes, not because of it").

2. A Lodestar Crosscheck Confirms the Reasonableness of the Requested Award.

"As a final check on the reasonableness of requested attorneys' fees, courts often compare the amount counsel would receive under the percentage-of-recovery method with the amount counsel would have received under the lodestar method." *Apple Device Performance Litig.*, 2023 WL 2090981, at *16 (quoting *In re Nexus 6P Prods. Liab. Litig.*, No. 17-cv-02185-BLF, 2019 WL 6622842, at *13 (N.D. Cal. Nov. 12, 2019)). Courts engaging in a lodestar crosscheck "start by determining how many hours were reasonably expended on the litigation, and then multiply those hours by the prevailing local rate for an attorney of the skill required to perform the litigation." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008). The aim of the lodestar crosscheck is to "do rough justice, not to achieve auditing perfection," and "trial courts need not, and indeed should not, become green-eyeshade accountants." *In re Wells Fargo & Co. Shareholder Derivative Litig.*, 445 F. Supp. 3d 508, 526 (N.D. Cal. 2020) (citations and internal quotations omitted); *see also In re Capacitors Antitrust Litig.*, No. 14-cv-03264-JD, 2018 WL 4790575, at *6 (N.D. Cal. Sept. 21, 2018) (quoting *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306–307 (3d Cir. 2005) ("[T]he lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records.").

DPP Counsel spent 39,091 hours prosecuting the litigation for a collective lodestar of $34,281,869 calculated at current rates. Roberts Decl. ¶¶ 179, 181. The requested fee award of $75,000,000 equates to a multiplier of 2.19,[12] which is well within the range of lodestar multipliers regularly deemed reasonable in complex class action cases.

a. DPP Counsel Spent a Reasonable Number of Hours Advancing the Litigation.

This matter was hard-fought and intensely litigated from the beginning. Pursuant to the Court's Common Benefit Order (ECF No. 176), Class Counsel collected monthly common benefit time and expense submissions from DPP Counsel firms and audited those submissions to ensure their compliance with the directives set forth in that Order. Roberts Decl. ¶ 179. Class Counsel also

[12] $75,000,000 / $34,281,869 = 2.1877.

thoroughly reviewed all DPP Counsel time submissions and made reductions and deletions of time as appropriate. *Id.*

As set forth in the accompanying Roberts Declaration, DPP Counsel collectively spent 39,091 hours opposing multiple motions to dismiss and to compel arbitration; engaging in extensive written discovery, including serving and responding to written discovery, serving more than a dozen third party subpoenas, and reviewing millions of pages of documents; preparing for and attending 90 depositions; briefing and arguing class certification; defending the petition for leave to appeal to the Ninth Circuit Court of Appeals; working with thirteen testifying experts and various other subject-matter experts and consultants; and coordinating with other plaintiff groups to brief summary judgment and *Daubert* motions and various other pretrial submissions. *Id.* ¶¶ 8–125. DPP Counsel also spent significant time preparing for trial and participating in settlement negotiations assisted by Kenneth Feinberg. *Id.* ¶¶ 126–162. The hours reported by DPP Counsel were reasonable and necessary to effectively prosecute this case.[13]

b. DPP Counsel's Hourly Rates Are Reasonable.

In assessing the reasonableness of an attorney's hourly rate, courts consider whether the claimed rate is "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886, 895-96 n.11 (1984). Because "attorneys in common fund cases must be compensated for any delay in payment," courts look to "current rates for all work done in the litigation" when applying a cross-check. *Marshall v. Northrop Grumman Corp.*, No. 16-cv-6794, 2020 WL 5668935, at *2 (C.D. Cal. Sept. 18, 2020); *see also Vizcaino,* 290 F.3d at 1051; *Ellis v. Costco Wholesale Corp.*, No. 04-cv-3341-EMC, 2014 WL 12641574, at *3 (N.D. Cal. May 27, 2014).

Here, the relevant legal community is San Francisco Bay Area attorneys specializing in complex antitrust class action litigation. DPP Counsel are highly regarded members of the bar with significant experience prosecuting antitrust cases and other complex class actions. DPP Counsel

[13] Attached as Exhibit 2 to each DPP Counsel's declaration is a chart detailing for each timekeeper from the declarant's firm: (1) the amount of time the timekeeper spent on each of the Court-approved billing activity codes, (2) the timekeeper's current hourly billing rate, (3) and the timekeeper's total lodestar in the case.

submitted the following hourly rates: attorneys with between 35 and 56 years of experience ($1,100 to $1,550 per hour), attorneys with between 20 and 34 years of experience ($760 to $1100 per hour); attorneys with between 8 and 19 years of experience ($650 to $920 per hour); attorneys with between 4 and 6 years of experience ($560 to $660); and paralegals ($150 to $360). Their hourly rates are in line with market rates in the San Franciso Bay Area. *See, e.g., In re Animation Workers Antitrust Litig.*, No. 14-cv-4062-LHK, 2016 WL 6663005, at *6 (N.D. Cal. Nov. 11, 2016) (hourly rates for senior attorneys of between $845 and $1200 deemed reasonable); *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, No. 2672 CRB, 2017 WL 1047834, at *5 (N.D. Cal. Mar. 17, 2017) (finding hourly rates to be reasonable where the billing rates for partners ranged from $275 to $1600, $150 to $790 for associates, and $80 to $490 for paralegals).

Multiplying the hours DPP Counsel spent advancing the litigation by their hourly rates results in a lodestar multiplier of 2.19, which is well within the range of lodestar multipliers routinely awarded in complex class actions. *See Vizcaino*, 290 F.3d at 1051 n.6 (9th Cir. 2002) (observing that lodestar multipliers ranging from one to four are frequently awarded in complex class actions); *Apple Device Performance Litig.*, 2023 WL 2090981, at *18 (multiplier of 2.232 deemed reasonable); *Glumetza*, 2022 WL 327707, at *8 (multiplier of 2.2 deemed reasonable); *McLeod v. Bank of Am., N.A.*, No. 16-cv-03294-EMC, 2019 WL 1170487, at *7 (N.D. Cal. Mar. 13, 2019) (multiplier of 3.5 deemed reasonable); *Alexander v. FedEx Ground Package Sys.*, Inc., No. 05-cv-00038-EMC, 2016 WL 3351017, at *3 (N.D. Cal. June 15, 2016) (multiplier of three deemed reasonable).

C. The Costs and Expenses Requested Are Reasonable.

"In common fund cases, the Ninth Circuit has stated that the reasonable expenses of acquiring the fund can be reimbursed to counsel who has incurred the expense." *In re High-Tech Employee Antitrust Litig.,* No. 11-cv-02509-LHK, 2015 WL 5158730, at *16 (N.D. Cal. Sept. 2, 2015) (citing *Vincent v. Hughes Air W., Inc.,* 557 F.2d 759, 769 (9th Cir. 1997)). This is because "litigation expenses make the entire action possible," *Online DVD,* 779 F.3d at 953, and "[t]o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense," *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 392 (1970).

DPPs request $2,887,478.45 for unreimbursed costs and expenses incurred by DPP Counsel firms in connection with the litigation.[14] Roberts Decl. ¶ 181. These costs and expenses include expert witness and consultant fees, mediation fees, travel costs (airfare, hotel, meals, etc.), document hosting/review platform costs, court fees, electronic research, service of process, deposition and court reporter fees, photocopies, and postage and delivery fees. *Id.* These costs and expenses were reasonably necessary for the continued prosecution of this litigation and incurred for the benefit of the DPP Classes with no guarantee that they would ever be reimbursed. *Id.* ¶¶ 185, 186. DPPs' request for reimbursement of $2,887,478.45 is reasonable and appropriate.

D. The Requested Class Representative Service Award Is Reasonable.

Service awards "intended to compensate class representatives for work undertaken on behalf of a class 'are fairly typical in class action cases.'" *Online DVD,* 779 F.3d at 943 (quoting *Rodriguez v. W. Publ'g Corp.,* 563 F.3d 948, 958 (9th Cir. 2009)). The requested $40,000 service award is reasonable and justified given KPH's importance to DPPs' recovery and the time and effort it devoted to protecting the DPP Classes.[15]

To determine if a requested award is "reasonable," the Court "must evaluate their awards individually, using 'relevant factors include[ing] the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, . . . the amount of time and effort the plaintiff expended in pursuing the litigation . . . and the reasonabl[e] fears of . . . retaliation.'" *Staton*, 327 F.3d at 977 (quoting *Cook v. Niedert,* 142 F.3d 1004, 1016 (7th Cir. 1998)). In addition, a court should look to "the number of named plaintiffs receiving incentive payments, the proportion of the payments relative to the settlement amount, and the size of each payment." *Online DVD,* 779 F.3d at 947.

In this case, the requested service award is well-deserved. The $246,750,000 Settlement would not have been possible absent the actions of KPH and its employees. Prior to filing this case,

[14] DPPs' request does not include the $2,500,000 they were reimbursed in connection with the BMS Settlement.

[15] KPH received a service award of $10,000 in connection with the BMS Settlement. As a result, KPH will receive service awards totaling $50,000 for its role in this litigation should the Court grant DPPs' request.

KPH worked with McKesson to obtain an assignment, and KPH reviewed the initial complaint. Roberts Decl. ¶ 182. From that time forward, KPH received regular updates from Class Counsel regarding the status of the litigation and reviewed filings (including additional complaints) brought to its attention by counsel. Working in coordination with Class Counsel, KPH provided responses and supplemental responses to Defendants' interrogatories, searched through hard-copy documents and electronically stored information to collect documents and data requested by Defendants, worked with others at McKesson regarding its collection of documents and data, and signed off on document productions. *Id.* ¶¶ 36–37. In all, KPH made six productions comprised of 11,152 documents totaling 26,345 pages. *Id.* ¶ 37.

KPH's employees spent a significant amount of time preparing to testify at KPH's 30(b)(6) deposition and at trial. KPH's corporate designee, Charles Aquilina, spent between eight and ten hours meeting with DPP counsel to prepare to testify at KPH's 30(b)(6) deposition and an additional five hours participating in that deposition. *Id.* ¶ 41. Additionally, Brian Scott, the KPH corporate representative designated to testify at trial, spent approximately 40 hours reviewing documents and working with Class Counsel preparing to testify (preparing outline, reviewing documents, practicing direct examination and cross-examination, etc.). *Id.* ¶ 148.

That KPH is the only class representative for the DPP Classes, and thus the only entity entitled to receive a service award, is very significant and further justifies an increased service award. *See McLeod,* 2019 WL 1170487, at *8 (quoting *Garner v. State Farm Mut. Ins. Co.,* No. 08-cv-1365-CW(EMC), 2010 WL 1687832, at *17 (N.D. Cal. Apr. 22, 2010)) ("[U]nlike many class actions, where there are several class representatives, each of whom are entitled to incentive awards, here there was just one."). A service award in this amount is likewise appropriate relative to the settlement amount obtained from Gilead. This minimal amount represents 0.016% of the Gilead Settlement Fund. *See Cuzick*, 2017 WL 4536255, at *6 (quoting *Bluetooth*, 654 F.3d at 947). The requested $40,000 service award is reasonable and appropriate considering KPH's importance to the DPP Classes' recovery as the lone class representative and the significant work it performed to protect the DPP Classes interests. *See, e.g., In re High-Tech Employee Antitrust Litig.*, 2015 WL 5158730, at *18 (noting that the service awards of $80,000 to four class representatives and

$120,000 to one class representative were "in line with awards in other 'megafund' cases."); *Nitsch v. Dreamworks Animation SKG Inc.*, No. 14-cv-04422-LHK, ECF 41 at 25-29 (awarding $90,000 each to three class representatives, in addition to the $10,000 each received from a prior settlement); *Meijer, Inc. v. Abbott Labs.*, No. 07-cv-05985-CW, ECF 514 ¶ 14 (N.D. Cal. Aug. 11, 2011) (awarding $60,000 each to three class representatives); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. 07-md-01819-CW, ECF 1370 ¶ 6 and ¶ F (N.D. Cal. June 30, 2011) (awarding $50,000 to sole class representative).

IV. CONCLUSION

For all the foregoing reasons, KPH respectfully requests that the Court grant final approval to the Settlement; award $75 million in attorneys' fees and $2,887,478.45 in costs and expenses to be allocated by Class Counsel among the DPP counsel performing common benefit work; and approve a service award of $40,000 to Class Representative KPH.

Respectfully submitted,

Dated: November 21, 2023

LAW OFFICES OF FRANCIS O. SCARPULLA

By: */s/ Francis O. Scarpulla*

FRANCIS O. SCARPULLA (SBN 41059)
fos@scarpullalaw.com
PATRICK B. CLAYTON (SBN 240191)
pbc@scarpullalaw.com
3708 Clay Street
San Francisco, CA 94118
Telephone: (415) 751-4193
Facsimile: (415) 788-0706

Liaison Counsel for Direct Purchaser Plaintiff Classes

ROBERTS LAW FIRM US, PC
MICHAEL L. ROBERTS (*pro hac vice*)
mikeroberts@robertslawfirm.us
ERICH P. SCHORK (*pro hac vice*)
erichschork@robertslawfirm.us
SARAH E. DELOACH (*pro hac vice*)
sarahdeloach@robertslawfirm.us
1920 McKinney Avenue, Suite 700
Dallas, TX 75204
Telephone: (501) 821-5575

NASTLAW LLC
DIANNE M. NAST (*pro hac vice*)
dnast@nastlaw.com
DANIEL N. GALLUCCI (*pro hac vice*)
dgallucci@nastlaw.com
MICHELE S. BURKHOLDER (*pro hac vice*)
mburkholder@nastlaw.com
1101 Market Street, Suite 2801
Philadelphia, PA 19107
Telephone: (215) 923-9300
Facsimile: (215) 923-9302

Co-Lead Counsel fort the Direct Purchaser Plaintiff Classes

HAUSFELD LLP
MICHAEL D. HAUSFELD (*pro hac vice*)
mhausfeld@hausfeld.com
888 16th St. NW, Suite 300
Washington DC 20006
Telephone: (202) 540-7200
Facsimile: (202) 540-7201

HAUSFELD LLP
MICHAEL P. LEHMANN (SBN 77152)
mlehmann@hausfeld.com
600 Montgomery Street, Suite 3200
San Francisco, CA 94111
Telephone: (415) 633-1908
Facsimile: (415) 358-4980

HAUSFELD LLP
BRENT W. LANDAU (*pro hac vice*)
blandau@hausfeld.com
325 Chestnut Street, Suite 900
Philadelphia, PA 19106
Telephone: (215) 985-3273
Facsimile: (215) 985-3271

Counsel for the Direct Purchaser Classes

TAB 3A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

FIRST IMPRESSIONS SALON, INC., ROY MATTSON, KPH HEALTHCARE SERVICES a/k/a KINNEY DRUGS, INC., PIGGLY WIGGLY MIDWEST, LLC, individually and on behalf of all others similarly situated,	
Plaintiffs,	
v.	**Case No. 3:13-CV-00454-NJR**
NATIONAL MILK PRODUCERS FEDERATION, COOPERATIVES WORKING TOGETHER, DAIRY FARMERS OF AMERICA, INC., LAND O'LAKES, INC., and AGRI-MARK, INC. d/b/a CABOT CREAMERY COOPERATIVE, INC.,	
Defendants.	

ORDER AWARDING ATTORNEY FEES, COSTS, AND CLASS REPRESENTATIVE SERVICE AWARDS

ROSENSTENGEL, Chief Judge:

Pending before the Court is a Motion for Attorney Fees and Costs (Doc. 531). For the reasons stated below, the Court grants the motion.

The Parties agreed to the proposed Settlement of this case in November 2019. (Doc. 521-1). On December 4, 2019, Plaintiffs' Motion for Preliminary Approval of Class Settlement (Doc. 521) was filed with the Court, and the Court's January 10, 2020 Preliminary Approval Order was entered. Notice was timely provided to the Class regarding the terms of the proposed settlement, and Plaintiffs moved for an award of

attorney fees, costs, and Class Representative service awards. *See* Notice to the Court on the Completion of Class Notice Program (Doc. 533). On February 26, 2020, Plaintiffs timely filed their motion requesting Final Approval of the Settlement and their motion for attorney fees, reimbursement of costs, and service awards for the Class Representatives (Docs. 530, 531). Plaintiffs' Motion requested an award of attorney fees in the amount of thirty-three and one-third percent (33 1/3%) of the Settlement Fund, and of the accrued interest (Doc. 531 at 2). Plaintiffs also seek $5,271,266.99 as reimbursement of their attorney costs and Class Representative service awards of $25,000 for each of the four class representatives. *Id.*

In the Preliminary Approval Order, this Court directed that "[i]n the written objection, the Class Member must state his or her (or company) full name, address, and affirm that he, she or it, is a Class Member, and must state whether they intend to appear at the Final Fairness Hearing . . . Any documents supporting the objection must also be attached to the objection." (Doc. 525, ¶ 12). On February 18, 2020, an objection (Doc. 528) was filed in response to Plaintiffs' Motion for Attorney Fees and Costs by Matthew Robbins. Robbins has not complied with this Court's Preliminary Approval Order because he did not affirm that he is a Class member, he did not state whether he intended to appear at the Final Fairness Hearing, and he did not provide any supporting documentation. Plaintiffs timely responded to the objection on April 10, 2020. (Doc. 537). On April 27, 2020, the Court held a Fairness Hearing to consider whether the proposed Class Action Settlement was fair, reasonable, adequate, and in the best interests of the Class (specifically, the two subclasses). Robbins did not appear at the hearing.

Having thoroughly considered the Settlement Agreement, this Motion, the single

objection thereto, memoranda, and the entire record in these proceedings, the Court **FINDS**:

1. Without proof that Robbins does in fact have standing to object, he lacks standing in this matter. *See Pearson v. NBTY, Inc.*, 772 F.3d 778, 786 (7th Cir. 2014) (the objector must have a stake in the outcome of the award of attorney fees, as a member of the class, to have standing). Robbins did not provide the information required under paragraph fourteen of this Court's Preliminary Approval Order, and he has, therefore, waived his rights to object. (Doc. 525, ¶ 14).
2. Class counsel has requested attorney fees based on a percentage of the fund doctrine. This is the method utilized in this Circuit for calculating common fund attorney fees. *Beesley v. Int'l Paper Co.*, 2014 WL 375432, at *2 (S.D. Ill. Jan. 31, 2014) ("When determining a reasonable fee, the Seventh Circuit Court of Appeals uses the percentage basis rather than a lodestar or other basis.")
3. A lodestar cross-check, although not required, underscores that the amount of Class Counsel's requested fees is reasonable. The fees awarded here are reasonable, based on such factors as: (a) the complexity of this antitrust case, (b) the experience and quality of the attorneys who litigated this case on behalf of Plaintiffs and the Class, (c) the Settlement fund established provides for significant payments to Class members, and (d) significant risks undertaken by Class Counsel.
4. Because there was no guarantee that Class Counsel would secure any recovery for the Class, for their services, or reimbursement for the expenses they had advanced in this contingent class action lawsuit, federal courts apply a risk adjustment

multiplier. The average multiplier that results from this fee request falls well within the range approved in this District for contingent class representation.

5. An analysis by this Court of the factors that federal courts in this Circuit regularly consider shows that the proposed attorney fees requested have been well-earned by Class Counsel's litigation efforts, and they are fair, reasonable, and adequate to the Class.

6. The requested attorney fees, litigation costs, and service awards for the Class Representatives are fair, reasonable, and adequate.

7. This Court has previously appointed Don Barrett of Barrett Law Group, Dianne Nast of NastLaw, LLC, and Michael L. Roberts of Roberts Law Firm as Co-Lead Counsel for the Class.

8. The Court previously appointed and confirmed First Impressions Salon, Inc., Roy Mattson, Piggly Wiggly Midwest, LLC and KPH Healthcare Services, Inc. a/k/a Kinney Drugs, Inc. as Class Representatives (Doc. 521, ¶7). The Class Representatives have invested significant time and resources in this litigation by, among other things: familiarizing themselves with pleadings, responding to Defendants' discovery requests, producing documents, sitting for depositions, and preparing for trial.

CONCLUSION

For these reasons, Plaintiffs' Motion for Attorney Fees and Costs is **GRANTED** in its entirety. It is **ORDERED** that Class Counsel receive $5,271,266.99 as reimbursement of reasonable litigation costs from the initial payment of the settlement proceeds, which was deposited pursuant to the Settlement Agreement. It is further **ORDERED** that Class

Counsel receive attorney fees in the amount of thirty-three and one-third percent (33 1/3%) of the $220 million common fund, and of accrued interest. The Court designates and authorizes the previously appointed Co-Lead Counsel, John (Don) W. Barrett of Barrett Law Group, PA, Dianne Nast of NastLaw, LLC, and Michael L. Roberts of Roberts Law Firm, in their sole discretion to distribute the attorney fees to co-counsel. Among the factors Co-Lead Counsel should consider are the consistency, quantum, duration, and intensity of the fee applicants' commitment to the litigation, participation and leadership in the various common benefit contributions performed, and the timing the common benefit work was performed. The attorney fees should be paid no sooner than the date when all the settlement proceeds are deposited into the class escrow fund for distribution to the class. It is further **ORDERED** that the Class Representatives receive service awards of $25,000 each.

IT IS SO ORDERED.

DATED: April 27, 2020

Nancy J. Rosenstengel

NANCY J. ROSENSTENGEL
Chief U.S. District Judge

TAB 3B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

FIRST IMPRESSIONS SALON, INC., individually and on behalf of all others similarly situated, *et al.*, Plaintiffs v. NATIONAL MILK PRODUCERS FEDERATION, *et al.*, Defendants.	Case No. 3:13-CV-00454-NJR-GCS

PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS
AND INCORPORATED MEMORANDUM OF LAW

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In accordance with this Court's January 10, 2020 Memorandum and Order (Doc. No. 525), Plaintiffs hereby respectfully request that the Court grant this Motion for Attorneys' Fees, Costs and Class Representative Service Awards.

INTRODUCTION

This litigation was an eight-year battle that involved a mountain of discovery numerous depositions, multiple discovery hearings, class certification proceedings, and extensive motion practice that was snowballing into potentially an intense and complex antitrust trial. *See* Declaration of Dianne M. Nast in Support of Plaintiffs' Motions for Final Approval of Settlement and for Attorneys' Fees and Costs ("Nast Decl."), at ¶ 10. Plaintiffs had achieved class certification and survived a motion to dismiss and multiple trips to the Seventh Circuit. Before trial was to begin, summary judgment motions were filed by both parties and were pending along with motions *in limine*, a Daubert motion to exclude Plaintiffs' expert, and a motion to decertify the Class. *Id.* at ¶ 14.

The Parties' initial mediation process was overseen by Court-appointed, former Federal District Judge Daniel Weinstein (Ret.), but that mediation process concluded in June of 2018, and the Parties continued to litigate. *Id.* at ¶ 12. Settlement negotiations resumed in May 2019, several months before this case was scheduled for trial. *Id.* at ¶ 13. As before, these settlement negotiations were conducted in good faith and at arm's length. *Id.*

During the second round of mediation—and with the continued assistance of the Court-appointed mediator—the Parties reached an agreement to settle Plaintiffs' antitrust claims for a non-reversionary fund of $220 million. *Id.* at ¶ 16. In light of the complexity of the issues, the risk of trial, and the appeals that could follow, this is an extraordinary result for the Class.

For the many years of risky, expensive, and labor-intensive work that Class Counsel[1] expended to achieve this result, they seek fees equaling thirty-three and one-third percent (33 1/3%) of the common fund (but net of administrative costs[2]) and $5,271,266. 99 in expenses. As confirmed by well-settled case law concerning attorney fees in the class action context, Class Counsel's request is reasonable, customary and fully supported by both the facts and law. The same is true for the requested service awards for each of the four Class Representatives (First Impressions Salon, Inc., Roy Mattson, Piggly Wiggly Midwest, LLC and KPH Healthcare Services, Inc. a/k/a Kinney Drugs, Inc.).

BACKGROUND

I. Class Counsel Undertook Extraordinary Risks in Prosecuting This Action.

When this case was initially filed, it was in many ways an uphill battle. Successful antitrust actions are very difficult to try to a jury. *See, e.g., Ohio Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 841 (7th Cir. 1978) ("While the challenges and subtleties of antitrust law often hold a strong fascination for lawyers, a trial such as this one could hardly be expected to keep the average lay juror on the edge of his or her seat….").

Plaintiffs' early effort to obtain partial summary judgment early on was denied, albeit without prejudice, followed by Plaintiffs clash with Defendants over Plaintiffs' motion to

[1] The three attorneys serving as Co-Lead Counsel for the Class include: Michael Roberts, Dianne Nast, and Don Barrett. In addition to Co-Lead Counsel's law firms, other law firms participated in this case on behalf of Plaintiffs, and they include Neal & Harwell, Kohn Swift & Graf, Michael Fishbein, Levin Sedran & Berman, Nussbaum Law Group, and Vanek Vickers & Masini/Sperling Slater.

[2] *See Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014) ("[A]dministrative costs should not have been included in calculating the division of spoils between class counsel and class members.").

substitute a Plaintiff-party, a motion which was granted by this Court. Dkt. 216. *See also* Nast Decl. at ¶ 6. Next, Defendants filed a motion seeking to dismiss the Complaint and Strike certain Class allegations, resulting in the dismissal of one of the named Plaintiffs that this Court determined did not have antitrust standing. *Id.* at ¶ 7 (citing Ct. Mem. Op., dated 10/05/2016) (Dkt. 250). Through diligent advocacy, however, Plaintiffs defeated, at least temporarily, the remainder of Defendants' dismissal motion.[3]

Subsequently, Plaintiffs successfully sought and were granted certification of two sub-classes on September 29, 2017. However, Defendants continued to challenge Class certification in a Rule 23(f) appeal filed with the Seventh Circuit, which was resolved on February 15, 2018, after Defendants' Petition for Rehearing and Rehearing En Banc was denied. Nast Decl. at ¶ 8.

The parties then engaged in extensive fact discovery on multiple fronts, consisting of review and analysis of hundreds of thousands of pages of document discovery, interrogatories and requests for admissions, thirty-six (36) depositions, preparation of expert reports, and multiple discovery proceedings before Magistrates Williams and Sison regarding discovery disputes that could not be resolved by meet-and-confers between the parties. *Id.* at ¶ 9.

By the time the parties were able to finally reach an agreement to settle this case, they were well-prepared for trial. But that does not undermine the complexity and uncertainty of the challenges Plaintiffs still faced, as Defendants' summary judgment motion, motions *in limine*, and their motion to decertify were all pending shortly before trial was scheduled to begin.

Thus, right up until the time of trial, Plaintiffs still faced significant risks, and there was no guarantee they would prevail. Indeed, Defendants repeatedly advanced a number of strong

[3] Other bases for Defendants' motion – including the statute of limitations and the filed-rate doctrine – would later resurface in a summary judgment motion filed by Defendants a few months before trial was scheduled to begin. (Doc. No. 430).

legal challenges, any one of which could have resulted in complete dismissal of the case. Those challenges included, among others: the *Capper-Volstead* and Filed-Rate doctrines, lack of standing, and the statute of limitations. These issues were briefed extensively in summary judgment filings, which were among other motions that were pending at the time of trial. *See, e.g.*, Dkt. Nos. 430, 436, 453, 512, and 513; *see also* Nast Decl. at ¶ 10 & Ex. A thereto (list of contested motions).

In sum, this lawsuit was always risky, challenging and required unwavering determination by Plaintiffs to forge ahead, despite the obstacles that Defendants and their counsel placed in the path of Plaintiffs every step of the way.

II. Class Counsel Fiercely Litigated This Case for Eight Years and Settled Close to the Start of Trial.

To say this case was hard fought would be an understatement. Some of the Defendants here, Dairy Cooperatives, are among the biggest in the United States. They were operating with virtually unlimited resources, and—as demonstrated in this case—they had little interest in settling. Instead, Defendants mounted a formidable defense, advanced by some of the largest law firms and most reputable litigators in the country.

Over the course of the litigation, Class Counsel (1) engaged in lengthy discovery and investigation; (2) briefed numerous contested motions; (3) carefully reviewed hundreds of thousands of pages of documents and evidence necessary to prove their case; (4) took and defended many depositions; (5) participated in multiple discovery hearings before the Magistrate Judges, most of which were preceded by lengthy meet and confers and letter briefs not filed on the docket; (6) worked with expert witnesses, who prepared expert reports; and (7) were making substantial preparations for trial. *See* Nast Decl. at ¶ 9 and Exhibits A-C thereto.

This case took substantial resources to litigate. In all, Class Counsel dedicated 44,890.55

hours (and $27,936,103.00 in lodestar) to this litigation. *See* Nast Decl. ¶ 23. Class Counsel also advanced $5,271,266. 99 in out-of-pocket costs, all of which was needed to secure experts, jury and trial consultants, and other services necessary to go toe-to-toe with motivated and well-funded defendants. *Id.* at ¶ 28. As a result, Class Counsel essentially have risked tens of millions of dollars – and risked losing it all on the outcome of this case. They did so without hesitation in the years-long pursuit of the best possible result for the Class.

III. The Settlement Is a Big Win for the Class.

The full terms of the Settlement, and the reasons it should receive final approval, are set forth in the simultaneously-filed motion for final approval of the Settlement, but two points are worth mentioning here. First, $220 million, less fees and costs, will go to the Class. Nast Decl., ¶ 16 and Exhibit F to Nast Decl. (Plan of Distribution). Second, the risks at trial and beyond were significant. Plaintiffs believed they had a strong case, but knew that if they did win at trial, an appeal was inevitable.[4] In the best-case scenario, this would have meant several more years before the Class could recover a dime. In the worst case—a very real possibility, for all the reasons stated above—the Class would have recovered nothing at all. *See* Nast Decl. at ¶ 14 ("Plaintiffs believed they had a strong case; however, given these pending motions were unresolved and could substantially affect the parties' positions, a great deal of uncertainty existed as the trial approached."). Counsel fought long and hard and would never have inked a deal that they did not feel confident was in the best interests of the Class.

[4] Defendants had similar concerns. *See* NMPF News Release, "Cooperatives Working Together Settlement Lifts Legal Cloud," dated 12/04/2019 at https://www.nmpf.org/cooperatives-working-together-settlement-lifts-legal-cloud/ ("NMPF's decision to enter into this settlement recognized the uncertainties inherent in any jury trial, the very large damages sought by the plaintiffs and the fact that the successful Export Assistance Program is entirely unaffected by the settlement.").

ARGUMENT

I. Class Counsel's Request Reflects a Conservative Estimate of the "Market Price" for Attorneys' Fees—Especially Given That This Case Involved Big Risks and was close to Trial.

"[L]awyer[s] who recover[] a common fund . . . [are] entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Sutton v. Bernard*, 504 F.3d 688, 691 (7th Cir. 2007). "[W]hen deciding on appropriate fee levels in common-fund cases," like this one, courts in the Seventh Circuit "must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Mktg. Litig.* ("*Synthroid I*"), 264 F.3d 712, 718 (7th Cir. 2001); *accord Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 635 (7th Cir. 2011) ("[T]he district court must try to assign fees that mimic a hypothetical *ex ante* bargain between the class and its attorneys."). There is little question that, under the facts of this case, the *ex ante* market price for Class Counsel's services was no less than thirty-three and one-third percent (33 1/3%) of the common fund.

A. The market price is measured as a percentage of the fund.

Although courts in this Circuit have the discretion to use either a percentage of the fund or lodestar methodology, *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 566 (7th Cir. 1994), the percentage method is employed by the Seventh Circuit. *Cf. Beesley v. Int'l Paper Co.*, No. 3:06-CV-703-DRH-CJP, 2014 WL 375432, at *2 (S.D. Ill. Jan. 31, 2014) (Herndon, J.) ("When determining a reasonable fee, the Seventh Circuit Court of Appeals uses the percentage basis rather than a lodestar or other basis.").[5] This makes sense, because "it is essentially

[5] *See also, e.g.*, *Cooper v. IBM Pers. Pension Plan*, No. CIV. 99-829-GPM, 2005 WL 1981501, at *3 (S.D. Ill. Aug. 16, 2005), *rev'd and remanded on other grounds*, 457 F.3d 636 (7th Cir. 2006) ("The approach favored in the Seventh Circuit is to compute attorney's fees as a

unheard of for sophisticated lawyers to take on a case of this magnitude and type on any basis other than a contingency fee, expressed as a percentage of the relief obtained." *In re Payment Card Interchange Fee and Merch. Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014), *rev'd on other grounds*, 827 F.3d 223 (2d Cir. 2016). Thus, where, as here, "the 'prevailing' method of compensating lawyers for 'similar services' is the contingent fee, then the contingent fee *is* the 'market rate.'" *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) (emphasis in original).

B. Class Counsel's 33 1/3 % request reflects the *ex ante* market price under the facts of this case.

Here, Class Counsel's request for thirty-three and one-third percent (33 1/3 %) is in line with the percentage class members regularly agree to pay attorneys in complex class actions.[6] This is true for a number of reasons.

1. Fee agreements in other litigation support Counsel's fee request.

Empirical data shows that sophisticated clients and sophisticated named plaintiffs regularly agree to pay thirty-three and one-third percent (33 1/3 %) or more in risky, complex litigation, even when potential rewards are enormous. Indeed, fee percentages in this range are common in patent and other large commercial cases, as well as in class actions led by sophisticated business entities.

For example, one empirical study found that in patent cases "the contingent rates are similar to the 'one-third' that a stereotypical contingent personal injury lawyer charges," and that

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percentage of the benefit conferred on the class."); *Spano v. Boeing Co.*, No. 06-CV-743-NJR-DGW, 2016 WL 3791123, at *2 (S.D. Ill. Mar. 31, 2016) (same); *Nolte v. Cigna Corp.*, No. 2:07-CV-2046-HAB-DGB, 2013 WL 12242015, at *2 (C.D. Ill. Oct. 15, 2013) (same).

[6] The attorney-client agreements in this case do not reference a specific percentage. Instead, they simply say that fees are contingent and will be determined by the Court.

the mean rate percentage was 38.6% for flat percentage contracts:

> On the whole, the contingent rates are similar to the "one-third" that a stereotypical contingent personal injury lawyer charges. There are two main ways of setting the fees for the contingent fee lawyer: a graduated rate and a flat rate. Of the agreements using a flat fee reviewed for this Article, the mean rate was 38.6% of the recovery. The graduated rates typically set milestones such as "through close of fact discovery," "through trial," and "through appeal," and tied rates to recovery dates. As the case continued, the lawyer's percentage increased. Of the agreements reviewed for this Article that used graduated rates, the average percentage upon filing was 28% and the average through appeal was 40.2%.

David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 ALABAMA LAW REVIEW 335, 360 (2012). In a case like this one that lasted about eight years and was settled close to the time that trial was to begin, the high-end of the graduated rates would apply. In addition, there are multiple examples of multi-million-dollar settlements in pharmaceutical antitrust cases awarding thirty-three and one-third percent (33 1/3 %) in fees plus expenses. *See, e.g., In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739 (E.D. Pa. June 14, 2013) ($150 million settlement with fee award of 33 1/3% plus expenses); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52 (D. Mass. 2005) ($75 million settlement with fee award of 33 1/3% plus expenses). Thus, the market consisting of sophisticated entities in comparable contexts routinely produces fee agreements at and sometimes above the percentage Class Counsel request here.

2. Courts in this Circuit regularly award fees of 33 1/3 % or higher.

Another relevant data point for the market price for attorneys' fees is those awarded in "analogous class action settlements." *Taubenfeld v. AON Corp.*, 415 F.3d 597, 600 (7th Cir. 2005); *accord Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013). This metric, too, confirms the reasonableness of Class Counsel's request.

As a starting point, many courts within the Seventh Circuit have awarded percentage fees

of thirty-three and one-third percent (33 1/3 %) or higher to class counsel.[7] Moreover, the most recent empirical study on class action fee awards shows that the *average* fee in the Seventh Circuit—without regard to complexity, risk, duration, or results—is thirty-one and six-tenths percent (31.6%).[8] These statistics alone, however, do not tell the full story, because they do not account for the riskiness of the case, the fact that Class Counsel settled on the verge of the scheduled trial, or the quality of Counsel's performance in litigating the case. Each of these factors, as discussed below, further supports Counsel's request.

3. <u>The market rewards risk, and this case was tremendously risky.</u>

"The greater the risk of walking away empty-handed, the higher the award must be to

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[7] *See, e.g.*, *Young v. Cnty. of Cook*, No. 06 C 552, 2017 WL 4164238, at *6 (N.D. Ill. Sept. 20, 2017) (awarding thirty three and one-third percent (33 1/3 %) of $52 million common fund and overruling objections calling for sliding scale approach); *Spano*, 2016 WL 3791123, at *2 ("A one-third fee is consistent with the market rate in settlements concerning this particularly complex area of law."); *In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d 838, 862 (N.D. Ill. 2015) (awarding one third plus expenses of $46 million common fund); *Standard Iron Works v. ArcelorMittal*, No. 08 C 5214, 2014 WL 7781572, at *1 (N.D. Ill. Oct. 22, 2014) ("The Court finds that a 33 % fee [of $163.9 million common fund] comports with the prevailing market rate for legal services of similar quality in similar cases."); *Beesley*, 2014 WL 375432, at *4 (Herndon, J.) (awarding one third of common fund); *Fosbinder-Bittorf v. SSM Health Care of Wisconsin, Inc.*, No. 11-CV-592-WMC, 2013 WL 5745102, at *1 (W.D. Wis. Oct. 23, 2013) (same); *George v. Kraft Foods Global, Inc.*, No. 1:07-CV-1713, 2012 WL 13089487, at *4 (N.D. Ill. June 26, 2012) (same); *City of Greenville v. Syngenta Crop Prot., Inc.*, 904 F. Supp. 2d 902, 908–09 (S.D. Ill. 2012) (awarding one-third of $105 million settlement plus roughly $8.5 million in costs and holding that "[w]here the market for legal services in a class action is only for contingency fee agreements, and there is a substantial risk of nonpayment for the attorneys, the normal rate of compensation in the market is 33.33% of the common fund recovered."); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 601 (N.D. Ill. 2011) (awarding one third of common fund); *Will v. Gen. Dynamics Corp.*, No. CIV. 06-698-GPM, 2010 WL 4818174, at *4 (S.D. Ill. Nov. 22, 2010) (same); *Martin v. Caterpillar Inc.*, No. 07-CV-1009, 2010 WL 11614985, at *2 (C.D. Ill. Sept. 10, 2010) ("[C]ourts in the Seventh Circuit award attorney fees 'equal to approximately one-third or more of the recovery.' The Seventh Circuit itself has specifically noted that 'the typical contingent fee is between 33 and 40 percent.'").

[8] Three leading empirical studies of attorney's fee awards[19] have found that the *average* fee in the Seventh Circuit is thirty one and six-tenths percent (31.6%) (2006-2011 data); 27.4% (2006-2007 data); and 26% (1993-2008 data). These data are set forth, with citations to the underlying studies, in *Newberg on Class Actions, supra* note 3, at § 15:83 tbl. 2.

attract competent and energetic counsel." *Silverman*, 739 F.3d at 958; *accord, e.g.*, *Synthroid I*, 264 F.3d at 721 (The market rate must account for the "risk of non-payment a firm agrees to bear."). That is, if this case was riskier than the average case, we would have expected the lawyers in a competitive market to demand an above-average fee percentage to take it on.") (emphasis in original). Thus, "[w]hen determining the reasonableness of a fee request, courts put a fair amount of emphasis on the severity of the risk (read: financial risk) that class counsel assumed in undertaking the lawsuit." *Dairy Farmers*, 80 F. Supp. 3d at 847-48.

For all the reasons set forth above, this case was about as risky as a case could be. The case involved highly complex legal and damages issues. Plaintiffs paid out-of-pocket millions in expert fees to hire expert econometric experts, Plaintiffs engaged in intense motion practice, and had this case fully prepared to try, in part, through working closely with their trial consultant and having conducted focus group sessions and mock trial proceedings. Plaintiffs deciphered millions of pages of documents, deposed several witnesses, and defended depositions taken by Defendants. This trial was slated to last several days, and Plaintiffs were fully prepared. Given that courts routinely award thirty-three and one-third percent (33 1/3 %) and that (according to at least one study) the average fee award in this Circuit is thirty-one and six-tenths percent (31.6%), a market that "put[s] a fair amount of emphasis on the severity of the [*ex ante*] risk" surely would set a reasonable attorneys' fees in this outlier case at no less than thirty-three and one-third percent (33 1/3 %), if not higher. *See Dairy Farmers*, 80 F. Supp. 3d at 847-48.

4. <u>The market price typically increases as cases get closer to trial.</u>

Sophisticated clients also recognize that even contingent-fee attorneys' compensation should, to a certain degree, reflect the amount of work performed. As mentioned above, plaintiffs in the market for legal representation often pay their lawyers with bifurcated rates that

call for a higher percentage as their lawyers get closer to taking their cases to trial. *See* Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 ALABAMA LAW REVIEW at 360. Courts recognize this as well and award fees reflecting this market tendency and, while trials are rare, it is understandable that cases progressing closer to trial resulted in fees closer to forty percent (40%). *See Hale v. State Farm Mut. Auto Ins. Co.*, No. 12-0660-DRH, 2018 WL 6606079, *11 (S.D. Ill. Dec. 16, 2018) (citing and agreeing with *Syngenta*, 2018 WL 6436074 at *14, that one-third fee is customary in contingent fee cases and often higher in complex cases or cases that proceed to trial). Taking this into account, and how close this litigation was to trial, Class Counsel's fee request proves even more reasonable.

5. Class Counsel performed well and achieved a significant result for the Class.

Of course, courts consider not just the level of risk and amount of work performed, but also quality of the work. *Taubenfeld*, 415 F.3d at 600 (7th Cir. 2005) (noting that the "evidence of the quality of legal services rendered" is among the "type[s] of evidence needed to mimic the market per *Synthroid I*"); *Schulte* 805 F. Supp. 2d at 597 (Compensation also depends on "the quality of [counsel's] performance."). Class Counsel's work here, and the result they achieved, are both noteworthy. As described above, over the course of eight years that included extensive discovery and numerous contested motions, Counsel navigated a minefield of legal and factual challenges, certified a nationwide class, survived a motion to dismiss, battled for and against motions for summary judgment, defeated a Rule 23(f) appeal of class certification to the Seventh Circuit, and prepped the case for the beginning of trial. Given the difficulty of prevailing with complex antitrust claims, this was no small feat. The result of this diligent advocacy and dogged effort is a substantial Settlement that affords significant cash relief to the Class. This factor, too, supports Class Counsel's request.

6. Under these facts, the market does not reduce or taper fee percentages for larger recoveries, and neither should courts.

Both the actual market for legal services, and the Seventh Circuit, have flatly rejected the notion that counsels' fee percentages should decrease as the recoveries they secure increase. As Judge Easterbrook observed, "[p]rivate parties would never contract for such an arrangement, because it would eliminate counsel's incentive to press for more [money] from the defendants." *Synthroid I*, 264 F.3d at 718. The Seventh Circuit has therefore disapproved a cap that would limit attorney fee percentages in large cases. *Id.*; *see also In re FedEx Ground Package Sys., Inc., Employment Practices Litig.*, 251 F. Supp. 3d 1225, 1239 (N.D. Ind. 2017) ("Our court of appeals . . . has rejected the concept behind the 'megafund' theory").

This makes sound economic sense, and scores of courts in this Circuit and elsewhere have awarded high percentages to class counsel in cases involving large settlements. Indeed, Professor Charles Silver, in *Hale*, 2018 WL 6606079 (S.D. Ill.), compiled a table of 63 cases (in addition to those discussed elsewhere in his report) with recoveries between $100 million and $1.08 billion in which courts awarded fee percentages of 25% or greater, 19 of which were equal to or greater than 33 1/3 %. *See* Nast Decl., Exhibit D. There are many more examples.[9] Accordingly, there is no sound reason to limit the attorneys' fee percentage in a case settling for

[9] *See, e.g.*, *Silverman*, 739 F.3d 956 (affirming award of twenty seven and five-tenths percent (27.5%) of $200 million settlement); *In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2018 WL 3960068, at *9 (N.D. Cal. Aug. 17, 2018) (twenty-seven percent (27%) of $115 million); *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-02420-YGR, 2018 WL 3064391, at *2 (N.D. Cal. May 16, 2018) (30% of $139.9 million); *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775-JG-VVP, 2012 WL 3138596, at *5 (E.D.N.Y. Aug. 2, 2012) (twenty-five percent (25%) of $198 million); *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-CV-1825 (NGG), 2010 WL 2653354, at *6 (E.D.N.Y. June 24, 2010) (twenty-five percent (25%) of $225 million).

a large amount such as this, which presented substantial risks.[10] *See* Nast Decl. ¶ 10.

In *Silverman*, as in *Synthroid I*, 264 F.3d at 721, Judge Easterbrook suggested that courts should consider tapered fee structures that "provide for a recovery that increases at a decreasing rate." *Silverman*, 739 F.3d at 959. One of the concerns animating this opinion was the perceived absence of "suits seeking more than $100 million in which solvent clients agree *ex ante* to pay their lawyers a flat portion of all recoveries, as opposed to a rate that declines as the recovery increases." *Id.* But outside of the securities context, sophisticated clients rarely employ declining percentages, and would have negotiated no less than a fee arrangement of one-third for a resolution reached so close to trial. *Cf. Hale*, 2018 WL 6606079 at *11 ("[S]ophisticated parties would have negotiated no less than a fee arrangement of 1/3 for a resolution reached after the case progressed to trial.").

Moreover, courts have held declining percentages to be inappropriate in cases like this one, involving a high risk of nonpayment, an enormous amount of work, and where counsel had turned down an earlier settlement offer in a successful effort to obtain more for the class. *See Young v. County of Cook*, No. 06 C 552, 2017 WL 4164238, *4-5 (N.D. Ill. Sept. 20, 2017); *Hale*, 2018 WL 6606079 at *12 (finding the reasoning of the court in *Young* persuasive in finding that a declining marginal percentage scale was not appropriate for all cases).

For these reasons, courts following the market need not—and probably should not—

[10] *Silverman* does not counsel otherwise. 739 F.3d at 956. There, the Seventh Circuit affirmed the district court's award of twenty-seven and five-tenths percent (27.5%) of a $200 million common fund. In so doing, it noted that such an "award *may* be at the outer limit of reasonableness." *Id.* at 959 (emphasis added). But this cannot reasonably be interpreted as a *per se* ceiling (certainly not in light of *Synthroid I*), especially given the greater risks this litigation presented. For example, *Silverman* was a securities fraud case, where class certification is relatively perfunctory, but in the present case, Defendants' motion to decertify the Class was one of several motions pending at the time the parties reached an agreement to settle.

apply declining percentages in large cases, especially under the facts of this case. This is confirmed by the result of *Silverman* itself, which affirmed a flat percentage in a case involving a large settlement fund. 139 F.3d at 956; *see also Dairy Farmers*, 80 F. Supp. 3d at 845 (awarding a flat one-third fee notwithstanding a "seemingly tailor-made tiered-pricing arrangement" set by the Seventh Circuit in *In re Synthroid Mktg. Litig.* ("*Synthroid II* "), 325 F.3d 974, 979 (7th Cir. 2003)).

C. A lodestar cross-check, though unnecessary, also confirms the reasonableness of Class Counsel's request.

As a threshold matter, a lodestar cross-check is not required in this Circuit. *Rohm & Haas Pension Plan*, 658 F.3d at 636 ("[C]onsideration of a lodestar check is not an issue of required methodology."); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 500 (N.D. Ill. 2015) ("[N]o Seventh Circuit case law suggests that a percentage-of-the-fund approach will yield a reasonable result only where it satisfies a lodestar cross-check."). Indeed, the "use of a lodestar cross-check has fallen into disfavor," *Beesley*, 2014 WL 375432, at *3 (*citing Synthroid II*, 325 F. 3d at 979-80)), and, in many cases, can be "counterproductive," *Gen. Dynamics Corp.*, 2010 WL 4818174, at *3 (collecting cases). Nevertheless, to the extent the Court wishes to conduct such a cross-check here, it confirms the reasonableness of Plaintiffs' request.[11]

1. Class Counsel expended a reasonable number of hours on this incredibly hard-fought litigation.

As noted above, this case was intensively litigated for more than seven years. During that time, Defendants mounted a formidable defense. In addition, because of the complex nature

[11] Plaintiffs have submitted a summary of the time expended in connection with this litigation, as well as the blended average billing rate. *See* Nast Decl. ¶¶ 23-25. These summaries are sufficient. *Beesley*, 2014 WL 375432, at *3 ("The Court may rely on summaries submitted by attorneys and need not review actual billing records."). However, Counsel stands ready to submit detailed records should the Court request them.

of both the facts and law underlying this case, the motion practice and discovery have been protracted and complex. Provided above, is a thorough, non-exhaustive, list of the work Plaintiffs undertook to advance this case through class certification and past motions to dismiss, summary judgment motions, and interlocutory appeals, all the way to trial.

In furtherance of those efforts, and many more, Class Counsel expended 44,890.55 hours (and $27,936,103.00 in lodestar) in a hard-fought litigation that lasted eight years (including a reasonable time for pre-filing investigation and complaint preparation). *See also* Plaintiff Firm Declarations in Support of Attorneys' Fees and Costs, attached hereto as Exhibit 1. Class Counsel's hours are therefore reasonable in the context of this litigation. *Id. Cf. City of Greenville*, 904 F. Supp. 2d at 909 (finding reasonable 83,300 hours for two firms over 8 years, which is approximately 10,412 hours/year).

2. Class Counsel's rates are reasonable under the facts of this case, and well below those recently approved for class action attorneys in this District.

Class Counsel calculated their lodestar using the customary, historical billing rates of all timekeepers at the time the services were rendered. *See also* Plaintiff Firm Declarations in Support of Attorneys' Fees and Costs, attached hereto as Exhibit 1. The blended average rate that results from this analysis is $622.32. Nast Decl., ¶ 25. This is eminently reasonable given (1) the complexity of the issues and the fact that the case proceeded to trial; (2) the resulting need for a relatively high proportion of time from very experienced lawyers; and (3) the presence of counsel with national practices and national expertise, whose participation was essential to prosecuting this difficult case. *Id.* at ¶ 26 (citing rates approved in 2016 by this Court in *Spano*).

Notably, this Court recently approved rates for contingent fee class action attorneys that significantly exceed those outlined above. In 2016, this Court found reasonable the following:

"for attorneys with at least 25 years of experience, $998 per hour; for attorneys with 15–24 years of experience, $850 per hour; for attorneys with 5–14 years of experience, $612 per hour; for attorneys with 2–4 years of experience, $460 per hour; for Paralegals and Law Clerks, $309 per hour; for Legal Assistants, $190 per hour." *Spano*, 2016 WL 3791123, at *4 (approving a lodestar of $18,066,346 with a blended rate of $673.74) (Rosenstengel, J.). Now, four years after *Spano* was decided, Class Counsel's blended rate still falls well within the range of those approved by this Court in 2016. Viewed in this context, Class Counsel's rates are reasonable.

3. The resulting lodestar multiplier reflects the risk Class Counsel undertook and falls below the mean in comparable cases.

"[A] risk multiplier is not merely available in a common fund case but mandated, if the court finds that counsel 'had no sure source of compensation for their services.'" *Florin,* 34 F.3d at 565; *accord City of Greenville*, 904 F. Supp. 2d at 909 ("[W]here counsel 'had no sure source of compensation for their services,' the Court must apply a risk multiplier to compensate the attorneys for the risk of nonpayment in the event the litigation were unsuccessful."). The Seventh Circuit has also observed that "'the need for such an adjustment is particularly acute in class action suits. The lawyers for the class receive no fee if the suit fails, so their entitlement to fees is inescapably contingent.'" *Florin*, 34 F.3d at 565 (*quoting In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 569 (7th Cir. 1992)). It is beyond dispute that here, in this contingent class action lawsuit, there was no guarantee that counsel would secure a single penny for their services or reimbursement for the millions of dollars in out-of-pocket expenses they had advanced. The Court must, therefore, apply a risk adjustment multiplier.

The specific multiplier that results from this fee request is 2.6, which falls well within the rates recently approved in this District for contingent class representation. This is customary and reasonable in the context of this litigation for several reasons.

First, as a general matter, courts in this Circuit regularly approve multipliers between one and four. *See, e.g.*, *City of Greenville*, 904 F. Supp. 2d at 909 (citing *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 976 (7th Cir. 1991) (noting that the Seventh Circuit, and courts within it, regularly approve multipliers between one and four). In large cases like this one, moreover, empirical studies demonstrate that a 2.6 multiplier is actually below average and is reasonable. *See* Exhibit E to Nast Decl. (listing more than 100 cases with a multiplier over 3). From a macro perspective, therefore, the multiplier requested here is entirely reasonable.

Second, and more to the point, a multiplier of 2.6 is particularly reasonable under the facts of this case. In the Seventh Circuit, multipliers should reflect the risks counsel faces *ex ante*. *Harman*, 945 F.2d at 976 ("The [multiplier] level selected should, to the extent possible, be without regard to most developments during discovery and litigation because it is designed to reflect the riskiness of the case at the outset."). Thus, the 2.6 multiplier is justified here, given the challenges of prevailing when Plaintiffs filed suit, the complex counts and allegations, and the high risks involved in litigating this case.

The lodestar cross-check readily confirms the reasonableness of Class Counsel's request. And with this Court's approval, as is customary in such cases, Co–Lead Counsel shall be responsible for and use their discretion in allocating and distributing counsel fees and costs (discussed below) that the Court approves to be paid to Class Counsel. *See In re CertainTeed Fiber Cement Siding Litigation*, 303 F.R.D. 199, 228 (E.D. Pa. 2014) ("The attorneys' fees awarded by the Court shall be allocated to class counsel at the sole discretion of co-lead counsel."); *In re Fasteners Antitrust Litigation*, Civil Action No. 08–md–1912, 2014 WL 296954, *10 (E.D. Pa. 2014) ("Co–Lead Counsel are responsible for allocating and distributing counsel fees and expenses to be paid to Class Counsel.").

II. Class Counsel's Requested Costs Are Reasonable.

"It is well established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses, which includes such things as expert witness costs; computerized research; court reports; travel expense; copy, phone and facsimile expenses and mediation." *Beesley*, 2014 WL 375432, at *3 (Herndon, J.) (citing *Boeing*, 444 U.S. at 478). Here, Class Counsel seek reimbursement of $5,271,266. 99 in litigation expenses. *See* Nast Decl., ¶ 28.[12] While these expenses are significant, at two and four-tenths percent (2.4%) of the common fund, the amount is significantly less than the average costs awarded, which is approximately "4 percent of the relief for the class." *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1041 (N.D. Ill. 2011) (citing Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Stud. 27, 70 (2004)).

Such costs are also commensurate with the stakes and duration of this litigation, and include, among other things: (1) $2,774,952.89 for highly-credentialed testifying experts instrumental to achieving class certification and defeating motions to dismiss and for summary judgment— who submitted multiple reports, were deposed, and had prepared extensively for trial; (2) $1,098,338.21 for consulting experts who advised Class Counsel on difficult legal issues and supported the testifying experts; (3) $36,879.80 to effectuate the Court-approved litigation notice plan; (4) $305,529.35 for the document review platform and services necessary to host millions of pages of documents and assist Counsel's review, and such document review

[12] Class Counsel have provided summaries of their expenses, broken down into different categories. *See* Nast Decl. at ¶ 28 and Exhibit H thereto. This summary is sufficient for the Court to "perform its oversight function." *Schulte*, 805 F. Supp. 2d at 600 (relying on a "summary document" of expenses); *see also Northbrook Excess & Surplus Ins. Co. v. Procter & Gamble*, 924 F.2d 633, 643 (7th Cir. 1991).

platform purchased by one of the Co-Lead counsel actually saved the class hundreds of thousands of dollars when one compares the retail cost of the class hiring a third party vendor to perform the same service with similar equipment; (5) $409,466.85 for travel and accommodations connected with more than one hundred hearings and depositions, several critical in-person strategy meetings, a number of mediation sessions, and trial preparation; (6) $1,241.70 for investigation, including an investigator whose work was critical to uncovering information on key farmer executives of the defendant coops; (7) $125,954.73 for trial/jury consultants and other trial preparation experts; (8) $87,008.49 for legal research fees, necessary to brief the extremely high volume of motions involving complex legal issues; (9) $270,012.36 for transcripts and court reporters; and (10) $89,649.00 for mediation-related costs. Exhibit H to Nast Decl.

No doubt, this was an expensive case to prosecute. But Class Counsel had a strong incentive to keep expenses at a reasonable level due to the high risk of no recovery when the fee is contingent. *Cf. Beesley*, 2014 WL 375432, at *3. Moreover, "the fact that Class Counsel does not seek interest as compensation for the time value of money or costs associated with advancing these expenses to the Class makes this fee request all the more reasonable." *Id.* Class Counsel's expenses are justified in the context of this extraordinary case.

III. The Named Plaintiffs' Service Awards Are Reasonable.

Plaintiffs request a service award of $25,000 for each of the four Class Representatives: First Impressions Salon, Inc., Roy Matson, KPH Healthcare Services a/k/a Kinney Drugs, Inc., and Piggly Wiggly Midwest, LLC. Each of them has invested significant time and resources in this litigation for many years by, among other things: reviewing pleadings, responding to discovery requests, producing documents, sitting for depositions, preparing for trial, and

overseeing the litigation. Nast Decl. at ¶ 27. Under these circumstances, a service award of $25,000 to each representative is reasonable and appropriate. *See, e.g.*, *Hale*, 2018 WL 6606079 at *15 (awarding each of the three Class Representatives $25,000); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (upholding award of $25,000 to class representative); *Spano*, 2016 WL 3791123, at *4 (awarding $25,000 to two representatives and $10,000 to a third); *Beesley*, 2014 WL 375432, at *4 (awarding $15,000 and $25,000); *Abbott v. Lockheed Martin Corp.*, No. 06-CV-701-MJR-DGW, 2015 WL 4398475, at *4 (S.D. Ill. July 17, 2015) (awarding $25,000); *Nolte v. Cigna Corp*., No. 07-cv-2046, Dkt. 413 at 9 (C.D. Ill. Oct. 15, 2013) (same).

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court award the following:

a. Class Counsel shall receive $5,271,266. 99 as reimbursement of reasonable litigation costs from the initial payment of the settlement proceeds, which was deposited pursuant to the Settlement Agreement;

b. Class Counsel shall receive attorneys' fees in the amount of thirty three and one-third percent (33 1/3 %) of the common fund—at the direction of Co-Lead Counsel, no sooner than when the payments of the settlement proceeds are deposited, pursuant to the Settlement Agreement, and/or at some point thereafter, within discretion of the Co-Lead Counsel; and

c. Class Representatives shall receive service awards of $25,000 each.

As is customary in class action settlements, Plaintiffs request this Court grant Co-Lead Counsel authority to reasonably allocate, pursuant to their discretion, the awarded attorneys' fees to the other plaintiff attorneys and law firms who worked on this case.

Plaintiffs respectfully submit that the incurred litigation costs and attorneys' fees are fair,

reasonable and adequate. Thus, Plaintiffs respectfully request that their Petition be granted in its entirety.

Dated: February 26, 2020

Respectfully Submitted:

By: /s/*Don Barrett*
Don Barrett
BARRETT LAW GROUP, P.A.
404 Court Square North
Lexington, Mississippi 39095-0927
Telephone: (662) 834-9168
Facsimile: (662) 834-2628
Email: dbarrett@barrettlawgroup.com

/s/*Dianne M. Nast*
Dianne M. Nast
NASTLAW LLC
1101 Market Street, Suite 2801
Philadelphia, PA 19107
Telephone: (215) 923-9300
Facsimile: (215) 923-9302
Email: dnast@nastlaw.com

/s/*Michael Roberts*
Michael Roberts
ROBERTS LAW FIRM
1920 McKinney Avenue, Suite 700
Dallas, TX 75201
Telephone: (501) 952-8558
Email: mikeroberts@robertslawfirm.us

Co-Lead Counsel for Plaintiffs and the Class

CERTIFICATE OF SERVICE

Pursuant to Local Rule 7.1(b), I certify that a copy of the foregoing was served upon counsel via the Court's CM/ECF system.

/s/Dianne M. Nast

TAB 4A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DIAL CORPORATION, *et al.*,	:	
Plaintiffs,	:	13cv6802
-against-	:	OPINION & ORDER
NEWS CORPORATION, *et al.*,	:	
Defendants.	:	

WILLIAM H. PAULEY III, District Judge:

Plaintiffs The Dial Corporation, Henkel Consumer Goods, Inc., Kraft Heinz Foods Company f/k/a H.J. Heinz Company, Foster Poultry Farms, BEF Foods Inc., Smithfield Foods Inc., and HP Hood LLC (the "Plaintiffs"), representing a class of non-retailer consumer packaged-goods firms in the United States (the "Class" or "Class Members"), seek final approval of a $244 million settlement with Defendants News Corporation, News America Incorporated, News America Marketing In-Store Services, LLC, and News America Marketing FSI, LLC (the "Defendants"). The proposed settlement (the "Settlement") resolves this class action involving claims that Defendants monopolized the in-store promotion ("ISP") services market. The five law firms purporting to represent the Class—Berry Law PLLC ("Berry"), Kellogg Huber Hansen Todd Evans & Figel PLLC ("Kellogg Huber"), Susman Godfrey LLP ("Susman Godfrey"), Kramer Levin Naftalis & Frankel LLP ("Kramer Levin"), and McKool Smith ("McKool Smith") (collectively, "Counsel")—also seek this Court's approval of their request for attorneys' fees and expenses.

For the following reasons, the motion for approval of the Settlement is granted, and the motion for approval of attorneys' fees and expenses is granted in part and denied in part.

I. Background

A. Investigation and Litigation Leading to Settlement

The factual and procedural background undergirding this class action is described in detail in this Court's prior opinions and orders. See, e.g., Dial Corp. v. News Corp., 13-cv-6802 (WHP), 2016 WL 690895 (S.D.N.Y. Feb. 9, 2016); Dial Corp. v. News Corp., 165 F. Supp. 3d 25 (S.D.N.Y. 2016); Dial Corp. v. News Corp., 314 F.R.D. 108 (S.D.N.Y. 2015). Accordingly, a brief summary suffices for purposes of these motions.

Beginning in 2010, Berry and Kellogg Huber devoted substantial resources and hundreds of hours investigating Defendants' alleged monopolistic activities in the ISP market. In December 2012, they filed an antitrust action in the Eastern District of Michigan, alleging various state and federal antitrust claims against Defendants. In 2013, that putative class action was transferred to this district—where Defendants had filed a related declaratory judgment action[1]—as three more law firms made appearances on behalf of several packaged goods companies alleging injuries from Defendants' anticompetitive conduct.

Because the allegations concerning anticompetitive conduct dated back to the early aughts, discovery was breathtaking: 11 million documents were reviewed and exchanged; dozens of current and former officers and employees were deposed; and six experts in economics and marketing provided reports and testimony. Numerous discovery disputes were resolved by this Court over the course of the litigation.

Motion practice was equally robust and class certification fiercely contested. Eventually, the Class was certified but not before Defendants filed an unsuccessful interlocutory

[1] That action was styled News America Marketing In-Store Servs. L.L.C. v. The Dial Corp., No. 13-cv-0055 (S.D.N.Y. 2013), and voluntarily dismissed on February 26, 2014. (ECF No. 45.)

appeal of this Court's certification decision. Defendants followed on with double-barreled motions for summary judgment and to exclude the testimony of Plaintiffs' experts at trial. To suggest that those motions were extensively briefed and argued would be an understatement. In January 2016, this Court denied both. (ECF No. 420.) With trial looming, the parties filed a barrage of 26 in limine motions (see ECF Nos. 461, 465, 471), and Defendants intensified their efforts to mount any challenge to Plaintiffs' claims, raising scores of issues concerning the class period, the admissibility of pre-class period evidence, and the effect of releases entered into between Defendants and various Class Members, to name just a few.

Against this backdrop, the parties explored the prospect of settlement. Beginning in November 2015, Defendants sought to negotiate separate resolutions of these antitrust claims with 23 of the largest Class Members. Those efforts, which were also the subject of motion practice, proved somewhat fruitful—by February 24, 2016, Defendants reported that they had entered into private, individual settlements totaling $30 million with five large, absent Class Members.

Settlement discussions between Counsel and Defendants reached a fever pitch in the days leading up to jury selection and trial. After a concerted effort to negotiate a settlement in the courthouse, the parties executed a term sheet embodying the critical terms of the settlement at the end of the first day of trial. Through March and April, the parties finalized the long form of the settlement and presented it to this Court for its review. On June 2, 2016, this Court preliminarily approved the Settlement, and thereafter, notice of the Settlement was mailed to all Class Members. On September 21, 2016, this Court conducted a final settlement hearing.

B. Terms of the Settlement Agreement

The Settlement provides that Defendants will pay $244 million into a common

settlement fund (the "Fund") to be distributed on a pro rata basis to the Class determined by the amount of ISPs purchased by each Class Member during the class period. After the initial distribution, any unclaimed funds will be distributed in subsequent rounds, pro rata, to Class Members that deposited previously distributed checks until all proceeds have been exhausted. No portion of the Fund will be returned to Defendants, nor will any remaining funds be subject to a cy pres provision.

The Settlement also features several forms of structural relief designed to protect Plaintiffs against the anticompetitive conduct alleged in this action. For the next five years, Defendants will not: (i) enter into any exclusive ISP contract with a retailer for a term longer than 30 months other than to meet competition or at the written request of the retailer; (ii) enter into a binding renewal of any contract with a retailer for more than 18 months before the expiration of the contract unless the retailer requests an earlier renewal; and (iii) prohibit retailers from disclosing the termination dates of their ISP contracts to prospective competitors of Defendants.

The Settlement contains an alternative dispute resolution (ADR) clause requiring any dispute involving the Settlement or any antitrust, competition, or comparable claim that accrues five years after approval of the Settlement to be submitted to mediation, and if not resolved by mediation, to binding arbitration. But any dispute relating to Defendants' compliance with the structural relief more than three years after approval of the Settlement is not subject to arbitration. Finally, the Settlement prohibits any additional opportunity to opt out, and forecloses any admission of liability by Defendants.

Notice of the Settlement was sent to Class Members soon after the Court entered its preliminary approval order. It established a deadline to file objections and proofs of claim.

In the Claims Administrator's latest filing with the Court, 317 claims (45.35% of the Class) were submitted, representing 87.44% of Defendants' purchases. (Sept. 20, 2016 Declaration of Rachel Christman ("Christman Decl.") at ¶ 3, ECF No. 594.) On September 30, 2016, Counsel provided an updated count, and the number of filed claims increased marginally to 328 although it is impossible to determine the percentage of qualifying purchases (as determined by Defendants' purchase records) covered by those claims. In the same filing, Counsel provided a list of unfiled claims but noted that several companies associated with some of the largest unfiled claims—amounting to at least $63 million in qualifying purchases at issue—have indicated that they will file late claims or had settled their claims outside of the Class. (See ECF No. 603.)

C. Attorneys' Fees and Expenses

Plaintiffs' Counsel seeks an award of $73.2 million, or 30% of the Fund. Over six years of investigating the claims and litigating this action, Counsel collectively billed a staggering 69,128.95 hours[2]—which equates to more than 35 billable years by "Big Law" standards. At each of the firms' current customary billing rates—a combined blended rate of $526.35 per hour—those hours represent a lodestar of $36,433,985.50. Thus, Counsel's fee request is enhanced by a lodestar multiplier of approximately 2.01. Notably, the lodestar does not account for time billed by independent contract attorneys, which were instead earmarked as an expense. Those costs and other standard out-of-pocket litigation expenses total $7,512,915.20.

In addition to the fees associated with their work on behalf of the Class, Counsel

[2] This figure does not include approximately 25,000 hours billed for contract attorney time.

note that they will receive a $6 million payment for Defendants' settlements with five absent Class Members totaling $30 million. While those fees are not a part of the Fund, any payment thereof is contingent upon final approval of the Class Settlement.

Finally, Berry has agreed to reimburse a total of $948,110 in fees that he received from five named Plaintiffs for his work during the first few years investigating and litigating the underlying claims. Reimbursement of those fees will put the named Plaintiffs on an even footing with the rest of the Class to ensure that the total fee award does not exceed $73.2 million.

II. Settlement Approval

For class action settlements, a "district court must determine whether both the negotiating process leading to a settlement and the settlement itself are fair, adequate and reasonable." In re Currency Conversion Fee Antitrust Litig., 263 F.R.D. 110, 122 (S.D.N.Y. 2009) (citing D'Amato v. Deutsche Bank, 236 F.3d 78, 85 (2d Cir. 2001)).

A. Procedural Fairness

Negotiation of a settlement is presumed fair when the settlement is "reached in arm's length negotiations conducted by experienced, capable counsel after meaningful discovery." Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 116 (2d Cir. 2005). The parties here were represented by highly skilled attorneys who have substantial experience in class actions. Counsel engaged in arms-length, painstaking negotiations from November 2015 through February 29, 2016, and eventually struck a deal that will substantially benefit the Class. This Court is mindful of Counsel's ability to assess the potential risks and rewards of litigation, and finds that the negotiations were fair, adequate and reasonable. See Wal-Mart, 396 F.3d at 116.

B. Substantive Fairness

In assessing the substantive fairness of a settlement, this Court must consider the following factors: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974). "[N]ot every factor must weigh in favor of settlement, rather the court should consider the totality of these factors in light of the particular circumstances." In re Global Crossing Sec. and ERISA Litig., 225 F.R.D. 436, 456 (S.D.N.Y. 2004) (citation omitted).

1. Complexity, Expense and Likely Duration of the Litigation

This antitrust action was exceptionally complex. It was fueled by Counsel's grassroots investigation of the ISP market unaided by a parallel government inquiry. Litigation ensued, involving the filing of four operative complaints, fact and expert discovery, class certification and an interlocutory appeal, summary judgment, motions in limine, and extensive trial preparation. This case spanned years of hard fought litigation that "impose[d] great expense on all parties as well as huge burdens on the Court." Global Crossing, 225 F.R.D. at 456. The Settlement obviates the need for a trial, calculation of damages, and any post-verdict appeals. This factor weighs strongly in favor of approval.

2. Reaction of the Class

There were no objections to the Settlement. While less than half of the Class appear to have filed proofs of claim, the filed claims nonetheless represent more than 87% of purchases made by Plaintiffs during the relevant period. (See Christman Decl. at ¶ 3.)

Moreover, according to Counsel's most recent submission, there are additional companies that have expressed their intention to file late proofs of claim reflecting sizeable purchases in the relevant period. (See ECF No. 603.) Certainly more Class Members could file proofs of claim. This Court believes that the value in providing a further opportunity to file a proof of claim far outweighs not doing it. As such, this Court orders the Claims Administrator to mail another set of notices, and follow up with a phone call, to potential members of the Class who possess valid claims and have not submitted a proof of claim, to be filed no later than December 1, 2016.

Notwithstanding the additional notice to the Class, the absence of objections "by the class is extraordinarily positive" and "weighs in favor of settlement." Global Crossing, 263 F.R.D. at 123; In re Giant Interactive Grp., Inc. Sec. Litig., 279 F.R.D. 151, 161 (S.D.N.Y. 2011) ("the reaction of the class to date supports approval of the Settlement" where "[n]o class members have objected to the Settlement.").

3. Stage of Proceedings and Amount of Discovery

This action settled at a very advanced stage of the proceedings: the jury trial, anticipated to last at least four weeks, had started. Counsel for both sides had multiple opportunities to appraise the strength of their respective claims and defenses, and were prepared to test their case at trial. But they also took stock of "the factual landscape and the uncertainties confronting them," Currency Conversion, 263 F.R.D. at 123 (S.D.N.Y. 2009), and determined

that settlement was in the best interests of the Class. Accordingly, this factor supports approval.

4. Risks of Establishing Liability and Damages and Maintaining Class Action Through Trial

Courts generally consider the fourth, fifth, and sixth Grinnell factors together in "assess[ing] the risks of litigation against the certainty of recovery under the proposed settlement." Global Crossing, 225 F.R.D. at 459. The complexity of Plaintiffs' claims shrouded this case with uncertainty. At trial, Plaintiffs faced substantial challenges to establishing liability—namely, that Defendants' contracting practices in the defined market were exclusionary and harmed Plaintiffs. See Wal-Mart, 396 F.3d at 118 ("[E]stablishing liability was no sure thing for plaintiffs."). But even assuming the jury rendered a favorable verdict, Plaintiffs would have encountered additional challenges to proving damages given the parties' dueling expert reports. As a result, Plaintiffs remained alert to the possibility that they would recover nothing, and constantly operated under the specter of decertification. Factors 4–6 weigh in favor of approval.

5. Ability of Defendants to Withstand a Greater Judgment

Defendants are part of a multi-billion dollar conglomerate recognized as one of the world's largest and most powerful enterprises. In the course of this multi-year litigation, Defendants spared no expense in defending the case at every stage. Although they have now resolved this action through a $244 million settlement, the notion that Defendants could withstand a judgment in the amount of Plaintiffs' damages estimate is not far-fetched. But even if they could, that factor, "standing alone, does not suggest that settlement is unfair." D'Amato, 236 F.3d at 86.

6. Range of Reasonableness of the Settlement Funds in Light of the Best Possible Recovery and All the Attendant Risks of Litigation

The final two Grinnell factors are typically considered together. The $244 million Settlement, in contrast to the $355 million in single damages under their expert's "core" theory, or even the $674 million in single damages under their "adjusted" theory, represents an outstanding result. Again, even if Plaintiffs prevailed on establishing liability at trial, their estimated damages were susceptible to attack by Defendants' experts, leaving them with nothing. And that is not surprising, given that "the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial or on appeal." In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 465, 476 (S.D.N.Y. 1998).

Notably, the Settlement also features structural relief designed to bring transparency to the ISP market and the way retailer contracts are negotiated. This type of relief squarely addresses Plaintiffs' claims that the length, renewal period, and confidentiality clauses of Defendants' contracts with retailers created barriers to entry and suppressed prices. While those forms of relief are intended to protect Plaintiffs for at least five years, the ADR clause provides that any dispute arising from the Settlement—including Defendants' compliance with the structural relief within three years of the final settlement approval—are subject to mediation and arbitration.

In essence, this Court—having supervised this action for four years and becoming intimately familiar with the parties, issues, and facts of this case—must cede its authority to adjudicate any disputes relating to the very issues that gave rise to the action. The ADR clause affords Defendants a non-public forum to litigate any non-compliance with the structural relief.

And once the settlement is approved, and the distribution of funds completed, the clarity forged by the adversarial process melts away.

But judicial decisions addressing court-approved class settlement agreements with ADR clauses, let alone rejecting them solely on that basis, are scant. Defendants rely principally on Meredith Corp. v. SESAC, LLC, 87 F. Supp. 3d 650 (S.D.N.Y. 2015), as precedent in this district for ceding the judge's authority to an ADR forum. In Meredith, the classwide settlement in an antitrust action provided substantial monetary relief as well as "forward-looking conduct restrictions" tantamount to the structural relief in this action. In finding that the settlement was fair, reasonable, and adequate, the court held that the "compulsory arbitration term supplies a fair proxy." Meredith, 87 F. Supp. 3d at 666; cf. Charron v. Pinnacle Grp. N.Y. LLC, 874 F. Supp. 2d 179, 204 (S.D.N.Y. 2012) (finding that class settlement providing alternative forums to resolving rent-related claims, including by arbitration, is permissible).

This Court's concerns regarding the ADR provision are mitigated by the fact that the Class is comprised of sophisticated businesses far better equipped than the average individual to litigate with Defendants in an opaque arbitral forum should the need arise. Moreover, none of the Class Members, after having adequate time to review the Settlement, objected to its terms. Further, Defendants insisted on adding an arbitration clause, and without it, may not have agreed to the Settlement. (See Sept. 21, 2016 Tr. at 16:6–10 ("Without the arbitration we wouldn't have a deal.").) The ADR provision, while not ideal in this Court's view, represents a "fair proxy" for future disputes.

After weighing all of the Grinnell factors, this Court finds that the Settlement is fair, reasonable, and adequate.

III. Approval of Attorneys' Fees, Expenses, and Incentive Awards

A. Attorneys' Fees

In awarding attorneys' fees, especially in the context of a class action, a court must "ensure that the interests of the class members are not subordinated to the interests of . . . class counsel." Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1078 (2d Cir. 1995). As a fiduciary for the Class, a court must assess the fee request with "a jealous regard to [class members'] rights." Goldberger v. Integrated Res., Inc., 209 F.3d 43, 53 (2d Cir. 2000); McDaniel v. Cty. of Schenectady, 595 F.3d 411, 419 (2d Cir. 2010) (noting that, in approving fees, it is the "district court's duty to act as a fiduciary who must serve as a guardian of the rights of absent class members") (internal quotation marks and citation omitted).

Courts traditionally have employed two methods to calculate reasonable attorneys' fees in class action litigation: (1) the percentage of the fund approach, and (2) the lodestar approach. The percentage of fund approach assigns a proportion of the common settlement fund toward payment of attorneys' fees. The lodestar approach calculates the total amount of fees billed by multiplying the number of hours expended by counsel by a reasonable hourly rate. The lodestar is typically enhanced by an appropriate multiplier which accounts for a number of factors unique to the case, including the contingent nature of success and the quality of counsel's work. While this Court has the discretion to choose between either method, the prevailing trend in the Second Circuit is the percentage method because it "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." In re WorldCom, Inc. ERISA Litig., No. 02-cv-4816 (DLC), 2005 WL 3101769, at *7 (S.D.N.Y. Nov. 21, 2005). However, the lodestar approach provides an effective "cross-check on the reasonableness of the requested percentage."

Goldberger, 209 F.3d at 50 (2d Cir. 2000).

Under the percentage of fund method, the Court considers the six Goldberger factors: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. Goldberger, 209 F.3d at 50. There is no "one-size-fits-all 'benchmark' in determining the appropriate fee"—in fact, courts should avoid that practice because it "'could easily lead to routine windfalls where the recovered fund runs into the multi-millions.'" In re Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503, 521 (E.D.N.Y. 2003) (quoting Nasdaq, 187 F.R.D. at 486). Further, in mega-fund settlements totaling more than $100 million, courts have "traditionally accounted for these economies of scale by awarding fees in the lower ranges." Goldberger, 209 F.3d at 52.

1. Time and Labor Expended by Counsel

The time and labor expended by Counsel in this matter was extraordinary. Even before the first operative complaint, Berry and Kellogg Huber conducted a two-year long investigation into the ISP market. While many class actions are filed on the heels of a government investigation, the claims in this case were formulated entirely from the findings of a private investigation. See In re Gulf Oil/Cities Serv. Tender Offer Litig., 142 F.R.D. 588, 597 (S.D.N.Y. 1992) ("[T]his is not a case where plaintiffs' counsel can be cast as jackals to the government's lion, arriving on the scene after some enforcement or administrative agency has made the kill. They did all the work on their own."). As recounted previously, Counsel worked through fact and expert discovery, class certification, dispositive motions, and trial. They surmounted significant challenges and avoided potential setbacks at every turn.

But this Court would be remiss if it did not highlight the fact that the time and

labor expended by five law firms—three more than this Court appointed—most certainly led to a duplication of effort and multiplication of attorneys' fees. Some of that redundancy stems from Counsel's circumvention of this Court's initial appointment order, and is therefore self-inflicted. After this Court denied two requests for the appointment of all five law firms as joint lead counsel, Counsel proposed the appointment of Susman Godfrey and Kellogg Huber as co-lead counsel. Satisfied that its message had been received, this Court appointed them. However, Counsel did not apprise this Court that one day before proposing Susman Godfrey and Kellogg Huber as co-lead counsel, they engineered a private work-around among themselves designating Kramer Levin and McKool Smith as co-lead trial and settlement counsel. See Dial Corp. v. News Corp., No. 13-cv-6802 (WHP), 2015 WL 7180667, at *1 (S.D.N.Y. Oct. 15, 2015). Months later, by serendipity, this Court learned of Counsel's subterfuge. At that time, it could have vacated the July 2015 Order. But, to avoid upsetting intricate financial arrangements among the Plaintiffs and delaying trial, this Court opted for a "pragmatic approach." Dial, 2015 WL 7180667, at *2. It permitted Susman Godfrey and Kellogg Huber to "keep their title, even if it [was] just an ornament," and Kramer Levin and McKool Smith to proceed in their role as co-lead trial and settlement counsel. See Dial, 2015 WL 7180667, at *2.

Nevertheless, this Court cautioned Counsel repeatedly "to avoid duplication of effort and multiplication of attorneys' fees." Dial, 2015 WL 7180667, at *2; see also Dial, 314 F.R.D. at 121 (appointment of five firms would not serve to streamline proceedings nor would it introduce efficiencies into case management).

A review of Counsel's time records validates this Court's concern that allowing five firms to represent the Class would result in a duplication of effort and a multiplication of attorneys' fees. From July to December 2014, for example, it appears the five firms staffed nine

partners, nine associates, five staff attorneys, and a few paralegals who spent over 1,900 hours briefing and arguing the class certification motion, leaving this Court wondering why so many attorneys—let alone partners—were staffed on the task.

In October 2015, all five firms staffed 12 partners, 10 associates, two staff attorneys, and a handful of paralegals who spent 1,100 hours briefing Plaintiffs' opposition to summary judgment. That too, is beyond the pale. Opposing summary judgment is a fundamental task in any complex litigation—one that readily could have been assumed by the two very capable firms the Court originally appointed for a fraction of the cost and time.

And for the first two months in 2016, the 13 partners, 11 associates, and several paralegals from the five firms logged over 5,300 hours preparing for trial. It was a curious arrangement, given this Court's October 15 order explicitly designating only two of the firms as co-lead trial and settlement counsel. See Dial, 2015 WL 7180667, at *2. But the lawyers from those two firms—Kramer Levin and McKool Smith—appear to have billed a little more than half the hours involved in the final preparation for trial and settlement negotiations.

Moreover, Counsel's allocation of time is heavily weighted towards partners. Such a division of labor is atypical in practice. In such instances, "[c]ourts have reduced the fee percentage requested where, as here, the lodestar value reflects an over-allocation of work to more expensive partners." In re Platinum and Palladium Commodities Litig., No. 10-cv-3617 (WHP), 2015 WL 4560206, at *4 (S.D.N.Y. July 7, 2015) (citing In re Dreyfus Aggressive Growth Mut. Fund Litig., 98-cv-4318 (HB), 2001 WL 709262 (S.D.N.Y. June 22, 2001); Ryan v. Allied Interstate, Inc., 882 F. Supp. 2d 628 (S.D.N.Y. 2012)). Accordingly, this factor weighs against the approval of the Plaintiffs' fee request.

2. Magnitude and Complexities of Litigation

"Federal antitrust cases are complicated, lengthy, and bitterly fought." Wal-Mart, 396 F.3d at 118. These monopolization claims were highly nuanced. Plaintiffs showcased theories of liability that were sharply contested by Defendants, and required both sides to work extensively with economists and marketing experts to define the relevant market and analyze Defendants' contracting practices. This case had far-reaching implications posing an existential threat to Defendants' business model. But even if Plaintiffs prevailed on liability, they faced a serious challenge to establishing damages and the looming threat of decertification. And after deftly navigating the numerous pitfalls and traps set by Defendants' counsel, Plaintiffs were also confronted with the risk that their victories could be overturned on appeal. Accordingly, this factor weighs in favor of approval of Counsel's fee request.

3. Risk of Litigation

The parties faced formidable challenges in litigating the action to a verdict and then prevailing on appeal. Counsel prosecuted this case largely on contingency and assumed the risk of recovering nothing if the claims were dismissed at various stages. Both Counsel and their clients waged a battle against one of the largest corporations in the world, knowing full well that dismissal of the suit could have widespread consequences to their future business. Even at such an advanced stage of litigation, serious obstacles remained. For those reasons, the substantial risks in this litigation should be credited as "the foremost factor to be considered in determining whether to award an enhancement" of fees. Goldberger, 209 F.3d at 54.

4. Quality of Representation

Plaintiffs were represented by some of the finest antitrust lawyers in the nation. Counsel tirelessly litigated this case against Defendants' lawyers, who were of equally high

caliber. The results achieved through the efforts of Counsel are a "critical element in determining the appropriate fee to be awarded," and the settlement here will undoubtedly have widespread benefits to the Class. See Maley v. Del Global Tech. Corp., 186 F. Supp. 2d 358, 373 (S.D.N.Y. 2002).

5. Requested Fee in Relation to Settlement

"To avoid routine windfalls where the recovered fund runs into the multi-millions, courts typically decrease the percentage of the fee as the size of the fund increases." In re Interpublic Sec. Litig., No. 02-cv-6527 (DLC), 2004 WL 2397190, at *11 (S.D.N.Y. Oct. 26, 2004) (internal quotation marks and citations omitted). In mega-fund cases such as this, several courts in this Circuit have subscribed to the view that "the percentage used in calculating any given fee award must follow a sliding-scale and must bear an inverse relationship to the amount of the settlement." In re Indep. Energy Holdings PLC, No. 00-cv-6689 (SAS), 2003 WL 22244676, at *6 (S.D.N.Y. Sept. 29, 2003); see also Nasdaq, 187 F.R.D. at 486 (noting that in cases "where a class recovers more than $75–$200 million . . . fees in the range of 6–10 percent and even lower are common"); Platinum and Palladium, 2015 WL 4560206, at *4 ("To avoid a windfall where the recovered funds run into the tens of millions, courts typically decrease the percentage of fee as the size of the fund increases."); Carlson v. Xerox Corp., 596 F. Supp. 2d 400, 404 (D. Conn. 2009) ("[L]ower percentages of the fund" should be awarded "as the size of the fund increase[s].").

Counsel cite a number of decisions in support of their view that 30% of the Fund is reasonable. (See Pl. Mot. for Attorneys' Fees and Expenses and Incentive Awards at 9 ("Pl. Mot. for Fees") (collecting cases).) But those opinions span a broad range, with some awarding proportions that are well below 30%. (Pl. Mot. for Fees at 9–10 (fees representing 13% to 34%

of settlement funds totaling anywhere from $12.1 million to $1.86 billion).) And they also stand in stark contrast to other decisions in this Circuit decreasing the amount of fees as the settlement recoveries increase. See In re Citigroup Inc. Bond Litig., 988 F. Supp. 2d 371, 374 (S.D.N.Y. 2013) ("the percentage fee awarded in settlements as large as this one is typically lower—[sometimes] substantially lower—than 20%.") (collecting cases); In re IndyMac Mortgage-Backed Sec. Litig., 385 F. Supp. 2d 363 (S.D.N.Y. 2015) (awarding 12% of $75 million settlement); In re Bristol-Meyers Squibb Sec. Litig., 361 F. Supp. 2d 229 (S.D.N.Y. 2005) (awarding 3% of $300 million settlement); In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 991 F. Supp. 2d 437 (E.D.N.Y. 2014) (awarding 9.6% of $5.7 billion settlement).

As one Class Member, PepsiCo, expressed to this Court, a "fee of 30 percent exceeds the range that this Court has awarded to class counsel in connection with other settlements." (ECF No. 590.) Indeed, this Court has previously held that fee requests of "27.5% [or higher] of the net fund is on the high end of the range of fee awards." Currency Conversion, 263 F.R.D. at 129 (collecting cases). And in earlier class action settlements ranging from $15 million to $336 million, this Court cabined awards to between 12% to 28% of the funds. See Platinum and Palladium, 2015 WL 4560206 (reducing request from 29.5% to 22.5% of $72.5 million fund); In re Currency Conversion Fee Antitrust Litig., 263 F.R.D. 110 (S.D.N.Y. 2009) (reducing fee request from 25.5% to 15.5% in $336 million fund); In re Bayer AG Sec. Litig., 03-cv-1546 (WHP), 2008 WL 5336691 (S.D.N.Y. Dec. 15, 2008) (approving 12% of 18.5 million fund); In re Polaroid ERISA Litig., No. 03-cv-8335 (WHP), 2007 WL 2116398 (S.D.N.Y. July 19, 2007) (reducing request from 30% to 28% of $15 million fund). Accordingly, this Court declines to adopt wholesale Counsel's notion that a 30% fee award is

reasonable in relation to a mega-fund settlement.

6. Public Policy Considerations

Public policy encourages the award of reasonable attorneys' fees, but courts must also "guard against providing a monetary windfall to class counsel to the detriment of the plaintiff class." In re NTL Inc. Sec. Litig., No. 02-cv-3013 (LAK), 2007 WL 1294377, at *8 (S.D.N.Y. May 2, 2007) (internal quotation marks omitted). On the one hand, Counsel should be rewarded for concentrating their time, effort, and resources in successfully representing the Class on a contingent basis. On the other hand, permitting five law firms that undermined this Court's appointment order to reap a fee based, in part, on an inflated lodestar would run contrary to public policy. And doing so would impair the Court's "duty to avoid any sense of vicarious generosity or to permit the lodestar to be enhanced without restraint above a fair and reasonable amount under all the facts and circumstances." In re Sumitomo Copper Litig., 74 F. Supp. 2d 393, 396 (S.D.N.Y. 1999).

In applying the Goldberger factors, this Court concludes that the first factor—labor and time expended by Counsel—warrants a reduction in the requested fee. While there is no question that this case involved a substantial investment of time and labor, a portion was duplicative. On multiple occasions, this Court warned Counsel, in the plainest terms, to avoid duplication of effort. (See Sept. 16, 2015 Tr., at 3 ("if this case is settled or if the case is tried and the plaintiffs prevail, I am going to be called upon to determine attorneys' fees in this case . . . I am not going to permit the multiplication of counsel in a case.").) See also Dial Corp., 2015 WL 7180667, at * 2 (reminding Counsel of "their duty to avoid duplication of effort and multiplication of attorneys' fees."). This Court's rationale in appointing only two law firms as class counsel was based on a reasonable and prescient concern that having too many lawyers in

one case, no matter how large the case, inevitably invites duplication of tasks with a concomitant escalation of fees.

The lodestar in this action is inflated, and therefore serves no useful purpose as a "cross-check" to the requested fee. The lodestar of $36,433,985.50 was calculated by multiplying 69,218.95 hours billed with a "combined blended rate [among the firms] of $526.35 per hour." (Pl. Mot. for Fees at 18.) But there are many anomalies in the blended rate. First, it is freighted with an inordinate number of partners and overweighted with partner time. For example, five partners at Susman Godfrey billed 42.5% of the firm's total time; four partners at Kramer Levin logged 37% of their firm's total time; and four partners at McKool Smith expended 30% of their firm's total time. (ECF Nos. No. 577-1, 578, 579-1.) Second, the blended rate is enhanced by inflated billing rates. Some mid-level and senior associates billed at rates as high as $855 per hour, and some paralegals billed at a lofty $280 per hour. (See ECF Nos. 578, 579-1, 579-4.) This kind of billing warrants an aggregate, "across-the-board" haircut of at least $2.5 million, resulting in a revised lodestar of $33,900,000. See Capitol Records, Inc. v. MP3tunes, LLC, No. 07-cv-9931 (WHP), 2015 WL 7271565, at *5 (S.D.N.Y. Nov. 12, 2015) (noting that aggregate reductions appropriate where "a precise hour-for-hour reduction would be unwieldy or potentially inaccurate."); Kahlil v. Original Old Homestead Restaurant, Inc., 657 F. Supp. 2d 470, 477 (S.D.N.Y. 2009) ("It is well established that across-the-board reductions are appropriate when billing records are voluminous and numerous billing entries are in dispute.").

Then, there is the separate question of why the bloated billing did not end after this Court's July 2015 Order appointing Susman Godfrey and Kellogg Huber as the only firms authorized to represent the Class. (See ECF No. 257.) Despite that Order, all five firms continued to bill for work in this action. This Court will also account for any duplicative work

billed from that day forward in reducing the fee.

Counsel billed approximately 20,190 hours from July 10, 2015 to June 30, 2016. Based on their blended rate of $526.35, the firms billed approximately $10,627,006.50 in fees for work in connection with summary judgment, expert testimony, motions in limine, trial preparation, and settlement negotiations, among other things. This Court, in its discretion, will only credit two-fifths of that amount ($4,250,802.60) as original work on the basis that the remaining three-fifths of those fees ($6,376,203.90) are presumptively multiplicative and superfluous. The lodestar should therefore be further adjusted downward by approximately $6 million to $27,900,000.

And even after this Court's October 15, 2015 order acquiescing in Counsel's decision to deputize Kramer Levin and McKool Smith as lead trial and settlement counsel, it is impossible to determine who actually did what. For example, in the January–February 2016 time frame, co-lead counsel Susman Godfrey and Kellogg Huber should have had little to do, since they had ceded responsibility for trial and settlement to Kramer Levin and McKool Smith. See Dial, 2015 WL 7180667, at *2. But Susman Godfrey appears to have logged more hours than McKool Smith during a period devoted substantially to trial preparation. And Kellogg Huber was a close second. Moreover, Kramer Levin billed disproportionately more than McKool Smith for trial preparation—roughly 2,550 hours versus 875 hours. Knowing the consequences, Counsel nevertheless continued to operate under their own byzantine and exquisite arrangement.

A reasonable multiplier enhancing the lodestar is appropriate in this action because it accounts for "the riskiness of the litigation and quality of the attorneys." Wal-Mart, 396 F.3d at 121. But because Counsel's original lodestar was premised on a blended billing rate saturated by excessive partner time and timekeeper rates, and further bloated by time records

reflecting an inscrutable division of labor among the five firms, this Court reduces the multiplier from 2.01 to 1.75. A multiplier of 1.75 recognizes the risk in this litigation, and falls within the range of multipliers awarded in cases of this magnitude. See In re IndyMac Mortgage-Backed Sec. Litig., 94 F. Supp. 3d 517, 528 (S.D.N.Y. 2015) (finding multiplier of 1.33 for $346 million settlement reasonable); Platinum and Palladium, 2015 WL 4560206, at *4 (reducing multiplier from 2.6 to 1.9 on $72.5 million fund); Currency Conversion, 263 F.R.D. at 130 (reducing multiplier from 2.69 to 1.6 on $336 million fund); Penny v. Jenkens & Gilchrist, 230 F.R.D. 317, 352-54 (S.D.N.Y. 2005) (reducing multiplier from 2.04 to 1.5 on $81.5 million settlement); see also In re Cendant Corp. PRIDES Litig., 243 F.3d 722, 742 (3d Cir. 2001) (noting multipliers range from 1.35 to 2.99 based on survey of cases with mega-funds exceeding $100 million). A lodestar of $27.9 million multiplied by 1.75 results in a fee award of $48,825,000.

Accordingly, the "principles of moderation" urged by the Goldberger court, the Court's duty to protect the Class from "the danger of routine overcompensation . . . in the context of mega fund class actions," In re Citigroup Sec. Litig., 965 F. Supp. 2d 369, 401 (S.D.N.Y. 2013), and the broad discretion of this Court compel a fee award of no more than $48,825,000, or 20% of the Settlement.[3]

[3] This is not inconsistent with the proportion of fees that Counsel will receive from News Corp. in connection with the settlement benefiting the five absent Class members (20% of $30 million). The reasons justifying an award in either settlement are not materially different. Simply put, the Goldberger factors, namely risk, complexity, time, and resources in litigating the claims to such an advanced stage of litigation—all of which were satisfied before any one of the settlements were negotiated—serve as the primary basis on which Counsel is entitled to a fee from both the private settlement and the Class settlement. Counsel attempt to distinguish their fee in the private settlement on the basis that it was not derived from "a market rate negotiation with a client, reflects marginally lower work contributed to the individual settlements," lacks the structural relief contained in the Class settlement, and saves them the opportunity cost of pursuing fees relating to that settlement in a separate action. (Pl. Mot. for Fees at 11.) But all of those reasons are settlement-specific, and have no bearing on the Goldberger factors, which are what entitle them to any fee in the first place.

B. Expenses

Plaintiffs seek reimbursement of $7,512,915.12 in expenses. The vast majority of those expenses arise from costs associated with retaining two expert witnesses and retaining contract attorneys to review millions of documents. (Pl. Mot. for Fees at 20.) The contract attorney fees, amounting to a little more than $1 million and were billed "at an average rate of $39/hour without any mark-up applied." (Pl. Mot. for Fees at 20.) Simple math reveals that more than 25,000 hours of attorney time were expended. To Counsel's credit, this attorney time was "accounted as an expense rather than included in the lodestar." (Pl. Mot. for Fees at 20.) That fact weighs heavily in favor of granting the expenses. While courts in this Circuit have permitted attorneys to garnish their lodestars with marked-up contract attorney fees, this Court appreciates Counsel's decision to treat these contractor fees as an expense. It saves the Court from having to "determine a correct spread between the contract attorney's cost and his or her hourly rate and his or her salary." Citigroup Sec. Litig., 965 F. Supp. 2d at 394. This Court encourages the Plaintiffs' class action bar to consider adopting this practice in future actions.

Accordingly, because the "lion's share of these expenses reflect the costs of experts, consultants, litigation and trial support services, document imaging and copying, deposition costs, online legal research, and travel expenses," the court will not "depart from the common practice in this circuit of granting expense requests." Visa Check, 297 F. Supp. 2d at 525.

C. Incentive Awards

Plaintiffs request incentive awards of $50,000 each for the six class representatives: (1) Dial Corporation and Henkel Consumer Goods; (2) Kraft Heinz Foods and H.J. Heinz; (3) Foster Poultry Farms; (4) Smithfield Foods; (5) HP Hood; and (6) BEF Foods.

(Pl. Mot. for Fees at 22.) The incentive awards in the aggregate amount of $300,000 represent 0.12% of the Fund. Plaintiffs contend that the awards are justified in view of each company's investment of resources in pursuing the claims and "risking Defendants' retaliation for bringing claims against the sole source of a product vital to their ability to compete in the marketplace." (Pl. Mot. for Fees at 22.) They also count the "many total hours of executive and employee time," and the "unreimbursed costs in searching and gathering documents . . . preparing for and giving multiple depositions . . . [and] preparing and being ready to testify at trial," as examples of the investment they made in prosecuting this case. (Pl. Mot. for Fees at 22.) Moreover, five of the companies advanced significant fees to Berry for the first few years of the investigation and litigation.

Class representatives may receive an incentive award in addition to their allocable share of the ultimate recovery, but the decision to grant the award, and the amount thereof, rests solely within the discretion of the Court. See Roberts v. Texaco, 979 F. Supp. 185, 200 (S.D.N.Y. 1997). The "guiding standard in determining an incentive award is broadly stated as being the existence of special circumstances including the personal risk (if any) incurred by the plaintiff-applicant in becoming and continuing as a litigant, the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise), any other burdens sustained by that plaintiff . . . and, of course, the ultimate recovery." Roberts, 979 F. Supp. at 200.

Awards on an individualized basis have generally ranged from $2,500 to $85,000. See Dornberger v. Metro. Life Ins. Co., 203 F.R.D. 118, 125 (S.D.N.Y. 2001). While many of these awards are usually given to individual plaintiffs who have incurred significant personal risk in representing a class, a few courts have recognized the efforts of corporate representatives in

granting incentive awards. In re Cardizem CD Antitrust Litig., 218 F.R.D. 508, 535 (E.D. Mich. 2003) ($75,000 each to two corporations); Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 252 (S.D. Ohio 1991) ($50,000 each to six corporations); In re Prandin Direct Purchaser Antitrust Litig., 2015 WL 1396473, at *5 (E.D. Mich. Jan. 20, 2015) ($50,000 each to two corporations). In Cardizem, for example, corporate representatives dedicated "hundreds of hours of time to the prosecution of these cases and responses to discovery," provided the services of their general counsel, senior executives, and other employees during the litigation, investigated the claims with outside counsel, and participated meaningfully in the negotiation of settlement. 218 F.R.D. at 535–36.

Here, five of the six representatives fronted almost $1 million in attorneys' fees for the investigation and early prosecution of the action. Together, they provided more than a million documents in discovery, and made several of their employees and executives available for fact investigation, depositions, and trial. (Pl. Mot. for Fees at 22–23.) Moreover, while this case exclusively involved major companies that arguably were better suited to assume the risk of waging an expensive litigation against a multinational corporation, the decision to fire the first shot on behalf of the Class was fraught with risks. Notably, the named Plaintiffs in this case assumed a substantial risk in antagonizing a longstanding, powerful business partner and suffering sweeping consequences in the marketplace as a result of filing this action. Finally, the size of the incentive awards, relative to the Fund, is consistent with what other courts have awarded in cases of this magnitude. See Roberts, 979 F. Supp. at 200 (0.18% of a $115 million Fund). Accordingly, this Court approves incentive awards in the amount of $50,000 to the six named Class representatives.

CONCLUSION

For the foregoing reasons, in its informed discretion, this Court grants final approval of the Settlement, and awards attorneys' fees in the amount of $48,825,000, expenses in the amount of $7,512,915.12, and incentive awards in the amount of $50,000 each to Henkel Consumer Goods, Inc. f/k/a The Dial Corporation; Kraft Heinz Foods Co. f/k/a H.J. Heinz Company; Foster Poultry Farms; Smithfield Foods, Inc.; HP Hood LLC; and BEF Foods. Further, the Claims Administrator is directed to send another set of notices, and to follow-up with a phone call, informing potential Class Members that have not filed a proof of claim that they may file a late proof of claim by December 1, 2016.

Counsel is directed to submit a revised proposed final judgment forthwith. The Clerk of Court is directed to terminate motions pending at ECF Nos. 574 and 584.

Dated: October 31, 2016
New York, New York

SO ORDERED:

WILLIAM H. PAULEY III
U.S.D.J.

General Information

Case Name	Dial Corporation, et al v. News Corporation et al
Court	U.S. District Court for the Southern District of New York
Date Filed	Thu Sep 26 00:00:00 EDT 2013
Judge(s)	WILLIAM H. PAULEY, III
Federal Nature of Suit	Other Statutes: Antitrust [410]
Docket Number	1:13-cv-06802
Status	Closed
Parties	HP Hood LLC; Spectrum Brands Inc.; Harland Clarke Holding Corp.; PepsiCo, Inc.; Dial Corporation; News America Incorporated; Valassis Communications; Catalina Marketing Corporation; BEF Foods Inc.; Foster Poultry Farms; Crowell & Moring LLP; News America Marketing FSI L.L.C.; Henkel Consumer Goods, Inc.; News America Marketing In Store Services LLC; Smithfield Foods Inc.; News America Marketing FSI, Incorporated; Kraft Heinz Foods Company; H. J. Heinz Company LP; News America Marketing In-Store Services, L. L. C.; MacAndrews & Forbes Holding Inc. n/k/a MacAndrews & Forbes Incorporated; News Corporation

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TAB 4B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE DIAL CORPORATION, *et al.*, Individually and on behalf of Similarly Situated Companies, Plaintiffs, v. NEWS CORPORATION, *et al.*, Defendants.	Civil Action No. 13-cv-06802-WHP

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND EXPENSES AND INCENTIVE AWARDS TO CLASS REPRESENTATIVES

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Pursuant to Rule 23(h) of the Federal Rules of Civil Procedure, Co-Lead Class Counsel respectfully move for an award of attorneys' fees and reimbursement of expenses from the common fund established by the class settlement, and incentive awards for the six class representatives.

INTRODUCTION

In December 2012, Berry Law PLLC ("Berry Law") and Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C. ("Kellogg Huber") filed the initial complaints on behalf of Dial and Heinz in this multi-year, multi-million dollar effort to recover monopoly overcharges imposed by one of the world's largest media companies and to reform the contracting practices that created and sustained that monopoly. The Susman Godfrey, LLP ("Susman Godfrey"), McKool Smith P.C. ("McKool Smith"), and Paul Hastings LLP ("Paul Hastings") firms joined as plaintiffs' counsel in mid-2013, along with named plaintiffs Foster Poultry Farms ("Foster Farms"), BEF Foods Inc. ("BEF"), HP Hood LLC ("HP Hood"), Smithfield Foods, Inc. ("Smithfield Foods"), and Spectrum Brands, Inc. ("Spectrum Brands").

Unlike many antitrust class actions that support substantial fee awards, this case did not have the advantage of *per se* claims against admitted—or even accused—conspirators. Plaintiffs' counsel did not piggy-back on the work of governmental enforcement efforts or benefit from cooperating amnesty applicants. This was private enforcement from first to last. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 122 (2d Cir. 2005) (noting that "extraordinary fee" was warranted in part because "plaintiffs' counsel did not have the benefit of 'piggybacking' off of a previous [government action]."); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 597 (S.D.N.Y. 1992) (Mukasey, J.) ("[T]his is not a case where plaintiffs' counsel can be cast as jackals to the government's lion, arriving on the scene after some enforcement or administrative agency has made the kill. They did all the work on their own.").

The difficulty of the private enforcement task these plaintiffs and their counsel undertook is underscored by the complete lack of any copycat lawsuits.

The only certainty at the outset of this case was that even reaching class certification would require millions of dollars of expert economic analysis, investigation, and discovery. From its inception, this case faced significant legal hurdles and a tenacious, skilled, and well-funded opposition. And unlike many class actions, this case did not settle after this Court certified the class. Instead, Defendants appealed that decision, moved to disqualify both of Plaintiffs' antitrust and industry experts, and sought summary judgment on all claims. When the Second Circuit rejected their appeal Defendants began directly negotiating settlements with the two dozen largest class members in an attempt to undermine the Class and Plaintiffs' Counsel's efforts on its behalf.

This case proceeded through jury selection before settling on the first trial day for $244,000,000 (the "Settlement Amount") and important reform of Defendants' contracting practices. In consideration of this long fight and superior result, the six law firms that represented the Plaintiff class[1] respectfully request a fee award of $73,200,000 representing 30% of the common fund and a multiplier of 2.01 on Counsel's lodestar of $36,433,985.50. Co-Lead Counsel also requests reimbursement of expenses incurred in the course of prosecuting these claims in the amount of $7,512,915.12, and incentive awards of $50,000 to each of the six named plaintiffs.

[1] The six firms that represented the named plaintiffs and certified class are: Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Susman Godfrey, LLP, Kramer, Levin, Naftalis & Frankel, LLP, McKool Smith, P.C., Berry Law PLLC, and Paul Hastings LLP. *See* the declarations of Steven Benz, James Southwick, Daniel Goldman, Lewis LeClair, and Steven Berry, filed contemporaneously herewith.

THE WORK UNDERTAKEN BY PLAINTIFFS' COUNSEL

A. Case Investigation and Pleadings

In 2010 Berry Law and Kellogg Huber began investigating the antitrust claims that were ultimately brought to conclusion nearly six years later. From 2010 to the filing of the first complaint, those two firms devoted hundreds of hours of attorney time to the investigation of Plaintiffs' claims. *See* Berry Decl. ¶¶ 10-11; Benz Decl. ¶ 12. On December 21, 2012, The Dial Corporation filed the first complaint in this action in the Eastern District of Michigan against Defendants, alleging federal and state antitrust claims relating to their provision of in-store promotions products ("ISPs") to customers. (ECF No. 1.) On December 27, 2012, H.J. Heinz Company (now renamed Kraft Heinz Food Company) joined the lawsuit in an Amended Complaint. (ECF No. 3.) On May 2, 2013, a Second Amended Complaint added Foster Farms as a plaintiff and made the first class allegations. (ECF No. 24.) In August 2013, three additional firms – Susman Godfrey, McKool Smith, and Paul Hastings – joined the case as plaintiffs' counsel and sought leave to file a third amended complaint. (ECF No. 46.) In September 2013, the case was transferred from the Eastern District of Michigan to this Court. (ECF No. 50.) Plaintiffs filed a Third Amended Complaint on October 24, 2013, adding HP Hood, BEF, Smithfield Foods, and Spectrum as plaintiffs. (ECF No. 70.) The Fourth Amended Complaint was filed on April 8, 2014 and asserts causes of action for (1) exclusive dealing in the ISP market in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1; and (2) monopolization of the ISP market in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2. (ECF No. 111.)[2]

[2] The Complaint also asserted causes of action for monopolization of the free-standing insert market, and for violations of Michigan and New York state antitrust laws. With the Court's permission, Plaintiffs later voluntarily dismissed those claims. (ECF No. 543.)

B. Discovery Efforts

Fact discovery began in October 2013. Because Plaintiffs alleged anticompetitive conduct dating back to News's efforts to crush competition in the early 2000s, document discovery was extensive: a total of 10,867,210 documents were produced, representing 48,440,389 pages. This total comprised:

- 5,793,586 documents from Defendants (22,943,421 pages)
- 3,443,921 documents from Plaintiffs (12,445,706 pages)
- 1,629,703 documents from non-parties (13,051,262 pages)

The temporal scope and rule of reason nature of the claims required extensive deposition testimony: the parties took and defended 48 depositions in the case. Benz Decl. ¶ 20. The deponents included Defendants' current and former employees, officers, and corporate designee, as well as Defendants' principal competitor, Valassis Corp. Southwick Decl. ¶¶ 16, 17. Plaintiffs' Counsel also took the depositions of Defendants' four expert witnesses, Dr. Dennis Carlton, Dr. Sanjay Dhar, Dr. Jerry Hausman, and Dr. Kevin Murphy, and defended multiple depositions of their own experts, Dr. Jeffrey MacKie-Mason and Dr. Paul Farris. Benz Decl. ¶ 21; Berry Decl. ¶ 11; Goldman Decl. ¶ 6; LeClair Decl. ¶¶ 5-7; Southwick Decl. ¶¶ 16, 17. Plaintiffs' Counsel defended depositions of current and former employees of Class Plaintiffs and participated in the depositions of current and former employees of non-party CPGs, retailers, and other former competitors of the Defendants. Benz Decl. ¶ 21; Berry Decl. ¶ 11; LeClair Decl. ¶¶ 5, 7, 8; Southwick Decl. ¶¶ 16-17. Together, the parties served approximately 20 non-party subpoenas and 10 expert reports, along with multiple report supplements and expert declarations. Benz Decl. ¶ 20.

In April 2015, with just days to go before discovery was to close and with depositions nearly complete, Defendants informed the Court that they had failed to produce more than one million emails relevant to the case and would endeavor to produce those emails in the coming weeks. (ECF Nos. 222, 224.) As a result, the case schedule was extended and Plaintiffs' Counsel began an intensive effort over the summer of 2015 to review and analyze the late wave of Defendants' emails that were not produced until after discovery was supposed to have been complete.

C. Expert Work

Simultaneous with document discovery and depositions, Plaintiffs' Counsel worked with two experts to establish key facets of class certification (common impact, predominance, common approach to damages) and their affirmative case (market definition, liability, and damages). These experts provided critical opinion evidence on the business context of the use of third-party ISPs offered by News and sound economic theory to establish liability and quantify damages for the class. Plaintiffs describe those experts' qualifications and opinions in the Declaration of Steven F. Benz. Benz Decl. ¶¶ 22-24.

D. Class Certification

On August 11, 2014, Plaintiffs moved the Court under Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure for an order certifying the case as a class action. (ECF No. 141.) On June 18, 2015, the Court granted Class Plaintiffs' motion and certified a class of "[n]on-retailer consumer packaged goods firms residing in the United States which have directly purchased in-store promotions from News Corp. at any time on or after April 5, 2008, and were not subject to mandatory arbitration clauses." (ECF No. 243, at 23.) Defendants petitioned to

appeal the Court's class certification order under Rule 23(f), (ECF No. 248), which the Second Circuit denied. (ECF No. 327.)

The Court approved a September 21, 2015 opt-out deadline. (ECF Nos. 266, 304.) Only one small putative Class Member opted out. (ECF No. 304-1.) The Court subsequently amended the start of the Class period to April 26, 2009. (ECF No. 484.)

E. Summary Judgment and Daubert Motions

On September 30, 2015, Defendants moved for summary judgment and sought to bar testimony of both of Plaintiffs' experts. (ECF Nos. 282–295.) Those motions, as well as Plaintiffs' responses, were supported by extensive expert reports, exhibits, and declarations. (*See id*.) On January 15, 2016, the Court denied Defendants' motion for summary judgment and motions to exclude the testimony of Professors MacKie-Mason and Farris. (ECF No. 420.)

F. Motions *in Limine* and Trial

From December 2015 through February of this year, the parties negotiated and filed all the required pre-trial materials, including a proposed jury questionnaire, jury instructions, verdict forms, *voir dire* questions, and motions *in limine*. (ECF Nos. 285, 286, 462, 471, 474, 538-540.) The Court held several pre-trial conferences, in court and by telephone, on important pre-trial issues, such as the parties motions *in limine*, including critical issues such as the admissibility of pre-class period evidence and the effect of releases entered into between Defendants and various Class Members at various times. (*See, e.g.*, ECF Nos. 365, 484, 520, 523.) In the lead-up to trial, Plaintiffs' Counsel prepared for and conducted a mock trial; selected, exchanged, and objected to trial exhibits; designated and objected to deposition designations; and prepared their trial witnesses to testify. Benz Decl. ¶ 20; Goldman Decl. ¶¶ 12-13; LeClair Decl. ¶¶ 6-8, 10-11.

Throughout these months of trial preparation, Plaintiffs' Counsel was actively involved in discussions with most of the two dozen large class members with whom Defendants were trying to negotiate non-class settlements. (ECF No. 339.) On February 24, less than a week before trial, Defendants informed Plaintiffs' Counsel of settlements worth more than $30 million it had struck the previous day with five substantial class members. (ECF No. 542.) And as described in Plaintiffs' motion for preliminary approval, during January and February of this year Lead Counsel were actively negotiating to settle the Class's claims. (ECF No. 565.)

On February 29 of this year, a *venire* was brought in and the parties proceeded through *voir dire* and jury empanelment. Counsel proceeded to give opening statements to the jury before reaching, and then briefing the Court on the details of, the parties' settlement. The Court preliminarily approved the settlement on June 2, 2016. (ECF No. 571.) On June 15, 2016, notice was mailed to all Class Members.

Every minute of work and every dollar of expense incurred by the firms of Kellogg Huber, Susman Godfrey, McKool Smith, Kramer Levin, and Paul Hastings was entirely at risk. Benz Decl. ¶ 43; Goldman Decl. ¶ 5; LeClair Decl. ¶¶ 18-19; Southwick Decl. ¶ 9. The six class representatives paid Berry Law a total of $918,110 during the course of Mr. Berry's pre-suit investigation and during the pendency of the case; all of Berry Law's time in excess of these payments were at risk. Berry Decl. ¶ 15. Ultimately, 80% of Berry Law's lodestar, and 97% of Plaintiffs' Counsel's combined lodestar was undertaken on a contingency basis. Benz Decl. ¶ 17; Berry Decl. ¶ 16.

ARGUMENT

THE FEE REQUEST IS FAIR AND REASONABLE

A. The Requested Fee Is Reasonable and Appropriate Under the Second Circuit's Preferred Percentage-Based Method

The total requested amount of fees is $73,200,000, 30% of the $244 million common fund created by the settlement. Applying the "percentage method" of fee calculation favored in this Circuit confirms that the requested fee is reasonable. *See Wal-Mart*, 396 F.3d at ("The trend in this Circuit is toward the percentage method"). The percentage method provides "appropriate financial incentives" necessary to "attract well-qualified plaintiffs' counsel who are able to take a case to trial," and "directly align[s] [the] interests of the class and its counsel." *WorldCom, Inc., In re*, 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005). Without "adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation." *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06 MD 1775 (JG), 2011 WL 2909162, at *6 (E.D.N.Y. July 15, 2011) (quoting *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co.*, 481 F.2d 1045, 1050 (2d Cir. 1973)).

The fee request for Plaintiffs' Counsel here totals 30% of the common fund, which is reasonable on its face. *Donoghue v. Morgan Stanley High Yield Fund*, No. 10 Civ. 3131 (DLC), 2012 WL 6097654, at *2 (S.D.N.Y. Dec. 7, 2012) (Cote, J.) ("attorney[s]'s fees of one-third or less of the settlement amount are customarily found to be reasonable.") (collecting cases). "Even in large-value cases, courts have sometimes awarded contingency fees exceeding 30% of the overall fund." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 447 n.11 (E.D.N.Y. 2014) (collecting cases), *rev'd on other grounds*, No. 12-4671-CV, 2016 WL 3563719 (2d Cir. June 30, 2016).

Thirty percent of a common fund is squarely within the percentage range of fees that courts in this circuit have approved as reasonable in recent large antitrust cases:

Case	Recovery	Percentage
In re Credit Default Swaps Antitrust Litig., No. 13-MD-2476, 2016 WL 2731524 (S.D.N.Y. Apr. 26, 2016) (Cote, J.)	$1.86 billion	13.61%
In re Platinum & Palladium Commodities Litig., No. 10 CV 3617, 2015 WL 4560206 (S.D.N.Y. July 7, 2015) (Pauley, J.) (fee award for Futures Class Counsel)	$72.5 million	22.5%
Id. (fee award for Physical Class Counsel)	$12.1 million	33.3%
In re Air Cargo Shipping Servs. Antitrust Litig., No. 06 MD 1775, 2012 WL 3138596 (E.D.N.Y. Aug. 2, 2012), 2011 WL 2909162 (E.D.N.Y. July 15, 2011), 2009 WL 3077396 (E.D.N.Y. Sept. 25, 2009) (Gleeson, J.)	$422.2 million	25%
In re Initial Pub. Offering Sec. Litig., 671 F. Supp. 2d 467 (S.D.N.Y. 2009) (Scheindlin, J.)	$510 million	33.3%
In re Adelphia Commc'ns Corp. Sec. & Derivative Litig., No. 03 MD 1529 (LMM), 2006 WL 3378705 (S.D.N.Y. Nov. 16, 2006) (Scheindlin, J.)	$455 million	21.4%
In re Oxford Health Plans. Inc. Sec Litig., MDL 1222, 2003 U.S. Dist. Lexis 26795 (S.D.N.Y. June 12, 2003) (Brieant, J.)	$300 million	28%

See generally Newberg on Class Actions § 15:83 (5th ed.) (mean fee award percentage for 26.9% in Second Circuit for 2006-2011 period). Awards in "megafund" cases in other circuits confirm the reasonableness of a 30% award here.

Case	Recovery	Percentage
In re Cathode Ray Tube (CRT) Antitrust Litig., MDL No. 1917, 2016 WL 721680 (N.D. Cal. Jan. 28, 2016)	$576 million	30%
In re AT&T Mobility Wireless Data Servs. Sales Tax Litig., 792 F. Supp. 2d 1028 (N.D. Ill. 2011)	$956 million	20%
In re (Bank of Am.) Checking Account Overdraft Litig., 830 F. Supp. 2d 1330 (S.D. Fla. 2011)	$410 million	30%
In re Tricor Direct Purchaser Antitrust Litig., No. 05-340-SLR, Dkt. No. 543 (D. Del. Apr. 23, 2009)	$250 million	33.33%
Allapattah Servs., Inc. v. Exxon Corp., 454 F. Supp. 2d 1185 (S.D. Fla. 2006)	$1.06 billion	31.33%
In re Relafen Antitrust Litig., Master File No. 01-12239-WGY (D. Mass. 2004 & 2005)	$250 million	33%
In re Vitamins Antitrust Litig., Misc. No. 99-197 (TFH), 2001 WL 34312839 (D.D.C. July 16, 2001)	$365 million	34.06%

Notably, in all but two of the cases above[3], settlement was achieved comparatively early in the case—before class certification, summary judgment, *Daubert* motions, and trial. The increased risks and difficulty posed by taking the case further here warrants a higher fee award relative to similar cases settled earlier in the course of litigation. *See Credit Default Swaps*, 2016 WL 2731524, at *17 n.24 (privately negotiated fee schedule increased rate as litigation advanced); *WorldCom*, 388 F. Supp. 2d at 355 (fee schedule "allows Lead Counsel to collect a higher fee for recoveries achieved in later stages of the litigation"); *see also Payment Card Interchange Fee*, 991 F. Supp. 2d at 446 ("Privately negotiated fees in complex cases . . . often include a higher fee for cases that proceed past a motion to dismiss, discovery, summary judgment, or other benchmarks; the *Goldberger* factors also dictate a smaller fee for less work."). In light of awards in other cases of similar scale but requiring comparatively less work, the requested fee is eminently reasonable.

Two additional case-specific issues should be noted in considering this fee request. First, five of the named plaintiffs paid Berry Law a total of $948,110 in fees during the investigation and litigation of this case. Berry Decl. ¶¶ 14, 15. Plaintiffs' counsel will reimburse those fees to the named plaintiffs out of any award of fees to Plaintiffs' Counsel. The repayment will put those Plaintiffs on even footing with the rest of the Class in terms of proportion of individual damages recovered, and will ensure the total fee to Plaintiffs' Counsel from the Class does not exceed the requested $73,200,000.

Second, in addition to the $244 million payment to the Class, Defendants settled with five class members in the week before trial for $30 million cash plus certain future price discounts and true-up payments to match any class settlement. (ECF No. 542.) The class settlement

[3] *Oxford Health* and *Allapattah Servs.*, which settled in the pre-trial phase and after trial and appeals, respectively.

agreement includes a payment to Plaintiffs' Counsel of $6 million as a fee related to work that resulted in those individual settlements. The $6 million fee does not come from the common fund and is thus separate from this fee request, but is contingent on final approval of the class settlement. This $6 million fee should not reduce the fee requested in this motion because if the five settling entities had remained in the Class, Class Counsel would have demanded a correspondingly larger class settlement payment and the percentage fee would also be correspondingly larger. Although $6 million represents only 20% of the individual settlements, that fee is not akin to a market rate negotiation with a client, reflects the marginally lower work contributed to the individual settlements, the lack of structural relief in the individual settlements, and the benefit to Plaintiffs' Counsel of being saved the effort of pursuing their due compensation for those settlements in separate actions.

The reasonableness of the requested fee award is also confirmed using the six-factor test promulgated in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000). Under that test, courts weigh "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Id.* at 50.

1. Quality of Representation and Time Spent by Counsel

"[T]he quality of representation is best measured by results." *Goldberger*, 209 F.3d at 55. As detailed in Plaintiffs' Motion for Preliminary Approval, ECF No. 565, Plaintiffs' Counsel obtained a cash recovery of $244,000,000 for the Class, in excess of the conservative single damages calculated by Dr. MacKie-Mason. (ECF No. 565, at 12). In addition, Plaintiffs' Counsel secured structural reform of Defendants' contracting procedures, which could

substantially reinvigorate competition in the third-party ISP market. *See In re Excess Value Ins. Coverage Litig.*, 598 F. Supp. 2d 380, 388 (S.D.N.Y. 2005) (Berman, J.) (holding that when injunctive relief confers substantial benefit upon the class but cannot be ascribed specific monetary value, appropriate to award higher percentage of common fund as attorneys' fees).

This result was achieved efficiently even though Plaintiffs' Counsel faced tenacious, and at times contentious, opposition from one of the nation's largest and best regarded defense firms. *See In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (Sweet, J.) (noting as factor in reasonableness of hours expended that defense counsel included "the nation's biggest and best defense firms operating on a seemingly unlimited budget over a period of four years"). Indeed, a report in the Wall Street Journal, a publication owned by Defendant News Corp, indicated that Defendants had spent nearly $35 million in legal fees in just the last year of litigation. *See* Benz Decl. Ex. 8, *News Corp Settles In-Store Ads Class-Action Suit*, Wall St. J., Feb. 29, 2016 ("The legal fees have been significant—around $35 million last year."), *available at* http://www.wsj.com/articles/news-corp-settles-in-store-ads-class-action-1456796184. If accurate, Defendants' fees for 2015 dwarf the lodestar of Plaintiffs' Counsel for the same period and nearly matches the entire $37.3 million lodestar for Plaintiffs' Counsel for the roughly five years of this litigation. *See infra* Part I.D.

2. Complexity of the Case

"[A]ntitrust cases, by their nature, are highly complex." *Wal-Mart*, 396 F.3d at 122. This case was no exception, and involved an alleged monopolization and the interplay of multiple contracts to restrain trade in a complicated, multi-part marketplace, with conduct spanning more than a decade. As described above, discovery was extensive and made more

complicated by Defendants' production of over one million emails after depositions were nearly completed.

The merits of this rule of reason monopolization case required extensive work with economists and marketing experts to analyze Defendants' contracting practices and to define the relevant market and determine whether Defendants' contracting practices were exclusionary or pro-competitive. Unlike *per se* cases, there are no bright lines in a rule of reason analysis that identify prohibited practices. Each alleged bad act needed to be analyzed in conjunction with the other alleged improper behavior in the context of the relevant market to support an argument why Defendants' conduct, taken as a whole, was anti-competitive and why Defendants' proffered explanations were pretext.

Plaintiffs' Counsel also faced novel statute of limitations questions, complicated not only by ambiguous tolling agreements, but also by many of the hundreds of contracts at issue having contractual provisions purporting to shorten the limitations period to bring a claim. Plaintiffs had to deal with the late surprise assertion by Defendants, only weeks before the trial, that certain Class members had previously released their claims. (ECF No. 429.) Plaintiffs' Counsel also faced the hurdle of preparing for trial and attempting to negotiate a class-wide settlement while also responding to numerous inquiries from the two-dozen largest class members as they were directly courted by Defendants for individual settlements. This substantially increased the difficulty of both the class settlement negotiations and trial preparation.

3. Litigation Risk

"Contingency risk is the principal . . . factor courts should consider in their determination of attorneys' fees." *In re Dreyfus Aggressive Growth Mut. Fund Litig.*, No. 98 CV 4318 HB, 2001 WL 709262, at *6 (S.D.N.Y. June 22, 2001) (Baer, J.); *see also Goldberger*, 209 F.3d at 54

(identifying risk as "perhaps the foremost factor to be considered in determining whether to award an enhancement") (internal citation and quotations omitted). An evaluation of the risks undertaken by Plaintiffs' Counsel in prosecuting this action supports the reasonableness of the fee request.

"It is well-established that litigation risk must be measured as of when the case is filed," not when the fee application is adjudicated. *Goldberger*, 209 F.3d at 55. Here, all of Plaintiffs' Counsel's time, with the exception of 20% of Berry Law's time, was undertaken entirely on contingency, risking all of their time and paying out millions of dollars in expenses. Even with the roughly $1 million that class representatives paid to Berry Law during the course of the case, $36 million of the $37.3 million in lodestar was entirely at risk, or 97% of all Plaintiffs' Counsel's time was fully at risk.

Even "despite the most vigorous and competent of efforts, success is never guaranteed." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974), *abrogated on other grounds*, *Goldberger*, 209 F.3d 43. In antitrust class actions in particular, "[t]he risks of establishing liability and damages at trial" are substantial. *In re Visa Check/Mastermoney Antitrust Litig.* 297 F. Supp. 2d 503, 511 (E.D.N.Y. 2003), *aff'd sub nom. Wal-Mart*, 396 F.3d 96; *see also NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. at 476 ("[T]he history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal.").

Plaintiffs' Counsel faced risks associated with taking on one of the largest and most powerful corporations in the world, one with extensive resources to support the litigation. The case has thus far taken almost six years to come from investigation to conclusion, with Plaintiffs' Counsel collectively laying out 69,000 hours—representing over $36 million in expended man-

hours that may never have been collected. Benz Decl. ¶ 17; Berry Decl. ¶¶ 12, 13; Goldman Decl. ¶¶ 24, 38; LeClair Decl. ¶ 15; Southwick Decl. ¶ 12. Counsel also invested over $7 million in expenses that they may have never recovered but for a successful outcome. Okada Decl. ¶ 9; Benz Decl. ¶¶ 51-52; Berry Decl. ¶ 14; Goldman Decl. ¶¶ 25, 26; LeClair Decl. ¶¶ 19, 21; Southwick Decl. ¶ 18.

The case itself posed substantial burdens for successful prosecution. Plaintiffs' Counsel had to overcome motions for summary judgment, a motion for class certification and an appeal, *Daubert* motions, and various motions *in limine*, any of which could have crippled or outright terminated the action. Plaintiffs' Counsel thus faced, and succeeded in overcoming, substantial legal and procedural obstacles to successfully bring the action to the point of settlement.

4. The Fee Is Reasonable in Relation to the Settlement

Courts in this Circuit generally examine the reasonableness of a requested fee in relation to the size of the settlement fund by comparing the fee sought with the requested fee in other similarly sized settlements. *See, e.g.*, *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 129 (S.D.N.Y. 2009) (Pauley, J.), *aff'd sub nom. Priceline.com, Inc. v. Silberman*, 405 F. App'x 532 (2d Cir. 2010); *but see Goldberger*, 209 F.3d at 53 ("a fee award should be assessed based on scrutiny of the unique circumstances of each case"). As shown above at 7-11, a fee award representing 30% of a common fund of this size is well in line with practice in the federal courts where a class action has progressed to trial.

5. Public Policy

Finally, public policy strongly favors the award of the requested fee in order to adequately incentivize lawyers to pursue challenging and high risk work in the antitrust context vital to the proper functioning of the economy. As Judge Cote recently wrote, "[i]t is important

to encourage top-tier litigators to pursue challenging antitrust cases such as this one. Our antitrust laws address issues that go to the heart of our economy. Our economic health, and indeed our stability as a nation, depend upon adherence to the rule of law and our citizenry's trust in the fairness and transparency of our marketplace." *Credit Default Swaps,* 2016 WL 2731524, at *18 (citing *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013) (noting the "fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws").

B. The Lodestar Cross-Check Supports the Requested Fee

The lodestar fee calculation method has "fallen out of favor particularly because it encourages bill-padding and discourages early settlements." *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 353 (S.D.N.Y. 2014) (Schofield, J.). At most, the lodestar method should be used as a cross-check to ensure the award here is not an "unwarranted windfall." *Goldberger*, 209 F.3d at 49-50. "[W]here used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Id.* at 50.

"Under the lodestar method, the Court examines the fee petition to ascertain the number of hours reasonably billed to the plaintiff and multiplies that figure by an appropriate hourly rate and a multiplier." *Currency Conversion Fee*, 263 F.R.D. at 128. "Courts applying the lodestar method generally apply a multiplier to take into account the contingent nature of the fee, the risks of non-payment, the quality of representation, and the results achieved." *Platinum & Palladium Commodities Litig.*, 2015 WL 4560206, at *3.

Plaintiffs' Counsel collectively billed 69,218.95 hours to this matter over roughly six years. Benz Decl. ¶ 17. At each firms' current customary rates, those hours represent $36,433,985.50 in total lodestar as of June 30, 2016. *Id*. Plaintiffs' Counsel's request for

$73,200,000 in attorneys' fees for Plaintiffs' Counsel thus represents a multiplier of approximately 2.01. Plaintiffs' Counsel has deducted from this lodestar the time of any lawyer, legal assistant, or other timekeeper who billed less than 20 hours to the case. Benz Decl. ¶ 48; LeClair Decl. ¶ 15; Southwick Decl. ¶ 12. This time excludes all of the time spent on this motion or supporting declarations. Benz Decl. ¶ 46.

The lodestar is calculated using current rates according to Second Circuit precedent. "[T]he use of current rates to calculate the lodestar figure has been endorsed repeatedly by the Supreme Court, the Second Circuit and district courts within the Second Circuit as a means of accounting for the delay in payment inherent in class actions and for inflation." *In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12-CIV-8557 CM, 2014 WL 7323417, at *15 & n.9 (S.D.N.Y. Dec. 19, 2014) (citing *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989) (endorsing "an appropriate adjustment for delay in payment" by applying "current" rate)), *Gierlinger v. Gleason*, 160 F.3d 858, 882 (2d Cir. 1998) (rates "should be 'current rather than historic'"), *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir. 1998) (current rates "should be applied in order to compensate for the delay in payment"), *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 589 n.10 (S.D.N.Y. 2008) (McMahon, C.J.) (same), and *In re Veeco Instruments Inc. Sec. Litig.,* 05 MDL 01695(CM), 2007 WL 4115808, at *9 (S.D.N.Y. 2007) (same).

A multiplier of 2.01x is at the low end for a case of this scale, expense, duration, and complexity. *See, e.g.*, *Asare v. Change Grp. New York, Inc.*, No. 12 Civ. 3371 (CM), 2013 WL 6144764, at *19 (S.D.N.Y. Nov. 18, 2013) (McMahon, C.J.) ("Typically, courts use multipliers of 2 to 6 times the lodestar."); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481-82 (S.D.N.Y. 2013) ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers."); *Credit Default Swaps*, 2016 WL 2731524, at *17 (approving

fees constituting a "multiple of just over 6" times the lodestar with $1.9 billion settlement fund); *Payment Card Interchange Fee*, 991 F. Supp. 2d at 448 (multiplier of 3.41 with $5.7 billion fund); *Maley v. Dale Global Techs. Corp.*, 186 F. Supp. 2d 358, 371 (S.D.N.Y. 2002) ("in 'cross-checking' the percentage fee against the lodestar-multiple, it clearly appears that the modest multiplier of 4.65 is fair and reasonable."); *NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. at 489 (awarding fees representing a 3.97 multiplier of $36,191,751 lodestar, noting that "multipliers of between 3 and 4.5 have become common.").

By way of comparison to another recent antitrust class action in this Court, Plaintiffs' Counsel in *In re Credit Default Swaps* produced a lodestar over $41 million in just over two years of litigation, 2016 WL 2731524, at *17, when the action settled mid-way through discovery and before briefing class certification or summary judgment. *See generally In re Credit Default Swaps Antitrust Litig.*, No. 13-MD-2476 (S.D.N.Y). In approving the requested fee award, Judge Cote approved a lodestar multiplier of 6.18. *See Credit Default Swaps*, 2016 WL 2731524, at *17. Plaintiffs' Counsel successfully settled this action with a lodestar $4 million less than that total. This was achieved despite comparable scale of discovery,[4] over nearly twice the span of time,[5] and despite the lodestar here including full briefing for class certification, summary judgment, and *Daubert* motion practice, as well as preparation for trial up to the point of jury empanelment and opening statements.

Plaintiffs' Counsel's combined blended rate of $526.35 per hour is below the market average for representation of this caliber in the Southern District of New York.[6] *See, e.g., Credit*

[4] Forty-eight million pages of documents, Benz Decl. ¶ 20, compared to roughly fifty million in *Credit Default Swaps*, 2016 WL 2731524, at *2.

[5] Forty months of litigation here vs. twenty four months in CDS. *Compare* 1:13-cv-06802 (S.D.N.Y.) to 13-MD-2476 (S.D.N.Y).

[6] If the time of outside document reviewers were included in Plaintiffs' Counsel's lodestar, rather than passed through as an expense at no mark-up, the blended rate would be only $393.27 per hour. Benz Decl. ¶ 49.

Default Swaps, 2016 WL 2731524, at *17 (blended hourly rate was roughly $440/hour at historical rates); *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 394 (S.D.N.Y. 2013) (Stein, J.) ("[T]he proposed rates for firm attorneys are reasonable. The blended hourly rate for associates here is $402, and the blended rate for partners and counsel is $632."); *Currency Conversion Fee*, 263 F.R.D. at 128 ("The blended hourly rate of some of the law firms [representing plaintiffs] was above $500. Class Counsel reduced those blended rates to $490 per hour. This resulted in a final blended hourly rate of $416."); *Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d at 589 (eight years ago, partner rates ranging "from $700 to $750 . . . [fell] within the norm . . . Likewise, associate rates . . . . rang[ing] from a low of $300 per hour to a high of $550 per hour. . . . [we]re consistent with rates charged by the defense bar for similar work."); *see also Billing Rates Across the Country*, National Law J., Jan. 13, 2014, http://www.nationallawjournal.com/id=1202636785489/Billing-Rates-Across-the-Country (for 2014, Paul Weiss average associate rate was $600/hr and average partner rate $1040/hr. The national average partner cost was $604/hour, while the average associate cost was $370/hr); *see generally Reiter v. MTA New York City Transit Auth.*, 457 F.3d 224, 232 (2d Cir. 2006) ("The lodestar figure should be based on market rates in line with those rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."). Each hour billed is supported by detailed contemporaneous records. *See* Benz Decl. Ex. 7; Berry Decl. Ex. 1; Goldman Decl. Exs. 3, 6; LeClair Decl. Ex. 1; Southwick Decl. Ex. 2.

The lead partners from each firm conferred weekly to ensure the minimum possible overlap in efforts, and work was largely divided by task and/or phase of litigation to mitigate risk of duplication of efforts, with lower cost staff and contract attorneys used as appropriate.

Southwick Decl. ¶¶ 10-11. Independent contract attorneys were retained at an average rate of $39/hour without any mark-up applied, and their 26,003.25 hours were accounted as an expense rather than included in the lodestar. Benz Decl. ¶ 49; *cf. Citigroup*, 965 F. Supp. 2d at 398 (approving $200 as "appropriate blended hourly rate for . . . contract-attorney services").

PLAINTIFFS' COUNSEL'S EXPENSES ARE REASONABLE

Over the course of five years of investigation and litigation, Plaintiffs' Counsel incurred out-of-pocket expenses totaling $7,512,915.12. *See* Okada Decl. ¶ 9; Benz Decl. ¶¶ 51-52; Berry Decl. ¶ 17; Goldman Decl. ¶¶ 25, 26; LeClair Decl. ¶¶ 19, 21; Southwick Decl. ¶ 18. Because all Plaintiffs' Counsel advanced those funds themselves and carried the costs for years with no certainty of recovery, these expenses were undertaken only when it was deemed warranted to advance the cause of the litigation.

Category	Amount
Experts	$3,913,551.43
Contract Attorneys – Document Review	$1,014,156.00
Electronic Discovery and Document Management (Outside)	$940,045.91
Travel/Lodging	$520,603.87
Graphics/Trial Consultants	$435,443.16
On-Line Research (Pacer/Lexis/Westlaw)	$199,544.78
Copying/Printing (Outside)	$149,915.15
Court Reporters	$139,550.82
Litigation Support-Data Hosting and Document Management (Internal)	$97,562.29
Copying (Internal)	$62,298.59
Postage/FedEx/UPS	$14,716.29
Courier Service	$8,674.31
Court Fees	$5,604.20
Telephone	$5,201.91
Deposition Logistics	$3,354.83
Process Servers	$1,696.80
Witness Fees	$649.28
Office Supplies	$303.74
Publications	$41.76

TOTAL	**$7,512,915.12**

Okada Decl. ¶ 9.

Roughly half of these expenses were incurred in retaining two expert witnesses, Professors Paul Farris and Jeffrey MacKie-Mason, whose *curricula vitae* are attached in Exhibit 1 to the Benz Declaration. Okada Decl. ¶ 6. These two experts and their extensive reports and testimony were essential to the case, including getting the Class certified, defeating Defendants' motion for summary judgment, and in preparing Plaintiffs' affirmative case for trial. *See* Benz Decl. ¶¶ 22-24. Costs stemming directly from discovery, such as document review and electronic document management, were the next largest cost base. *See* Benz Decl. ¶ 49; Okada Decl. ¶¶ 6, 9. Lead Counsel monitored the major expenses as they were incurred and believe the expenses are reasonable and in line with what experience indicates are required to advance these claims. Benz Decl. ¶¶ 15, 16; Southwick Decl. ¶ 24.

The remaining expenses were industry-standard expenses, such as travel and lodging, deposition transcription and videotaping, outside contractors for document review, document imaging and copying, online legal research fees, and other miscellaneous litigation support services. Plaintiffs' Counsel monitored and reviewed these expenses as well, and found them reasonable. Benz Decl. ¶ 16; Southwick Decl. ¶ 24. There is "no reason to depart from the common practice in this circuit of granting expense requests." *Visa Check*, 297 F. Supp. 2d at 525 (granting $18.7 million expense request where "lion's share of these expenses reflects the costs of experts and consultants, litigation and trial support services, document imaging and copying, deposition costs, online legal research, and travel expenses.

INCENTIVE AWARDS FOR CLASS REPRESENTATIVES

Plaintiffs' Co-Lead Counsel also requests incentive awards of $50,000 for each of the class representatives: the Dial Corporation, Henkel Consumer Goods Inc., Kraft Heinz Foods Co. and H.J. Heinz Co. L.P., Foster Poultry Farms, Smithfield Foods, Inc., HP Hood LLC, and BEF Foods Inc. (collectively, "the Class Representatives"). These awards are justified to compensate these companies for the time and expense they incurred pursuing this case and as a reward for risking Defendants' retaliation for bringing claims against the sole source of a product vital to their ability to compete in the marketplace.

Each Class Representative donated substantial time and support to the prosecution of the Class's claims. Five of them advanced substantial fees as noted above. The Class Representatives willingly aided the entire Class, which includes those Representatives' principal competitors. The Class Representatives gave needed and valuable contributions to the pursuit of this litigation, both by spending many total hours of executive and employee time, and by directly incurring unreimbursed costs in searching and gathering documents, preparing for and giving multiple depositions, and preparing and being ready to testify at trial.

Class Representative	Number of Records Produced (Pages)	Witnesses Provided (Title)	Duration of Deposition
BEF Foods	178,580 records (616,847 pages)	Dave Brotherton (Senior Brand Manager);	5 hrs 23 mins
		Theodor Muir (Senior Director of Marketing)	4 hrs 51 mins
Foster Poultry Farms	449,218 records (1,829,066 pages)	Jennifer Corsiglia-Keim (Senior Marketing Manager)	6 hrs 9 mins
Kraft & Heinz	603,275 records (2,564,015 pages)	Marion Findlay (Group Leader – Licensing, Multi-Brand Partnerships)	8 hrs 8 mins
Henkel & Dial	933,025 records (3,603,814 pages)	Henry Hendrix (Former Senior Brand Manager)	7 hrs 2 mins
		Andrea Jeannet (Senior Manager Media and Integrated Marketing)	5 hrs 22 mins

		Wendy Warus (Vice President of Sales for eCommerce)	6 hrs 57 mins
		Karen Welch (Purchasing Manager)	6 hrs 26 mins
HP Hood	24,857 records (500,017 pages)	Melissa Gilreath (Senior Marketing Manager)	6 hrs 21 mins
		Patrick Maguire (Senior Marketing Manager)	5 hrs 27 mins
		Christopher Ross (Vice President of Marketing)	6 hrs 57 mins
Smithfield Foods	767,168 records (2,059,093 pages)	Erin Turley (Senior Director, Innovation and Commercialization)	5 hrs 44 mins
		Charles Gitkin (Vice President of Marketing, Innovation, and R&D for The John Morrell Food Group)	4 hrs 51 mins

The Class Representatives should be given incentive awards to avoid discouraging corporate class representatives from leading a future meritorious case, and because otherwise their net recovery could be substantially less than those absent class members who bore no risk of antagonizing an important business partner. *See In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06 MD 1775, 2015 WL 5918273, at *4 (E.D.N.Y. Oct. 9, 2015) ("Payments to class representatives can be properly included in class action settlements to the extent they are needed to fairly compensate the named plaintiffs for the efforts they have made on behalf of the class."); *In re Plastic Tableware Antitrust Litig.*, No. 94 CV 3564, 1995 WL 723175, at *2 (E.D. Pa. Dec. 4, 1995) (incentive awards to named plaintiffs appropriate "as a reward for public service and for the conferring of a benefit on the entire class").

The $300,000 total requested for incentive awards is .12% of the common fund, small in relation to the expected average recovery of the Class and the total size of the fund. *See Currency Conversion Fee*, 263 F.R.D. at 131 (noting relative size of incentive awards to average recovery and common fund size as factors for approval, and that "0.1% of the total Fund . . . is similar to other cases") (citing *Roberts v. Texaco, Inc.*, 979 F. Supp. 185 (S.D.N.Y. 1997) (permitting incentive award of 0.18% of the settlement fund)); *Velez v. Novartis Pharm. Corp.,*

No. 04 CIV 09194 CM, 2010 WL 4877852, at *4, *8, *28 (S.D.N.Y. Nov. 30, 2010) (McMahon, C.J.) (awarding $125,000 to named plaintiffs from $175 million settlement); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917, 2016 WL 153265, at *3 (N.D. Cal. Jan. 13, 2016) (incentive awards totaling $250,000 "spread among ten named plaintiffs is still only 0.196%" of then $127.45 million common fund); *In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730, at *18 (N.D. Cal. Sept. 2, 2015) ("service awards of $120,000 and $80,000 are in line with awards in other 'megafund' cases."); *Marchbanks Truck Serv., Inc. v. Comdata Network, Inc.*, Case No. 07-CV-1078, ECF No. 713, at 2, 8 (E.D. Pa. July 14, 2014) (approving $130 million class action settlement, including service award of $150,000 to one class representative and service awards of $75,000 to two other class representatives); *In re Titanium Dioxide Antitrust Litig.*, No. 10-CV-00318 RDB, 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) (awarding $125,000 to lead class representative out of $163.5 million settlement).

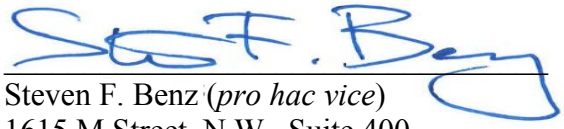
Given the duration, expense, and risk involved in leading a case of this magnitude from inception to trial, these incentive awards are appropriate to ensure parity of recovery within the Class and to create proper incentives for future potential antitrust plaintiffs to bring meritorious claims. *See, e.g.*, *Air Cargo Shipping Servs.*, 2015 WL 5918273, at *6 (granting $540,000 in incentive awards out of a total settlement of approximately $330 million); *Currency Conversion Fee*, 263 F.R.D. at 131 (noting "case law supports payments of between $2,500 and $85,000 to [each] representative plaintiff[] in class actions").

CONCLUSION

For the foregoing reasons, Co-Lead Class Counsel respectfully request that the Court award Plaintiffs' Counsel attorneys' fees of $73,200,000, equaling 30 percent of the common

fund, for reimbursement of $7,512,915.12 in costs, and for incentive awards of $50,000 each to the six named plaintiffs.

KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, PLLC



Steven F. Benz (*pro hac vice*)
1615 M Street, N.W., Suite 400
Washington, DC 20036
Phone: (202) 326-7900
sbenz@khhte.com

SUSMAN GODFREY, LLP

James T. Southwick
Richard W. Hess (*pro hac vice*)
Ryan V. Caughey (*pro hac vice*)
1000 Louisiana Street, Suite 5100
Houston, Texas 77002-5096
Phone: (713) 651-9366
jsouthwick@susmangodfrey.com
rhess@susmangodfrey.com
rcaughey@susmangodfrey.com

Plaintiffs' Co-Lead Counsel

KRAMER LEVIN NAFTALIS & FRANKEL LLP
Daniel B. Goldman
1177 Avenue of the Americas
New York, NY 10036
Phone: (212) 715-9162
dgoldman@kramerlevin.com

BERRY LAW PLLC
R. Stephen Berry *(pro hac vice)*
1717 Pennsylvania Ave., NW, Suite 450
Washington, DC 20006
Phone: (202)296-3038
sberry@berrylawpllc.com

MCKOOL SMITH, PC
Lewis T. LeClair (*pro hac vice*)
300 Crescent Court, Suite 1500
Dallas, Texas 75201
Phone: (214) 978-4984
lleclair@mckooksmith.com

MCKOOL SMITH, PC
John C. Briody
James H. Smith
One Bryant Park, 47th Floor
New York, NY 10036
Phone: (212) 402-9438
jbriody@mckoolsmith.com
smith@mckoolsmith.com

Plaintiffs' Counsel

TAB 5A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

RHONDA BURNETT, JEROD BREIT, JEREMY KEEL, HOLLEE ELLIS, and FRANCES HARVEY, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE NATIONAL ASSOCIATION OF REALTORS, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, RE/MAX LLC, and KELLER WILLIAMS REALTY, INC., Defendants.	)	Case No. 4:19-CV-00332-SRB

ORDER

Before the Court is Plaintiffs'[1] Motion for Final Approval of Settlements with Anywhere Real Estate, Inc. (f/k/a Realogy Holdings Corp.) ("Anywhere"); RE/MAX LLC ("RE/MAX"); and Keller Williams Realty, Inc. ("Keller Williams"). (Doc. #1469.) The Court preliminarily approved the Settlements on November 20, 2023, and February 2, 2024, respectively. (Doc. #1321; Doc. #1372.) Notice to the Settlement Classes commenced February 1, 2024, and class members were provided with an opportunity to opt out of, or object to, the Settlements. A small number of class members filed objections. (Doc. #1404; Doc. #1424; Doc. #1430; Doc. #1439; Doc. #1441; Doc. #1445; Doc. #1447; Doc. #1448; Doc. #1453; Doc. #1454; Doc. #1455.) Settling Defendants filed briefs in support of final approval. (Doc. #1471; Doc. #1473; Doc.

[1] Rhonda Burnett, Jerod Breit, Hollee Ellis, Frances Harvey, Jeremy Keel, Christopher Moehrl, Michael Cole, Steve Darnell, Jack Ramey, Daniel Umpa, and Jane Ruh (collectively "Plaintiffs").

#1478.) The Court held a hearing on May 9, 2024, at which arguments were presented for and against final approval. Having considered the arguments at the hearing and reviewed the written submissions, and based on all materials in the record, the motion for final approval is GRANTED.

The Court hereby ORDERS the following:

1. Unless defined herein, all defined terms in this Final Approval Order and any accompanying Judgment shall have the respective meanings set forth in the Settlement Agreements.

2. At preliminary approval, the Court appointed JND Legal Administration ("JND") as the Settlement Administrator. As directed by the Court, JND implemented the parties' Class Notice Plan. Now at the final approval stage, Plaintiffs submitted with their motion a declaration of Jennifer M. Keough from JND summarizing the notice that was given to class members and the resulting claims to date, opt-outs, and objections. (Doc. #1469-3.) Notice was provided by first-class U.S. mail, electronic mail, and digital and print publication. Without repeating all the details from Keough's declaration, the Court finds that the direct notice program was extremely successful and reached more than 95% of the potential Settlement class members. More than 30 million direct notices were mailed or emailed to the Class. The digital effort alone delivered more than 300 million impressions. In addition to the formal class notice process, more than 415 news stories addressed the litigation and settlement, with over 133 million potential viewers. The media effort alone reached at least 71 percent of the Settlement Class members. JND also implemented a Settlement Website that had over 934,000 unique visitors and nearly 5 million page views.

3. As of May 2, 2024, nearly 200,000 claims have been made. This is only the beginning of the claims, because the claims period extends until May 9, 2025. This extended claims period is valuable because additional settlements covering the same Settlement Class (with

minor variations on the length of the class periods) have been reached with other defendants, and the notice process for those settlements will provide additional opportunities to submit claims.

4. In contrast to the massive scale of the notice program and the large volume of claims, there were only 12 objectors and 61 opt outs from the Settlement Classes.

5. Based on the record, the Court finds that the notice given to the Settlement Class constituted the best notice practicable under the circumstances and fully satisfied the requirements of due process, Federal Rule of Civil Procedure 23, and all applicable law. The Court further finds that the notice given to the Settlement Class was adequate and reasonable.

6. The notice fully and accurately informed members of the Settlement Class of all material elements of the Settlements. The Settlement Class Members received notice of: (a) the pendency of the Actions; (b) the terms of the proposed Settlements, including the Released Claims, Released Parties, and Releasing Parties; (c) their rights under the proposed Settlement, including how to receive the benefits offered by the Settlements; (d) their right to exclude themselves from the Settlement Class and the proposed Settlements; (e) their right to object to any aspect of the proposed Settlements; (f) their right to appear at the Final Approval Hearing; (g) Class Counsel's request for attorneys' fees and expenses and an incentive award to the Class Representatives; and (h) the binding effect of this Final Judgment and Order Approving Settlement on all Persons who did not timely exclude themselves from the Settlement Class. Some of the objectors challenged certain aspects of the notice program. The Court addresses those objections below and finds that they present no valid challenge to the notice.

7. The Court also finds that the appropriate state and federal officials were timely notified of the Settlement Agreements under the Class Action Fairness Act of 2005 ("CAFA"), 28

U.S.C. § 1715, and that ninety (90) days have passed without comment or objection from any governmental entity.

8. For the purposes of the settlement of the claims against Anywhere and RE/MAX, and only for that purpose, the Court certifies the following class:

a. All persons who sold a home that was listed on a multiple listing service anywhere in the United States where a commission was paid to any brokerage in connection with the sale of the home in the following date ranges:

i. Moehrl MLSs: March 6, 2015 to date of notice;
ii. Burnett MLSs: April 29, 2014 to date of notice;
iii. MLS PIN: December 17, 2016 to date of notice;
iv. All other MLSs: February 1, 2020 to the date of notice.

9. For the purposes of the settlement of the claims against Keller Williams, and only for that purpose, the Court certifies the following class:

b. All persons who sold a home that was listed on a multiple listing service anywhere in the United States where a commission was paid to any brokerage in connection with the sale of the home in the following date ranges:

i. Moehrl MLSs: March 6, 2015 to date of notice;
ii. Burnett MLSs: April 29, 2014 to date of notice;
iii. MLS PIN: December 17, 2016 to date of notice;
iv. All Other MLSs: October 31, 2019 to date of notice.

10. The Court finds that certification of the Settlement Classes is warranted in light of the Settlements under the prerequisites of Federal Rule of Civil Procedure 23(a) because: (1) the members of the Settlement Classes are so numerous that joinder is impracticable; (2) there are issues of law and fact common to the Settlement Classes; (3) Plaintiffs' claims are typical of the

claims of the Settlement Class Members; and (4) Plaintiffs and Co-Lead Counsel will fairly and adequately represent the interests of the Settlement Class Members.

11. The Court finds that certification of the Settlement Classes is warranted in light of and solely for purposes of the Settlements under Federal Rule of Civil Procedure 23(b)(3) because common issues, including whether Anywhere, RE/MAX, and Keller Williams entered into any conspiracy, predominate over any questions affecting only individual members of the Settlement Class in the settlement context, and settlement of the Actions on a class basis is superior to other means of resolving the Actions as to Anywhere, RE/MAX, and Keller Williams.

12. The Court reaffirms the appointment of Plaintiffs Rhonda Burnett, Jerod Breit, Hollee Ellis, Frances Harvey, Jeremy Keel, Christopher Moehrl, Michael Cole, Steve Darnell, Jack Ramey, Daniel Umpa, and Jane Ruh as the Settlement Class Representatives. The Court finds that the Settlement Class Representatives will fairly and adequately protect the interests of the Settlement Class because: (1) the interests of the Settlement Class Representatives are consistent with those of Settlement Class Members; (2) there appear to be no conflicts between or among the Settlement Class Representatives and the other Settlement Class Members; (3) the Settlement Class Representatives have been and appear to be capable of continuing to be active participants in both the prosecution and the settlement of this litigation; and (4) the Settlement Class Representatives and Settlement Class Members are represented by qualified, reputable counsel who are experienced in preparing and prosecuting large, complicated class action cases, including those concerning violation of the antitrust laws.

13. In making these findings, the Court has considered, *inter alia*, (1) the interests of the Settlement Class Members in individually controlling the prosecution or defense of separate actions; (2) the impracticality or inefficiency of prosecuting or defending separate actions; (3) the

extent and nature of any litigation concerning these claims already commenced; and (4) the desirability of concentrating the litigation of the claims in a particular forum.

14. The Court has also specifically considered that the settlement class is broader than the class alleged in the complaint. In the settlement context, courts in this district and elsewhere regularly certify broader settlement classes than litigation classes. *See, e.g., In re Gen. Am. Life Ins. Co. Sales Pracs. Litig.*, 357 F.3d 800, 805 (8th Cir. 2004) ("There is no impropriety in including in a settlement a description of claims that is somewhat broader than those that have been specifically pleaded. In fact, most settling defendants insist on this."); *Smith v. Atkins*, 2:18-cv-04004-MDH (W.D. Mo.). Here, the Court finds that certifying a nationwide class is warranted, including because Plaintiffs have conducted extensive discovery into the alleged nationwide conspiracy and have thoroughly litigated the claims, providing a robust factual record on which to assess the claims and base negotiations, Plaintiffs could have made nationwide allegations in this matter, a nationwide settlement was a necessary condition of obtaining any settlement for the benefit of the class, a nationwide settlement will conserve judicial and private resources, and Class Members were fully apprised of the settlement class definition through the notice process. As the Court explains more thoroughly below, it was both justified and necessary to achieve any settlement for the Settlement Classes to include all multiple listing services for residential real estate nationwide, however the multiple listing services were named (e.g., real estate listing service), and regardless of whether the services were affiliated or associated with NAR or not.

15. As a general matter, "the law strongly favors settlements. Courts should hospitably receive them." *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 921 F.2d 1371, 1383 (8th Cir. 1990) (noting it is especially true in "a protracted, highly divisive, even bitter litigation"). Courts adhere to "an initial presumption of fairness when a proposed class settlement,

which was negotiated at arm's length by counsel for the class, is presented for court approval." 4 Newberg on Class Actions § 11.41; *see also Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999) ("A strong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor."); *Marshall v. Nat'l Football League*, 787 F.3d 502, 508 (8th Cir. 2015) ("A settlement agreement is 'presumptively valid.'" (quoting *In re Uponor, Inc., F1807 Plumbing Fittings Products Liab. Litig.*, 716 F.3d 1057, 1063 (8th Cir. 2013)); *Sanderson v. Unilever Supply Chain, Inc.*, 10-cv-00775-FJG, 2011 WL 5822413, at *3 (W.D. Mo. Nov. 16, 2011) (crediting the judgment of experienced class counsel that settlement was fair, reasonable, and adequate). The presumption in favor of settlements is particularly strong "in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *Cohn v. Nelson*, 375 F. Supp. 2d 844, 852 (E.D. Mo. 2005).

16. The standard for reviewing a proposed settlement of a class action is whether it is "fair, reasonable, and adequate." *In re Wireless Tel. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005). Federal Rule of Civil Procedure 23(e)(2) establishes factors the court must consider reviewing a class settlement. Eighth Circuit precedent also sets forth four factors which overlap with the Rule 23(e)(2) factors that a court should review in determining whether to approve a proposed class action settlement: "(1) the merits of the plaintiff's case, weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement." *Id.* (citing *Grunin v. Int'l House of Pancakes,*, 513 F.2d 114, 124 (8th Cir. 1975); *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988)). "The views of the parties to the settlement must also be considered." *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995).

17. Under Federal Rule of Civil Procedure 23(e)(2), the Court finds that the Settlements with Anywhere, RE/MAX, and Keller Williams, as set forth in the Settlement Agreements, are fair, reasonable and adequate. The Class Representatives have adequately represented the class, the Settlement Agreements were negotiated at arm's-length by experienced counsel acting in good faith, including mediation with a nationally recognized and highly experienced mediator, and the Settlement Agreements were reached as a result of those negotiations; there has been adequate opportunity for discovery for experienced counsel to evaluate the claims and risks at this stage of the litigation; and the Court therefore approves the Settlements.

18. This Court's Order granting final approval of the Settlements is informed by the risks that the Settlement Class would have faced in continuing to litigate against Anywhere, RE/MAX, and Keller Williams and the cost and complexity of continued litigation. "[E]xperience proves that, no matter how confident trial counsel may be, they cannot predict with 100% accuracy a jury's favorable verdict, particularly in complex antitrust litigation." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 523 (E.D. Mich. 2003). "Antitrust cases are particularly risky, challenging, and widely acknowledged to be among the most complex actions to prosecute." *In re Lithium Ion Batteries Antitrust Litig.*, 2020 WL 7264559, at *15 (N.D. Cal. Dec. 10, 2020). Here, some of the Settling Defendants claim to have opposed the rules in question (*See* Doc. #1478, p. 11), and all of the Settling Defendants challenged this Court's finding of a *per se* antitrust violation (Doc. #1471, pp. 3-4; Doc. #1473, pp. 5-6, Doc. #1478, p. 14). These defenses presented risks to the Settlement Class in continuing to litigate. Moreover, appeals alone, even if ultimately unsuccessful, would have delayed any recovery to the Settlement Class by more than a year. Therefore, these factors favor approving the Settlements.

19. This Court's Order granting final approval is also supported by the financial condition of the Settling Defendants. Before settling, Plaintiffs used a forensic accountant to confirm each defendant's ability to pay while still maintaining a viable business. This analysis was complicated by the recent and prolonged downturn in the real estate market. The Settlements each capture a significant portion of the Settling Defendants' available assets while still allowing them to continue operations. In contrast, the joint and several liability that would have resulted from a judgment would have been disastrous for any of the defendants. Therefore, this factor also favors approval. *See Grunin*, 513 F.2d at 125 (affirming antitrust settlement and explaining that a "total victory" for plaintiffs after trial "would have been financially disastrous if not fatal" to the defendant, and the final settlement "gave valuable concessions to the [settlement class] yet maintained [the defendant's] corporate viability"); *see also Petrovic.*, 200 F.3d at 1153 ("While it is undisputed that [the settling defendant] could pay more than it is paying in this settlement, this fact, standing alone, does not render the settlement inadequate."); *Meredith v. SESAC, LLC*, 87 F. Supp. 3d 650, 665 (S.D.N.Y. 2015) ("class actions are strong medicine" that "confront defendants with potentially ruinous financial exposure," but "a defendant is not required to 'empty its coffers' before a settlement can be found adequate").

20. As discussed above, the minuscule amount of opposition to the Settlements also favors approval. "The Court has an obligation not only to the minority of class members who filed objections, but also to the majority who, by their silence, indicated their approval of the Settlement Agreement." *In re Tex. Prison Litig.*, 191 F.R.D. 164, 175 (W.D. Mo. 1999) (citing *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995)). As of May 2, 2024, almost 200,000 claims have been made. In contrast, there were only 12 objections and 61 opt outs from the Settlement Classes. This weighs heavily in favor of granting final approval. *See, e.g.*, *Keil v.*

Lopez, 862 F.3d 685, 698 (8th Cir. 2017) (with a settlement class of approximately 3.5 million households, and "only fourteen class members submitted timely objections," the "amount of opposition is minuscule when compared with other settlements that we have approved"); *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, No. MDL 1559 4:03-MD-015, 2004 WL 3671053, at *13 (W.D. Mo. Apr. 20, 2004) (of the 4,838,789 settlement class members who were sent notice, only 620 (0.012%) opted out of the settlement and only 33 (0.00068%) objected to the settlement, which "are strong indicators that the Settlement Agreement was viewed as fair by an overwhelming majority of Settlement Class members and weighs heavily in favor of settlement"); *see also, e.g.*, *Van Horn*, 840 F.2d at 607 ("the amount of opposition to the settlement" is a key factor to be considered in the settlement approval process).

21. This Court's order granting final approval of the Settlements is further supported both by the substantial monetary compensation to the Settlement Class that will result directly from the Settlements, which collectively totals $208.5 million, and by the icebreaker status of the Anywhere and RE/MAX Settlements. Specifically, following the Anywhere, RE/MAX, and Keller Williams Settlements, this Court preliminary approved settlements by the National Association of Realtors ("NAR"), Compass, The Real Brokerage, At World Properties, Realty ONE Group, and Douglas Elliman. (Doc. #1460; *Gibson v. Nat'l Assn of Realtors*, No. 23-cv-00788, Doc. #163 (W.D. Mo.)). Collectively, together with the Anywhere, RE/MAX and Keller Williams settlements, these settlements provide a total settlement fund of over $600 million with other settlements announced bringing the total to over $900 million. The NAR settlement also provides opportunities for various multiple listing services and brokerages to opt-in to the settlement, which may provide still further financial compensation to the Settlement Class. All of this further supports approval of the Settlements. *In re Packaged Seafood Prods. Antitrust Litig.*,

2022 WL 228823, at *5 (S.D. Cal. Jan. 26, 2022) ("Courts typically approve settlements that offer the first settling party a discount due to 'the significant value in and of itself as an icebreaker settlement,' particularly when, as here, the settling defendants have agreed to cooperate in the remaining litigation." (quoting *In re Domestic Airline Travel Antitrust Litig.*, 378 F. Supp. 3d 10, 19 (D.D.C. 2019)); *see also, e.g.*, *Sonterra Cap. Master Fund, Ltd. v. Barclays Bank PLC*, No. 15-CV-3538, 2023 WL 3749996, at *5 (S.D.N.Y. June 1, 2023) (finding that settlement "provides adequate recovery for the Class, not only through its monetary value, but also through . . . the value of serving as an 'ice-breaker' settlement to potentially facilitate future settlements"); *accord In re Packaged Seafood*, 2022 WL 228823, at *5; *In re Packaged Ice Antitrust Litig.*, 322 F.R.D. 276, 293-94 (E.D. Mich. 2017); *Standard Iron Works v. ArcelorMittal*, No. 08C5214, 2014 WL 11350176, at *3 (N.D. Ill. Oct. 23, 2014); *In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 278, 304-05 (E.D. Pa. 2012); *In re Corrugated Container Antitrust Litig.*, No. MDL 310, 1981 WL 2093, at *19 (S.D. Tex. June 4, 1981).

22. This Court's order granting final approval of the Settlements is also supported by the substantial benefits to the class afforded by the practice changes obtained by the Settlements. Those changes include:

a. advise and periodically remind the company owned brokerages, franchisees, and their agents that there is no requirement that they must make offers to or must accept offers of compensation from cooperating brokers or that, if made, such offers must be blanket, unconditional, or unilateral;

b. require that any company owned brokerages and their agents (and recommend and encourage that any franchisees and their agents) disclose to prospective home sellers and buyers and state in conspicuous language that broker commissions are not set by law and are fully negotiable (i) in their listing agreement if it is not a government or MLS-specified form, (ii) in their buyer representation agreement if there is one and it is not a government or MLS-specified form, and (iii) in pre-closing disclosure documents if there are any and they are not government or MLS-specified forms. In the event that the listing agreement, buyer representation agreement, or pre-closing disclosure documents are a government or MLS-

specified form, then the Settling Defendants will require that any company owned brokerages and their agents (and recommend and encourage that any franchisees and their agents) include a disclosure with conspicuous language expressly stating that broker commissions are not set by law and are fully negotiable;

c. prohibit the company owned brokerages and their agents acting as buyer representatives (and recommend and encourage that franchisees and their agents acting as buyer representatives refrain) from advertising or otherwise representing that their services are free;

d. prohibit the company owned brokerages and their agents (and recommend and encourage that any franchisees and their agents refrain) from utilizing any technology or taking manual actions to filter out or restrict MLS listings that are searchable by and displayed to consumers based on the level of compensation offered to any cooperating broker unless directed to do so by the client (and eliminate any internal systems or technological processes that may currently facilitate such practices);

e. advise and periodically remind the company owned brokerages and their agents of their obligation to (and recommend and encourage that any franchisees and their agents) show properties regardless of the existence or amount of cooperative compensation offered provided that each such property meets the buyer's articulated purchasing priorities;

f. develop educational materials that reflect and are consistent with each provision above, and eliminate educational materials, if any, that are contrary to it.

(Anywhere Agreement ¶ 51; RE/MAX Agreement ¶ 51; Keller Williams Agreement ¶ 53).

23. Additional practice changes are reflected in a subsequent NAR settlement that would impact not only the Settling Defendants but also the broader industry. Collectively, these practice changes provide a substantial additional benefit to the Settlement Class. The NAR practice changes prohibit the communication of any offer of compensation to a cooperating brokerage on an MLS. As a further example, the NAR settlement prohibits efforts to circumvent the prohibition on conveying offers of compensation on MLS by prohibiting the aggregation of MLS data with offers of compensation on public websites. Nothing set forth in the Settlements requires Anywhere, RE/MAX, or Keller Williams to violate the NAR practice changes.

Collectively these practice changes present great value to the Settlement Classes and further support approval of the Settlements.

24. The Court has carefully considered each of the timely filed objections, as well as a handful received after the deadline. The untimely objections are barred by the terms of the Court's orders granting preliminary approval, but the Court has also considered their merits. The Court finds that none of the objections, whether timely or untimely, provides a basis for denying final approval of the Settlements. *See Marshall*, 787 at 513–14 ("The district court refused to give credence to the vocal minority" and "the court aptly noted that "only one-tenth of one percent of the class objected, and less than ten percent of the class ha[d] requested exclusion from the settlement."). All objections are overruled.

25. Seven objections were submitted by individuals acting without counsel. (Doc. #1404; Doc. #1424; Doc. #1430; Doc. #1439; Doc. #1453; Doc. #1454; Doc. #1455.) These objections cast no doubt on the fairness, adequacy, or reasonableness of the Settlements. All objections are overruled.

26. The Court finds that a number of objectors are not members of the class and do not have standing to object because they did not sell a home within the class period, including several objections from Realtors who have not indicated they are home sellers. *See* (Doc. #1404; Doc. #1405; Doc. #1416; Doc. #1430; Doc. #1453; Doc. #1454; Doc. #1455.)

27. The Court overrules objections that the injunctive relief does not go far enough because the injunctive relief in the Settlements, either alone or coupled with the relief provided in the NAR settlement, is fair, reasonable, and adequate. The Court oversaw the trial of the *Burnett* Plaintiffs' claims, and the injunctive relief addresses the issues raised by Plaintiffs.

28. The Court overrules objections that the injunctive relief goes too far. The injunction is reasonably tailored to address the Plaintiffs' claims – which centered on the Mandatory Offer of Compensation Rule.

29. The Court overrules objections that the Settlement Class Period for the Anywhere and RE/MAX Settlements is slightly different from the Class Period for the Keller Williams Settlement. Individuals who do not fall within the respective settlement Class Period are not class members to that Settlement. Moreover, a defendant is free to bargain for a narrower or broader release as it sees fit, consistent with the risks it determines are at issue.

30. The Court overrules objections that the Settlement amounts paid are too low. The Court has presided over the *Burnett* litigation for five years and is in a superior position to evaluate this objection. The Court finds the settlement amounts are fair, reasonable, and adequate. The Court further finds that there is no suggestion or evidence of collusion or other wrongdoing that would merit additional analysis of the Settling Defendants' ability to pay. The Court finds that Class Counsel acted diligently on behalf of the Settlement Class in obtaining meaningful recoveries for the class without risking bankruptcy by the Settling Defendants. The Court observes that, given the *Burnett* judgment, Class Counsel's interests are aligned with the Settlement Class to obtain as high of a settlement amount as possible.

31. The Court overrules the objections that attorneys' fees should not be paid out of the common fund or that the requested fees are too high. *See* Paragraphs 67-80 below.

32. The Court overrules the objections that the notice and claim process is deficient, because, among other things, the notice process meets and exceeds best notice practicable. *See* Paragraph 2 above.

33. The Pulte Group objection is overruled. *First*, courts repeatedly hold that parties do not need to include a detailed allocation formula in class notice or formulate one before final settlement approval, rejecting Pulte's contention. *See In re Phila. Stock Exch., Inc.*, 945 A.2d 1123, 1135-36 (Del. 2008); *In re Johns-Manville Corp.*, 340 B.R. 49, 70 (S.D.N.Y. 2006); *In re Agent Orange Prod. Liab. Litig. MDL No. 381*, 818 F.2d 145, 170 (2d Cir. 1987); *In re Polyurethane Foam Antitrust Litig.*, No. 1:10MD2196, 2015 WL 1639269, at *6 (N.D. Ohio Feb. 26, 2015); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, No. MDL 551, 1988 WL 158947, at *3 (W.D. Wash. July 28, 1988); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94C897, 1996 WL 167347, at *5 (N.D. Ill. Apr. 4, 1996). "[C]ourts frequently approve" class settlements and allocation plans "separately," 2 McLaughlin on Class Actions § 6:23 (20th ed. Oct. 2023 Update), because it "is appropriate, and often prudent, in massive class actions to follow a two-stage procedure" and defer consideration of the plan of distribution until after final settlement approval. *In re Domestic Airline Travel Antitrust Litig.*, 378 F. Supp. 3d 10, 22 (D.D.C. 2019) (quoting *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 480 (S.D.N.Y. 1998)).

34. This is because "court approval of a settlement as fair, reasonable and adequate is conceptually distinct from the approval of a proposed plan of allocation." 2 McLaughlin on Class Actions § 6:23 (20th ed. Oct. 2023 Update). "The prime function of the district court in holding a hearing on the fairness of the settlement is to determine that the amount paid is commensurate with the value of the case," which "can be done before a distribution scheme has been adopted so long as the distribution scheme does not affect the obligations of the defendants under the settlement agreement." *In re Agent Orange*, 818 F.2d at 170. Further, the formation of a plan of allocation "is a difficult, time-consuming process." *Id.* "To impose an absolute requirement that a hearing on the fairness of a settlement follow adoption of a distribution plan would immensely complicate

settlement negotiations and might so overburden the parties and the district court as to prevent either task from being accomplished." *Id.* Relatedly, "if a hearing on a settlement must follow formulation of a distribution plan, then reversal of any significant aspect of the plan on appeal . . . would require a remand for reconsideration of the settlement, followed by yet another appeal." *Id.* As courts have held, "[t]here is no sound reason to impose such procedural straitjackets upon the settlements of class actions." *Id.*

35. It is particularly appropriate to defer creation of an allocation plan when, as here, there are multiple defendants, only some have settled, and additional settlements may add to the fund to be distributed. *Washington Pub. Power Supply Sys.*, 1988 WL 158947, at *4 (citing *In re Chicken Antitrust Litig.*, 560 F. Supp. 957, 959 (N.D. Ga. 1980), *aff'd*, 669 F.2d 228 (5th Cir. 1982)); *see also In re Domestic Airline Travel Antitrust Litig.*, 378 F. Supp. 3d 10, 22 (D.D.C. 2019); *In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2011 WL 717519, at *2 (E.D. Mich. Feb. 22, 2011) (developing plan of allocation is properly delayed until after final approval of settlement where "the potential for additional settlements with other Defendants . . . may affect the final plan of allocation").

36. Among the cases rejecting Pulte's contention is the primary authority Pulte relies on: *Petrovic*. The Eighth Circuit in *Petrovic* stated that it did "not agree with the objectors' contention that a mailed notice of settlement must contain a formula for calculating individual awards" and dismissed the same objection Pulte raises because "[t]he notice described with sufficient particularity the stakes involved: the settlement of environmental claims against [the defendant], the award of significant injunctive relief, and the potential aggregate payout of over seven million dollars in compensatory damages." *Petrovic*, 200 F.3d at 1152–53. The same is true here. The notice explains the claims being settled and released. (Doc. #1442-2, pp. 4, 6

(Anywhere & RE/MAX notice); Doc. #1442-3, pp. 4, 6 (Keller Williams notice).) It also states the total settlement amounts. (Doc. #1442-2, p. 5 (Anywhere & RE/MAX notice); Doc.#1442-3, p. 5 (Keller Williams notice).)

37. Further, just as in *Petrovic*, class members could obtain more information on the allocation process by contacting counsel or the settlement administrator. 200 F.3d at 1153. For those class members who did email and/or call and inquire about allocation, class counsel explained that class members are unlikely to receive the full value of their claims, but that settlement proceeds will be distributed equitably and reduced on a pro rata basis. Class counsel further explained that—subsequent to notice going out—there were additional settlements benefitting the class, and others expected, making it premature to set a detailed allocation formula or provide estimates of how much each class member would recover. Dirks Decl. ¶ 29.

38. *Second*, Pulte's objection that there is no mechanism for homebuilding companies to make bulk claim submissions is meritless. Pulte Objs. at 1–2, 4–6. Class Counsel have submitted evidence that, the claims administrator worked with bulk filers who wished to submit multiple claims—exactly what Pulte is requesting through its objections. Keough Decl. 54. The objection is overruled.

39. *Third*, Pulte's objection to the notice campaign previously approved by the Court does not raise any due process concerns. Pulte Objs. at 1–2, 6–7. Pulte complains that it "did not receive notice," Pulte Objs. at 6, but obviously it did—otherwise it would not have been able to raise its objections before the deadline. Thus, as Pulte itself acknowledges, the "notice issues" it raises are "moot." Pulte Objs. at 7; *see also In re Pinterest Derivative Litig.*, No. C21-05385-WHA, 2022 WL 2079712, at *2 (N.D. Cal. June 9, 2022) ("[T]hough delayed, Mr. Sweeney

received actual notice of the proposed settlement, voiced his objections, and has been heard. Having been heard, Mr. Sweeney's objections [to notice] are OVERRULED.").

40. The Court has already found that the notice program constituted the best notice practicable. Pulte's objection is overruled.

41. Three objections were lodged by counsel for plaintiffs in other cases alleging the same or similar as those in *Moehrl* and *Burnett*. None of these cases is a certified class. All are at the infancy of the litigation. All were filed after and appear to have been derived from *Moehrl* and *Burnett*. The Court finds that none of these objections advances the best interest of the class members who stand to gain monetary and practice change relief from the Settlements.

42. The attorneys prosecuting *Burton v. National Association of Realtors*, 23-05666 (D. S.C.) filed an objection on behalf of three home sellers in South Carolina. Instead of a global resolution, certainty, and practice changes, they seek to unwind the Settlements This would result in protracted and costly piecemeal litigation, the risk of inconsistent results, and a redo of the last five years of litigation on a state-by-state basis.

43. South Carolina objectors claim that the scope of the Settlements is broader than the certified litigation classes in *Burnett* and *Moehrl*. (Doc. #1441, p. 2.) But as noted above, in the settlement context, courts regularly certify broader classes. *See, e.g., In re Gen. Am. Life Ins. Co. Sales Pracs. Litig.*, 357 F.3d at 805; *Smith v. Atkins*, 2:18- cv-04004-MDH (W.D. Mo.); *Spann v. J.C. Penney Corp.*, 314 F.R.D. 312, 318 (C.D. Cal. 2016) (court can "expand the scope of a settlement class"); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-cv-1827, 2011 WL 13152270, at *9 (N.D. Cal. Aug. 24, 2011) ("For the history of class certifications, courts have generally certified settlement classes broader than the previously-certified litigation classes; the claims released are typically more extensive than the claims stated. Courts have noted that the

concerns about manageability and/or the class-wide applicability of proof (which can serve to limit or defeat class certification for trial) are in large part no longer relevant when establishment of a defendant's liability is replaced by a settlement."); *In re Initial Pub. Offering Sec. Litig.*, 226 F.R.D. 186, 190 (S.D.N.Y. 2005) ("[A] court may approve a settlement class broader than a litigation class that has already been certified."); *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 661 (E.D. Va. 2001) (certifying settlement class broader than previously certified litigation class); *In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 172 (E.D. Pa. 2000) (same).

44. Often, broad classes are a practical prerequisite to reaching any settlement because a defendant will not agree to any meaningful settlement unless it can obtain global peace. *See, e.g.*, *Albin v. Resort Sales Missouri, Inc*., No. 20-03004-CV-S-BP, 2021 WL 5107730, at *5 (W.D. Mo. May 21, 2021) (reasoning that the absence of "a single nationwide class action" would "discourage class action defendants from settling" (quotation omitted)); *accord Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F.3d 96, 103 n.5, 106 (2d Cir. 2005) ("Broad class action settlements are common, since defendants and their cohorts would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country. Practically speaking, class action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability" (quotation omitted)) (affirming nationwide settlement in an antitrust case); *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 247-48 (2d Cir. 2011) ("Parties often reach broad settlement agreements encompassing claims not presented in the complaint in order to achieve comprehensive settlement of class actions, particularly when a defendant's ability to limit his future liability is an important factor in his willingness to settle."); *Sullivan v. DB Invs., Inc*., 667 F.3d 273, 310-11 (3d Cir. 2011) (en banc) ("[Without] global peace . . . there would be no settlements.") (affirming nationwide settlement in an antitrust case). Conversely, because global

peace is most valuable to defendants, defendants will pay more to obtain it, thus benefitting class members. *See, e.g.*, *In re BankAmerica Corp. Sec. Litig*., 210 F.R.D. 694, 705 (E.D. Mo. 2002) ("[Defendants] paid both classes of plaintiffs more in the instant global settlement out of a desire to obtain 'total peace' than they would have paid either group of plaintiffs individually.").

45. The Court finds these considerations apply here. The record supports the view that the Settling Defendants would not have settled on anything less than a nationwide basis, because doing so would have left them exposed to potentially crippling liability. (Doc. ##1473, pp. 8-10; Doc. #1478, pp. 20-22.) They therefore insisted that the Settlement Class include all "multiple listing services," regardless of whether they were affiliated with NAR. To get the benefits of the Settlements, Plaintiffs therefore agreed to settle on a nationwide basis. Thus, the Settlements are in the best interest of the *Burnett* and *Moehrl* classes, in addition to the nationwide class as a whole, because, among other things, Settlement was not possible on a piecemeal basis, and enforcement of the *Burnett* verdict alone would have bankrupted the Settling Defendants.

46. South Carolina objectors claim that the rules at issue are different in South Carolina. The Court is intimately familiar with the record of the case and alleged conspiracy and agrees with Plaintiffs that it is, as alleged, nationwide in scope. Plaintiffs here were well positioned to adequately represent a nationwide settlement class because they alleged a nationwide conspiracy. As expressly alleged in *Umpa*, and as supported by expert analysis in *Moehrl*, the vast majority of MLSs nationwide are formally controlled by local NAR associations that are required to implement the challenged rules. *Umpa v. Nat'l Assn of Realtors,* No. 23-cv-00945 (W.D. Mo.), Doc. #1, ¶ 2. Only a small number of MLSs are not exclusively owned or operated by NAR associations, and even those MLSs are not fully independent from NAR. *Id.* at ¶ 4. For example, most of those MLSs have adopted rules identical or similar to the NAR rule mandating blanket

unilateral offers of compensation, and NAR's Code of Ethics applies to Realtors participating even in non-NAR MLSs. *Id.* at ¶¶ 4-5. In both *Burnett* and *Moehrl*, Plaintiffs' experts specifically analyzed rules implemented by non-NAR MLSs, including Northwest MLS, WPMLS, and REBNY/RLS (8-10-22 Schulman Reply Rept., *Burnett* Doc. #922-3, pp. 23-25) and concluded that Realtors® operating in these jurisdictions "remain obligated to compensate the buyer's agent per the NAR Code of Ethics and are thereby incentivized to require sellers to make unilateral offers of compensation to buy-side brokers/agents." *Id.* at ¶ 75; *see also* Elhague Report, Appendix C (*Moehrl v. Nat'l Assn of Realtors* (N.D. Ill.) Doc. #324-6, pp. 231-250, addressing Non-NAR MLSs and concluding "it was common among these MLSs to adopt restrains that were identical or similar to those imposed by NAR"). Therefore, Plaintiffs adequately represented the nationwide class that is subject to the Settlements.

47. South Carolina objectors argue that the cooperation provisions in the Settlements apply only to *Burnett* and *Moerhl.* The Court finds that while cooperation is unnecessary for the Settlements to be fair, reasonable, and adequate, there are good reasons for the scope of cooperation Class Counsel obtained. At the time of the Anywhere and RE/MAX settlements the South Carolina case had not even been filed. When Plaintiffs settled with Keller Williams, *Burton* had been filed and a motion to coordinate the cases was pending before the JPML, so the Keller Williams Agreement specifically included cooperation in *the nationwide cases Gibson* and *Umpa* as well as in the pending MDL. (Keller Williams Agreement at ¶ 57). The South Carolina Objectors opposed the formation of an MDL with the JPML; had one been formed, the cooperation agreement would have extended to *Burton* as well. Nothing about the cooperation agreement makes the Settlement unfair, unreasonable, or inadequate.

48. South Carolina objectors next state that the Settlement amounts are too low. The Court finds this argument unsubstantiated, and even if the Court believed the Settlements could have been higher, that does not make them unfair, unreasonable, or inadequate. *Keil v. Lopez*, 862 F.3d 685, 696 (8th Cir. 2017); *see also Pro. Firefighters Ass'n of Omaha, Loc. 385 v. Zalewski*, 678 F.3d 640, 649 (8th Cir. 2012) ("Appellant falls far short of establishing the settlement agreement was unfair or inadequate simply because the retirees did not get as much as they believed they should."); *Marshall*, 787 F.3d at 520 ("The plaintiffs who opted out of the settlement could have brought their own individual or collective action against the NFL and potentially obtained the direct financial payout they allege is lacking in this settlement."); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 312–13 (N.D. Ga. 1993) ("In determining whether to approve a proposed settlement, the Court is entitled to rely upon the judgment of the parties' experienced counsel. The trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel.") (cleaned up) (citing *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975)); *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. at 762 (approving settlement despite the fact that "the settlement amount would not begin to cover the total costs of medical treatment for the class which easily could amount to billions of dollars" and holding "[t]he fact that the settlement amount may equal but a fraction of potential recovery does not render the settlement inadequate").

49. The standard the Court applies is whether the settlement is fair, reasonable, and adequate -- not perfection. *See Godson v. Eltman, Eltman, & Cooper, P.C.*, 328 F.R.D. 35, 54 (W.D.N.Y. 2018) ("The court's task, then, is simply to decide whether the settlement agreement *as written* is fair, reasonable, and adequate, not whether the parties or the court could conceivably have come up with a 'better' agreement.") (emphasis in original). Class counsel, having

strenuously litigated the case for years, were in the best position to determine the extent of the best relief that reasonably could be obtained for the class. There is no suggestion, nor could there be, that they were uninformed, lacked experience and expertise, or that they had any inability that kept them from negotiating the best deal possible for the class.

50. Moreover, Class Counsel made clear in their filings and declarations that they analyzed the finances of Settling Defendants and determined this was the most they could reasonably pay. The Settlement amounts were reached at arms-length between experienced counsel. Obtaining relief now, rather than risk bankruptcy or reversal on appeal, was the most prudent thing Class Counsel could have done. *See Meredith Corp.*, 87 F. Supp. 3d at 665 ("[A] defendant is not required to 'empty its coffers' before a settlement can be found adequate." (quoting *In re Sony SXRD Rear Projection T.V. Class Action Litig.*, No. 06-cv-5173, 2008 WL 1956267, at *8 (S.D.N.Y. May 1, 2008)) (alteration in original)); *see also Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir. 1999) ("While it is undisputed that [the settling defendant] could pay more than it is paying in this settlement, this fact, standing alone, does not render the settlement inadequate."); *Grunin*, 513 F.2d at 125 (affirming antitrust settlement and explaining that a "total victory" for plaintiffs after trial "would have been financially disastrous if not fatal" to the defendant, and the final settlement "gave valuable concessions to the [settlement class] yet maintained [the defendant's] corporate viability").

51. The Court gives little weight to the Declaration of Professor Alford. His analysis does not seek to (and in any event, does not) answer the question of whether the Settlements are fair, reasonable, and adequate.

52. South Carolina Objectors next say that the Keller Williams Settlement releases Keller Williams franchisees without formally binding Keller Williams Franchisees to do anything.

The Court disagrees with this characterization and, having overseen this case for five years, finds that the practice change relief is significant. Nor is it unfair or inappropriate to release corporate affiliates or franchisees (or agents affiliated with those affiliates or franchisees). *In re Am. Inv'rs Life Ins. Co. Annuity Mktg. and Sales Practices Litig.*, 263 F.R.D. 226, 240 (E.D. Pa. 2009) (overruling objection to release of independent sales agents of insurance company because "the release of agents is a necessary component of the settlement agreement in order to provide finality. Otherwise, dissatisfied policyholders could sue the defendants' agents who would then, in turn, look to the defendants for indemnity or contribution." (citing *In re Prudential Ins. Co. of Am. Sales Prac. Litig. Agent Actions*, 962 F. Supp. 450, 522-23 (D.N.J. 1997), *aff'd*, 148 F.3d 283 (3d Cir. 1998))); *Shay v. Apple Inc.*, No. 3:20-cv-1629, 2024 WL 1184693, at *8 (S.D. Cal. Mar. 19, 2024) ("The release of non-party retailers is common practice in cases such as this, where the released claims against these non-parties concern an identical injury arising from common facts." (citing *Hesse v. Sprint Corp.*, 598 F.3d 581, 590-91 (9th Cir. 2010))); *Maine State Ret. System v. Countrywide Fin. Corp.*, No. 10-CV-00302, 2013 WL 6577020, at *7, *17 (C.D. Cal. Dec. 5, 2013) (overruling objection that argued "non-parties cannot be released for the claims asserted in the Settlement Actions"); *Retta v. Millennium Products, Inc.*, No. 15-CV-1801, 2017 WL 5479637, at *8 (C.D. Cal. Aug. 22, 2017) (overruling objection that release of third party retailers was inappropriate: "this argument is meritless because the purpose of the settlement is to prevent duplicative litigation of identical claims. . . . Millennium is a manufacturer that sells its products through various retailers, so any claims Ference purports to have against third-party retailers of the Subject Products are going to be based on the same false or misleading labeling allegations asserted here. This objection is overruled." (citations omitted)); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 108–09 (2d Cir. 2005) (approving class settlement with broad releases against non-

parties, including member banks, insurance companies and Swiss governmental entities); *Flaum v. Doctor's Associates, Inc.*, No. 16-CV-61198, 2019 WL 2576361, at *3 (S.D. Fla. Mar. 11, 2019) (final approval of settlement releasing all Subway franchisees in suit against Subway franchisor); *Adkins v. Nestle Purina PetCare Co.*, No. 12-CV-2871, 2015 WL 10892070, at *4 (N.D. Ill. June 23, 2015) (final approval of settlement releasing variety of non-parties, including suppliers, manufacturers, retailers, and franchisees); *McCabe v. Six Continents Hotels, Inc.*, No. 12-CV-4818, 2015 WL 3990915, at *3 (N.D. Cal. June 30, 2015) (preliminary approval of settlement releasing franchisees) ECF No. 167 (Feb. 8, 2016) (ordering final approval of settlement).

53. Finally, the South Carolina Objectors question the duration of practice change relief. *See, e.g.*, (Doc. #1371-1 (Keller Williams Settlement) ¶ 54) (business practice changes "will sunset 5 years after the Effective Date" unless automatically terminated at an earlier time by another provision). The Court finds that the time limitation on these practice changes is reasonable. No company wishes to stay under the enforcement power of a court indefinitely, nor does a court wish to retain such indefinite jurisdiction. Injunctive relief settlements with sunset provisions are routinely approved, often for shorter periods than the five-year periods at issue here. *See, e.g., Smith v. Atkins*, 2:18- cv-04004-MDH, Order Approving Settlement, at ECF 53 (W.D. Mo. June 26, 2020) (approving settlement of nationwide class with 2-year practice change requirement); *Zepeda v. PayPal, Inc.*, No. 10-CV-1668, 2017 WL 1113293, at *13 (N.D. Cal. Mar. 24, 2017) (approving final settlement with expiration of injunctive relief after two years, "ensuring that Defendants maintain such practices until two years following the date of the Preliminary Approval Order"); *In re Colgate-Palmolive Softsoap Antibacterial Hand Soap Mktg. and Sales Practices Litig.*, No. 12-MD-2320, 2015 WL 7282543, at *10 (D.N.H. Nov. 16, 2015) (approving final settlement and overruling objections "that the injunctive remedies go away in five years" and

observing the injunctive relief "provides a valuable benefit to the class" and just because the injunction is not as broad as some class members wanted "does not make this settlement inadequate"); *Fla. ex rel. Crist v. HCA, Inc.*, No. 03-CV-177, 2002 WL 32116840, at *4 (M.D. Fla. Apr. 23, 2002) (entering a final consent judgment in a Sherman Act case, in which monetary payments and injunctive relief were provided and the judgment was set to expire in five years); *In re HP Inkjet Printer Litig.*, No. 05-CV-3580, 2011 WL 13156938, at *5 (N.D. Cal. Mar. 29, 2011) (order approving settlement with injunctive relief expiring within at least three years).

54. The Pennsylvania objection was filed by the plaintiff and lawyers who brought a case filed on December 6, 2023 – again, after the Anywhere and RE/MAX Settlements and after the *Burnett* verdict. Their objections closely track the South Carolina objections, and the arguments are nearly identical. The Pennsylvania objection is overruled for the same reasons discussed above.

55. James Mullis has filed objections based on his status as a plaintiff in the homebuyer actions pending in the Northern District of Illinois, *Batton v. Nat'l Ass'n of Realtors, et al.*, No. 21-cv-430 (N.D. Ill.) (*Batton I*) and *Batton v. Compass, et al.*, No. 23-cv-15618 (N.D. Ill.) (*Batton II*). The *Batton* buyer case objections are also overruled. As discussed above, when approving a proposed settlement, courts regularly certify broader classes and release broader claims than those originally pleaded in the action. Achieving this kind of broad relief is often a prerequisite to reaching a settlement in the first place, because a defendant will not agree to a meaningful settlement unless it can obtain global peace. *See, e.g.*, *Albin*, 2021 WL 5107730, at *5 (reasoning that the absence of "a single nationwide class action" would "discourage class action defendants from settling") (quotation omitted). The record in this case shows that a nationwide settlement

class and release of all potential claims arising out of the same alleged antitrust conspiracy was necessary to enable the settlements to occur. (Doc. #1473, pp. 7-10; Doc. #1478, pp. 20-22.)

56. Releases in antitrust direct-purchaser settlements commonly cover all claims the settlement class members could raise against the Settling Defendant arising out of the same conspiracy, including indirect-purchaser claims. *See, e.g., In re Transpacific Passenger Air Transportation Antitrust Litigation* (N.D. Cal, 07-cv-5634), ECF No. 900-2 § 1.11 (releasing "any and all claims . . . on account of, arising from, or in any way related to, the pricing of passenger air transportation by JAL or Defendants . . . with respect to the facts, occurrences, transactions or other matters that were alleged or could have been alleged [in the action] . . . regardless of legal theory, and regardless of the type or amount of relief or damages claimed"); *In re: Processed Egg Products Antitrust Litigation* (E.D.P.A., MDL 2002), ECF No. 349-1 ¶ 25 (similar); *In re Intuniv Antitrust Litigation* (D. Mass., 16-cv-12653), ECF No. 480-1 ¶ 10 (similar); *In re: Prograf Antitrust Litigation* (D. Mass. 1:11-md-2242), ECF No. 652-2 ¶ 10(a) (similar); *In re Pre-Filled Propane Tank Antitrust Litigation* (W.D. Mo. 14-md-2567 / MDL No. 2567), ECF No. 362-1 ¶ 12 (similar); *In re HIV Antitrust Litigation* (N.D. Cal, 19-cv-02573), ECF No. 711-2 at 11-12 (similar); *In re Broiler Chicken Antitrust Litigation* (N.D. Ill. 16-cv-8637), ECF No. 3324, ¶ 26 (similar). Courts have approved these settlements even over objections that the settlement improperly releases or otherwise devalues a subset of claims. *See In re Transpacific Passenger Air Transportation Antitrust Litig.*, 701 F. App'x 554, 555-56 (9th Cir. 2017) ("The district court properly certified the settlement class and was not obligated to create subclasses for purchasers of U.S.-originating travel and direct purchasers of airfare. Federal Rule of Civil Procedure 23(a) does not require a district court to weigh the prospective value of each class member's claims or conduct a claim-by-claim review when certifying a settlement class."); *In re HIV Antitrust Litig.*, No. 19-

cv-02573, 2023 WL 7397567, at *1 (N.D. Cal. Nov. 8, 2023) (rejecting indirect purchasers' request to set aside portion of direct-purchaser settlement).

57. The *Batton* objection that Settlement Class members who both sold and bought houses during the class period could not release of all their claims arising out of the same alleged conspiracy is therefore overruled. The homebuyer claims by homeseller Class Members indisputably arise out of the same alleged conspiracy and the same factual predicates as the asserted homeseller claims. *See Batton I* Am. Compl., ECF No. 84 ¶¶ 1-11 (describing background of conspiracy centered around NAR and the buyer-broker commission rules); *Batton II* Compl., ECF No. 1 ¶¶ 1-12 (same). The releases in the Settlements are thus consistent with Eighth Circuit authority holding that parties may release all claims—even those not pleaded—so long as they are based on the same factual predicate as the pleaded claims. *See, e.g., In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.*, 716 F.3d 1057, 1065 (8th Cir. 2013) (rejecting objection that "the settlement contained an overbroad release" and finding that it permissibly released only claims "[]related to leaky brass fittings," i.e., the subject of the litigation); *Thompson v. Edward D. Jones & Co.*, 992 F.2d 187, 190-91 (8th Cir. 1993) (affirming district court's approval of settlement that released claims which could have been but were not brought and finding that "the situation is analogous to the barring of claims [under res judicata] that could have been asserted in the class action"); *Huyer v. Wells Fargo & Co.*, 314 F.R.D. 621, 628 (S.D. Iowa 2016) (release was "not overly broad" because it was "only applicable to claims 'arising out of, or relating to'" the factual predicate giving rise to the plaintiffs' claims), *aff'd sub nom. Huyer v. Njema*, 847 F.3d 934 (8th Cir. 2017).

58. Mullis's complaints about adequacy are likewise unfounded. *See Petrovic*, 200 F.3d at 1146 ("If the objectors mean to maintain that a conflict of interest requiring subdivision is

created when some class members receive more than other class members in a settlement, we think that argument is untenable. It seems to us that almost every settlement will involve different awards for various class members."). Several of the named Plaintiffs in this case both bought and sold homes within the class period.

59. This is not a case where there are different groups of plaintiffs with non-overlapping claims that might conflict.

60. And of course, if a homeseller believed that they would be better off by opting out of the settlement to be able to pursue additional buyer claims, they were entitled to do so.

61. The requirements of Rule 23(g) of the Federal Rules of Civil Procedure are met, and the Court reaffirms the appointment of the law firms of Ketchmark and McCreight P.C., Williams Dirks Dameron LLC, Boulware Law LLC, Hagens Berman Sobol Shapiro LLP, Cohen, Milstein, Sellers & Toll, PLLC, and Susman Godfrey LLP as Co-Lead Counsel for the Settlement Class.

62. The 61 persons and entities identified in the Parties paperwork (*see* Exhibit J to Keough Decl.) have timely and validly requested exclusion from the Settlement Class and are therefore excluded from the Settlement Class and are not bound by this Order, and may not make any claim upon or receive any benefit from the Settlements, whether monetary or otherwise. These excluded persons and entities may not pursue any Released Claims on behalf of those who are bound by this Order. Nothing in this order should be construed as a determination by this Court that the excluded persons and entities are members of the Settlement Class or that they meet other prerequisites, such as standing, for bringing claims alleged in the Actions. Each Settlement Class member who is not listed in Exhibit J to the Keough Declaration is bound by this Order and will remain forever bound, including by releasing all Released Claims of Releasing Parties against

Released Parties. The Court specifically approves these releases as set forth in the Settlement Agreements.

63. Members of the Settlement Class, unless they excluded themselves from the Settlement Class, are hereby enjoined from filing, commencing, prosecuting, intervening in, or pursuing as a plaintiff or class member any Released Claims against any of the Released Parties, which include Settling Defendants' franchisees and affiliated brokerages, and agents affiliated with those franchisees or affiliated brokerages. *See* 28 U.S.C. § 1651; *Bank of Am., N.A. v. UMB Fin. Servs., Inc.*, 618 F.3d 906, 914 (8th Cir. 2010) (noting that "the district court has the inherent ability to protect its own jurisdiction over the dispute pending before it"); *Janson v. LegalZoom.com, Inc.*, 2012 WL 13047852, at *2 (W.D. Mo. Apr. 30, 2012) ("In order to protect the continuing jurisdiction of the Court, prevent a multiplicity of lawsuits, and protect and effectuate the Court's Judgment in this Litigation, Plaintiffs and Class Members . . . are barred and enjoined from instituting, commencing, or continuing to prosecute . . . any action in this Court, any other state or federal court, or any other tribunal or forum of any kind, against any Released Party that asserts any claims that are Released Claims under the terms of the Settlement[.]") (granting final approval); *accord Almanzar v. Home Depot U.S.A., Inc.*, No. 2:20-cv-0699-KJN, 2024 WL 36175, at *13 (E.D. Cal. Jan. 3, 2024); *Smith v. Floor & Decor Outlets of Am., Inc.*, No. 1:15-cv-04316-ELR, 2017 WL 11495273, at *6 (N.D. Ga. Jan. 10, 2017); *In re Ortho. Bone Screw Prods. Liab. Litig.*, 176 F.R.D. 158, 188 (E.D. Pa. 1997). Released Claims include claims that arise from or relate to conduct that was alleged or could have been alleged in the Actions based on any or all of the same factual predicates for the claims alleged in the Actions, including but not limited to commissions negotiated, offered, obtained, or paid to brokerages in connection with the sale of any residential home. This injunction extends to claims arising from or relating to

transactions where Settlement Class Members either sold or purchased a home on any multiple listing service nationwide, regardless of affiliation or association with NAR or not, and thus includes, *e.g.*, NWMLS, WPMLS, and REBNY/RLS. This injunction does not extend to any individual claims that a plaintiff or class member may have against his or her own broker or agent based on breach of contract, breach of fiduciary duty, malpractice, negligence or other tort claim, other than a claim that a class member paid an excessive commission or home price due to the claims at issue in the Actions.

64. This Order does not settle or compromise any claims by Class Representatives or the Settlement Classes against entities or persons other than Released Parties, and all rights against any other person or entity are specifically reserved.

65. Settling Defendants shall issue payment in accordance with the Settlement Agreement.

66. Plaintiff's request for service awards for current and former Class Representatives and other individuals as set forth in the Settlement is hereby approved. The Court finds these individuals not only put their names on the line to advance the litigation, but that they also sat for lengthy depositions and approved multiple settlements. Some even testified at trial. Courts routinely approve service awards to compensate class representatives for the services they provide and the risks they incur on behalf of the class. The factors for deciding whether the service awards are warranted are: "(1) actions the plaintiffs took to protect the class's interests, (2) the degree to which the class has benefited from those actions, and (3) the amount of time and effort the plaintiffs expended in pursuing litigation." *Caligiuri*, 855 F.3d at 867. Here, Plaintiffs seek a service award of $15,000 per Settlement Class Representative and $25,000 for Class Representatives who testified at trial. The Settlement Class Representatives performed important work on the case,

including time-consuming gathering of facts and documents, assisting Class Counsel with the specifics of their transactions, preparing for and sitting for depositions, reviewing the Settlement Agreements, and for some, attending and testifying at trial. That work materially advanced the litigation and protected the Settlement Class's interests. *Id.* Indeed, without their time and effort, these Settlements would have been impossible. Finally, the requested service awards are consistent with other awards approved in the Eighth Circuit. *Tussey*, 850 F.3d 951, 961–62 (8th Cir. 2017) (approving $25,000 service awards); *Rogowski*, 2023 WL 5125113, at *6 (approving $25,000 service awards for named plaintiffs); *Wolfert v. UnitedHealth Group, Inc.*, No. 08-CV-01643 (E.D. Mo. Aug. 21, 2009), ECF No. 38 at 4–5 (approving a service award of $30,000). Accordingly, Plaintiffs' request falls within a fair range of service awards—especially given the landmark nature of this litigation. The Court should therefore approve the requested service awards for each Settlement Class Representative.

67. Class Counsel has adequately represented the Class. Their application for an award of attorneys' fees and reimbursement of costs as set forth in the Motion for Attorneys' Fees and Costs (Doc. #1392) is hereby GRANTED and shall be paid in accordance with the Settlement Agreements.

68. Courts in the Eighth Circuit typically use the "percentage-of-the-fund method" to award attorneys' fees from a common fund. *See, e.g.*, *Rawa v. Monsanto Co.*, 934 F.3d 862, 870 (8th Cir. 2019). "In the Eighth Circuit, use of a percentage method of awarding attorney fees in a common-fund case is not only approved, but also 'well established,'" *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 991 (D. Minn. 2005) (quoting *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999)), or even "preferable,'" *Barfield v. Sho-Me Power Elec. Co-op.*, No. 11-CV-4321, 2015 WL 3460346, at *3 (W.D. Mo. June 1, 2015) (quoting

West v. PSS World Med., Inc., No. 13-CV-574, 2014 WL 1648741, at *1 (E.D. Mo. Apr. 24, 2014)). The percentage method aligns the interests of the attorneys and the class members by incentivizing counsel to maximize the class's recovery. *See Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 245 (8th Cir. 1996) ("[T]he Task Force [established by the Third Circuit] recommended that the percentage of the benefit method be employed in common fund situations." (citing *Court Awarded Attorneys Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 255 (3rd Cir. 1985))). The Court will therefore use the percentage approach to award fees in this case. This Court and others within the Eighth Circuit confirm that one-third of the common fund is an appropriate amount for class counsels' fees in complex class actions, including antitrust litigation. Eighth Circuit and Missouri courts "have frequently awarded attorney fees between twenty-five and thirty-six percent of a common fund in other class actions." *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017) (quoting *In re Xcel*, 364 F. Supp. 2d at 998); *see also Rawa*, 934 F.3d at 870 ("courts have frequently awarded attorneys' fees ranging up to 36% in class actions" (quoting *Huyer*, 849 F.3d at 399)); *Yarrington v. Solvay Pharm., Inc.*, 697 F. Supp. 2d 1057, 1064 (D. Minn. 2010) (holding fee award of 33% reasonable); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir.2002) (affirming fee award representing 36% of the settlement fund as reasonable)); *In re Xcel*, 364 F.Supp.2d at 998 (collecting cases demonstrating that district courts routinely approve fee awards between 25% and 36%). Just recently, this District approved one-third of the fund in a settlement valued at $325 million. *See Rogowski v. State Farm Life Ins. Co.*, No. 22-CV-203, 2023 WL 5125113, *4-5 (W.D. Mo. April 18, 2023). Thus, judges in the Western District of Missouri and the Eighth Circuit routinely apply the one-third-of-the-fund fee calculation, even to large settlements.

69. In doing so, courts typically consider some or all of the relevant factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974). *See In re Target Corp. Customer Data Security Breach Litig.*, 892 F.3d 968, 977 (8th Cir. 2018). The *Johnson* factors are:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

In re Target, 892 F.3d at 977 n.7. To be sure, "[m]any of the *Johnson* factors are related to one another and lend themselves to being analyzed in tandem." *Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d 848, 886 (S.D. Iowa 2020). Therefore, courts in the Eighth Circuit often focus on the most relevant *Johnson* factors in evaluating fee requests. *See Huyer*, 849 F.3d at 398–400 (affirming trial court's award of one-third of the common fund after review of Johnson factors 1-5 only); *In re Xcel*, 364 F. Supp. 2d at 993; *Tussey v. ABB, Inc.*, No. 06-CV-4305, 2019 WL 3859763, at *2 (W.D. Mo. Aug. 16, 2019); *Yarrington*, 697 F. Supp. 2d at 1062; *Hardman v. Bd. of Educ. of Dollarway, Arkansas Sch. Dist.*, 714 F.2d 823, 825 (8th Cir. 1983). The Court has considered the Johnson factors here, and finds that each weighs in favor of Plaintiffs' fee request.

70. Here, Class Counsel's time and labor invested was substantial and necessarily precluded other work. In addition to the substantial number of hours it took to reach the Settlements, Class Counsel were also required to expend $12,923,266.48 of their own money toward the litigation through the date of the initial settlements. That work was undertaken without any guarantee of payment. Moreover, this case faced low odds of early settlements given the attack on practices that were central to the real estate brokerage industry. *See, e.g.*, *How the $1.8*

Billion Real-Estate Commissions Lawsuit Came to Be, Wall Street Journal, November 26, 2023 ("Antitrust cases almost always settle before trial, giving attorneys some assurance they will get paid something. But in this case, the damages were so high and the threat to the industry so existential that plaintiff attorneys thought it unlikely NAR would settle."). Indeed, from the outset, NAR took the position that the cases were "baseless." *See, e.g., Realtor Group Moves to Dismiss Class Action Lawsuit Alleging Collusion,* Forbes, May 21, 2019 ("According to John Smaby, president of NAR, all three claims have no merit. 'In today's complex real estate environment, REALTORS and Multiple Listing Services promote a pro-consumer, pro-competitive market for home buyers and sellers, contrary to the baseless claims of these class action attorneys,' he said. 'Our filing today shows the lawsuit is wrong on the facts, wrong on the economics and wrong on the law.'").

71. "Courts have recognized that the risk of receiving little or no recovery is a major factor in awarding attorney fees." *Yarrington*, 697 F. Supp. 2d at 1062 (quoting *In re Xcel*, 364 F. Supp. 2d at 994); Theodore Eisenberg & Geoffrey Miller, *Attorney Fees In Class Action Settlements: An Empirical Study*, 1 J. Emp. L. Studies 27, 27, 38 (2004) ("Fees are also correlated with risk: the presence of high risk is associated with a higher fee, while low-risk cases generate lower fees . . . . [This] is widely accepted in the literature.")). "Unless that risk is compensated with a commensurate award, no firm, no matter how large or well-financed, will have the incentive to consider pursuing a case such as this." *Tussey*, 2019 WL 3859763, at *3. "Courts agree that a larger fee is appropriate in contingent matters where payment depends on the attorney's success." *Been v. O.K. Industries, Inc.*, No. 02-CV-285, 2011 WL 4478766, at *9 (E.D. Okla. Aug. 16, 2011). And critically, "[t]he risks plaintiffs' counsel faced must be assessed as they existed in the

morning of the action, not in light of the settlement ultimately achieved at the end of the day." *In re Xcel*, 364 F. Supp. 2d at 994.

72. Because antitrust claims are especially complex, expensive, and difficult to prosecute, courts have recognized that antitrust settlements should result in attorneys' fees equal to one-third of the fund. *See In re Peanut Farmers Antitrust Litig.*, No. 19-CV-00463, 2021 WL 9494033, at *6 (E.D. Va. Aug. 10, 2021) ("[A]n award of one-third is also common in antitrust class actions.") (citing cases); *In re Urethane Antitrust Litig.*, No. 04-CV-1616, 2016 WL 4060156, at *5 (D. Kan. July 29, 2016) (awarding one-third of $835 million settlement, noting "a one-third fee is customary"); *In re Flonase Antitrust Litig*., 291 F.R.D. 93, 100, 106 (E.D. Pa. 2013) (awarding one-third of the settlement fund as attorneys' fees in which court relied upon the fact that class counsel had litigated a number of hotly contested *Daubert* challenges).

73. Here it is undeniable that the antitrust claims at issue in these cases were challenging to prosecute.

74. Courts often judge class counsel's skill against the "quality and vigor of opposing counsel[.]" *In re Charter Commc'ns, Inc.*, MDL No. 1506, No. 02-CV-1186, 2005 WL 4045741, at *29 (E.D. Mo. June 30, 2005) (citing *In re IBP, Inc. Sec. Litig.*, 328 F. Supp. 2d 1056, 1064 (D.S.D. 2004)). Here, Class Counsel faced off against no fewer than twenty highly-respected law firms over the course of the litigation. Although Class Counsel's team included some of the country's most accomplished class action and trial lawyers, Defendants also hired some of the country's most prominent and respected defense attorneys. This weighs heavily in favor of the requested award.

75. In the Eighth Circuit, courts have "frequently awarded attorneys' fees ranging up to 36% in class actions." *Huyer*, 849 F.3d at 399. Courts have recognized that prosecution of

antitrust claims should result in a one-third-of-the-fund fee award. *See In re Peanut Farmers*, 2021 WL 9494033, at *6 ("[A]n award of one-third is also common in antitrust class actions.") (citing cases); *In re Urethane*, 2016 WL 4060156, at *5 (awarding one-third of $835 million antitrust settlement, noting "a one-third fee is customary").

76. Moreover, the requested one-third fee award is equal to or less than what the actual Named Plaintiffs—those with the most on the line and most involved in the case—agreed to at the outset of the case. Class representatives in *Burnett* agreed to 35%. Dirks Decl. at ¶27. Class representative in *Moehrl* agreed to up to 33.3%. Berman Dec. at ¶ 16.

77. Here, the Fund is pure cash and non-reversionary; so, the Settlements, plus interest earned until its distribution, require no further valuation. In requesting a fee as a percentage of the Fund, Class Counsel necessarily seeks a fee proportionate to the degree of monetary success obtained.

78. Equally important, the Settlements include significant practice change relief which require the Settling Defendants, among other things, to not enforce the Mandatory Offer of Compensation Rule and to train their agents that commissions are negotiable. Counsel is not seeking any additional fee for this valuable relief on these Settlements, but the value of that relief is substantial in itself and should be considered when evaluating the fee that is sought.

79. Here, the request is supported by both the size of the recovery and the results obtained as compared to the risk of a lesser recovery or none at all. Moreover, the Settlements represent the first recovery on behalf of the Class. Rather than stop at these settlements and move on to less risky litigation, Class Counsel have continued to prosecute these joint and several liability claims against other Defendants. Thus, any future settlements or judgments will also benefit the Class. This factor supports a contingency percentage of one-third, particularly given

the benefits achieved. Importantly, success—including "exceptional success"—is not measured solely by the maximum damages alleged but must be evaluated against any "unusually difficult or risky circumstances and the size of plaintiffs' recovery." *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1204–05 (S.D. Fla. 2006).

80. A lodestar crosscheck is "not required" in the Eighth Circuit, *Keil v. Lopez*, 862 F.3d 685, 701 (8th Cir. 2017); *PHT Holdings II, LLC v. N. Am. Co. Life & Health Ins.*, 2023 WL 8522980, *7 (S.D. Iowa November 30, 2023). The Court declines to do one here. But in any event, a crosscheck here confirms that the requested fee is reasonable and should be approved. The hours and rates submitted are consistent with the large undertaking of this case. Class Counsel's request is reasonable and the Court approves their requested fee of one-third of the Settlement Fund.

81. The Court also grants Plaintiffs' request for their costs. The expenses submitted were reasonable expenses in such a large and complex litigation.

82. The Settlement Administrator shall be paid in accordance with the Settlement Agreement.

83. The Court authorizes payments to be made from the Escrow Accounts under the Settlement Agreements as qualified settlement funds ("QSF") as defined in Section 1.468B-1(a) of the U.S. Treasury Regulations and retains continuing jurisdiction as to any issue that may arise in connection with the formation or administration of the QSFs. Co-Lead Counsel are, in accordance with the Settlement Agreements, authorized to withdraw up to the amounts allowed by the Settlement Agreements out of the Escrow Accounts.

84. Co-Lead Counsel are directed to prepare and submit for Court approval a plan of allocation for the Settlement Fund, and to propose a schedule for comment and Court review. The

proposed plan of allocation must be posted to https://www.realestatecommissionlitigation.com and emailed to all individuals who submit a claim in order to provide those individuals an opportunity to comment on the plan. After the plan of allocation is proposed and an opportunity to comment has been provided, the Court will evaluate the proposed plan and any objections thereto. The Court's review of the plan of allocation will be conducted separately from this final review of the Settlements.

85. Pursuant to Federal Rule of Civil Procedure 54(b), this Court directs entry of final judgment of dismissal with prejudice and without costs (except as provided in the Settlements) as to the defendants covered by the Settlements. This case contains claims against multiple parties, and there is no just reason to delay the entry of final judgment as to these Settling Defendants.

86. Settling Defendants have denied any liability, fault, or wrongdoing of any kind in connection with the allegations in the Actions, and as such, neither the Settlements, nor any of their respective terms or provisions, nor any of the negotiations or proceedings connected with the Settlements shall be construed as an admission or concession of the truth of any of the allegations, or of any liability, fault, or wrongdoing of any kind by Settling Defendants.

87. The Court expressly retains continuing and exclusive jurisdiction over all matters relating to the administration and consummation of the Settlements and to interpret, implement, administer and enforce the Settlements (including with respect to the scope of the Settlement Classes, Released Claims, and Released Parties), in accordance with their terms, and to implement and complete the claims administration process, in accordance with the Settlements, for the benefit of the Settlement Class. The Court does this for the purpose of satisfying the requirements of *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994), concerning the obligation of a Court entering a settlement agreement to speak clearly when it wishes to retain jurisdiction.

IT IS SO ORDERED.

/s/ Stephen R. Bough
STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE

Dated: May 9, 2024

TAB 5B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

RHONDA BURNETT, JEROD BREIT, HOLLEE ELLIS, FRANCES HARVEY, and JEREMY KEEL, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE NATIONAL ASSOCIATION OF REALTORS, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, RE/MAX LLC, and KELLER WILLIAMS REALTY, INC., Defendants.	Case No. 19-CV-00332-SRB

PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS, EXPENSES AND SERVICE AWARDS AND SUGGESTIONS IN SUPPORT THEREOF

INTRODUCTION

After years of hard-fought litigation in two separate jurisdictions, Plaintiffs achieved nationwide settlements with three Defendants: Anywhere, RE/MAX and Keller Williams (the "Settlements"). Plaintiffs reached settlements with Anywhere and RE/MAX on October 5, 2023 ("the initial settlements"). Subsequently, Plaintiffs reached a settlement with Keller Williams on February 1, 2024.

Combined, the Settlements provide a non-reversionary common fund of $208,500,000. To achieve this result, Class Counsel worked over the past five years filing and prosecuting two separate lawsuits pending in different jurisdictions, *Moehrl* and *Burnett*. Class Counsel faced large risk representing the Settlement Class. They worked on a fully contingent basis, investing over 96,500 hours of labor— through the date of the last of the three settlements —and advancing nearly $13 million in out-of-pocket costs without any guarantee of success. They did so despite this case having no roadmap or pre-established path to a recovery. Indeed, far from any guarantee that they would be paid for their work or reimbursed their expenses, Class Counsel faced off against well-funded and entrenched opponents represented by *at least twenty* of the top defense firms in the country.

Class Counsel performed a massive amount of legal work leading to the Settlements, including more than 100 motions and responses, such as motions to dismiss, motions to transfer, motions to stay, motions to compel arbitration (and related appeals), class certification, Rule 23(f) appeal petitions, summary-judgment motions, *Daubert* motions, trial motions, and over 180 depositions. Class Counsel did not rely on any governmental prosecution or litigation by other private attorneys. To the contrary, Class Counsel are comprised of a diverse group of well-respected antitrust, complex litigation, and trial lawyers who spearheaded the litigation. This

Settlement therefore represents the culmination of their wholly contingent, risky, costly, and time-intensive work seeking a recovery against Defendants, not the work of anyone else.

Under well-established precedent, Class Counsel is entitled to an award of attorneys' fees representing one-third of the settlement fund and their case expenses. In the Eighth Circuit, a fee based on a percentage of the fund recovered is the favored approach for calculating attorney's fees in contingent representation, including class actions. Such a fee provides an incentive for attorneys like Class Counsel to pursue claims for those whose individual claims are otherwise too small to justify the costs of litigation. And a percentage-based recovery allows individuals without the means to pay counsel by the hour to nonetheless assert their claims. A percentage-based recovery also aligns Class Counsel's interests with those of their clients because the greater the recovery Class Counsel obtains, the greater the fee to which Class Counsel is entitled.

FACTUAL BACKGROUND

A background of the litigation and Settlements is well-known to the Court and can be found in Plaintiffs' Motion for Preliminary Settlement Approval (Doc. 1192 at ECF 8-19; ECF 1371). The Settlements are non-reversionary meaning the entire amount will be distributed and no amount will revert to the Settling Defendants. Moreover, the Settlements include substantial injunctive relief aimed at ending the Defendants' support for the challenged restraints, including their enforcement of the Mandatory Offer of Compensation Rule. To achieve this result for the Class, Class Counsel performed more than 96,500 hours through the date of the Keller Williams settlement (January 31, 2024) and invested almost $13 million of their own money. Counsel continue to work on behalf of the Class even after these settlements, defending a verdict in *Burnett* and continuing to press forward to trial in *Moehrl* against the remaining Defendants.

I. CLASS COUNSEL PERFORMED EXTRAORDINARY WORK AND ASSUMED SIGNIFICANT RISK ON A CONTINGENT BASIS ON BEHALF OF THE SETTLEMENT CLASS TO OBTAIN THE SETTLEMENTS.

Plaintiffs alleged that various participants in the residential real estate industry, including Anywhere, RE/MAX, and Keller Williams carried out a conspiracy to inflate or stabilize broker commissions by following and enforcing NAR's Mandatory Offer of Compensation Rule as well as associated restraints promulgated by NAR and its members. Defendants have fought this litigation at every conceivable step.[1] To date, Defendants have been represented by at least twenty defense firms – including many of the most highly-regarded defense firms in the world. Dirks Dec. at ¶ 13. Defendants contested every aspect of the cases – including through jurisdictional challenges, motions to compel arbitration, to motions to dismiss, to *Daubert* motions, class certification, summary judgment motions, and—in the case of Keller Williams and other co-Defendants—even a jury trial. *Id.* at ¶¶ 14, 20. Anywhere and RE/MAX fully litigated the cases right up to the courthouse steps, with the settlements only reached on the precipice of trial. *Id.* at ¶ 23. Keller Williams went even further, litigating the case through a jury trial; and settlement was not achieved until after the verdict in *Burnett*. *Id.*

Moreover, in undertaking this substantial commitment on behalf of the Settlement Class, Class Counsel assumed significant risk. There was no roadmap of previous cases or settlements, and no assistance from governmental entities or regulators through parallel litigation. *Id.* at ¶¶ 12, 14. Despite the odds, Class Counsel was successful in their efforts on behalf of the Settlement Class in the Litigation. They obtained favorable rulings on key issues including class-certification,

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[1] *See generally* Declaration of Eric L. Dirks ("Dirks Decl.") for an overview of the procedural history and efforts to reach the Settlements. Attached as Ex. 1. Also attached are the declarations of Michael S. Ketchmark (Ex. 2), Brandon J.B. Boulware (Ex. 3), Steve W. Berman Ex. 4), Marc M. Seltzer (Ex. 5), Robert A. Braun (Ex. 6), Daniel C. Hedlund (Ex. 7), George Farah (Ex. 8), Benjamin D. Elga (Ex. 9), Vildan A. Teske (Ex. 10), Russell E. Marsh (Ex. 11). These declarations cover many of the same topics set out in the Dirks Decl. as well as each firm's individual lodestar and expense amounts.

summary judgment, and *Daubert*. *Id.* at ¶¶ 14, 20, 23. But it took years of briefing, review of over 5 million pages of documents, retention of at least 20 experts and consultants, and approximately 180 depositions to achieve this result. *Id.* at ¶ 14. Reflecting these efforts, *Burnett* and *Moehrl* have over 1,800 docket entries as of the date of this filing.

Complex litigation, especially against experienced and sophisticated defense counsel, takes extra skill and effort, and that was true here. *Id.* at ¶ 36. Despite the work required and the risk in light of Defendants' stalwart defense, Class Counsel did not waver in their investment of time and money on behalf of the Settlement Class. Class Counsel pushed the Settling Defendants for the best possible settlement they could pay, which included at least three unsuccessful mediations. *Id.* at ¶¶ 24-26. During the subsequent settlement negotiations with Anywhere and RE/MAX which were ultimately successful, Class Counsel had completed all pretrial work in *Burnett* and were on the precipice of the trial. There was no guarantee whatsoever of success at trial and the Settlements represent the culmination of years of work.

Despite the uncertainty, Class Counsel's work necessarily hampered their ability to take on other work. *Id.* at ¶¶ 17-18. That was time and money spent and invested on behalf of the Settlement Class that could have been spent on less risky cases, where liability or damages were more certain, or where the claims had been advanced by previous litigation, government prosecutions or public admissions. *Id.* And even after a trial victory, risks remain given the Defendants' stated inability to pay a judgment – not to mention any risks on appeal.

ARGUMENT

I. THE REQUESTED ATTORNEY'S FEES ARE REASONABLE UNDER THE FACTS AND CIRCUMSTANCES PRESENTED HERE.

Under well-established Eighth Circuit law, a fee equal to one-third of the Settlement Fund should be approved.

A. Contingent Fees Are Awarded Using the Percentage-of-the-Fund Approach.

Courts typically use the "percentage-of-the-fund method" to award attorneys' fees from a common fund. *See, e.g.*, *Rawa v. Monsanto Co.*, 934 F.3d 862, 870 (8th Cir. 2019). "In the Eighth Circuit, use of a percentage method of awarding attorney fees in a common-fund case is not only approved, but also 'well established,'" *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 991 (D. Minn. 2005) (quoting *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999)), or even "preferable,'" *Barfield v. Sho-Me Power Elec. Co-op.*, No. 11-CV-4321, 2015 WL 3460346, at *3 (W.D. Mo. June 1, 2015) (quoting *West v. PSS World Med., Inc.*, No. 13-CV-574, 2014 WL 1648741, at *1 (E.D. Mo. Apr. 24, 2014)). The percentage method aligns the interests of the attorneys and the class members by incentivizing counsel to maximize the class's recovery. *See Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 245 (8th Cir. 1996) ("[T]he Task Force [established by the Third Circuit] recommended that the percentage of the benefit method be employed in common fund situations.") (citing *Court Awarded Attorneys Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 255 (3rd Cir. 1985))).[2] The Court should therefore use the percentage approach to award fees in this case.

B. A Fee Equal to One-third of the Fund is Reasonable.

This Court and other courts within the Eighth Circuit confirm that one-third of the common fund is an appropriate amount for class counsels' fees in complex class actions, including antitrust litigation. Eighth Circuit and Missouri courts "have frequently awarded attorney fees between twenty-five and thirty-six percent of a common fund in other class actions." *Huyer v. Buckley*, 849

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[2] In contrast, undue focus on hours or hourly rates "creates an unanticipated disincentive to early settlements, tempts lawyers to run up their hours, and compels district courts to engage in a gimlet-eyed review of line-item fee audits." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (cleaned up).

F.3d 395, 399 (8th Cir. 2017) (quoting *In re Xcel*, 364 F. Supp. 2d at 998); *see also Rawa*, 934 F.3d at 870 ("courts have frequently awarded attorneys' fees ranging up to 36% in class actions") (quoting *Huyer*, 849 F.3d at 399); *Yarrington v. Solvay Pharm., Inc.*, 697 F. Supp. 2d 1057, 1064 (D. Minn. 2010) (holding fee award of 33% reasonable); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir.2002) (affirming fee award representing 36% of the settlement fund as reasonable)); *In re Xcel,* 364 F.Supp.2d at 998 (collecting cases demonstrating that district courts routinely approve fee awards between 25% and 36%).

Just recently, this District approved one-third of the fund in a settlement valued at $325 million. *See Rogowski v. State Farm Life Ins. Co.*, No. 22-CV-203, 2023 WL 5125113, *4-5 (W.D. Mo. April 18, 2023). Thus, judges in the Western District of Missouri and the Eighth Circuit routinely apply the one-third-of-the-fund fee calculation, even to large settlements.

In doing so, courts typically consider some or all of the relevant factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974). *See In re Target Corp. Customer Data Security Breach Litig.*, 892 F.3d 968, 977 (8th Cir. 2018). The *Johnson* factors are:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

In re Target, 892 F.3d at 977 n.7. To be sure, "[m]any of the *Johnson* factors are related to one another and lend themselves to being analyzed in tandem." *Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d 848, 886 (S.D. Iowa 2020). Therefore, courts in the Eighth Circuit often focus on the most relevant *Johnson* factors in evaluating fee requests. *See Huyer*, 849 F.3d at 398–400 (affirming trial court's award of one-third of the common fund after review of Johnson factors 1-

5 only)*; In re Xcel*, 364 F. Supp. 2d at 993; *Tussey v. ABB, Inc.*, No. 06-CV-4305, 2019 WL 3859763, at *2 (W.D. Mo. Aug. 16, 2019); *Yarrington*, 697 F. Supp. 2d at 1062; *Hardman v. Bd. of Educ. of Dollarway, Arkansas Sch. Dist.*, 714 F.2d 823, 825 (8th Cir. 1983).

Class Counsel worked on a contingent basis, despite the numerous risks and time commitments.
(Factors 1, 4, 6-7 and 10)

Here, Class Counsel's time and labor invested was substantial and necessarily precluded other work. Dirks Decl. (Ex. 1) at ¶ 18. Prosecuting the Litigation required over $80,000,000 in lodestar through January 31, 2024. Dirks Decl. at ¶ 41. In addition to the substantial number of hours it took to reach the Settlements, Class Counsel were also required to expend $12,923,266.48 of their own money toward the litigation through the date of the initial settlements. All that work, which precluded other less-risky employment, was the result of Class Counsels' efforts undertaken without any guarantee of payment. Dirks Decl. at ¶ 10, 17-18, 27. Moreover, this case faced low odds of early settlements given the attack on practices that were central to the real estate brokerage industry. *See, e.g.*, *How the $1.8 Billion Real-Estate Commissions Lawsuit Came to Be*, Wall Street Journal, November 26, 2023 ("Antitrust cases almost always settle before trial, giving attorneys some assurance they will get paid something. But in this case, the damages were so high and the threat to the industry so existential that plaintiff attorneys thought it unlikely NAR would settle."). Indeed, from the outset, NAR took the position that the cases were "baseless." *See, e.g., Realtor Group Moves to Dismiss Class Action Lawsuit Alleging Collusion,* Forbes, May 21, 2019 ("According to John Smaby, president of NAR, all three claims have no merit. 'In today's complex real estate environment, REALTORS and Multiple Listing Services promote a pro-consumer, pro-competitive market for home buyers and sellers, contrary to the baseless claims of these class

action attorneys,' he said. 'Our filing today shows the lawsuit is wrong on the facts, wrong on the economics and wrong on the law.'").

"Courts have recognized that the risk of receiving little or no recovery is a major factor in awarding attorney fees." *Yarrington*, 697 F. Supp. 2d at 1062 (quoting *In re Xcel*, 364 F. Supp. 2d at 994); Theodore Eisenberg & Geoffrey Miller, *Attorney Fees In Class Action Settlements: An Empirical Study*, 1 J. Emp. L. Studies 27, 27, 38 (2004) ("Fees are also correlated with risk: the presence of high risk is associated with a higher fee, while low-risk cases generate lower fees . . . . [This] is widely accepted in the literature."). "Unless that risk is compensated with a commensurate award, no firm, no matter how large or well-financed, will have the incentive to consider pursuing a case such as this." *Tussey*, 2019 WL 3859763, at *3. "Courts agree that a larger fee is appropriate in contingent matters where payment depends on the attorney's success." *Been v. O.K. Industries, Inc.*, No. 02-CV-285, 2011 WL 4478766, at *9 (E.D. Okla. Aug. 16, 2011). And critically, "[t]he risks plaintiffs' counsel faced must be assessed as they existed in the morning of the action, not in light of the settlement ultimately achieved at the end of the day." *In re Xcel*, 364 F. Supp. 2d at 994.

This was the riskiest case some Class Counsel have ever prosecuted, due not only to the possibility of no recovery but also due to the amount of time and money they were required to expend in order to be in a position to reach the Settlements (or judgment) against entrenched defendants. Dirks Decl. at ¶22; Berman Dec. at ¶ 5. *See also Caligiuri v. Symantec Corp.*, 855 F.3d 860, 866 (8th Cir. 2017) (affirming fee award where lower court reasoned, in part, that "[p]laintiffs' counsel, in taking this case on a contingent fee basis, was exposed to significant risk"); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 17-md-2800, 2020 WL 256132, at *33 (N.D.

Ga. Mar. 17, 2020) ("This action was prosecuted on a contingent basis and thus a larger fee is justified.").

The claims were difficult to prosecute.
(Factor 2)

Because antitrust claims are especially complex, expensive, and difficult to prosecute, courts have recognized that antitrust settlements should result in attorneys' fees equal to one-third of the fund. *See In re Peanut Farmers Antitrust Litig.*, No. 19-CV-00463, 2021 WL 9494033, at *6 (E.D. Va. Aug. 10, 2021) ("[A]n award of one-third is also common in antitrust class actions.") (citing cases);[3] *In re Urethane Antitrust Litig.*, No. 04-CV-1616, 2016 WL 4060156, at *5 (D. Kan. July 29, 2016) (awarding one-third of $835 million settlement, noting "a one-third fee is customary"); *In re Flonase Antitrust Litig*., 291 F.R.D. 93, 100, 106 (E.D. Pa. 2013) (awarding one-third of the settlement fund as attorneys' fees in which court relied upon the fact that class counsel had litigated a number of hotly contested *Daubert* challenges).

Here it is undeniable that the antitrust claims at issue in these cases were challenging to prosecute. As the Court saw, no stone was left unturned by Defendants and challenges were made at every stage (*i.e.* motions to dismiss, motions for summary judgment, Daubert motions, efforts to appeal from class certification orders, appeals on arbitration issues, and trial). *See* Dirks Decl. at ¶¶ 14, 23.

Class Counsel's reputation and skillful resolution of the Litigation supports the award.
(Factors 3 and 9)

Courts often judge class counsel's skill against the "quality and vigor of opposing counsel . . . ." *In re Charter Commc'ns, Inc.*, MDL No. 1506 All Cases, No. 02-CV-1186, 2005

[3] And observing that "[o]ther courts have determined that a higher percentage rate is appropriate where discovery has been completed and the case is ready for trial." *Id.*

WL 4045741, at *29 (E.D. Mo. June 30, 2005) (citing *In re IBP, Inc. Sec. Litig.*, 328 F. Supp. 2d 1056, 1064 (D.S.D. 2004)).

Here, Class Counsel faced off against no fewer than *twenty* highly-respected law firms over the course of the litigation. Although Class Counsel's team included some of the country's most accomplished class action and trial lawyers, Defendants also hired some of the country's most prominent and respected defense attorneys. This weighs heavily in favor of the requested award.

Class Counsel in their own right are well-known on both a national level and local level. *See generally* Exhibits 1-6. Indeed, trial counsel for the *Burnett* case was named as this year's Missouri Lawyer of the Year. *See Ketchmark named Lawyer of the Year*, Missouri Lawyers Weekly, December 7, 2023. And Class Counsel for the *Moehrl* case have been repeatedly recognized for their skill and expertise in antitrust litigation. *See, e.g.,* Berman Dec. at ¶ 2; Seltzer Dec. at ¶ 3; Braun Dec. at ¶ 2.

The percentage requested is supported by other awards under the facts and circumstances of this Litigation.
(Factors 5 and 12)

In the Eighth Circuit, courts have "frequently awarded attorneys' fees ranging up to 36% in class actions." *Huyer*, 849 F.3d at 399.[4] Courts have recognized that prosecution of antitrust claims should result in a one-third-of-the-fund fee award. *See In re Peanut Farmers*, 2021 WL 9494033, at *6 ("[A]n award of one-third is also common in antitrust class actions.") (citing cases); *In re Urethane*, 2016 WL 4060156, at *5 (awarding one-third of $835 million antitrust settlement, noting "a one-third fee is customary").

[4] *See also supra* pp. 5-6.

Moreover, the requested one-third fee award is equal to or less than what the actual named plaintiffs—those with the most on the line and most involved in the case—agreed to at the outset of the case. Class representative in the *Burnett* case agreed to at least 35%. Dirks Decl. at ¶27. Class representative in the *Moehrl* case agreed to up to 33.3%. Berman Dec. at ¶ 16.

The amount involved and results obtained for the Settlement Class given the risks of the Litigation support the percentage requested.
(Factor 8)

Here, the Fund is pure cash and non-reversionary; so, the Settlements, plus interest earned until its distribution, requires no further valuation.[5] In requesting a fee as a percentage of the Fund, Class Counsel necessarily seeks a fee proportionate to the degree of monetary success obtained.

Equally important, the Settlements include significant injunctive relief which require the Settling Defendants, among other things, to not enforce the Mandatory Offer of Compensation Rule and to train their agents that commissions are negotiable. *See also National Association of Realtors Verdict Will Send "Shock Waves" Through the Industry,* The Wall Street Journal, November 1, 2023 ("There is no question that Tuesday's nearly $1.8 billion verdict against the National Association of Realtors and brokerage firms is going to send shock waves through the industry. Commissions have stayed pretty stable at about 5% to 6% of the sales price for decades now, despite major technological upheaval in the industry. We may finally start to see those costs for home buyers and sellers go down quite a bit."). Counsel is not seeking any additional fee for this valuable relief in this motion, but the value of that relief is substantial in itself and should be considered when evaluating the fee that is sought.

This factor supports a contingency percentage of one-third, particularly given the benefits achieved. Importantly, success—including "exceptional success"—is not measured solely by the

[5] The value of the injunctive relief obtained is also substantial.

maximum damages alleged but must be evaluated against any "unusually difficult or risky circumstances and the size of plaintiffs' recovery." *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1204–05 (S.D. Fla. 2006). Here, the request is supported by both the size of the recovery and the results obtained as compared to the risk of a lesser recovery or none at all. Moreover, the Settlements represent the first recovery on behalf of the class. Rather than stop at these settlements and move on to less risky litigation, Class Counsel have continued to prosecute these joint and several liability claims against other Defendants. Thus, any future settlements or judgments will also benefit the Class.

Finally, the Settlements represent the most Anywhere, RE/MAX and Keller Williams can reasonably pay. Dirks Decl. at ¶ 26.

C. The Requested Fee Is Reasonable Under a Lodestar Crosscheck.

Although a lodestar crosscheck is "not required" in the Eighth Circuit, *Keil v. Lopez*, 862 F.3d 685, 701 (8th Cir. 2017); *PHT Holdings II, LLC v. N. Am. Co. Life & Health Ins.*, 2023 WL 8522980, *7 (S.D. Iowa November 30, 2023)—and should be disfavored[6]—performing such a crosscheck here confirms that the requested fee is reasonable and should be approved. As noted above, Class Counsel have spent over 96,500 hours through January 31, 2024. These hours result in an overall lodestar through January 31, 2024 of $80,354,706.40. Dirks Decl. at ¶ 41.

Thus, under these Settlements, class counsel's lodestar exceeds the fee request.

[6] "'[T]o overly emphasize the amount of hours spent on a contingency fee case would penalize counsel for obtaining an early settlement and would distort the value of the attorneys' services.'" *Rawa*, 934 F.3d at 870 (quoting *In re Charter Commc'ns*, 2005 WL 4045741, at *18).

II. THE COURT SHOULD APPROVE CLASS COUNSEL'S REQUEST FOR REIMBURSEMENT OF REASONABLY INCURRED EXPENSES.

"Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionately by those class members who benefit by the settlement." *Yarrington*, 697 F. Supp. 2d at 1067 (quoting *In re Media Vision Tech. Sec. Litig.,* 913 F. Supp. 1362, 1366 (N.D. Cal. 1996)). Under the Settlements, Class Counsel are entitled to recover their expense reimbursement. The costs and expenses through January 31, 2024 were reasonable and necessary in order to reach these Settlements. Dirks Decl. ¶ 42; see also Exhibits 2-11.

The largest components of these costs are for experts, class notice and administration, depositions and mediations, travel and online research. *See Tussey*, 2019 WL 3859763, at *5 ("Reimbursable expenses include many litigation expenses beyond those narrowly defined 'costs' recoverable from an opposing party under Rule 54(d), and includes: expert fees; travel; long-distance and conference telephone; postage; delivery services; and computerized legal research.") (*citing* Alba Conte, 1 Attorney Fee Awards § 2:19 (3d ed.))). Here, the litigation required a large number of depositions due to the complex nature of the claims, the size of the case, and the number of relevant witnesses. Experts were critical because they are virtually essential in antitrust cases. The *Moehrl* and *Burnett* cases were partly coordinated but litigated separately, involving different geographical regions and case schedules, and therefore it was necessary for Class counsel in each case to retain separate experts. A platform for storing documents and facilitating their review was required given the large volume of documents produced. Class notice administration was required under Rule 23. Legal research was required given the innumerable legal disputes and briefs. When possible, the *Moehrl* and *Burnett* plaintiffs coordinated in order to reduce expenses. For example,

Class Counsel shared document repositories and coordinated numerous depositions to occur on the same day. Dirks Decl. at ¶ 45.

All of the expenses submitted were reasonable expenses in such a large litigation. The Court should thus approve Class Counsel's expense reimbursement request.

III. THE COURT SHOULD APPROVE THE REQUESTED SERVICE AWARDS.

Courts routinely approve service awards to compensate class representatives for the services they provide and the risks they incur on behalf of the class. The factors for deciding whether the service awards are warranted are: "(1) actions the plaintiffs took to protect the class's interests, (2) the degree to which the class has benefited from those actions, and (3) the amount of time and effort the plaintiffs expended in pursuing litigation." *Caligiuri*, 855 F.3d at 867.

Here, Plaintiffs seek a service award of $15,000 per Settlement Class Representative and $25,000 for Class Representatives who testified at trial. The Settlement Class Representatives performed important work on the case, including time-consuming gathering of facts and documents, assisting Class Counsel with the specifics of their transactions, preparing for and sitting for depositions, reviewing the Settlement Agreements, and for some, attending and testifying at trial. Dirks Decl. at ¶ 46. That work materially advanced the litigation and protected the Settlement Class's interests. *Id.* Indeed, without their time and effort, these Settlements would have been impossible. Finally, the requested service awards are consistent with other awards approved in the Eighth Circuit. *Tussey*, 850 F.3d 951, 961–62 (8th Cir. 2017) (approving $25,000 service awards); *Rogowski*, 2023 WL 5125113, *6 (approving $25,000 service awards for named plaintiffs); *Wolfert v. UnitedHealth Group, Inc.,* No. 08-CV-01643 (E.D. Mo. Aug. 21, 2009), ECF No. 38 at 4–5 (approving a service award of $30,000).

Accordingly, Plaintiffs' request falls within a fair range of service awards—this is

especially so given the landmark nature of this litigation. The Court should therefore approve the requested service awards for each Settlement Class Representative.[7]

CONCLUSION

Class Counsel respectfully request that the Court approve the requested fee of one-third of the Settlement Fund, reimbursement of current expenses in the amount of $12,923,266.48 (subject to being updated before the final approval hearing), and service awards of $15,000-25,000 to each of the Settlement Class Representatives.

Respectfully Submitted,

WILLIAMS DIRKS DAMERON LLC

/s/ Eric L. Dirks
Eric L. Dirks MO #54921
Matthew L. Dameron MO #52093
1100 Main Street, Suite 2600
Kansas City, Missouri 64105
Tel: (816) 945-7110
Fax: (816) 945-7118
dirks@williamsdirks.com
matt@williamsdirks.com

BOULWARE LAW LLC
Brandon J.B. Boulware MO # 54150
Jeremy M. Suhr MO # 60075
Erin D. Lawrence MO # 63021
1600 Genessee, Suite 416
Kansas City, MO 64102
Tel: (816) 492-2826
brandon@boulware-law.com
jeremy@boulware-law.com
erin@boulware-law.com

[7] To the extent a Settlement is reached with the additional defendants, Plaintiffs may seek additional service awards for class representatives who further participated.

TAB 6A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE CAPACITORS ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO: THE DIRECT PURCHASER CLASS ACTION

Master File No. 3:17-md-02801-JD
Civil Action No. 3:14-cv-03264-JD

ORDER RE DPP ATTORNEYS' FEES AND COSTS, AND SERVICE AWARDS

This long-running antitrust litigation is now fully resolved for all class members who did not opt out of prior settlements. The final issue before the Court is Direct Purchaser Class Counsel's application for Attorneys' Fees, Reimbursement of Expenses and Service Awards ("Motion") (MDL ECF No. 1714[1]) made in connection with the Class's Motion for Final Approval of Settlements with Defendants Matsuo Electric Co., Ltd., Nippon Chemi-Con Corp. and United Chemi-Con, Inc. (collectively "Settling Defendants").

These settlements total $165,000,000 in cash (the "Settlement Fund"). They follow earlier rounds of settlements with 17 other defendant corporate families totaling $439,550,000, and result in a final settlement fund of $604,550,000. The Court entered orders granting final approval of the prior four rounds of settlements on June 27, 2017, June 28, 2018, May 16, 2019, and November 6, 2020. ECF No. 1713[2]; MDL ECF Nos. 249, 597, 1422.

Class counsel for the Direct Purchaser Class (the "Class") have requested attorneys' fees in the amount of $66,000,000. Class counsel also request reimbursement of $3,636,429.21 in costs and expenses, and "service awards" for the named plaintiffs.

The Court appointed Special Master Monica Ip to review the costs requests. Special Master Ip has provided the same auditing review of prior costs requests. She recommends an award of costs in the amount of $2,459,577.54. *See* MDL ECF No. 1730 at 7. Class counsel do not object to this figure, and costs are awarded in that amount.

For attorneys' fees, the Court has used a proposed order lodged by class counsel and modified pursuant to the Court's practices and conclusions. The Court set out the governing standards and discussion in a prior fees order, ECF No. 2196, which apply fully here and are incorporated by reference.

The proposed $66,000,000 in attorneys' fees amounts to 40% of the Settlement Fund created by the present round of settlements, and a cumulative 31.01% of the total settlements reached for the benefit of the Class. These amounts are well within the range of reasonable fees awards, especially in

[1] "MDL ECF No. __" citations are to Case No. 3:17-md-02801-JD.

[2] "ECF No. ____" citations are to Case No. 3:14-cv-03264-JD.

light of the complexity of these antitrust cases, and the degree of work and skill required to obtain highly beneficial results for the class. *See, e.g., In re Lenovo Adware Litig.*, No. 15-md-02624, 2019 WL 1791420, at *7-9 (N.D. Cal. Apr. 24, 2019) (30% of $8,300,000 recovery); *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-md-02420-YGR, 2018 WL 3064391, at *1 (N.D. Cal. May 16, 2018) (30% of $139,000,000 recovery); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2013 WL 149692, at *2 (N.D. Cal. Jan. 14, 2013) (30% of $68,000,000 recovery); *Meijer, Inc. v. Abbott Labs*, No. C-07-05985 CW, 2011 WL 13392313, at *2 (N.D. Cal. Aug. 11, 2011) (33 1/3% of $52,000,000 recovery); *see also*, *e.g.*, *In re Polyurethane Foam Antitrust Litig*., No. 1:10 MD 2196, 2015 WL 1639269, at *7 (N.D. Ohio Feb. 26, 2015) (30% of $147,800,000 recovery); *In re Checking Account Overdraft Litig*., 830 F. Supp. 2d 1330, 1366 (S.D. Fla. 2011) (30% of $410,000,000 recovery); *In re Linerboard Antitrust Litig*., No. MDL 1261, 2004 WL 1221350, at *19 (E.D. Pa. June 2, 2004) (30% of $202,572,489 recovery); *In re Ikon Office Sols*., 194 F.R.D. 166, 170 (E.D. Pa. 2000) (30% of net $116,000,000 recovery).

The *Vizcaino* factors weigh decidedly in favor of the fees request for the same reasons stated in the prior award order. *See* ECF. No. 2196 at 5-10; *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002). No class member or other person has objected to the proposed fees award.

A lodestar cross-check supports the requested fees. *See Vizcaino*, 290 F.3d at 1050; *Lobatz v. U.S. W. Cellular of Cal., Inc.*, 222 F.3d 1142, 1149-50 (9th Cir. 2000). Class counsel's cumulative lodestar as of the filing of their motion for fees, is $103,802,430.30. Class counsel's cumulative fee awards to date including the present request is $187,490,000. Using a lodestar cross-check, the fees sought here in addition to the attorneys' fees previously awarded by the Court for prior settlements result in a lodestar multiplier of 1.81. This multiplier is amply justified by the demands and duration of the litigation, and is well within acceptable parameters. *See Vizcaino*, 290 F.3d at 1051 (multiplier of 3.65 held "within the range of multipliers applied in common fund cases"); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995) ("Multipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation.") (citations omitted); *see also In re*

Lidoderm Antitrust Litig., No. 14-md-02521-WHO, 2018 WL 4620695, at *3 (N.D. Cal. Sept. 20, 2018) (approving 1.37 multiplier).

Consequently, the Court concludes that the $66,000,000 fee request is fair and reasonable. Fees in that amount are awarded to class counsel.

For the "service awards," the Court has expressed substantial doubt about outsized awards to named plaintiffs in light of Federal Rule of Civil Procedure 23(e)(2)(D) and fundamental fairness in not giving such plaintiffs many multiples of the amounts a typical class members will recover. *See, e.g., Myles v. AlliedBarton Security Services, LLC*, No. 12-cv-05761-JD, 2014 WL 6065602, at *6 (N.D. Cal. Nov. 12, 2014); *Arnold v. DMG Mori USA, Inc.*, No. 18-cv-02373-JD, 2022 WL 18027883, at *6 (N.D. Cal. Dec. 30, 2022). Those concerns apply here with respect to the proposal of awarding $100,000 to plaintiffs Chip-Tech Ltd. and eIQ Energy, Inc.; $75,000 to plaintiff Dependable Component Supply Corp.; and $50,000 to plaintiff Walker Component Group, Inc. These will be the first and only service awards granted in this litigation, and class counsel has documented the work the named plaintiffs invested in the case. *See* Krzyowinski Decl., ¶¶ 7-9; Lubman Decl., ¶¶ 5-16; Ryan Decl., ¶¶ 7-9; Walker Decl., ¶¶ 6-8. Class counsel say that Chip-Tech and eIQ took particularly significant actions to protect the interests of the class by testifying twice at trial, among other measures.

Even so, the proposed awards are excessive. The Court grants service awards in these amounts: $50,000 each to Chip Tech and eIQ; $25,000 to Dependable Component; and $15,000 to Walker Component.

IT IS SO ORDERED.

Dated: March 6, 2023

HON. JAMES DONATO
United States District Judge

TAB 6B

Joseph R. Saveri (State Bar No. 130064)
Steven N. Williams (State Bar No. 175489)
Christopher K.L. Young (State Bar No. 318371)
Elissa A. Buchanan (State Bar No. 249996)
Abraham Maggard (State Bar No. 339949)
JOSEPH SAVERI LAW FIRM, LLP
601 California Street, Suite 1000
San Francisco, California 94108
Telephone: (415) 500-6800
Facsimile: (415) 395-9940
Email: jsaveri@saverilawfirm.com
swilliams@saverilawfirm.com
cyoung@saverilawfirm.com
eabuchanan@saverilawfirm.com
amaggard@saverilawfirm.com

Lead Counsel for the Direct Purchaser Class

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE CAPACITORS ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO: THE DIRECT PURCHASER CLASS ACTION

Master File No. 3:17-md-02801-JD
Civil Action No. 3:14-cv-03264-JD

DIRECT PURCHASER'S CLASS COUNSEL'S MOTION FOR ATTORNEY FEES, REIMBRSEMENT OF EXPENSES AND SERVICE AWARDS

Date: September 15, 2022
Time: 10:00 a.m.
Courtroom: 11, 19th Floor

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that at 10:00 a.m. on September 15, 2022, at the United States District Court for the Northern District of California located at 450 Golden Gate Avenue, San Francisco California 94102, or as soon thereafter as the matter may be heard, the Direct Purchaser Class (the "Class") will and hereby do move, pursuant to Rules 23(h) and 54(d)(2) of the Federal Rules of Civil Procedure, to grant Class Counsel: (1) attorneys' fees of $66,000,000 in accordance with Ninth Circuit precedent; (2) reimbursement for incurred expenses; and to grant (3) Class Counsel's request for service awards.

Specifically, the Class requests that the Court:

1. Grant Counsel's request for a payment of $66,000,000 of the additional $165,000,000 settlement fund ("Settlement Fund") established in connection with the Class's settlements with Defendants Matsuo Electric Co., Ltd., Nippon Chemi-Con Corp. and United Chemi-Con, Inc. (collectively "Settling Defendants), now pending before the Court for final approval.

2. Grant Counsel's request for a payment of $3,636,429.21 of the additional Settlement Fund) to reimburse incurred litigation costs and expenses.

3. Grant Counsel's request for service awards for the named plaintiffs of the additional Settlement Fund. Specifically, awards of $100,000 for Plaintiff Chip-Tech Ltd. ("Chip-Tech"); $100,000 for Plaintiff eIQ Energy, Inc. ("eIQ"); $75,000 for Plaintiff Dependable Component Supply Corp. ("Dependable"); and $50,000 for Plaintiff Walker Component Group, Inc. ("Walker").

The Class's motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Joseph R. Saveri and the exhibits thereto, the Declaration of Eugene Krzywinski, the Declaration of Barry Reed Lubman, the Declaration of Shawn Ryan, the Declaration of John Walker, the Court's files and records in this matter, argument of counsel, and such other and further matters as the Court may consider.

Dated: June 23, 2022

Respectfully Submitted,

JOSEPH SAVERI LAW FIRM, LLP

By: */s/ Joseph R. Saveri*
Joseph R. Saveri

Joseph R. Saveri (State Bar No. 130064)
Steven N. Williams (State Bar No. 175489)
Christopher K.L. Young (State Bar No. 318371)
Elissa Buchanan (State Bar No. 249996)
Abraham A. Maggard (State Bar No.339949)
JOSEPH SAVERI LAW FIRM, LLP
601 California Street, Suite 1000
San Francisco, California 94108
Telephone: (415) 500-6800
Facsimile: (415) 395-9940
Email: jsaveri@saverilawfirm.com
swilliams@saverilawfirm.com
cyoung@saverilawfirm.com
eabuchanan@saverilawfirm.com
amaggard@saverilawfirm.com

Lead Counsel for the Direct Purchaser Class

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I. INTRODUCTION

Counsel for the Direct Purchaser Class (the "Class") submit this motion for attorneys' fees and reimbursement of litigation expenses, seeking an award in the amounts of (1) $66,000,000 for fees accrued as of January 1, 2020; (2) $3,636,429.21 to fully reimburse incurred litigation costs and expenses incurred since January 1, 2020 (the "Motion") and (3) service awards for the named plaintiffs of the additional Settlement Fund in the amount of $100,000 for Plaintiff Chip-Tech Ltd.;$100,000 for Plaintiff eIQ Energy, Inc.; $75,000 for Plaintiff Dependable Component Supply Corp.; and $50,000 for Plaintiff Walker Component Group, Inc.

Pursuant to the Procedural Guidance for Class Action Settlements, the background history and facts are set forth in the Class's motion for Final Approval of Class Action Settlement with the Settling Defendants, MDL ECF No. 1713, ("Final Approval Motion") and will not be repeated here, except to summarize where relevant to this motion past settlements and their related awards of attorneys' fees reimbursement of expenses, and service awards. Having presided over the litigation from its inception, including two jury trials, the first of which commenced on March 2, 2020, before being suspended due to the commencement of the COVID-19 pandemic, and the second of which commenced on November 29, 2021 and concluded when Class Counsel settled with the remaining Defendants on the final day of trial, right before the case was to be handed to the jury, the Court is aware of the substantial work performed on behalf of the Class by Counsel to date.

A. The Pending Settlements

The settlements with the Settling Defendants (the "Settlements") provide for cash payments totaling $165,000,000. Adding the $439,550,000 in settlements from the First, Second and Third Round Settlements, Class Counsel has recovered a total of $604,550,000 for the Class, which represents a recovery of 141.4% of the Class's single damages as calculated by the Class's expert. Declaration of Joseph R. Saveri ("Saveri Decl."), ¶ 13.

This case began in 2014. Since then, Class Counsel—all of whom work on a contingency basis—have devoted substantial time which has not been compensated and have advanced costs on behalf of the Class. The Settlements, if finally approved, provide Class Counsel the opportunity to be

compensated for their hard and successful work for the benefit of the Class, and to receive reimbursement for costs incurred in the litigation. On a cumulative basis, the total amount of attorneys' fees—the requested $66,000,000 added to the fee awards for the First, Second, Third, and Fourth Round Settlements—amounts to 31.01% of the common fund which Class Counsel has recovered for the benefit of the Class in this case.

The Motion is being publicly filed at-least thirty-five days before the deadline for objecting to the Settlements, as required by the Court's order granting preliminary approval of the present settlements, MDL ECF No. 1707, is consistent with the requirements set forth in the Northern District of California's *Procedural Guidance for Class Action Settlements*, and satisfies the requirements of *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 995 n.2 (9th Cir. 2010). Saveri Decl., ¶ 3.

B. The Prior Round One, Round Two, Round Three and Round Four Settlements

On June 27, 2017, the Court granted final approval of the Class's first round of settlements with the NEC Tokin, Fujitsu, Nitsuko, Okaya, and ROHM defendants totaling $32.6 million (the "First Round Settlements"). ECF No. 1713. On June 28, 2018, the Court granted final approval of the Class's second round of settlements with the Hitachi Chemical and Soshin defendants totaling $66.9 million (the "Second Round Settlements"). MDL ECF No. 249. On February 21, 2020, the Court entered an order granting final approval of the Class's third round of settlements with the Nichicon and Rubycon defendants totaling $108 million plus up to an additional $12 million in contingent payments based on Rubycon's financial results through fiscal year 2019. MDL ECF No. 587 at 11. These settlements demonstrate that Class Counsel and the named class representatives have diligently and successfully represented the Class. On June 27, 2017, the Court awarded $8,150,000 (25% of the settlement fund) as partial payment of their fees accrued as of September 30, 2016, in connection with the First Round Settlements. ECF No. 1714, at 3. The Court also approved $3 million for partial reimbursement of Counsel's costs and expenses. *Id.* at 9-10.

For the Second Round Settlements, the Court granted $16,725,000 in attorneys' fees (25% of the settlement fund) as partial payment of their fees accrued as of December 31, 2017. MDL ECF No. 332 at 3. The Court also approved $6,690,000 in expenses (10% of the settlement fund). *Id.* at 10.

For the Third Round Settlements, The Court granted $27,000,000 in attorneys' fees (25% of the of the settlement fund) as partial payment of their fees accrued as of December 31, 2018. *Id.* The Court also approved $1,997,809.74 in expenses (approximately 1.85% of the settlement fund).[1] *Id.* On May 7, 2020, the Court granted the Class's Supplemental Motion for Reimbursement of Expenses and awarded $1,002,190.62 for unreimbursed expenses incurred by Class Counsel. MDL ECF No. 1295.

For the Fourth Round Settlements, Special Master Monica Ip conducted an audit of Class Counsel's request for fees and costs as documented in MDL ECF No. 1366 and issued a Report and Recommendation (MDL ECF No. 1397) that was approved and adopted in full by the Court. MDL ECF No. 1423. The Court granted $69,615,000 in attorney fees (approximately 30% of the settlement fund). *Id.* The Court further granted $9,548,764.41 for unreimbursed expenses incurred by Class Counsel. *Id.*

C. The Pending Requests for Attorneys' Fees and Reimbursement of Expenses

Counsel's request for an award of attorneys' fees from the pending settlements in the amount of $66,000,000 is consistent with the Ninth Circuit's permitted fee awards calculated using the "percentage-of-the-fund" approach. *See In re Nat'l Collegiate Athl. Ass'n Athl. Grant-In-Aid Cap Antitrust Litig.*, 768 F. App'x 651, 653 (9th Cir. 2019). Counsel have taken a significant risk, invested substantial amounts of their time and money on a contingent basis, and forgone other work opportunities to dedicate their professional efforts to this case.[2]

Lead Class Counsel submits declarations for its time and expenses, and expenses incurred by the Litigation Fund[3] (Saveri Decl., Exs. 1-3) together with declarations from Class Counsel that have worked under Lead Counsel's direction in this case. Saveri Decl., Exs. 4-17. Attached to each of these

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[1] Special Master Monica Ip conducted an audit of Class Counsel's request for fees and costs as documented in MDL ECF Nos. 498, 594, and issued a Report and Recommendation (MDL ECF No. 1019) that was approved and adopted in full by the Court. MDL ECF No. 1036. The Court granted the Class's motion for attorneys' fees and reimbursement of expenses after adopting and approving in full the findings and recommendations as set forth in Special Master Monica Ip's Report and Recommendation. MDL ECF No. 1021.

[2] Indeed, Counsel overcame significant challenges in litigating this case. This case was tried twice, the first trial was interrupted by the COVID-19 pandemic after the Class had nearly completed presenting its case-in-chief. Counsel is unaware of any other case that was so interrupted.

[3] JSLF established a litigation fund to finance the joint prosecution of this case against the Defendants. The Litigation Fund has been used to pay necessary costs and expenses including expert and consulting fees, the costs of document hosting, certification of translations and trial expenses

declarations from Class Counsel are documents that summarize the time their respective firms have billed from January 1, 2020, to May 31, 2022, as reported by timekeeper. Ex. 1; Ex. A to each Counsel's declaration. Class Counsel have also attached a summary of the expenses they incurred in this case during the same period. Ex. 2; Ex. B to each Counsel's declaration. Lead Class Counsel has reviewed each of Class Counsel's daily time records. Duplicative, unnecessary, or unauthorized work has been removed and will not be compensated. *See id.*, ¶ 40.

Lead Class Counsel has also reviewed all costs submitted by Class Counsel for reimbursement to ensure their compliance with the instructions set forth in the Court's October 31, 2014, Order Appointing Interim Lead Class Counsel (ECF No. 319 at 4-5). *See id.* Expenses that were unauthorized or in excess of the Court's guidelines will not be compensated. *See id.* Consistent with the Court's guidance, the fees, and costs in connection with the present round of Settlements will be submitted to Special Master Ip in the first instance. MDL ECF No. 1708; Saveri Decl., ¶ 14. The Class's request for $3,636,429.21 is a request to reimburse Class Counsel for incurred litigation costs and expenses that have not yet been reimbursed. Saveri Decl., ¶ 20.

On a cumulative basis, the total amount of attorneys' fees—the requested $66,000,000 added to the fee awards for the First, Second, Third, and Fourth Round Settlements—is $187,490,000. *Id.*, ¶¶ 15-18. This represents attorneys' fees of 31.01% of the common fund which Class Counsel has recovered for the benefit of the Class in this case. *See In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 JG VVP, 2012 WL 3138596, at *5 (E.D.N.Y. Aug. 2, 2012); *see also In re Transpac. Passenger Air Transp. Antitrust Litig.*, No. 3:07-cv-05634-CBR, 2019 WL 6327363, at *6 (N.D. Cal. Nov. 26, 2019). Including the $66,000,000 request, Class Counsels' cumulative fee amounts to 31.01% of the total settlements reached for the benefit of the Class.

The requested expenses of $3,636,429.21 added to the expenses and costs reimbursements for the First, Second Third, and Fourth Round Settlements brings the cumulative total expenses and costs to $25,875,194. Saveri Decl., ¶¶ 15-18, 45. The Class's request for $3,636,429.21 fully reimburses Class Counsel for their expenses incurred but unreimbursed to date. *Id.*, ¶ 22-23, and reimburses Class Counsel for Litigation Fund expenses incurred between July 24, 2020, to date.

II. LEGAL STANDARD

A. Attorneys' Fees

The Supreme Court has explained that "'a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.'" *Indep. Living Ctr. of S. Cal., Inc. v. Kent*, 909 F.3d 272, 284 (N.D. Cal. 2018) (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)); *see also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 393 (1970). "The rationale behind awarding a percentage of the fund to counsel in common fund cases is the same that justifies permitting contingency fee arrangements in general. . . . The underlying premise is the existence of *risk*—the contingent risk of non-payment." *In re Quantum Health Resources, Inc. Sec. Litig.*, 962 F. Supp. 1254, 1257 (C.D. Cal. 1997) (emphasis in original). In addition, attorneys' fees are awarded as a means of ensuring the beneficiaries of a common fund share with those whose labors created the fund. *See In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994).

B. Costs Reimbursement

Counsel may obtain reimbursement for costs from a common fund settlement. *In re Am. Apparel, Inc. S'holder Litig.*, Case No. CV 10-06352 MMM (JCGx), 2014 WL 10212865, at *28 (C.D. Cal. Jul. 28, 2014). "'The prevailing view is that expenses are awarded in addition to the fee percentage.'" *Perez v. Rash Curtis & Assocs.*, No. 16-cv-03396-YGR, 2020 WL 1904533, at *21 (N.D. Cal. Apr. 17, 2020) (citations omitted).

III. THE COURT SHOULD AWARD THE CLASS'S COUNSEL $66,000,000—40 PERCENT OF THE FUND—AS PARTIAL PAYMENT OF THEIR FEES ACCRUED AS OF DATE

A. The Percentage-of-the-Fund Method for Calculating Fees Is Appropriate Here

District courts in the Ninth Circuit use either the "percentage-of-the-fund" or the "lodestar" method in calculating fees in common fund settlements. *Fischel v. Equitable Life Assur. Soc'y of U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002). Using either method, the ultimate inquiry is whether the end result is reasonable. *Powers v. Eichen*, 229 F.3d 1249, 1258 (9th Cir. 2000).

Where there is an easily quantifiable benefit to the class—namely, the cash recovery achieved through the settlement—the percentage of the fund approach is appropriate. *See In re Bluetooth Headset*

Prods. Liab. Litig., 654 F.3d 935, 942 (9th Cir. 2011). "The use of the percentage-of-the-fund method in common-fund cases is the prevailing practice in the Ninth Circuit for awarding attorneys' fees and permits the Court to focus on a showing that a fund conferring benefits on a class was created through the efforts of plaintiffs' counsel." *In re Korean Air Lines Co. Antitrust Litig.*, No. CV 07-05107 SJO (AGRx), 2013 WL 7985367, at *1 (C.D. Cal. Dec. 23, 2013); *see also Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 260 (N.D. Cal. 2015). Courts supervising antitrust cases in this District regularly apply the percentage of the fund approach. *See, e.g.*, *In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2018 WL 3960068, at *5 (N.D. Cal. Aug. 17, 2018); *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-md-02420-YGR, 2018 WL 3064391, at *1 (N.D. Cal. May 16, 2018); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995). The Court should do so as well here.

"In the Ninth Circuit, the benchmark for percentage of recovery awards is 25 percent of the total settlement award, which may be adjusted up or down." *Carlin v. DairyAmerica, Inc.*, 380 F.Supp.3d 998, 1019 (E.D. Cal. 2019) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998)). Selection of the benchmark or any other rate, however, must be supported by findings that account for all of the circumstances of the case. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002). The benchmark is subject to adjustment—upward or downward—based on the Court's analysis of the factors the Ninth Circuit considered in *Vizcaino*: (1) the results achieved for the class; (2) the complexity of the case and the risk of and expense to counsel of litigating it; (3) the skill, experience, and performance of counsel on both sides; (4) the contingent nature of the fee; and (5) fees awarded in comparable cases. *See id.* at 1048-50. The complexity of this case, the significant benefits achieved for the Class and the excellent work performed support an upwards adjustment.

B. The *Vizcaino* Factors Warrant Granting Counsel's Fee Request

Here, each of the *Vizcaino* factors weighs in favor of awarding the requested $66,000,000, which amounts to 40% of the Settlement Fund associated with the latest settlements, or, when accounting for the fee awards granted in the prior rounds of settlements, 31.01% of the cumulative settlements recovered for the benefit of the Class, a well-warranted upwards adjustment.

1. Counsel Obtained an Exceptional Result for the Direct Purchaser Class with The Settlements.

"The overall result and benefit to the class from the litigation is the most critical factor in granting a fee award." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008). The pending Settlements—the fifth round in the consolidated Direct Purchaser Class Action—provide the Class with significant and valuable monetary benefits.

The Settling Defendants' all-cash payments for the benefit of the Class together combined with the prior settlements achieved in this case will total $604,550,000, significantly exceeding single damages. This is a large amount of money relative to the Settling Defendants' individual and collective capacitor sales to Class members between 2002 and 2014 and is over 141.4% of the total overcharges ($427,530,613) as calculated by the Class's expert—an extraordinary result. Courts have approved equal or higher upward adjustments from the benchmark in cases where the settlement was a much lesser percentage of single damages. *See, e.g., Carlin*, 380 F. Supp. 3d at 1020 (33% fee award approved where settlement recovered 48% of experts' estimate damages); *Marshall v. Northrop Grumman Corp.*, Case No. 16-CV-6794 AB (JCx), 2020 WL 5668935, at *2-3 (C.D. Cal. Sep. 18, 2020) (recovery of 29% of claimed damages at trial justified fee award of one-third of settlement fund); *In re Lidoderm Antitrust Litig.*, No. 14-md-02521-WHO, 2019 WL 4620695, at *1-2 (N.D. Cal. Sep. 20, 2018) (approving 33% fee award in end-payor class action settlement recovering 46% of single damages estimate).[4]

The settlements represent an excellent, valuable, and significant recovery to the Class. The Class's $5,000,000 settlement with Matsuo represents a significant recovery given evidence of Matsuo's lack of resources, notwithstanding its participation in the price-fixing conspiracy. NCC and UCC's $160,000,000 settlement represents approximately 212% of NCC and UCC's overcharges during the class period (based on the Class's calculation of $75,447,114 in overcharges attributable to NCC and UCC) and nearly 17.6% of the total overcharges as calculated by the Class's experts. Additionally, NCC and UCC's settlement is the largest settlement among all defendant families in this

[4] *See also Morris v. Lifescan, Inc.*, 54 Fed.Appx. 663, 664 (9th Cir. 2003) (33% fee award justified as "class counsel achieved exceptional results in this risky and complicated class action and despite Lifescan's vigorous opposition throughout the litigation").

case. These settlements are further evidence that the settlements pending approval are excellent and warrant the granting of attorney fees. *See*, *e.g.*, *In re Packaged Seafood Prods. Antitrust Litig.*, Case No. 3:15-md-002670-DMS-MDD, 2022 WL 228823, at *23 (S.D. Cal. Jan. 26, 2022) (finding settlement totaling $20 million "compares favorably to other antitrust and class action settlements") (citation omitted); *Marshall*, 2020 WL 5668935, at *3 ("great effort on behalf of the Class" justifies "an award of one-third of the settlement fund in attorney fees"); *In re Urethane Antitrust Litig.*, No. 04-1616-JWL, 2016 WL 4060156, at *4 (D. Kan., July 29, 2016) ("This enormous success in a highly contingent case favors an award of a substantial percentage of the . . . settlement fund to the counsel who achieved that success for the class members"). In addition to financial consideration, the Class has also benefitted from the cooperation that Lead Class Counsel secured from previously settling defendants.

The Settlements' monetary component—all cash—greatly benefits the Class by providing and, in fact, accelerating the Class's chances for monetary recovery in this case through the claims administration process. Saveri Decl., ¶13. Here, a substantial amount of money stands to be distributed to the Direct Purchaser Class. *Id.*

2. Counsel Have Taken Significant Risks Prosecuting This Litigation.

Counsel assumed a significant risk in undertaking this litigation. *See* Saveri Decl., ¶¶ 30-31. By its nature, recovery is never guaranteed in contingency litigation. *Id.,* ¶ 30. Counsel committed their time, money, and energy to the prosecution of a multi-year, international price-fixing cartel case against 22 sprawling Defendant corporate families based almost entirely in Japan. *See id.*, ¶ 24. This cartel case is complex, and complex antitrust cases often take years to resolve through settlement, trial, or appeal—indeed, this litigation has now lasted over 7 years. *See id.* As the case has advanced, certain Defendants have claimed poor financial health that could ultimately impede or diminish recovery for the Class.[5] As set forth in Lead Class Counsel's declaration, Class Counsel have expended millions of dollars of their

[5] The Class has worked diligently to maximize compensation and restitution for those injured by Defendants. Lead Class Counsel retained experts and filed submissions under the Crime Victims' Rights Act, 18 U.S.C. § 3771, in connection with the Court's sentencing of Matsuo in *United States v. Matsuo Elec. Co. Ltd.*, 4:17-cr-00073-JD (N.D. Cal. filed on Feb. 8, 2017) In particular, Lead Class Counsel submitted briefing and a declaration from the Class's expert analyzing Matsuo's claimed inability to pay its criminal fine and suggesting appropriate restitution for those injured by Defendants' anticompetitive conduct. *See id.*, at ECF No. 58 & 58-1.

time and incurred millions of dollars in expenses, all on a purely contingent basis. Counsel have turned away other case opportunities over the last six years to dedicate the time and resources needed to prosecute the Class's claims. This entails substantial risk.[6] *Id.*, ¶¶ 30-34.

3. Advancing the Litigation to this Point and Obtaining the Settlements Has Required Professional Skill.

The docket and the procedural history in this this case demonstrate Class Counsel's expertise and the Class's successes to date. *See*, *e.g.*, ECF No. 332, at pp. 5-8. Counsel have done much to prosecute the Class's claims effectively and efficiently. Counsels' success was hard won. Defendants have hired excellent antitrust defense counsel to defend them against the Class's Sherman Act claims. *See Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 449 (E.D. Cal. 2013) ("The quality of opposing counsel is important in evaluating the quality of Class Counsel's work."). Indeed, Class Counsel has litigated this case to a successful conclusion despite two rounds of summary judgment, motions to decertify the class, motions to disqualify experts and two trials due to the COVID-19 pandemic.

4. Awards in Similar Complex Antitrust Cases Demonstrate That Class Counsel Seek a Reasonable Fee Award.

The requested award of $66,000,000 matches and is in keeping with fee awards in similar cases, both in the Ninth Circuit and elsewhere. *See Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir.1989). Class Counsel's request is comparable to percentages awarded plaintiffs' counsel in other similarly and arguably less complex antitrust cases in this District and elsewhere in the United States. *See, e.g., In re Lenovo Adware Litig.*, No. 15-MD-02624-HSG, 2019 WL 1791420, at *7-9 (N.D. Cal. Apr. 24, 2019) (30% of $8,300,000 recovery); *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-02420-YGR, 2018 WL 3064391, at *1 (N.D. Cal. May 16, 2018) (30% of $139,000,000 recovery); *see also*, *e.g.*, *Urethane*, 2016 WL 4060156, at *6 (33.33% of $835,000,000 recovery); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1366 (S.D. Fla. 2011) (30% of $410,000,000 recovery).

[6] Class Counsel also incurred risk associated with having a parallel criminal proceeding, addressing the impact of the FTAIA, and evaluating massive amounts of electronic transactional data necessary to prove their case. Counsel also faced significant difficulty due to the unprecedented nature of the COVID-19 pandemic. Due to the pandemic, Counsel faced challenges including securing witness travel from Japan. Each of these risks weigh in favor of granting Class Counsel the requested fee award.

As these precedents demonstrate, Class Counsel's request is easily consistent with recognized "market rates," i.e., rates typically awarded in similar contingency fee cases in this District and across the United States, *see Vizcaino*, 290 F.3d at 1050, particularly in light of the posture of the litigation and the state of the Class's evidence here.

5. Counsel Undertook a Significant Financial and Resource Burden in Prosecuting the Direct Purchaser Class's Claims

Class Counsel have invested significant amounts of time, money, and resources in this case for over six years, as shown in their time and expense records. Lead Class Counsel's time submissions—$9,395,583.75 for 2021 and $43,604,109.00 total lodestar billed to date—illustrate the point. Saveri Decl., ¶ 45. This litigation has required a significant devotion of Lead Class Counsel's resources for the last six years. For example, Lead Class Counsel has performed the following tasks:

- **Discovery**: Lead Class Counsel undertook significant discovery efforts in this case. Discovery included drafting discovery responses, evaluating and analyzing defendants' discovery responses, including document productions, managing multiple foreign language document review projects, supervising all depositions, preparing for and taking key depositions, identifying and interviewing cooperating witnesses, and taking pre-trial depositions. Much of the document discovery involved the review and analysis of documents in Japanese and in Chinese. Many of the depositions were taken abroad and required translation from Japanese and Chinese.

- **Motion Practice**: Lead Class Counsel prepared, edited, and briefed various court filings, including several dispositive motions. Plaintiffs successfully moved for class certification. Defendants opposed the motion and sought appellate review of the Court's decision. Defendants sought to decertify the action on numerous occasions. This included appearances before the Judicial Panel on Multidistrict Litigation, briefing and arguing the motion for class certification, and briefing two rounds of motions for summary judgment. Lead Class Counsel also selected and prepared the Class's expert witnesses and reports, oversaw and coordinated the work of its experts, and responded to *Daubert* motions in relation to its experts. Additionally, Lead Class Counsel hired forensic accountants, and filed submissions pursuant to the Crime Victims' Rights Act, 18 U.S.C. § 3771 in connection with the criminal cases against certain Defendants.

- **Case Management**: Lead Class counsel interfaced, communicated and negotiated with various entities during the course of this litigation, including, the United States Department of Justice, the indirect purchaser plaintiffs, and opt-out plaintiffs. In addition to conducting various settlement negotiations, Lead Class Counsel has diligently communicated with Class members, responded to inquiries concerning the status of the case and settlement and coordinated various notice and claims management issues. The high degree of class participation in the settlements to date evidences the success of those efforts.

- **Trial and Pre-Trial**: Most recently, Lead Class Counsel prepared, supervised, and presented two weeks of evidence at the jury trial in November 2021. Trial preparation

> included the preparation of all pretrial filings and submissions, presentation of witnesses (including witnesses from Japan), attendance of pre-trial conferences, taking pre-trial depositions, defending trial depositions, and organizing pre-trial meet and confers. Trial preparation also included arranging for precautions and safety measures to address the risks of trying a case during the ongoing pandemic. Class Counsel had tried the case once before in March 2020 until the COVID-19 pandemic forced the suspension and eventual termination of that trial. Additionally, given Defendants' lack of U.S. assets, Class Counsel also assessed the risk associated with enforcing a treble-damage judgment in Japan should the jury return with a favorable verdict for the Class.

Saveri Decl., ¶ 25.

Lead Class Counsel have relied on Class Counsel to assist the prosecution of this case. Each of the firms have wide and deep experience in the field and has successfully resolved numerous cases, and the Class has benefitted from that experience here. *Id.*, ¶ 43. The Court has seen the quality of legal work on behalf of the Class. Under the active supervision of Lead Class Counsel, the firms have worked closely together as an efficient team. *See id.* ¶ 24. Assignments have been given based on the particular expertise and skill of individual lawyers. *See id.* Duplication of effort has been minimized, and as noted above, duplicative or unnecessary work has been excluded as a basis for the attorney fee award. *Id.* Class Counsel have set forth for the Court the details regarding their contributions in their declarations attached to the Saveri Declaration. *Id.*, Exs. 4-17 ¶ 3 in each declaration.

C. Lodestar Cross-Check Confirms That the Fees Sought by Class Counsel Are Reasonable.

A lodestar cross-check may be used to ensure that class counsel has done the work necessary to justify the fee sought. *Vizcaino*, 290 F.3d at 1050. "[T]he lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records." *In re Rite Aid Corp. Sec. Litig.,* 396 F.3d 294, 306-07 (3d Cir. 2005)) (citation omitted).

On a cumulative basis, the total amount of attorneys' fees—the requested $66,000,000 added to the fee awards for the First, Second, Third Round, and Fourth Round Settlements—is $187,490,000.00 *Id.*, ¶¶ 15-18. Counsel's cumulative lodestar in the case as of today is $103,082,430.30. Saveri Decl., ¶ 45; *id.*, Exs. 1-17. Consistent with the Court's instructions, time was reported on a monthly basis and those historical rates are used as the basis for the fee request here. *Id.* ¶ 45-46, and Exs. 2, 4-17. In the

Ninth Circuit, a lodestar multiplier of around four has frequently been awarded in common fund cases such as this. *See Vizcaino*, 290 F.3d at 1051 (multiplier of 3.65 held "within the range of multipliers applied in common fund cases"); *see also Van Vranken,* 901 F. Supp. 294 at 298 ("Multipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation."). The lodestar cross-check thus confirms that Counsel's $66,000,000 fee request is reasonable and should be awarded.[7]

D. The Court Should Grant Attorneys' Fees Based on Work Counsel Has Performed on the Case as a Whole.

Because the total work performed by counsel from inception of the case makes each settlement possible, courts typically base fee awards in subsequent settlements on all work performed in the case. *Lobatz v. U.S. W. Cellular of Cal., Inc.*, 222 F.3d 1142, 1149-50 (9th Cir. 2000); *In re Se. Milk Antitrust Litig.*, No. 2:07-CV 208, 2013 WL 2155387, at *4 (E.D. Tenn. May 17, 2013). Indeed, when considering fee awards for subsequent settlements, courts typically calculate the lodestar multiplier by dividing all past and requested fee awards by all of counsel's time from inception of the case. *See, e.g., Se. Milk*, 2013 WL 2155387, at *4; *see also, e.g., Air Cargo*, 2012 WL 3138596, at *5. Class Counsel has devoted a tremendous amount of time to prosecuting the Class's claims from the case's inception—to the Class's great benefit. The Court should consider Class Counsel's total efforts and find Class Counsel's requested fee award appropriate and reasonable. *See Lobatz*, 222 F.3d at 1149-1150. (affirming that counsel should be awarded fees based on work on entire litigation.)

IV. THE COURT SHOULD GRANT CLASS COUNSEL $3,636,429.21 FOR THEIR COSTS ADVANCED FROM JANUARY 1, 2020, TO PRESENT

Counsel requests the amount of $3,636,429.21 (approximately 2.20 % of the Settlement Fund) to reimburse incurred litigation costs and expenses that have not been reimbursed. Saveri Decl., ¶ 20.

[7] For the First Round, the lodestar incurred was $44,454,689.20, and the fees granted were $8,150,000. For the Second Round, the lodestar incurred was $26,307,241.50 and the fees granted were $16,725,000. For the Third Round, the lodestar incurred was $11,877,369 and the fees granted were $27,000,000. For the Fourth Round, the lodestar incurred was $6,794,035.75 and the fees granted were incurred was $69,615,000. On a cumulative basis, if the Court grants Counsel's fee request of $66,000,000, the lodestar multiplier would be 1.81.

It is appropriate to reimburse attorneys prosecuting class claims on a contingent basis for "reasonable expenses that would typically be billed to paying clients in non-contingency matters," i.e., costs "incidental and necessary to the effective representation of the Class." *Trosper v. Stryker Corp.*, No. 13-CV-00607-LHK, 2015 WL 5915360, at *1 (N.D. Cal. Oct. 9, 2015) (citing *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994)). Reasonable reimbursable litigation expenses include those for document production, experts and consultants, depositions, translation services, travel, mail, and postage costs.[8] Under the common fund doctrine, plaintiffs' counsel should receive reimbursement of all reasonable out-of-pocket expenses and costs in prosecution of the claims and in obtaining a settlement. *See generally Vincent v. Hughes Air W., Inc.*, 557 F.2d 759 (9th Cir. 1977).

Aside from the typical litigation-related costs necessarily incurred in a complex antitrust litigation like this one (e.g., travel and lodging, legal research, court reporters), Class Counsel have incurred many other expenses that warrant reimbursement. In the four prior rounds of Class settlements, Class Counsel had informed the Court of the extraordinary expenses entailed by this complex litigation, including the substantial costs in reviewing, translating, and analyzing 39 million Bates-numbered pages, mostly in Japanese, from over 100 document custodians, and significant expert fees and related expenses from submitting expert reports. ECF No. 1713; MDL ECF No. 249. Since the last round of settlements, the Class incurred significant expenses including those associated with preparing for and conducting the November 2021 trial. Saveri Decl., ¶¶ 20, 22.

V. THE COURT SHOULD GRANT SERVICE AWARDS TO THE NAMED PLAINTIFFS IN LIGHT OF THEIR SUBSTANTIAL CONTRIBUTIONS TO THE LITIGATION.

Class Counsel seeks service awards for the four named class representatives: $100,000 for Plaintiff Chip-Tech Ltd. ("Chip-Tech"); $100,000 for Plaintiff eIQ Energy, Inc. ("eIQ"); $75,000 for Plaintiff Dependable Component Supply Corp.; and $50,000 for Plaintiff Walker Component Group, Inc. Service awards are "fairly typical in class action cases." *Rodriguez*, 563 F.3d at 958. Service awards

[8] *See*, *e.g.*, *Media Vision*, 913 F. Supp. at 1366 (court fees, experts/consultants, service of process, court reporters, transcripts, deposition costs, computer research, photocopies, postage, telephone/fax); *Thornberry v. Delta Air Lines, Inc.*, 676 F.2d 1240, 1244 (9th Cir. 1982) (travel, meals and lodging), *remanded on other grounds*, 461 U.S. 952(1983); *Mauss v. NuVasive, Inc.*, Case No. 13cv2005 JM (JLB), 2018 WL 6421623, at *8-9 (S.D. Cal. Dec. 6, 2018) (online research, press release and newswires).

are particularly appropriate when the litigation is "complicated" and "took up quite a bit of the class representatives' time." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 947-48 (9th Cir. 2015); *accord In re Facebook Biometric Info. Priv. Litig.*, 522 F. Supp. 3d 617, 633-34 (N.D. Cal. 2021). "In deciding whether such an award is warranted, relevant factors include the actions the plaintiff has taken to protect the interest of the class, the degree to which the class has benefited from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Cook v. Niedert*, 142 F.3d 1004, 1016 (9th Cir. 1998); *accord Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 2003).

The named Plaintiffs undertook significant action to protect the interests of the class. Each of the named Plaintiffs maintained close contact with Class Counsel throughout the case, produced thousands of documents during the course of this complex litigation, were subject to multiple depositions, and devoted dozens to hundreds of hours in assisting Class Counsel in this case, expending a great deal of time and effort. *See* Krzywinski Decl., ¶¶ 7-9; Lubman Decl., ¶¶ 5-16; Ryan Decl., ¶¶ 7-9; Walker Decl., ¶¶ 6-8. Plaintiffs Chip-Tech and eIQ in particular devoted significant time and effort on behalf of the Class as Barry Lubman of Chip-Tech and Gene Krzywinski of eIQ, in addition to providing significant discovery in this case, twice presented testimony before a jury, including at the prior trial that was interrupted by the onset of the COVID-19 pandemic. Krzywinski Decl., ¶ 8; Lubman Decl., ¶¶ 13-14. "[T]he Court knows firsthand from seeing plaintiff[s] [Lubman and Krzywinski] on the witness stand during the . . . trial[s] that [they] ha[ve] put time and effort into this case, likely more than is asked of the usual named class action representative." *Norcia v. Samsung Telecomms. Am., LLC*, No. 14-cv-00582-JD, 2021 WL 3053018, at *5 (N.D. Cal. July 20, 2021).

The requested total service awards are well within the fair and reasonable awards approved by courts in this Circuit and resulted in a significant benefit to the Class. *See Wolf v. Permanente Med. Grp., Inc.*, Case No. 3:17-cv-05345-VC, 2018 WL 5619801, at *1, ¶ 5 (N.D. Cal. Sep. 14, 2018); Saveri Decl., ¶ 35. The average recovery unnamed class members received for the first four rounds of settlement is $630,521.82. That is before accounting for the distribution of the pending settlements with Matsuo and Chemi-Con. *See Online DVD-Rental*, 779 F.3d at 947. The aggregate service awards requested by Class Counsel amounts to 51% of the average recovery for an unnamed class member, and courts have

approved *individual* service awards which are many times that ratio. *See In re High-Tech Emp. Antitrust Litig.*, Case No. 11-CV-02509-LHK, 2015 WL 5158730, at *18 (N.D. Cal. Sep. 2, 2015) (approving service awards of about 14 to 21 times average class member recovery); *Lemus v. H & R Enters. LLC*, No. C 09-3179 SI, 2012 WL 3638550, at *5-6 (N.D. Cal. Aug. 22, 2012) (approving $15,000 service awards where average class recovery about $1,200). This recovery was due, in no small part, to the work of the named Plaintiffs. Further, the requested service awards cumulatively make up a mere 0.06% of the total settlement fund of $604,550,000, which is fair and reasonable in light of the significant benefit to the Class resulting from Plaintiffs' efforts. *See, e.g., Online DVD-Rental*, 779 F.3d at 948 (approving service awards of $45,000 totaling 0.17% of the total settlement fund).[9] Indeed, courts have granted similar service awards even in cases which did not proceed to jury trial once, let alone twice. *See*, *e.g.*, *High-Tech*, 2015 WL 5158730, at *17-18 (approving service awards of $120,000 and $80,000); *see also Cameron v. Apple Inc.*, Case No. 4:19-cv-03074-YGR (N.D. Cal. June 10, 2022), ECF No. 491 at 15 (granting service awards in pre-summary judgment case).[10]

VI. CONCLUSION

For the reasons set forth above, Counsel requests the Court grant its request for payment of $66,000,000 in attorneys' fees, $3,636,429.21 in reimbursable costs, and request for a total of $325,000 in service awards.

[9] *See also*, *e.g.*, *In re Polyurethane Foam Antitrust Litig.*, 135 F. Supp. 679, 694 (W.D. Ohio 2015) (approving $35,000 award to each plaintiff amounting to .00005% of total settlement of $433.1 million).

[10] *See also*, *e.g.*, *High-Tech* at *18 (collecting cases granting service awards in excess of $125,000); *In re Skelaxim (Metaxalone) Antitrust Litig.*, No. 2:12-cv-83, 2014 WL 2946459, at *3-4 (E.D. Tenn. June 30, 2014) ($50,000 service award for each class representative); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 535-36 (E.D. Mich. 2003) (granting $75,000 service awards).

Dated: June 23, 2022

Respectfully Submitted,

JOSEPH SAVERI LAW FIRM, LLP

By: */s/ Joseph R. Saveri*
Joseph R. Saveri

Joseph R. Saveri (State Bar No. 130064)
Steven N. Williams (State Bar No. 175489)
Christopher K.L. Young (State Bar No. 318371)
Elissa Buchanan (State Bar No. 249996)
Abraham A. Maggard (State Bar No.339949)
JOSEPH SAVERI LAW FIRM, LLP
601 California Street, Suite 1000
San Francisco, California 94108
Telephone: (415) 500-6800
Facsimile: (415) 395-9940
Email: jsaveri@saverilawfirm.com
swilliams@saverilawfirm.com
cyoung@saverilawfirm.com
eabuchanan@saverilawfirm.com
amaggard@saverilawfirm.com

Lead Counsel for the Direct Purchaser Class

TAB 7A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In re Neurontin Antitrust Litigation	
THIS DOCUMENT RELATES TO:	**Civil Action No. 02-1830**
LOUISIANA WHOLESALE DRUG COMPANY, INC., MEIJER, INC. and MEIJER DISTRIBUTION, INC., on behalf of themselves and all others similarly situated,	**Civil Action No. 02-2731**
Plaintiffs,	
v.	
PFIZER, INC. and WARNER-LAMBERT CO.,	
Defendants.	

FINAL JUDGMENT AND ORDER OF DISMISSAL APPROVING PROPOSED CLASS SETTLEMENT AND DISMISSING ACTIONS

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, and in accordance with the terms of the Settlement Agreement dated April 17, 2014, it is hereby ORDERED as follows:

1. This Final Judgment and Order of Dismissal hereby incorporates by reference the definitions in the Settlement Agreement among the parties to these actions on file with this Court, and all capitalized terms used and not otherwise defined herein shall have the meanings set forth in the Settlement Agreement.

2. The Court has jurisdiction over these actions and over each of the parties and over

all members of the Class.

3. The notice of settlement (in the forms presented to this Court as Exhibits B-1 and B-2 to the Settlement Agreement) (the "Notice") directed to the members of the Class, constituted the best notice practicable under the circumstances. In making this determination, the Court finds that the Notice provided for individual notice to all Class members who were identified through reasonable efforts. Pursuant to, and in accordance with, Rule 23 of the Federal Rules of Civil Procedure, the Court hereby finds that the Notice provided Class members due and adequate notice of the Settlement, the Settlement Agreement, these proceedings and the rights of Class members to object to the Settlement.

4. The Court held a preliminary fairness hearing on May 1, 2014 and a final fairness hearing on July 31, 2014, regarding the reasonableness of the parties' settlement. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court hereby approves the Settlement, and finds that the Settlement is, in all respects, fair, reasonable and adequate to Class members. Accordingly, the Settlement shall be consummated in accordance with the terms and provisions of the Settlement Agreement.[1]

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[1] The Court has fully considered the *Girsh* factors and finds that, considered together, the factors overwhelming favor approval of the Class settlement. *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *see also In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 323 (3d Cir. 1998). As the Court indicated at the fairness hearing, every issue in this complex antitrust case has been vigorously litigated by both sides for over twelve years. Class Plaintiffs faced significant risks in taking the case to trial, which this Court has discussed in its opinions on dispositive motions and recent status conferences. This Court agrees with counsel's position, as discussed in the extensive briefing and supporting affidavits, that the Settlement Agreement is fair and reasonable for all Class members. The value of the settlement to the Class is confirmed by the fact that no members of the Class of identifiable, sophisticated business

5. The Court hereby approves the Plan of Allocation of the Settlement Fund as proposed by Class Counsel (the "Plan"), which was summarized in the Notice of Proposed Settlement. The Claims Administrator is directed to distribute the net Settlement Fund as provided in the Plan.

6. The Court has certified a Class consisting of "[a]ll persons or entities in the United States that purchased Neurontin from Pfizer at any time during the period of December 11, 2002 through August 31, 2008 and who have purchased generic gabapentin. Excluded from the Class are Defendants and each of their respective parents, employees, subsidiaries, affiliates, and franchisees, and all government entities."

7. Also excluded from the Class are CVS Pharmacy Inc., Caremark, L.L.C., Rite Aid Corporation, Rite Aid HDQTRS Corp., Walgreen Co., American Sales Co, Inc., HEB Grocery Co. LP, Safeway Inc., SuperValu Inc., and The Kroger Co., in their own right as direct purchasers of Neurontin from Pfizer and as assignees limited to their purchases of Neurontin from Class members.

8. The Court has found that the Class meets all the requirements of Fed. R. Civ. P. 23. The Class, made up of sophisticated business entities, had a full and fair opportunity to request exclusion at the time of class certification and, therefore, there is no reason for the Court to afford a new opportunity to individual Class members to request exclusion who had an earlier opportunity to request exclusion but did not do so.

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entities have objected, rather many have explicitly approved of the Settlement.

9. The Court has appointed Louisiana Wholesale Drug company, Inc., Meijer, Inc., and Meijer Distribution, Inc. as class representatives (the "Class Representatives").

10. The Court has found that Co-Lead Counsel, listed below, along with other Class Counsel, have fairly and adequately represented the interests of the Class and satisfied the requirements of Fed. R. Civ. P. 23(g):

Bruce E. Gerstein, Esq.
GARWIN GERSTEIN & FISHER LLP
88 Pine Street, 10th Floor
New York, NY 10005

Richard J. Kilsheimer, Esq.
KAPLAN FOX & KILSHEIMER LLP
850 Third Avenue, 14th Floor
New York, NY 10022

11. The following actions are hereby dismissed with prejudice, as provided in the Settlement Agreement, and without costs, except as provided for herein and in the Settlement Agreement:

- *Louisiana Wholesale Drug Company, Inc., et al. v. Pfizer, Inc. and Warner-Lambert,* No. 2:02-cv-01830-FSH (D.N.J.)
- *Meijer, Inc., et al. v. Pfizer, Inc. and Warner-Lambert*, No. 2:02-cv-02731 (D.N.J.)

12. Each of the foregoing dismissals shall become effective upon the date the Settlement becomes final in accordance with paragraph 4 of the Settlement Agreement.

13. Upon this Settlement becoming final in accordance with paragraph 4 of the Settlement Agreement, Defendants and their past, present and future parents, subsidiaries, divisions, affiliates, joint ventures, stockholders, officers, directors, management, supervisory

boards, insurers, general or limited partners, employees, agents, trustees, associates, attorneys and any of their legal representatives (and the predecessors, heirs, executors, administrators, successors and assigns of each of the foregoing) (the "Released Parties") are and shall be unconditionally, fully and finally released and forever discharged from all manner of claims, debts, obligations, demands, actions, suits, causes of action, damages whenever incurred, liabilities of any nature whatsoever, including costs, expenses, penalties and attorneys' fees, known or unknown, suspected or unsuspected, accrued in whole or in part, in law or equity, that Plaintiffs or any member or members of the Class (including any of their past, present or future officers, directors, insurers, general or limited partners, divisions, stockholders, agents, attorneys, employees, legal representatives, trustees, parents, associates, affiliates, joint ventures, subsidiaries, heirs, executors, administrators, predecessors, successors and assigns, acting in their capacity as such) (the "Releasors"), whether or not they object to the Settlement and whether or not they make a claim upon or participate in the Settlement Fund, ever had, now has, or hereafter can, shall or may have, directly, representatively, derivatively or in any other capacity, arising out of or relating in any way to any conduct alleged or asserted in any of Plaintiffs' complaints filed in this Class Action, relating to any alleged delay in the marketing, sale, manufacture, pricing, or purchase of, or the enforcement of intellectual property related to Neurontin or its generic equivalents, prior to the date hereof, except the Settlement does not release any claims between Plaintiffs, members of the Class and the Released Parties concerning product liability, breach of contract, breach of warranty or personal injury (the "Released Claims").

14. In addition, Plaintiffs and each Class member, on behalf of themselves and all

other Releasors, hereby expressly waive, release and forever discharge, upon the Settlement becoming final, any and all provisions, rights and benefits conferred by § 1542 of the California Civil Code, which reads:

> Section 1542. General Release; extent. A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor;

or by any law of any state or territory of the United States or other jurisdiction, or principle of common law, which is similar, comparable or equivalent to § 1542 of the California Civil Code. Each Class member may hereafter discover facts other than or different from those which he, she or it knows or believes to be true with respect to the claims which are the subject matter of this paragraph 13, but each Class member hereby expressly waives and fully, finally and forever settles, releases and discharges, upon this Settlement becoming final, any known or unknown, suspected or unsuspected, asserted or un-asserted, contingent or non-contingent claim that would otherwise fall within the definition of Released Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts. Each Class member also hereby expressly waives and fully, finally and forever settles, releases and discharges any and all claims it may have against any Released Party under § 17200, *et seq*, of the California Business and Professions Code or any similar, comparable or equivalent provision of the law of any other state or territory of the United States or other jurisdiction, which claims are expressly incorporated into the definition of Released Claims.

15. The releases set forth in paragraphs 13 and 14 of this Order shall not release any claims between Plaintiffs, Class members and the Released Parties concerning product liability,

breach of contract, breach of warranty, or personal injury.

16. Upon consideration of Class Counsel's petition for fees, costs and expenses, Co-Lead Counsel, on behalf of all counsel for the Class, are hereby awarded attorneys' fees in the amount of 33⅓% of the Settlement Fund and costs and expenses totaling $2,213,537.35, together with a proportionate share of the interest thereon from the date the funds are deposited in the Escrow Account until payment of such attorneys' fees, costs and expenses, at the rate earned by the Settlement Fund, to be paid solely from the Settlement Fund and only if and after the Settlement becomes final in accordance with paragraph 4 of the Settlement Agreement. Upon consideration of Class Counsel's petition for incentive payments for Plaintiffs in these actions, LWD and Meijer are each hereby awarded an incentive award in the amount of $100,000.00, to be paid solely from the Settlement Fund, and only if and after the Settlement becomes final in accordance with paragraph 4 of the Settlement Agreement. Co-Lead Counsel shall allocate and distribute such attorneys' fees, costs and expenses among the various Class Counsel that have participated in this litigation. Co-Lead Counsel shall distribute such incentive awards to the Plaintiffs as provided herein. The Released Parties (as defined in paragraph 10 of the Settlement Agreement) shall have no responsibility for, and no liability whatsoever with respect to, any payment or disbursement of attorneys' fees, expenses, costs or incentive awards among Class Counsel and/or Plaintiffs, or with respect to any allocation of attorneys' fees, expenses, costs or incentive awards to any other person or entity who may assert any claim thereto. The attorneys' fees, costs and expenses, and incentive award authorized and approved by this Final Judgment and Order shall be paid to Co-Lead Counsel within five (5) business days after this

Settlement becomes final pursuant to paragraph 4 of the Settlement Agreement and in accordance with the terms of the Settlement Agreement and the Escrow Agreement. The attorneys' fees, costs and expenses, and incentive awards authorized and approved by this Final Judgment and Order shall constitute full and final satisfaction of any and all claims that Plaintiffs and any Class member, and their respective counsel, may have or assert for reimbursement of fees, costs, and expenses, and incentive awards, and Plaintiffs and members of the Class, and their respective counsel, shall not seek or demand payment of any fees and/or costs and/or expenses and/or incentive awards from any source other than the Settlement Fund. The Court retains exclusive jurisdiction over the Settlement and the Settlement Agreement as described therein, including the award of attorneys' fees to Plaintiffs' Counsel, the reimbursement of expenses, the award of incentive payments to Plaintiffs, and the administration and consummation of the Settlement, and over this Final Judgment and Order.

17. The Court finds that this Final Judgment and order adjudicates all of the claims, rights and liabilities of the parties to the Settlement Agreement (including the members of the Class), and is final and shall be immediately appealable. Neither this Order nor the Settlement Agreement nor any other Settlement-related document shall constitute any evidence or admission of liability by Defendants or any other Released Party, nor shall either the Settlement Agreement or this Order or any other Settlement-related document be offered in evidence or used for any other purpose in this or any other matter or proceeding except as may be necessary to consummate or enforce the Settlement Agreement of the terms of this Order or if offered by any Released Party in responding to any action purporting to assert Released Claims.

18. Class Counsel for the Direct Purchaser Class Plaintiffs have moved for an award of attorneys' fees, reimbursement of expenses, and incentive awards for class representatives. (Doc. No. 749). Pursuant to Rule 23(h) of the Federal Rules of Civil Procedure, and pursuant to the factors for assessing the reasonableness of a class action fee request as set forth in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000), this Court makes the following findings of fact and conclusions of law with respect to Class Counsel's request for an award of attorneys' fees, reimbursement of expenses, and incentive awards for Class Representatives:

19. The Settlement of $190,416,438.36 million (the "Settlement Fund"), representing the agreed-upon $190 million plus 1% per annum interest that had accrued from March 14, 2014 (the date that the parties first orally agreed to the Settlement's terms) to June 2, 2014 (the date that defendants deposited such amount into an escrow account held in trust by UBS AG that is earning interest for the benefit of the Class), plus interest on the Settlement Fund from June 2, 2014, confers a monetary benefit on the Direct Purchaser Class that is substantial, both in absolute terms and when assessed in light of the risks of establishing liability and damages in this case. The Settlement was reached following negotiations held in good-faith and in the absence of collusion, with the aid of a highly-renowned mediator, over the course of three mediation sessions, covering six days.

20. The Court-approved Notice of Proposed Settlement of Class Action (Doc. No. 727) advised Class Members that Class Counsel intended to move for an award of attorneys' fees in an amount up to 33-1/3% of the gross Settlement Fund (including the interest accrued thereon), plus reimbursement of reasonable costs and expenses incurred in the prosecution of this action.

21. Class Counsel have moved for an award of attorneys' fees in the amount of 33-1/3% of the gross Settlement Fund (including the interest accrued thereon), plus reimbursement of reasonable costs and expenses incurred in the prosecution of this action, which such motion has been on the docket and publicly available since July 1, 2014.

22. In prosecuting this action, Class Counsel expended over 60,570 hours of uncompensated time, and incurred substantial out of pocket expenses, with no guarantee of recovery. Class Counsel's hours were reasonably expended in this complex case that was vigorously litigated for over twelve years, and their time was expended at significant risk of nonpayment.

23. No Class Members objected to Class Counsel's fee request. In fact, as described below, the reaction of the Class has been entirely positive and supportive of the Settlement generally and Class Counsel's requested fee award specifically.

24. The Settlement achieved for the benefit of the Direct Purchaser Class was obtained as a direct result of Class Counsel's skillful advocacy. This is confirmed by the entirely positive reaction of the Class Members to the Settlement and Class Counsel's request for a fee award of 33-1/3% of the Settlement. Outside antitrust counsel for the country's three largest pharmaceutical distributors, who made in excess of 70% of the branded and generic Neurontin purchases at issue in this case, wrote to the Court on behalf of their clients to express their clients' support for the Settlement and Class Counsel's request for an award of one-third of the Settlement amount. *See* Exhibits 2-4 to the Joint Declaration of Bruce E. Gerstein and Richard J. Kilsheimer in Support of Direct Purchaser Class Plaintiffs' Motions for Final Approval of Settlement and for

an Award of Attorneys' Fees, Reimbursement of Expenses and Incentive Awards to Class Representatives (the "Joint Declaration" or "Joint Decl.," Doc. No. 748-5) (Doc. Nos. 748-7 – 748-9) (letters to the Court from outside counsel to AmerisourceBergen Corporation, Cardinal Health, Inc., and McKesson Corporation). In addition, a number of other Class Members wrote directly to the Court stating their belief that Class Counsel's requested fees are justified in light of the time and expense that Class Counsel expended prosecuting and favorably resolving this complex litigation. *See* Exhibits 5-12 to the Joint Declaration (Doc. Nos. 748-9 – 748-17) (letters from Class Members Burlington Drug Company, Inc., Dakota Drug, Inc., Drogueria Betances, Inc., King Drug Company of Florence, Inc., Miami-Luken, Inc., Prescription Supply, Inc., J M Smith Corporation d/b/a Smith Drug Co., and Value Drug Co.). All of the above-mentioned Class Members who have written to the Court to express their support for the Settlement and Class Counsel's fee request account for approximately 93% of the purchases at issue in this litigation.

25. The "percentage-of-the-fund" method is the proper method for calculating attorneys' fees in common fund class actions in this Circuit. *See, e.g., In re Rite Aid Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005). The Court concludes that that the fees requested by Class Counsel are comparable to recent awards in similar cases in the Third Circuit and elsewhere, including direct purchaser class actions similarly alleging anticompetitive practices in the pharmaceutical industry.

26. The Court finds that Class Counsel's request for a 33-1/3% fee is consistent with what would have been negotiated for a contingent-fee case of this complexity. For example, the current and former presidents of class representative Louisiana Wholesale Drug Co., Inc. ("LWD")

attested that "had LWD retained the law firms and/or attorneys . . . to represent it in an individual action in this complex litigation, LWD would have retained these same attorneys based on a 33 1/3% contingency fee in the event of settlement or compromise without trial and/or based on a 40% contingency fee in the event of trial, with any applicable contingency fee percentage computed in addition to out-of-pocket expenses." Exhibit 13 to the Joint Decl., Declaration of Chad Gielen, President/Chief Executive Office of LWD, at ¶ 6, and Exhibit 14 to the Joint Decl., Declaration of Gayle White, former President and General Manager of LWD, at ¶ 3. Furthermore, the letters from the Class Members supporting Class Counsel's fee award is further evidence that the 33-1/3% fee award is consistent with what those entities would have assented to had they retained Class Counsel in private litigation.

27. As detailed in Class Counsel's affidavits, a one-third fee award would equate to a lodestar multiplier of approximately 1.99. The Court concludes that, based on recently-approved multipliers in other Third Circuit antitrust class actions alleging similar anticompetitive practices in the pharmaceutical market, the multiplier requested here is well within the acceptable range. *See, e.g., In re Flonase Antitrust Litigation*, 951 F. Supp. 2d 739, 750 (E.D. Pa. 2013) (approving 33 1/3% fee award of $150 million settlement that amounted to multiplier of 2.99).

28. In light of the factors and findings described above, the Court finds that the requested 33-1/3% fee award is within the applicable range of reasonable percentage fund awards.

29. The Court finds this fee award is reasonable pursuant to Federal Rule of Civil Procedure 23(h). The Court orders that Class Counsel request for attorneys' fees of 33-1/3% of the Settlement Fund, which equates to $63,472,146.12, plus one-third of the interest earned on the

Settlement Fund from June 2, 2014 (the date of funding of the Settlement Fund) to the date of payment, at the same net interest rate earned by the Settlement Fund, is granted.

30. Further, the Court orders that Class Counsel is awarded $2,213,537.35 out of the Settlement Fund to reimburse them for the expenses incurred in prosecution of this case, which such expenses the Court finds to be fair and reasonably incurred to achieve the benefits to the Direct Purchaser Class obtained by the Settlement.

31. Further, the Court orders payment of two incentive awards of $100,000 each for each of the Class Representatives – one incentive award of $100,000 to LWD and one incentive award to "Meijer", which consists of Meijer, Inc. and Meijer Distribution, Inc. (together, "Meijer") – for their active participation and assistance in the prosecution of this case, including responding to document requests and interrogatories, appearing for deposition and keeping apprised of the progress of the case, including settlement efforts. The Class Representatives' efforts contributed to the benefits conferred upon the Class through the Settlement. In addition, no Class Member has objected to the awarding of these incentive awards. Moreover, the three largest pharmaceutical distributors have specifically supported granting incentive awards in the requested amounts. *See* Exhibits 2-4 to the Joint Decl. (Doc. Nos. 748-7 – 748-9) (letters to the Court from outside counsel to AmerisourceBergen Corporation, Cardinal Health, Inc., and McKesson Corporation).

IT IS SO ORDERED.

Dated: 8-6-14

Hon. Faith S. Hochberg, U.S.D.J.

TAB 7B

Jonathan D. Clemente
CLEMENTE MUELLER, P.A.
222 Ridgedale Avenue
Cedar Knolls, NJ 07927
(973) 455-8008
Liaison Counsel for Direct Purchaser Class Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In re Neurontin Antitrust Litigation	**Master File No. 02-1390**
THIS DOCUMENT RELATES TO: **LOUISIANA WHOLESALE DRUG COMPANY, INC., MEIJER, INC. and MEIJER DISTRIBUTION, INC., on behalf of themselves and all others similarly situated,** **Plaintiffs,** **v.** **PFIZER, INC. and WARNER-LAMBERT CO.,** **Defendants.**	**Civil Action No. 02-1830** **Civil Action No. 02-2731**

MEMORANDUM OF LAW IN IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND INCENTIVE AWARDS FOR CLASS REPRESENTATIVES

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I. INTRODUCTION.

Class Counsel,[1] on behalf of Louisiana Wholesale Drug Company, Inc. ("LWD"), Meijer, Inc., and Meijer Distribution, Inc. (together, "Meijer")[2] and the Class[3] (LWD, Meijer and the Class collectively, "Plaintiffs"), respectfully submit this Memorandum of Law in Support of their Motion for an Award of Attorneys' Fees, Reimbursement of Expenses and Incentive Awards for the Class Representatives, under Federal Rules of Civil Procedure 23(h)(1) and 54(d)(2).

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[1] This Court designated the following law firms to serve as "Class Counsel" pursuant to Fed. R. Civ. P. 23(c)(1)(B) and 23(g): Garwin Gerstein & Fisher, LLP and Kaplan Fox & Kilsheimer LLP as Co-Lead Counsel; Clemente Mueller, P.A. as Liaison Counsel; and Odom & Des Roches, LLP, Smith Segura & Raphael, LLP (formerly The Smith Foote Law Firm), Sperling & Slater, P.C., and Berger & Montague, P.C., to serve as an Executive Committee in combination with Co-Lead counsel. Doc. No. 412 at ¶ 7. Heim, Payne & Chorush LLP served as patent counsel.

[2] This Court appointed LWD and Meijer as representatives of the Class (the "Class Representatives"). *Id.* at ¶ 6.

[3] On January 25, 2011, this Court certified a class (the "Class") consisting of:

> All persons or entities in the United States that purchased Neurontin from Pfizer at any time during the period of December 11, 2002 through August 31, 2008 and who have purchased generic gabapentin. Excluded from the Class are Defendants and each of their respective parents, employees, subsidiaries, affiliates, and franchisees, and all government entities.

Id. at ¶ 4. Also excluded from the Class are CVS Pharmacy Inc., Caremark, L.L.C., Rite Aid Corporation, Rite Aid HDQTRS Corp., Walgreen Co., American Sales Co, Inc., HEB Grocery Co. LP, Safeway Inc., SuperValu Inc., and The Kroger Co., in their own right as direct purchasers of Neurontin from Pfizer and as assignees limited to their purchases of Neurontin from Class members.

For a dozen years, Class Counsel have prosecuted this complex, hotly-contested antitrust class action (the "Action")[4] against Defendants Pfizer Inc. and Warner-Lambert Co. (together, "Defendants" or "Pfizer") on a wholly contingent basis, without any guarantee of success. In all, Class Counsel expended over 60,000 hours of uncompensated professional time and incurred over $2,213,537.35 in unreimbursed out-of-pocket expenses prosecuting this Action. Through its efforts, Class Counsel obtained a settlement (the "Settlement") in the amount of $190 million plus interest for the benefit of the Class (the "Settlement Fund").[5] This remarkable recovery was achieved as a result of Class Counsel's skill, competence, perseverance and diligence in the face of significant legal and factual hurdles during the course of litigation against vigorous and skillful opponents. As compensation for its efforts, Class Counsel seeks an award of attorneys' fees in the aggregate amount of 33⅓% of the total Settlement Fund, and reimbursement of litigation expenses in the amount of $ 2,213,537.35 and interest thereon. Class

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[4] This Action consolidated the cases *Louisiana Wholesale Drug Company, Inc., et al. v. Pfizer, Inc. and Warner-Lambert*, No. 2:02-cv-01830-FSH (D.N.J.) and *Meijer, Inc., et al. v. Pfizer, Inc. and Warner-Lambert*, No. 2:02-cv-02731 (D.N.J.).

[5] Pursuant to the terms of the Settlement, on June 2, 2014, Defendants deposited $190,416,438.36, representing the agreed-upon $190 million plus 1% per annum interest that had accrued since March 14, 2014 (the date that the parties first orally agreed to the terms of the Settlement), into an escrow account held in trust by UBS AG that is earning interest for the benefit of the Class. *See* Joint Decl. at ¶ 91.

Counsel also seeks incentive awards in the amount of $100,000 for each of the Class Representatives, LWD and Meijer, to compensate them for their extensive participation in this Action.

A detailed description of this Action, Class Counsel's work in achieving the Settlement, and the numerous and substantial risks that Class Counsel faced (and would have faced in the future absent the Settlement) are set forth in the accompanying Joint Declaration of Co-Lead Counsel Bruce E. Gerstein and Richard J. Kilsheimer (the "Joint Declaration" or "Joint Decl.").[6] That said, certain of this case's important and unique characteristics bear mention at the outset.

First and foremost, as a result of its experience with this Action, as well as its prior experience with *In re Remeron*,[7] this Court is already aware that the Action is unique. In a typical class action, a class's evaluation of counsel's efforts is limited to counsel's performance in that particular case. Here, the Class consists

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[6] Class Counsel submits, as Exhibits 19 through 31 of the Joint Decl., affidavits of the 10 individual firms (in addition to Co-Lead Counsel) that worked on this Action. These affidavits detail the professional experience and qualifications of each of these firms, the services each firm rendered, the hours each firm expended, and the expenses incurred by each firm.

[7] *In re Remeron* was another Hatch-Waxman direct purchaser antitrust class action litigated in this Court by many of the same firms that comprise Class Counsel here.

of approximately 45 national and regional pharmaceutical resellers. The core of the Class – a group of sophisticated business entities that made approximately 93% of all Class purchases in this case – have been class members in a series of Hatch-Waxman antitrust cases (most of which were prosecuted by the same Class Counsel as here) that challenged conduct that allegedly impeded generic competition. These core Class members have closely monitored the work of Class Counsel in this case, as they have in other cases.

The Class Representatives, the "Big 3" national wholesalers (consisting of Cardinal Health, Inc., McKesson, Inc. and AmerisourceBergen Co.) and 11 regional wholesalers, all of whom collectively made approximately 93% of all Class purchases in this case, have expressed their support for Class Counsel's requests for attorneys' fees of one-third of the Settlement Fund and expense reimbursement. *See* Exhibits 2 through 16 to the Joint Decl. These Class members recognize the legal hurdles and risks involved in this twelve-year-old case, the extraordinary results obtained, and Class Counsel's superior efforts in obtaining those results. As this Court has recognized, the percentage fee requested by Class Counsel "should approximate the fee that would be negotiated if the lawyer were offering his or her services in the private marketplace." *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-0085 (FSH), 2005 U.S. Dist. LEXIS 27013, at, at *46 (D.N.J. Nov. 9, 2005) (Hochberg, J.). Given the affirmative support by

these Class members for Class Counsel's fee request, the Court need not speculate on this issue.

Second, this Action has been vigorously fought, both by Class Counsel and Defendants' highly-respected counsel. Besides the typical motion to dismiss and summary judgment battles, this case also included (1) protracted disputes regarding Defendants' privilege logs (which, ultimately, required the involvement of a Special Master), *see* Joint Decl. at ¶¶ 38-40; (2) litigation of Plaintiffs' two motions designed to obtain discovery on the basis of the crime-fraud exception (which also required the involvement of a Special Master), *see* Joint Decl. at ¶¶ 41-46; and (3) Defendants' failure to provide, on multiple occasions, an appropriate Rule 30(b)(6) witness on issues relating to the illegal marketing of Neurontin for off-label uses and the factual bases for Defendants' denials concerning their promotion of Neurontin for off-label uses in their Answer in this case, which led to Plaintiffs' partially-successful motion for sanctions, adjudicated by a Magistrate Judge and the Court (on appeal), *see* Joint Decl. at ¶¶ 47-57. Not surprisingly, the prosecution of this Action required Class Counsel to expend tens of thousands of hours doing sophisticated legal work, and to incur millions of dollars in as-yet unreimbursed out-of-pocket expenses.

Third, this Action was atypically and exceptionally complicated. It raised a multitude of difficult and complicated factual and legal matters regarding highly-

technical subjects. Plaintiffs alleged that Defendants, among other things, improperly maintained their exclusivity for Neurontin by delaying generic competition through an overarching, multi-faceted scheme over a ten-year period that included a host of interrelated acts. Plaintiffs' case required an understanding of all of the complicated details involved in a multi-year overall scheme. In turn, Defendants presented sophisticated defenses to each aspect of Plaintiffs' case, including that Plaintiffs would be unable to establish causation; namely, whether the cause of the delay in generic entry was due to Pfizer's alleged scheme (which Defendants denied), or rather was the result of actions unrelated to Defendants' conduct. Embracing this case's complexity, Class Counsel retained and worked closely with expert witnesses in such varied fields as antitrust economics, patent prosecution and chemistry, and dove into extensive discovery of facts surrounding all elements and defenses.

In light of the above (and as explained in further detail below), the reasonableness of Class Counsel's "percentage-of-recovery" fee request is strongly supported by analyses of the "*Gunter* factors" derived from *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 193 (3d Cir. 2000) and the relevant factors outlined in *In re Prudential Ins. Co. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 338-40 (3d Cir. 1998) (the "*Prudential* factors"). Additionally, a "lodestar cross-check" confirms the reasonableness of Class Counsel's requested fee. *See Gunter*, 223

F.3d at 195 n.1. Because Class Counsel's unreimbursed expenses were incidental and necessary to representation of the Class, and were reasonably expended to prosecute this Action, this Court should also approve Class Counsel's request for reimbursement of such expenses. *See Remeron*, 2005 U.S. Dist. LEXIS 27013, at *48-49.

Additionally, Class Counsel seeks incentive awards of $100,000 for each of the Class Representatives, LWD and Meijer.[8] Given that each Class Representative participated actively throughout the twelve years of this litigation, including, among other things, responding to multiple discovery requests, appearing at depositions, and regularly communicating with Class Counsel concerning the progress of the litigation and settlement negotiations, this Court should approve such awards.

II. HISTORY OF THE LITIGATION.

A. Nature of the Claims.

Plaintiffs are direct purchasers of Defendants' brand-name drug, Neurontin, which was initially approved by the FDA for the treatment of epilepsy. Plaintiffs filed this Action in 2002 and alleged that Defendants maintained and enhanced their monopoly power with respect to Neurontin (also known by its generic name,

[8] Plaintiffs Meijer, Inc. and Meijer Distribution, Inc. (together referred to as "Meijer") would, pursuant to Class Counsel's request for incentive rewards, *together* receive one incentive award of $100,000, if allowed by the Court.

gabapentin) in violation of the Sherman Act, 15 U.S.C. § 2. Among other things, Defendants allegedly delayed generic competition for Neurontin through an overarching, multi-faceted scheme that included illegal off-label promotion, manipulation of the patent application process, violation of Hatch-Waxman Act procedures, repeated filing and maintenance of sham patent suits, and perpetration of fraud on the courts hearing those cases. Defendants' alleged conduct delayed the market entry of less expensive generic versions of Neurontin, thereby forcing members of the Class to pay artificially inflated prices for Neurontin and/or its AB-rated generic equivalents. *See* Joint Decl. at ¶ 3, 67(b).

Defendants denied Plaintiffs' allegations and asserted a number of defenses. *See* Joint Decl. at ¶¶ 16, 65-66. Having ruled on extensive cross-motions for summary judgment, this Court is quite familiar with the parties' factual and legal positions.

B. Class Counsel's Litigation Efforts.

The team assembled by Class Counsel (drawn primarily from the firms listed in footnote 1 above) includes lawyers from some of the preeminent antitrust law firms in the country.[9] These firms have over fifteen years of extensive experience

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[9] In addition to the firms listed in footnote 1 above, other firms that participated in the prosecution of this case on behalf of the Class have submitted affidavits in support of Class Counsel's motion, which are appended as Exhibits 27 through 31 to the Joint Declaration.

prosecuting and trying Hatch-Waxman antitrust cases on behalf of the same core class of direct purchasers, and have been involved in many of the critical decisions made by various courts in this emerging area of antitrust law. *See* Joint Decl. at ¶ 113. Class Counsel took advantage of each firm's particular area of expertise to litigate this case in the most effective and efficient manner possible. *See* Joint Decl. at p. 3.

1. Discovery and Related Disputes.

Prior to filing the first class action on March 26, 2002, Class Counsel undertook an exhaustive investigation of the facts and law giving rise to the claims alleged. This investigation included monitoring various patent infringement litigations filed by Defendants against manufacturers of generic Neurontin and investigating Defendants' efforts to block or delay the entry of generic Neurontin. *See* Joint Decl. at ¶¶ 1-3. In the subsequent process of preparing an amended complaint, Class Counsel reviewed, analyzed, and marshalled facts from, millions of pages of documents produced in the patent infringement litigations, as well as hearing transcripts, plea agreements and information released to the public as part of criminal proceedings related to Defendants' illegal off-label promotion. *See* Joint Decl. at ¶¶ 12-15.

After defeating Defendants' motion to dismiss, Class Counsel conducted substantial fact and expert discovery. *See* Joint Decl. at ¶¶ 16-27, 31-37. During

this lengthy and hotly-contested litigation, Class Counsel, among other things, (1) drafted and served comprehensive document requests, interrogatories and requests for admission, as well as subpoenas directed to multiple third parties; (2) obtained and analyzed millions of pages of documents received from Defendants and third parties; (3) objected to Defendants' discovery requests and worked with the Class Representatives to respond and to prepare and defend Rule 30(b)(6) witnesses at deposition; (4) took a leading role in identifying fact witnesses from Defendants and non-parties, and then took a leading or substantial role in more than 40 fact depositions, including negotiating, arranging for, and taking a third-party deposition outside of the United States; (5) retained and worked closely with expert witnesses in such varied fields as antitrust economics, patent prosecution and chemistry, who provided analysis and testimony in support of Plaintiffs' claims and to rebut Defendants' defenses, including the preparation for, and defense of, such experts' depositions; (6) responded to, and took depositions of, experts retained by Defendants on a wide variety of issues; and (7) litigated and argued multiple important discovery disputes before the Court, including (a) protracted disputes regarding Defendants' privilege logs, (b) two motions to obtain discovery on the basis of the crime-fraud exception, (c) a motion for sanctions, which was renewed multiple times, related to Defendants' failure to produce an adequate Rule 30(b)(6) witness on issues related to Pfizer's illegal marketing of

Neurontin for off-label uses, and (d) motion practice relating to the admissibility of, and production of discovery regarding settlements of the patent infringement actions. *See* Joint Decl. at ¶¶ 22-23, 31-57, 76.

2. Motion Practice.

On April 1, 2008, Defendants' moved to dismiss Plaintiffs' amended complaint on a variety of grounds. Class Counsel researched and developed responsive arguments and drafted a brief in opposition. On August 28, 2009, the Court denied Defendants' motion to dismiss, holding that Plaintiffs had sufficiently alleged an overall anticompetitive scheme, rejecting Defendants' attempts to bind the Court with opinions and statements from the related patent infringement litigation, and noting that Plaintiffs' amended complaint raised myriad factual issues that could not be resolved at that stage of the case. *See* Joint Decl. at ¶¶ 16-18.

Class Counsel also played the lead role in obtaining class certification. Working closely with Plaintiffs' expert, Dr. Gary French, Class Counsel conducted extensive document analyses to support Plaintiffs' claims of class-wide impact and to rebut Defendants' defenses to class certification, and submitted the requisite motion and briefing, including a trial plan. *See* Joint Decl. at ¶¶ 58-61. On January 25, 2011, the Court granted Plaintiffs' motion for class certification and certified the Class. *See* Doc. No. 412.

At the summary judgment stage, Plaintiffs moved for partial summary judgment on two related issues: (a) Pfizer's monopoly power in the market for gabapentin prior to generic entry and (b) Pfizer's improper maintenance of that monopoly power. Plaintiffs also moved for an order that Defendants be collaterally estopped from relitigating certain findings from the government's criminal action related to Defendants' off-label marketing and related litigations. Defendants, too, moved for summary judgment with respect to all of Plaintiffs' claims, asserting a variety of arguments. Class Counsel's extensive efforts, including researching and briefing the motions and opposition, as well as working with Defendants' counsel to draft, revise and submit a joint statement of undisputed material facts, were, on the whole, successful. On August 8, 2013, the Court denied Defendants' motion for summary judgment (which put the case on a course for trial) and, though it also denied Plaintiffs' motion for partial summary judgment, granted Plaintiffs' request for collateral estoppel with respect to several key findings. *See* Joint Decl. at ¶¶ 64-71.

Plaintiffs also moved, pursuant to *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993), to exclude the opinions of several of Defendants' experts. Preparation of these motions involved considerable effort on Class Counsel's part, including thorough review of those experts' opinions, prior testimony and publications. Plaintiffs also filed oppositions to Defendants' *Daubert* motions

that sought to exclude certain opinions offered by Plaintiffs' experts. These *Daubert* motions were still pending as of the time the parties reached agreement to settle in March 2014. *See* Joint Decl. at ¶¶ 77-78.

3. Trial Preparation.

Following the Court's August 8, 2013 summary judgment decision, Class Counsel began to prepare for trial. In the roughly seven months between the Court's summary judgment decision and Class Plaintiffs' signing of an agreement settling the class action, Class Counsel engaged in final preparations for trial, including drafting motions *in limine*; identifying trial exhibits; devising a chronological ordering of fact and expert witnesses; designating deposition testimony for likely non-live witnesses; preparing cross-examinations for likely live witnesses; working on opening statements; creating demonstratives; and attending to all the other details of preparing for trial. As part of its trial preparation, Class Counsel retained a nationally-known jury consultant and, over two days in December 2013, presented to focus groups made up of members of the prospective jury pool from northern New Jersey. Class Counsel devoted significant time preparing for these focus groups, which were convened to test different case theories and means of presentation. Class Counsel carefully reviewed the report produced by the jury consultant, and took its

recommendations into account as trial preparations proceeded. *See* Joint Decl. at ¶ 79.

4. Mediation.

Class Counsel prepared for, and participated in, mediation sessions (in December 2010, February 2013 and February/March 2014) conducted by Eric Green, a well-respected mediator with extensive experience mediating settlements in pharmaceutical cases. For certain of these mediation sessions, Class Counsel prepared detailed mediation statements for Professor Green and delivered live presentations for both Professor Green and the Defendants that outlined key theories and supporting evidence.

Besides serving as a mediator, Professor Green is a well-respected authority on evidence, having written many books and articles on the subject. He also teaches several courses at Boston University School of Law. Throughout the mediation sessions, Professor Green probed both parties regarding the legal and evidentiary weaknesses in their cases. Familiar with Professor Green and his methods, Class Counsel knew that it was necessary to be well-prepared to respond with vigorous and well-supported advocacy, as well as with intimate knowledge of all aspects of the case.

Representatives from LWD and Meijer traveled to New York to attend and participate in the mediation session held in December 2010, and Class Counsel was

in close communication with key decision-makers at LWD and Meijer during all mediation sessions and settlement discussions.

III. ARGUMENT.

A. Class Counsel's Fee Request Is Reasonable.

1. The Percentage-of-Recovery Method is the Appropriate Method for Calculating Attorneys' Fees in This Case

The Supreme Court has long recognized that a lawyer who recovers a "common fund" on behalf of a class is entitled to reasonable attorneys' fees and expenses from the fund. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). In common fund cases, it is appropriate for attorneys' fees to be determined "based on a percentage of the fund bestowed upon the class." *Blum v. Stenson*, 465 U.S. 886, 930 n.16 (1984).

The Third Circuit has stated a preference for the use of the "percentage-of-recovery" method in determining fees. *See, e.g., In re AT&T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006) (noting that "the percentage-of-recovery method is generally favored [in common fund cases] because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure") (citations and internal quotations omitted); *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 330 (3d Cir. 2011) (*en banc*) (citations omitted). Among other reasons, courts generally favor this method because:

> The percentage method directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient

> prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system. The percentage approach is also the most efficient means of rewarding the work of class action attorneys, and avoids the wasteful and burdensome process – to both counsel and the courts – of preparing and evaluating fee petitions, which the Third Circuit Task Force described as "cumbersome, enervating, and often surrealistic."

In re Lloyd's Am. Trust Fund Litig., 96 Civ. 1262 (RWS), 2002 U.S. Dist. LEXIS 22663, at *74 (S.D.N.Y. Nov. 26, 2002) (quoting *Court Awarded Attorney Fees, Report of the Third Cir. Task Force*, 108 F.R.D. 237, 258 (3d Cir. 1985).)

2. Application of the Third Circuit's Reasonableness Factors Supports the Requested Fee Here.

Class Counsel's fee request is consistent with applicable law. The Third Circuit has identified ten factors for district courts to consider when applying the percentage-of-recovery method and considering the reasonableness of a request for attorney's fees. The first seven factors – the *Gunter* factors – derive from *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 193, 195 n.1 (3d Cir. 2000):

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

These *Gunter* factors "need not be applied in a formulaic way. Each case is different, and in certain cases, one factor may outweigh the rest." *Gunter*, 223 F.3d at 195 n.1.

The remaining three potentially relevant factors considered by courts weighing the reasonableness of fee requests – the *Prudential* factors – derive from *In re Prudential Ins. Co. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 338-40 (3d Cir. 1998): (1) the value of benefits accruing to class members that are attributable to the efforts of class counsel as opposed to other groups, such as government agencies conducting investigations; (2) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement; and (3) any "innovative" terms of settlement. Because each case is different, these factors "need not be applied in a formulaic way" or be given the same weight. *AT&T*, 455 F.3d at 166 (quotation omitted)

Analyses of these factors strongly supports approval of Class Counsel's requested fee.

a. The Size of the Fund Created and the Number of Class Members Benefitted Favors the Requested Fee Award.

The Settlement provides a significant recovery for the Class, which is comprised of approximately 45 members that will share in the $190 million plus interest, net of any attorneys' fees, expenses, and incentive awards granted by the

Court. Upon the Settlement becoming final, the only thing Class members will need to do in order to receive their *pro rata* share of the net Settlement Fund is to submit a claim form that will be made available to them via multiple sources, including direct mailing. Accordingly, the recovery is both substantial and immediate. *See In re Relafen Antitrust Litig.*, No. 01-12239-WGY, 2004 U.S. Dist. LEXIS 28801, at *19 (D. Mass. Apr. 9, 2004) (multi-million dollar cash settlement fund for direct purchasers of prescription drug conferred a substantial benefit on the class).

Additionally, the magnitude of this recovery is substantial – both in absolute terms and, particularly, when assessed in light of the significant obstacles and risks faced by Class Counsel in this case. *See In re Ins. Brokerage Antitrust Litig*., 282 F.R.D. 92, 105 (D.N.J. 2012) ($41 million settlement represented a reasonable and adequate settlement for the class in view of the "substantial risks" plaintiffs faced and the "immediate benefits" provided by the settlement). Indeed, absent the Settlement, Class Counsel would have to win a favorable jury verdict in the face of the numerous defenses raised by Defendants and their able counsel. *See* Joint Decl. at ¶¶ 84-87. As in any case, receipt of a favorable jury verdict would be uncertain. And, even if Class Counsel succeeded in obtaining a favorable jury verdict, given the size and complexity of the case, Defendants would likely appeal any such verdict – perhaps even multiple times (*e.g.*, motions for reconsideration,

rehearing *en banc* and potentially *certiorari*). Upholding a verdict through such appeals would be an obstacle to Class Counsel's ability to obtain any recovery for the Class.

Accordingly, analysis of this *Gunter* factor supports Class Counsel's fee request.

b. The Overwhelming Class Support and Absence of Objections To Date Favor Awarding the Fees Requested by Counsel

The overwhelmingly favorable response of the Class strongly militates in favor of approval of Class Counsel's fee request. The Third Circuit has recognized that the lack of objection to a fee request and positive view of Class Counsel's efforts, particularly from sophisticated class members, is highly relevant to an evaluation of the fairness of a fee request. *See, e.g.*, *In re Rite Aid Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) (fact that a number of class members were "'sophisticated' institutional investors that had considerable financial incentive to object had they believed the fees were excessive" was a factor supporting the requested fee) (citation omitted).

As described above, in the wake of the dissemination of detailed notice describing the Settlement, Class members have overwhelmingly *affirmatively supported* the Settlement and Class Counsel's requests for fees, expense reimbursement and incentive awards. Indeed, core Class members who made

approximately 93% of the purchases at issue in this case (entitling them to a like percentage of the Settlement Fund, net of fees, costs, and incentive awards) have written to this Court to support the Settlement and Class Counsel's one-third fee request. *See* Exhibits 19 through 31 to Joint Decl.

Furthermore, though the period for lodging objections does not expire until July 17, 2014, not a single Class member has objected to date.[10] This is particularly significant because the Class consists of sophisticated businesses that possess both the incentive and the knowledge to object if they believed that Class Counsel's requests are inappropriate. The lack of any objection, particularly in a class that consists of sophisticated entities, is a "rare phenomenon," *see Rite Aid*, 396 F.3d at 305 (citation and internal quotation omitted), and strongly supports the requested fee.

Thus, analysis of this *Gunter* factor favors the reasonableness of the fee request.

c. Class Counsel Are Skilled in Antitrust Class Actions and Efficiently Resolved this Protracted Case.

Class Counsel's skill and efficiency supports the fee request here. Many of the firms that comprise Class Counsel are among the preeminent antitrust firms in

[10] In the event that any objection is received, Class Counsel will promptly inform the Court.

the United States, with decades of experience prosecuting and trying complex antitrust actions. *See* Joint Decl. at ¶ 112. These firms have a particular expertise in litigating Hatch-Waxman pharmaceutical antitrust cases on behalf of direct purchasers, having litigated such cases for over fifteen years on behalf of the core class of such direct purchasers. This experience enables each law firm involved to specialize in particular areas of expertise, thus providing Class Counsel with the ability to quickly and efficiently coordinate, organize, and implement litigation strategies. *See* Joint Decl. at p. 3; ¶ 112.

"The skill and efficiency of the attorneys involved is measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel." *Chemi v. Champion Mortg.*, No. 2:05-cv-1238 (WHW), 2009 U.S. Dist. LEXIS 44860, at *31 (D.N.J. May 26, 2009) (citation and internal quotations omitted). Class Counsel's experience and skill is evidenced by their effective prosecution of this case, including the highly favorable Settlement achieved.[11]

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[11] In *Remeron*, a Hatch-Waxman case involving many of the same lawyers comprising Class Counsel here, this Court noted that "[t]he settlement entered with Defendants is a reflection of Class Counsel's skill and experience." *Remeron*, 2005 U.S. Dist. LEXIS 27013, at *37.

Additionally, the Court should consider the quality of defense counsel when evaluating Class Counsel's work. *See, e.g., In re Schering-Plough Corp.*, 2013 U.S. Dist. LEXIS 147981, *71 (D.N.J. Aug. 28, 2013); *Hall v. AT&T Mobility LLC*, 2010 U.S. Dist. LEXIS 109355, at *64 (D.N.J. Oct. 13, 2001). Over the course of this case, Pfizer has been represented by some of the country's leading law firms: Kaye Scholer LLP; Skadden, Arps, Slate, Meagher & Flom, LLP; Paul, Weiss, Rifkind, Wharton & Garrison LLP; and Drinker Biddle & Reath, LLP. Achieving such a successful result for the Class when faced by such capable defense counsel further demonstrates Class Counsel's skill.

Accordingly, analysis of this *Gunter* factor weighs in favor of Class Counsel's fee request.

d. The Complexity and Duration of the Litigation Favors the Requested Fee Award.

In evaluating a fee award, the complexity and duration of the litigation is a factor to be considered by the court. *See Gunter*, 223 F.3d at 195 n.1. "An antitrust class action is arguably the most complex action to prosecute." *In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000). *See also In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 743 (E.D. Pa. 2013) ("Antitrust class actions are particularly complex to litigate and therefore quite expensive"). And this twelve-year old case is no exception.

This case raised many complex legal and factual issues regarding highly-technical subjects. Among other things, Plaintiffs' case required an understanding of the complicated details involved in a multi-year overall scheme that consisted of myriad components that, at first blush, might appear disparate and unrelated. Additionally, as evidenced by Defendants' motion for summary judgment, Defendants presented sophisticated defenses to each aspect of Plaintiffs' case that the Class had to overcome in order to succeed. Indeed, Defendants asserted that Plaintiffs could not prove the existence of monopoly power, exclusionary conduct, or causation. Accordingly, the complexity and duration of this twelve-year litigation supports the requested fee. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d at 305.

Analysis of this *Gunter* factor therefore favors approval of Class Counsel's fee request.

e. The Risk of Nonpayment Favors Approval of Class Counsel's Fee Request.

Class Counsel achieved the $190 million plus interest Settlement despite facing the significant risk that they would receive no compensation whatsoever for the hard work and long hours, as well as the millions of dollars in cash outlays, expended litigating this Action. Class Counsel represented the Class Representatives and the Class entirely on a contingency fee basis, with no up-front retainer fees or allowance for expenses. And, despite devoting over 60,570 hours

prosecuting this case, Class Counsel received no compensation during the course of this litigation. *See, e.g., In re Fasteners Antitrust Litig.*, No. 08-md-1912, 2014 U.S. Dist. LEXIS 9993, at *15 (E.D. Pa. Jan. 27, 2014) (noting that "Plaintiffs' Counsel undertook this case on a purely contingent fee basis, and that this poses a significant risk of not being paid or reimbursed for the costs of litigating the case").

A determination of a fair fee must include consideration of the characteristics of contingent antitrust actions, including the uncertain nature of the fee, the wholly contingent outlay of large out-of-pocket sums by class counsel, and the fact that the risk of failure (and thus nonpayment) in an antitrust case may be extremely high. *See, e.g., Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, No. 03-4578, 2005 U.S. Dist. LEXIS 9705, at *37-40 (E.D. Pa. May 20, 2005) (risk of overcoming *Noerr-Pennington* defense, among others defenses, "favors approval of the percentage of recovery requested as a fee in this case"). In *Gunter*, the Third Circuit noted the "stated goal in percentage fee-award cases of ensuring that competent counsel continue to be willing to undertake risky, complex and novel litigation." *Gunter*, 223 F.3d at 198 (citations and internal quotation omitted). Indeed, attorneys' risk is a critical factor in determining an appropriate fee award. *See, e.g., Schering-Plough*, 2013 U.S. Dist. LEXIS 147981, at *79-80 ("Plaintiffs' Counsel undertook this Action on a purely contingent fee basis,

assuming an enormous risk that the litigation would yield potentially little, or no, recovery and leave them uncompensated for their significant investment of time and very substantial expenses. This Court and others have consistently recognized that this risk is an important factor favoring an award of attorneys' fees.") (citation omitted).

The risks of non-recovery were abundant from the outset of this Action, as Class Counsel expended tens of thousands of hours and millions of dollars in out-of-pocket expenses investigating the Class's claims, taking extensive discovery, retaining and working with experts, briefing numerous motions, and preparing for trial. *See* Joint Decl. at ¶ 113. Moreover, Defendants' counsel vigorously asserted defenses to each element of the Class's claims. Success in complex litigation is highly unpredictable. As one court observed in another antitrust class action: "It is known from past experience that no matter how confident one may be of the outcome of the litigation, such confidence is often misplaced." *West Virginia v. Chas. Pfizer & Co.,* 314 F. Supp. 710, 743-44 (D.C.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971).

These risk considerations have particular application to complex Hatch-Waxman antitrust cases, where several cases litigated by the same Class Counsel as here have been unsuccessful and have yielded no recovery, even after expending thousands of hours in time and millions of dollars in expenditures.

Accordingly, the substantial risks of non-payment assumed by Class Counsel in order to achieve the Settlement for the benefit of the Class support the fee requested.

f. The Significant Time Devoted by Class Counsel Supports Approval of the Requested Fee Award.

Plaintiffs' Counsel expended 60,572.12 hours litigating this twelve-year case, and have advanced out-of-pocket outlays of $2,213,537.35 in that effort to date. *See* Joint Decl. at ¶ 113. As a court in this district has observed, "[o]ver the course of years, it is reasonable that so much time would have been spent on these complex cases, particularly given the excellent counsel of Defendants and their contested nature." *Varacallo v. Massachusetts Mut. Life Ins. Co.*, 226 F.R.D. 207, 253 (D.N.J. 2005). Such was the case here. From the pre-complaint investigation through comprehensive trial preparation, Class Counsel expended an enormous amount of time, energy and resources on this case. *See* Joint Decl. at ¶¶ 1-79.

Moreover, Class Counsel will likely continue to work a significant number of hours in connection with administering the Settlement and carrying out the Plan of Allocation. *See Varacallo*, 226 F.R.D. at 253 (fee award will be sole compensation for counsel "despite the continuing responsibilities [counsel] will have in responding to Class Member inquiries…").

Analysis of this *Gunter* factor therefore supports the reasonableness of the fee request.

g. Plaintiffs' Counsel's Fees are Comparable to Awards in Similar Cases.

A comparison of Class Counsel's fee request with attorneys' fees awarded in similar cases, *see Gunter*, 223 F.3d at 198-99; *Rite Aid*, 396 F.3d at 303, supports the instant fee request. Indeed, Class Counsel's requested fee is consistent with awards granted in the most analogous cases previously settled – other complex Hatch-Waxman antitrust class action cases brought by classes of direct purchasers (that overlap substantially with the Class here) alleging impeded generic entry – as the following chart indicates:

Case	Fee Award
Meijer, Inc. v. Abbott Labs., No. C07-5985 CW (N.D. Cal. Aug. 11, 2011)	33⅓% of $52 million settlement
In re Nifedipine Antitrust Litig., No. 03-mc-223-RJL (D.D.C. Jan. 31, 2011)	33⅓% of $35 million settlement
In re Oxycontin Antitrust Litig., 04-md-1603-SHS (S.D.N.Y. Jan. 25, 2011)	33⅓% of $16 million settlement
In re Tricor Direct Purchaser Antitrust Litig., No. 05-cv-340 (D. Del. April 23, 2009)	33⅓% of $250 million settlement
In re Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013 (D.N.J. Nov. 9, 2005)	33⅓% of $75 million settlement
In re Terazosin Hydrochloride Antitrust Litig., No. 99-MDL-1317, 2005 U.S. Dist. LEXIS 43082 (S.D. Fla. Apr. 19, 2005)	33⅓% of $74 million settlement
In re Relafen Antitrust Litig., No. 01-12239, 2004 U.S. Dist. LEXIS 28801	33⅓% of $175 million settlement

(D. Mass. April 9, 2004)	
In re Buspirone Antitrust Litig., No. 01-CV-7951, 2003 U.S. Dist. LEXIS 26538 (S.D.N.Y. April 11, 2003)	33⅓% of $220 million settlement
In re Cardizem CD Antitrust Litig.,MDL No. 1278 (E.D. Mich. Nov. 26, 2002)	30% of $110 million settlement

The percentage requested in this case –33[1]/3% of the total $190 million (plus interest) Settlement – is consistent with these fee awards.

Additionally, district courts in the Third Circuit have consistently awarded fees similar to Class Counsel's request. *See, e.g., Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 150 (E.D. Pa. 2000) ("the award of one-third of the fund for attorneys' fees is consistent with fee awards in a number of recent decisions within this district"). Indeed, a one-third fee from a common fund has been found to be typical by several courts that have undertaken surveys of awards within the Third Circuit, as well as other circuits. *See, e.g., In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 735 (E.D. Pa. 2001) (review of 289 settlements demonstrates "average attorney's fees percentage [of] 31.71%" with a median value that "turns out to be one-third"); *Remeron*, 2005 U.S. Dist. LEXIS 27013, at *42-43 (collecting cases); *Brumley v. Camin Cargo Control, Inc.*, Nos. 08-1798 (JLL), 10-2461 (JLL), 09-6128 (JLL), 2012 U.S. Dist. LEXIS 40599, *36 (D.N.J. Mar. 26, 2012) ("Counsel's request for one-third of the settlement fund falls within the

range of reasonable allocations in the context of awards granted in other, similar cases").

Accordingly, analysis of this *Gunter* factor weighs in favor of approval of Class Counsel's fee request.

h. The Benefits of the Settlement to the Class Are Attributable to the Efforts of Class Counsel.

The Third Circuit has suggested that, in evaluating a fee request, it "may be relevant and important to consider" whether the benefits of the Settlement were attributable to the efforts of others, such as government investigators, rather than class counsel. *AT&T*, 455 F.3d at 165 (citing *Prudential*, 148 F.3d at 338). Here, the benefits of the Settlement are directly attributable to the efforts of Class Counsel, rather than a separate antitrust investigation or litigation. No government agency investigated whether, or brought a proceeding alleging that, Pfizer had violated the antitrust laws by illegally extending their monopoly over Neurontin. And although the Department of Justice investigated Defendants' off-label promotion, and ultimately Defendants pled guilty to engaging in such illegal conduct, *see* Joint Decl. at ¶ 13, that conduct was only one element of Defendant's overall anticompetitive scheme. No government entity (or any other entity, for that matter) compiled the evidence of the overarching scheme that Plaintiffs alleged here. In short, there was no government agency investigating or litigating this case for the benefit of the Class.

Accordingly, application of this *Prudential* factor supports Class Counsel's fee request.

i. The Percentage Fee Requested Is Consistent With The Fee That Would Have Been Negotiated If The Case Had Been Subject To A Private Contingent Fee Agreement

The percentage fee requested by Class Counsel is consistent with the fee that would have been negotiated had this case been subject to a private contingent fee arrangement. *See, e.g., AT&T*, 455 F.3d at 165 (citing *Prudential*, 148 F.3d at 338). "The percentage-of-the-fund method of awarding attorneys' fees in class actions should approximate the fee that would be negotiated if the lawyer were offering his or her services in the private marketplace." *Remeron*, 2005 U.S. Dist. LEXIS 27013, at *46. In *In the Matter of Continental Illinois Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (Posner, C.J.), the court explained that:

> The object in awarding a reasonable attorney's fee . . . is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation, had one been feasible. In other words the object is to simulate the market where a direct market determination is infeasible.

Indeed, the 33[1]/3% requested fee is "consistent with a privately negotiated contingent fee in the marketplace." *Hall*, 2010 U.S. Dist. LEXIS 109355, at *71. "Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class commercial litigation." *Remeron*, 2005 U.S. Dist. LEXIS 27013, at *46. *See also In re Orthopedic Bone Screw Prods. Liab. Litig.*, No. 97-

381, 2000 U.S. Dist. LEXIS 15980, at *29 (E.D. Pa. Oct. 23, 2000) (noting that "plaintiffs' counsel in private contingency fee cases regularly negotiate agreements providing for thirty to forty percent of any recovery").

Here, the Class Representatives, LWD and Meijer, have independently represented that, had they individually retained certain members of Class Counsel to represent them in this complex litigation, they would have engaged counsel based on a one-third contingency fee. *See* Declaration of Gayle White at ¶3, attached as Exhibit 15 to the Joint Decl.; Declaration of Chad Gielen at ¶5, attached as Exhibit 14 to the Joint Decl.; Declaration of Cynthia Rogowski at ¶ 4, attached as Exhibit 16 to the Joint Decl.

Accordingly, Class Counsel's requested fee is supported by application of this *Prudential* factor.[12]

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[12] Where, as here, the attorneys' fees requested as part of a large class action settlement satisfy the *Gunter*/*Prudential* factors, courts in the Third Circuit decline to apply the so-called "declining percentage" approach to awarding fees, where a district court reduces the percentage of requested attorneys' fees because the proposed settlement is particularly large. *See Rite Aid*, 396 F.3d at 303 (rejecting an attempt to apply the declining percentage approach to a $126.6 million settlement, pointing out that "there is no rule that a district court must apply a declining percentage reduction" and concluding that "put simply, the declining percentage concept does not trump the fact-intensive *Gunter/Prudential* analysis" utilized for evaluating attorney fee awards). The "declining percentage" approach has been criticized as failing to recognize the enormous risk of non-recovery that class counsel undertakes in prosecuting class actions. *See In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 197 (E.D. Pa. 2000).

3. A Lodestar Cross-Check Confirms the Reasonableness of Class Counsel's Requested Fee.

The Third Circuit has suggested that district courts cross-check the percentage award against the "lodestar" to help ensure the reasonableness of the fee. *See Gunter*, 223 F.3d at 195 n.1. *See also Drazin v. Horizon Blue Cross Blue Shield of New Jersey, Inc.*, 832 F. Supp. 2d 432, 440 (D.N.J. 2011) (Hochberg, J.) ("The percentage of recovery is usually . . . 'cross-checked' against the lodestar, to ensure that the fee is reasonable and appropriate."). As part of the cross check, the lodestar is determined by multiplying the hours reasonably expended on the case by a reasonable hourly rate. *See Gunter*, 223 F.3d at 195 n.1 (citation omitted). The Third Circuit has recognized that "[m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.'" *Prudential*, 148 F.3d at 341 (quotation omitted). In calculating the lodestar for cross check purposes, the court does not need to scrutinize the documented hours. *See Rite Aid*, 396 F.3d at 306-07 ("The lodestar cross-check calculation need entail neither mathematical precision nor bean counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records.").

Class Counsel's requested fee award is reasonable when analyzed in light of a lodestar crosscheck. As detailed in the Joint Declaration, Class Counsel have worked 60,570.12 hours on this case, which is collectively $31,807,227.57 in time

based on current billing rates. *See* Joint Decl. at ¶ 113.[13] A one-third fee award would equate to a lodestar multiplier of 1.99. *See* Joint Decl. at ¶ 114. This is well within the acceptable multiplier range of 1-4 noted in *Prudential*. It is also well below the multiplier granted in some other Hatch-Waxman antitrust cases. *See, e.g., Nichols v. Smithkline Beecham Corp.*, No. 00-6222, 2005 U.S. Dist. LEXIS 7061, at *78 (E.D. Pa. Apr. 22, 2005) (noting that "[t]he fee awarded in [the Buspar antitrust litigation] resulted in a multiplier of 8.46"); *Stop & Shop*, 2005 U.S. Dist. LEXIS 9705, at *60 (approving multiplier of 15.6 in Paxil antitrust litigation).

Accordingly, the lodestar cross check in this case supports the requested fee.

B. Class Counsel's Costs And Expenses Are Reasonable And Were Necessarily Incurred To Achieve The Benefit Obtained.

It is well-settled that counsel who have created a common fund for the benefit of a class are entitled to be reimbursed for out-of-pocket expenses reasonably incurred in creating the fund. *See Remeron*, 2005 U.S. Dist. LEXIS

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[13] As detailed in the Joint Declaration, Co-Lead Counsel carefully allocated assignments based on the experience and expertise of each member of Class Counsel in a manner that effectively prosecuted the case and avoided duplication of effort. *See* Joint Decl. at p.3. A description of the expenditures from the litigation fund is included in the Declaration of Richard J. Kilsheimer on Behalf of Kaplan Fox & Kilsheimer LLP in Support of Direct Purchaser Class Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Expenses, attached as Exhibit 20 to the Joint Declaration.

27013, at *48-49 ("Counsel in common fund cases is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case.") (citing *In re Cendant Corp.*, 232 F. Supp. 2d 327, 343 (D.N.J. 2002) (internal citation omitted)). Attorneys may be reimbursed for costs that are "incidental and necessary expenses incurred in furnishing effective and competent representation." *Planned Parenthood of Central New Jersey v. Attorney General of State of New Jersey*, 297 F.3d 253, 267 (3d Cir. 2002).

Class Counsel's unreimbursed expenses, which total $ 2,213,537.35, were incidental and necessary to representation of the Class. These expenses were reasonably expended to prosecute this litigation, and they include fees paid to experts and consultants who were instrumental in helping Plaintiffs obtain class certification, establish monopoly power and exclusionary conduct, calculate damages, refute Defendants' defenses, prepare for trial, and obtain this favorable Settlement for the Class. *See* Joint Decl. at ¶¶ 36-37, 71, 79, 80-81. These expenses also include costs for computerized research, the creation of an electronic document database, travel and lodging expenses, copying, court reporters, deposition transcripts, mediation, and preparation for trial.[14] *See* Joint Decl. at ¶¶

[14] Certain of the individual declarations and affidavits of Class Counsel may list "contribution to the litigation fund" (or similar phrase) as an expense. Class

20-23; Exhibits 19 through 31 to Joint Declaration. Such expenses are of the type routinely charged to hourly fee-paying clients.

Reimbursement of such expenses is routinely permitted. *See, e.g., Remeron*, 2005 U.S. Dist. LEXIS 27013, at *49-50 (finding the following expenses to be reasonable: "(1) travel and lodging, (2) local meetings and transportation, (3) depositions, (4) photocopies, (5) messengers and express services, (6) telephone and fax, (7) Lexis/Westlaw legal research, (8) filing, court and witness fees, (9) overtime and temp work, (10) postage, (11) the cost of hiring a mediator, and (12) NJ Client Protection Fund-pro hac vice.") (citing *Oh v. AT&T Corp.*, 225 F.R.D. 142, 154 (D.N.J. 2004)); *McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448, 479 (D.N.J. 2008).

Additionally, Class members comprising approximately 93% of Class purchases have written to support Class Counsel's request for reimbursement of expenses. *See* Exhibits 2 through 16 to Joint Decl.

Accordingly, the Court should approve reimbursement of Class Counsel's expenses in full.

Counsel made individual contributions to this fund, which was, in turn, used to pay certain of the reasonable expenses described herein.

C. Incentive Awards For the Class Representatives Are Appropriate and Reasonable.

Class Counsel requests that the Court approve an incentive award in the amount of $100,000 each for each of the Class Representatives, LWD and Meijer. To date, no Class member has objected to the requested incentive awards. To the contrary, Class members with the largest stake in this litigation have expressly supported the requested incentive awards to the Class Representatives. *See* Joint Decl. at ¶ 117; Exhibits 2 through 4 to the Joint Decl.

Courts have long held that private class action suits are a primary weapon in the enforcement of the laws for the protection of the public. *See, e.g., Am. Soc'y of Mech. Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 573 n.10 (1982) (noting "private suits are an important element of the Nation's antitrust enforcement effort"). LWD and Meijer actively pursued the Class's interests by filing suit on behalf of the Class and undertaking the responsibilities attendant upon them as representative plaintiffs, including responding to document requests and interrogatories, appearing for deposition and keeping apprised of the progress of the case, including settlement efforts. *See* Joint Decl. at ¶ 116.

Numerous courts have found it appropriate to reward named class plaintiffs for the benefits they have conferred on a class of plaintiffs, and the amount requested here is in line with typical awards in the Third Circuit and elsewhere. *See, e.g., In re Nifedipene Antitrust Litig.*, MDL No. 1515, Civil Action No. 1:03-

MC-223 (RJL), Dkt No. 333 at ¶ 3 (D.D.C. Jan. 31, 2011) (attached as Exhibit 17 to the Joint Decl.) (awarding $60,000 to each of four class representatives, for a total of $240,000 in incentive awards); *Meijer, Inc. et al. v. Barr Pharmaceuticals, Inc.*, Civ. Action No. 05-2195 (CKK), Dkt. No. 210 at ¶ 17 (D.D.C. Apr. 20, 2009) (attached as Exhibit 18 to the Joint Decl.) (approving $50,000 to each of five class representatives for a total of $250,000 in incentive awards); *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 347 (E.D. Pa. 2007) ($75,000 incentive award); *In re Lupron Mktg. & Sales Practices Litig.*, MDL No. 1430, 2005 U.S. Dist. LEXIS 17456, at *24-25 (D. Mass. Aug. 17, 2005) (awarding a total of $100,000 to named plaintiffs and noting that "the named plaintiffs participated actively in the litigation…"); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 535-36 (E.D. Mich. 2003) (awarding $75,000 to each of two corporate class representatives).

This Court should therefore approve these appropriate and reasonable incentive awards to Class Representatives, LWD and Meijer.

IV. CONCLUSION

For the reasons set forth above and in the Joint Declaration, Class Counsel respectfully request that this Court approve their fee and expense request and enter an Order awarding Class Counsel fees in the amount of 33⅓% of the Settlement Fund (which includes the $190 million Settlement plus interest, and a

proportionate share of the interest thereon through the date of the award), and reimbursement of expenses in the amount of $ $2,213,537.35 plus interest. Class Counsel also request that this Court approve incentive awards of $100,000 to each of the Class Representatives, LWD and Meijer, for their efforts on behalf of the Class in the prosecution of this action.

Dated: July 1, 2014

Respectfully submitted,

CLEMENTE MUELLER, P.A.
222 Ridgedale Avenue
Cedar Knolls, NJ 07927
Tel.: (973) 455-8008

By: /s/ Jonathan D. Clemente
Jonathan D. Clemente
Liaison Counsel

GARWIN GERSTEIN & FISHER, L.L.P.
Bruce E. Gerstein
88 Pine Street, 10th Floor
New York, NY 10005
Tel.: (212) 398-0055
Fax: (212) 764-6620

KAPLAN FOX & KILSHEIMER LLP
Robert N. Kaplan
Richard J. Kilsheimer
850 Third Avenue, 14th Floor
New York, NY 10022
Tel.: (212) 687-1980
Fax: (212) 687-7714

Co-lead Counsel for the Direct Purchaser Class Plaintiffs

ODOM & DES ROCHES, LLP
John Gregory Odom
Stuart E. Des Roches
Suite 2020, Poydras Center
650 Poydras Street
New Orleans, LA 70130
Tel.: (504) 522-0077
Fax: (504) 522-0078

SMITH SEGURA & RAPHAEL LLP
David P. Smith
720 Murray Street
P.O. Box 1632
Alexandria, LA 71309
Tel.: (318) 445-4480
Fax: (318) 487-1741

SPERLING & SLATER, P.C.
Paul E. Slater
55 West Monroe Street
Suite 3200
Chicago, IL 60603
Tel.: (312) 641-3200
Fax: (312) 641-6490

BERGER & MONTAGUE, P.C.
Daniel Berger
Eric L. Cramer
Ellen T. Noteware
1622 Locust Street
Philadelphia, PA 19103
Tel.: (215) 875-3000
Fax: (215) 875-4604

VANEK, VICKERS & MASINI, P.C.
Joseph M. Vanek
David P. Germaine
111 S. Wacker, Suite 4050
Chicago, IL 60606
Tel.: (312) 224-1500
Fax: (312) 224-1510

HEIM, PAYNE & CHORUSH LLP
Russell A. Chorush
600 Travis, suite 6710
Houston, Texas 77002
Tel.: (713) 221-2000
Fax: (713) 221-2021

GRANT & EISENHOFER PA
Linda P. Nussbaum
485 Lexington Ave., 29th Fl.
New York, NY 10017
Tel.: (646) 722-8504
Fax: (646) 722-8501

KOHN, SWIFT & GRAF, P.C.
Joseph C. Kohn
One South Broad Street
Suite 2100
Philadelphia, PA 19107
Tel.: (215) 238-1700
Fax: (215) 238-1968

KOZYAK TROPIN &
THROCKMORTON, P.A.
Adam Moskowitz
2800 First Union Financial Center
200 South Biscayne Boulevard
Miami, FL 33131-2335
Tel.: (305) 377-0652
Fax: (305) 372-3508

TAB 8A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DOMESTIC DRYWALL ANTITRUST LITIGATION	
THIS DOCUMENT RELATES TO: **All Direct Purchaser Actions**	**MDL No. 2437** **13-MD-2437**

MEMORANDUM

Baylson, J. **July 17, 2018**

As part of the class settlement for Direct Purchasers in these cases, Plaintiffs have appropriately filed a Motion for Award of Attorneys' Fees and Expenses. The Court has reviewed the supporting documents filed by Plaintiffs' counsel and the applicable legal precedents and files this Memorandum in support of the award.

As the first step in the outstanding success of Plaintiffs' counsel, this case started as a traditional price-fixing antitrust case. Counsel had located several direct purchasers of drywall, extensively used in construction and renovation work, as Plaintiffs on behalf of class of similarly situated direct purchasers. The initial Complaint in this Court was filed on December 20, 2012, and shortly thereafter a number of other Complaints were filed and the Judicial Panel on Multidistrict Litigation consolidated all of the cases in this Court. An initial pretrial conference and scheduling order set in motion the start of discovery, and the Court determined other relatively routine issues that commonly arise in complex litigation.

The course of this litigation can be succinctly summarized by cross-reference to the major decisions issued by the undersigned on various issues in the case, as a prelude to the award of attorneys' fees:

A. Major Opinions in Drywall

1. Use of contention statements rather than answers to interrogatories

On May 12, 2014, Defendants served interrogatories asking Plaintiffs to state "all acts and omissions that you contend each took in furtherance of the alleged conspiracy." In re Domestic Drywall Antitrust Litig., 300 F.R.D. 228, 229 (E.D. Pa. 2014). Defendants then filed a motion to compel. The Court decided Defendants' request was not premature, but that "[r]ather than compel individual Plaintiffs to answer Defendants' interrogatories at this time, the Court will adopt a sequence of pretrial statements under which Plaintiffs' counsel will be required to set forth facts in their possession supporting their allegations … Defendants must reciprocate." Id. at 231. The contention statements filed by Plaintiffs were detailed, thorough and reflected a great deal of high-quality work in assembling and the results of the discovery which they had conducted on a highly professional basis.

2. Thompson Research Group, LLC's motion to quash

On May 15, 2014, the Court granted in part and denied in part the motion to quash subpoena of a non-party analyst Thompson Research Group, LLC, which had allegedly served as a "conduit" for information regarding pricing among Defendants. In re Domestic Drywall Antitrust Litig., 300 F.R.D. 234 (E.D. Pa. 2014). The Court allowed some discovery as to Thompson, but asked the parties to insure the confidentiality of Thompson Research Group's sources, limit the intrusion into Thompson's investigative files, and required Plaintiffs to pay for the costs of complying with the subpoena. Id. This third party discovery was appropriate and

indeed, in retrospect, necessary because one of the theories of liability of the Plaintiffs was that the Defendants had used these third party marketing research firms as "conduits" for providing information from one Defendant to another as to their pricing plans, pricing decisions, and other normally confidential competitive strategies. Although the conduit theory is not completely novel in antitrust litigation, the results of this third party discovery proved to be very important in the Plaintiffs' building a successful dossier of evidence on liability issues as well as damages.

3. Denial of summary judgment as to all Defendants except CertainTeed

Following the direct and indirect purchaser settlements with USG and TIN, the remaining Defendants moved for summary judgment, with voluminous affidavits, deposition testimony and documents, asserting that there were no genuine issues of fact as to any alleged agreement to fix prices, and that the Court should conclude that the Plaintiffs had failed to gather sufficient evidence to warrant a jury trial. On February 18, 2016, the Court granted CertainTeed's motion for summary judgment, finding that "Plaintiffs' evidence as to Defendant CertainTeed is not sufficient to show that CertainTeed participated in the conspiracy," but denied summary judgment as to all other moving Defendants. In re Domestic Drywall Antitrust Litig., 163 F. Supp. 3d 175, 230–31 (E.D. Pa. 2016). The Plaintiffs' responsive briefs were outstanding in all respects, with thorough responses, excellent briefs, and persuasive citations – all of which warranted the Court to deny summary judgment except as to CertainTeed, as noted above.

4. Appointment of independent expert on class issues

The Court decided not to appoint an independent expert on class action issues, but on June 16, 2017, it instead appointed a "technical advisor," Dr. Jeffrey Church of the University of Calgary, to assist the Court on limited econometric issues. (Letter, ECF 601.) Because both Plaintiffs and Defendants had retained highly skilled and knowledgeable expert economists on

the class action issue, the Court determined to retain its own expert as to some of the economic issues in this case. Although this independent technical adviser generally sided with the Defendants' view of the economic theories, the Court concluded that the Plaintiffs' evidence warranted certification of a class of Direct Purchasers, but did not warrant a class of Indirect Purchasers.

5. Grant of Direct Purchaser Litigation Class

On August 23, 2017, the Court approved a litigation class of direct purchasers of drywall, finding that the requirements of Rule 23(a) and Rule 23(b)(3), as interpreted by the Third Circuit, had been met. In re: Domestic Drywall Antitrust Litig., 322 F.R.D. 188 (E.D. Pa. 2017).

6. Denial of Indirect Purchaser Litigation Class

On August 24, 2017, the Court denied certification of a litigation class of indirect purchasers of drywall. In re Domestic Drywall Antitrust Litig., No. 13-MD-2437, 2017 WL 3700999 (E.D. Pa. Aug. 24, 2017). The Court found that although the indirect purchaser plaintiffs had satisfied the requirements of Rule 23(a), they had not met the Third Circuit's implied ascertainability requirement for Rule 23(b)(3) class actions, and had not shown that common issues predominated or that a class action was the superior method for adjudicating their claims, as was required under Rule 23(b)(3).

7. Third Circuit Rulings

The Third Circuit rejected appeals under Rule 23(f), filed by Defendants as to the Court's grant of a Direct Purchaser class action, and filed by Plaintiffs as to the denial of class certification of Indirect Purchasers.

Also, previously, although the undersigned had certified the denial of Defendants' motions for summary judgment for interlocutory appeal under 28 U.S.C. § 1292(b), the Third Circuit rejected the interlocutory appeal.

B. Determining Attorneys' Fees in Class Action Common Fund Settlements: the Percentage-of-Recovery Method

There are two methods of calculating attorneys' fees—the percentage-of-recovery method and the lodestar method. Under the percentage-of-recovery method, counsel will typically take a certain percentage of the plaintiffs' total recovery, with the understanding that the attorney is working on a contingent basis. The percentage-of-recovery method is favored in class action settlements involving a common fund, allowing the court to award attorneys' fees "in a manner that rewards counsel for success and penalizes it for failure." In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 821 (3d Cir. 1995). The theory underlying the use of the percentage-of-recovery method is that "the class would be unjustly enriched if it did not compensate the counsel responsible for generating the valuable fund bestowed on the class." Id. Therefore, counsel's compensation depends directly on the value created for the class.

Under the lodestar method, attorneys' fees are calculated by multiplying the hours worked by counsel by the average hourly rate. This method is often used in the context of fee-shifting statutes, or to reward counsel for undertaking socially beneficial litigation in cases where the expected recovery is small enough such that utilizing the percentage-of-recovery method would yield inadequate compensation for counsel. Id. Even though the lodestar method is not the primary method for calculating attorneys' fees in class action common fund settlements, "it is sensible for a court to use [this] second method of fee approval to cross check" the award calculated under the percentage-of-recovery method. Id. at 820. What is often referred to as the "lodestar cross-check" is performed by dividing the total recovery requested under the

percentage-of-recovery method by counsel's lodestar value, yielding a "lodestar multiplier." Thus, a lodestar multiplier of 2 would mean that under the percentage-of-recovery method, counsel would receive twice the amount of compensation that they would typically request for the same number of hours expended on the litigation.

1. Krell v. Prudential Ins. Co. of Am. (in Re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions), 148 F.3d 283 (3d Cir. 1998)

a. Overview

In Prudential, the Third Circuit established three factors ("the Prudential factors") that courts will consider when determining whether the requested attorneys' fees are appropriate. They are:

(1) whether the entire value of benefits to the class is attributable to the efforts of class counsel;

(2) whether the percentage-of-recovery request reflects the fee that would result from private negotiations; and

(3) whether there are any particularly innovative terms in the settlement.

In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 338-40 (3d Cir. 1998).

These factors supplement the seven Gunter factors, discussed *infra*, in the balancing of whether a request for attorneys' fees is reasonable under the settlement agreement. Ultimately, the Third Circuit remanded the issue of attorneys' fees upon a finding that the district court inappropriately (1) failed to separate the value of the settlement created by administrative investigation from the value created by class counsel, and (2) gave weight to the contingency fee rates typical of smaller class actions or individual actions, but found that the district court's consideration of "innovative terms" of settlement was appropriate. Id.

b. Procedural Posture and Factual Background

This case was before the Third Circuit as an appeal of the district court's approval of the settlement of a nationwide class action against Prudential Life Insurance Company, including the district court's creation of a bifurcated attorneys' fee award valued as high as $90 million in a nearly $2 billion settlement.

Beginning in 1994, lawsuits against Prudential Life Insurance Company alleging improper sales and marketing practices were filed across the United States. Id. at 290. In response to the growing number of lawsuits against Prudential, the New Jersey Insurance Commissioner assembled a task force to investigate the allegations and develop a remedial plan to compensate injured policyholders. Id. In 1996, the task force issued a remedial action plan creating two options—alternative dispute resolution or "no-fault" basic claim relief—across four types of claims. Id. at 291. While the task force was investigating, individual parties and classes continued to file actions against Prudential in both state and federal court. Id. at 292. Following the publication of the task force report, lead counsel in the underlying class action and Prudential entered into a settlement agreement in September of 1996. Id. at 294. The settlement agreement largely adopted the substance and structure of the task force remedial plan, but the district court found that the settlement made some enhancements. Id. at 296-97. Under the Stipulation of Settlement filed in October of 1996, lead counsel would request $90 million in attorneys' fees to be paid by Prudential. Id. at 329.

c. The District Court's Analysis of Lead Counsel's Attorneys' Fees Request

The district court found the remedy structure analogous to a common fund, and thus determined that the percentage-of-recovery method was to apply. Id. An expert retained by lead counsel estimated that $863.7 million of the settlement agreement's value of $1.987 billion was

created by the task force plan, while the remaining $1.123 billion was created by class counsel. Id. The district court rejected the lead counsel's fee petition, instead creating a bifurcated fee award designed to provide between $45 million and $90 million to class counsel. Id. Notably, the district court recognized that the fee awards in cases where the recovery exceeded $100 million ranged between 4.1 and 17.92%; it also concluded that private parties would likely have negotiated a contingent fee of 10 to 15%. Id. at 331-332. The district court calculated that if the full $90 million in attorneys' fees were awarded, this would result in approximately 6.7% of the minimum recovery guaranteed by Prudential under the settlement agreement. Id. at 332. With a lodestar value of $17.7 million and expenses at just over $3 million, a $90 million fee would generate a lodestar multiplier of 5.1 at an average hourly rate at $1,148.70. Id.

d. The Third Circuit's Rejection of the District Court's Analysis and Remand on the Issue of Attorneys' Fees

In its analysis of the appropriateness of the attorneys' fees, the Third Circuit primarily took issue with the high value of attorneys' fees despite the presence of substantial government investigation. In remanding the issue of attorneys' fees back to the district court, the Third Circuit emphasized that "[i]t is not clear on the record before us that class counsel had so significant a role in the institution of the Task Force proceedings that the district court was justified in crediting counsel for all of the benefits created under the Task Force plan." Id. at 337.

Next, the Third Circuit focused on the district court's conclusion that a contingent fee of 10 to 15% would be privately negotiated in class actions of such a large size. "While such private fee arrangements might be appropriate in smaller class actions or litigation involving individual plaintiffs, we do not believe they provide much guidance in cases involving the aggregation of over 8 million plaintiffs and a potential recovery exceeding $1 billion," it noted. Id. at 340. The Third Circuit additionally took issue with the size of the lodestar multiplier of 5.1, stressing that

the district court did not "take care to explain how the application of a multiplier is justified by the facts of a particular case." Id.

Finally, though the Court found the above issues to be problematic in the district court's fee structure, it did consider the bifurcated fee award to be "an appropriate and innovative response to the structure of the settlement." Id. at 334.

2. Gunter v. Ridgewood Energy Corp., 223 F.3d 190 (3d Cir. 2000)

a. Overview

In Gunter v. Ridgewood Energy Corp., the Third Circuit adopted a discrete seven-factor test, listed in subsection d, *infra*, that courts use in determining the reasonableness of attorneys' fees in class action common fund settlements. Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000). The Third Circuit also added a separate lodestar cross-check generating a "lodestar multiplier" that is used to gauge the difference between the class counsel's lodestar and the fee under the percentage-of-recovery method. Id. The Gunter factors are typically combined with the Prudential factors (discussed *supra*) in a court's analysis, resulting in a comprehensive ten-factor balancing test. Ultimately, the Third Circuit remanded the issue of attorneys' fees to the district court for a correct and clear articulation of its analysis in determining what amount of attorneys' fees ought to be awarded. Id. at 192, 196.

b. Procedural Posture and Factual Background

Gunter was before the Third Circuit on the plaintiffs' appeal of the district court's grant of attorneys' fees at only 18% of the $9.5 million settlement fund, instead of the 33 1/3% fee that the parties agreed to under the settlement agreement. 223 F.3d at 191. The underlying class action arose from a series of failed oil and gas investments, with the class alleging that the defendants fraudulently marketed and sold about $150 million of interests in partnerships

between 1986 and 1990. Id. at 192. The class action was brought under the Racketeer Influenced and Corrupt Organization Act and §§ 10(b) and 20(a) of the Securities Exchange Act of 1934, as well as various state common law claims. Id. After discovery and pre-trial motion practice, including class certification and a round of summary judgment argument, the parties reached a settlement agreement in June of 1999. Id. at 193.

The terms of the settlement included a common fund of $9.5 million, which represented more than half of the total amount lost by class members to the fraudulent practices of the defendants. Id. In its submissions to the district court, class counsel requested reimbursement of $300,000 in costs as well as one third of the $9.5 million common fund (about $3.16 million). Id. Class counsel calculated the lodestar multiplier to be 1.1, and noted that none of the class members objected to the requested fee amount. Id. at 194.

c. The District Court's Analysis of Class Counsel's Attorneys' Fees Request

In its brief analysis of class counsel's request for one-third of the common settlement fund, the district court decided to reduce the fee to 18% of the recovery. Gunter v. Ridgewood Energy Corp., No. CIV. 95-438 (WHW), 1999 WL 33266979, at *2 (D.N.J. Nov. 16, 1999), vacated, 223 F.3d 190 (3d Cir. 2000). The factors considered by the district court included class counsel's submissions and statements regarding their efforts to settle the litigation, and the number of hours expended. *Id.* The district court ultimately held that "[t]he nature of this litigation, its resolution at this stage without the necessity of trial, the nature of the settlement, and its value, convince the court that it would place a reasonable burden on the class to award attorneys' fees of 18% of the Settlement Fund, or $1,700,000." Id. The district court denied class counsel's motion for reconsideration on the grounds that it was wary of the number of hours class counsel reported, stating "[t]he Court is of the opinion that these hours merely serve as a hindsight prop to the one-third percentage of plaintiffs' recovery sought by counsel as their fee." Gunter v.

Ridgewood Energy Corp., Civ. No. 95-438 (WHW), at 2-3 (D.N.J. Dec. 29, 1999). Noting that "[c]ounsel had their opportunity to provide full information to the Court upon their original submission. They did not. And, interestingly, they did not even attempt to do so by their motion for reconsideration." Id.

d. The Third Circuit's Remand of the Issue of Attorneys' Fees Based on Inadequate Reasoning on the Part of the District Court

After analyzing the district court's award of reduced attorneys' fees, the Third Circuit ultimately remanded the issue back to the district court, since "if the district court's fee-award opinion is so terse, vague, or conclusory that we have no basis to review it, we must vacate the fee-award order and remand for further proceedings." Gunter, 223 F.3d at 196. The Third Circuit then identified seven factors that courts ought to consider when determining the appropriateness of an attorneys' fee request in common fund class action settlements:

(1) the size of the fund created and the number of persons benefitted;

(2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel;

(3) the skill and efficiency of the attorneys involved;

(4) the complexity and duration of the litigation;

(5) the risk of nonpayment;

(6) the amount of time devoted to the case by plaintiffs' counsel; and

(7) the awards in similar cases.

Id. at 195 n.1. It also noted that in mega-fund cases, like those valued at over one billion dollars, courts may give these factors less weight. Id. Finally, the Third Circuit suggested that after a court's has analyzed the seven factors, it should perform a lodestar "cross-check," in which it

calculates the lodestar multiplier to determine whether the difference between counsel's lodestar and the fee request is reasonable under the circumstances of the case. Id.

In reviewing the district court's analysis of the factors, the Third Circuit found that, in the original fee award opinion as well as in the opinion denying class counsel's motion for reconsideration, the district court either failed to apply some of the seven factors it identified, or misapplied them. Id. at 201. The following analysis does not follow the order of the factors listed explicitly by the Third Circuit, 223 F.3d at 191 n.1.

i. Third Circuit Review of the First Factor Analyzed by the District Court: The Complexity and Duration of the Litigation

Regarding the first factor analyzed by the district court—the complexity and duration of the litigation—the Third Circuit found, unlike the district court, that the underlying litigation was both complex (involving federal securities law and a plethora of state claims), and that its four-and-a-half year duration weighed in favor of granting class counsel's fee request. Id. at 197.

ii. Third Circuit Review of the Second Factor Analyzed by the District Court: The Existence of a Settlement Between the Parties

The Third Circuit then addressed the second factor that the district court analyzed, and found that the district court inappropriately considered the existence of a settlement to warrant a reduction in the attorneys' fee award. Id. at 198. The Third Circuit held that "[p]rocuring a settlement, in and of itself, is never a factor that the district court should rely upon to reduce a fee award. To utilize such a factor would penalize efficient counsel, encourage costly litigation, and potentially discourage able lawyers from taking such cases." Id.

iii. Third Circuit Review of the Third Factor Analyzed by the District Court: The Size of the Settlement and the Number of Persons Benefitted

Turning to the next factor the district court analyzed—the size of the settlement and the number of persons benefitted—the Third Circuit found that the district court provided scant analysis of whether the attorneys' fee request was appropriate in light of the litigation in similar cases. Id.

iv. Third Circuit Review of Two Factors Not Analyzed by the District Court: The Absence of Objections from Class Members, and the Risk of Non-Payment

The Third Circuit next identified two factors that the district court failed to include altogether: the absence of objections from class members to class counsel's request for fees, and the risk of non-payment. Id. at 199. On the first issue, the Third Circuit did not make any explicit finding on the significance of the lack of objection to the requested fee amount. On the second issue, the Third Circuit noted "it seems that the risk of non-payment in this case was present both because the defendants were close to insolvency, and because other classes of plaintiffs in similar cases against the defendants had lost on similar legal theories." Id.

v. Third Circuit Review of the District Court's Use of the Lodestar Cross-Check

Finally, the Third Circuit found that the district court failed to adequately apply the lodestar cross-check, noting that "the District Court neither reduced its lodestar calculations to writing, nor gave Counsel a chance to justify their hours billed or their hourly rates." Id. While in its opinion denying the motion for reconsideration the district court stated that it had considered the lodestar value in arriving at its original fee award, the Third Circuit observed that any mention or discussion of either the lodestar value or multiplier was notably absent. Id. For all of these reasons—either a lack of analysis or improper analysis—the Third Circuit remanded the

issue of attorneys' fees back to the district court. Id. at 192, 196. No subsequent district court order or opinion could be found following the Third Circuit's remand.

3. Welch & Forbes, Inc. v. Cendant Corp. (In re Cendant Corp. Prides Litig.), 243 F.3d 722 (3d Cir. 2001)

a. Overview

This case presents an example of where a percentage-of-recovery award appeared to be reasonable on its face, but analysis under the Gunter factors and a lodestar cross-check demonstrated the award's unreasonableness. As in Gunter, the Third Circuit found the district court's analysis to be too cursory, and also determined that the district court had either failed to analyze or mis-analyzed several factors that it had outlined in Gunter. In re Cendant Corp. Prides Litig., 243 F.3d 722, 733, 735-36 (3d Cir. 2001). While a percentage-of-recovery figure of 5.7% appeared reasonable given the range suggested by other cases, the Third Circuit found that such a percentage was materially undermined by a projected lodestar multiplier between 7 and 10. Id. at 742. After reviewing the district court's analysis, the Third Circuit vacated the award of attorneys' fees and remanded the issue to the district court. Id. at 743.

b. Procedural Posture and Factual Background

This case was before the Third Circuit on appeal of the district court's approval of a class settlement and award of attorneys' fees to lead counsel, and was ultimately remanded by the Third Circuit to the district court for proper analysis under the Gunter factors. Id. The underlying class action was filed on behalf of investors in the Cendant Corporation after it had disclosed some prior "accounting irregularities" in April of 1998. Id. at 725. On behalf of one of the classes of the consolidated class action (the "PRIDES class,") a law firm, Kirby, entered into a settlement agreement with Cendant in March of 1999 under which Cendant agreed to issue Rights to new PRIDES (a type of share); with 29,161,474 shares each valued at $11.71, the total

approximate value of the settlement agreement was $341,500,000. Id. Under the terms of the settlement agreement, Kirby would not ask for more than 10% of the $341,500,000 stated value, plus reasonable expenses. Id.

c. The District Court's Analysis of Kirby's Attorneys' Fees Request

In June of 1999, the district court approved the settlement, granted Kirby's expenses of $2,367,493, but found that for attorneys' fees, Kirby should receive 5.7% (instead of the 10% requested) of the settlement rights, totaling 1,650,680 rights valued at $19,329,463. Id. at 726. The district court's lodestar analysis found that approximately 5,600 hours were expended, and that senior partners charge an hourly rate of $495. In re Cendant Corp. Prides Litig., 51 F. Supp. 2d 537, 542 (D.N.J. 1999). Using this hourly rate, the district court calculated the lodestar multiplier to be 7. Cendant, 243 F.3d at 732. The $495 hourly rate of senior partners artificially lowered the lodestar multiplier, as inferior legal staff expended hours on the litigation. Id.

d. The Third Circuit Review of the District Court's Analysis and Remand on the Issues of Attorneys' Fees

The Third Circuit found the district court's analysis problematic for several reasons, not the least of which was the fact that "[a]s in Gunter, the District Court's fee opinion in this case was too cursory for us to 'have a sufficient basis to review for abuse of discretion.'" Id. at 733 (quoting Gunter, 223 F.3d at 196). The Third Circuit itemized a list of factors that the district court either failed to recognize or misjudged in its analysis of the adequacy of Kirby's attorneys' fee request:

> 1) the case was relatively simple in terms of proof, in that Cendant had conceded liability and no risks pertaining to liability or collection were pertinent;
>
> 2) the case was settled at a very early stage of the litigation, with an agreement being announced two months after Kirby filed for class certification and a proposed settlement being submitted to the District Court two months after that;

> 3) there was a minimal amount of motion practice in this case—before settlement, Kirby submitted only the Complaint and three motions, all on the same day;
>
> 4) discovery was virtually nonexistent—indeed the District Court did not mention any depositions taken or document review conducted by Kirby;
>
> 5) Kirby spent a relatively small amount of time on this case compared to the amount of time expended in most other large class actions."

Id. at 735-36. In other words, the attorneys' fee amount requested by Kirby did not actually reflect the amount of work it expended on litigating the case. Because the high value of the settlement might have arguably come from the number of class members or the values of the PRIDES shares, the law firm might receive a windfall under the requested amount. These notions supported the Third Circuit's observation that "[i]n In re GMC Trucks, we observed that 'one court has noted that the fee awards have ranged from nineteen percent to forty-five percent of the settlement fund.' . . . These varying ranges confirm that a district court may not rely on a formulaic application of the appropriate range in awarding fees but must consider the relevant circumstances of the particular case." Id. at 736 (quoting 55 F.3d at 822) (internal citations omitted).

The Third Circuit noted that the district court failed to compare the requested attorneys' fee to those granted in similar cases. Id. The Third Circuit provided a chart listing class action common fund settlements, their value, and the percentage-of-recovery. Id. at 737. Looking at the cases listed in the chart, the Third Circuit noted that the attorneys' fees awards ranged from 2.8% to 36% of the total common settlement fund. Id. at 738. While the 5.7% fee awarded by the district court appeared to fall within this range, the Third Circuit again emphasized the fact that the work counsel performed was not deserving of an award of that size, writing "a brief review of the facts and posture of these other cases makes clear that, when examined through the seven-

factor lens of Gunter, the higher fees awarded in the other cases were far more justified than the high award in this case." Id. (italics added). Finally, the lodestar multiplier would likely fall between 7 and 10, a value the Third Circuit found inappropriately high. Id. at 742. The Third Circuit observed: "[i]n all the cases in which high percentages were applied to arrive at attorneys' fees, the courts explained the extensive amount of work that the attorneys had put into the case, and appropriately the lodestar multiplier in those cases never exceeded 2.99." Id. Thus, this case highlights the importance of the multiplier resulting from the lodestar cross-check, as even low percentage-of-recovery values may nevertheless leave law firms with windfall fee awards.

4. In re AT&T Corp. Sec. Litig., 455 F.3d 160 (3d Cir. 2006)

a. Overview

Where a district court granted the request for an attorneys' fee that was the product of a pre-arranged scale (not a traditional sliding scale where the percentage of recovery decreases as the settlement value increases), the Third Circuit found that because the attorneys' fee award conformed with the Gunter and Prudential factors, the district court did not abuse its discretion in granting the request. In re AT&T Corp. Sec. Litig., 455 F.3d 160, 175 (3d Cir. 2006).

b. Procedural Posture and Factual Background

This case was before the Third Circuit from an appeal of three class members on the issue of attorneys' fees in a class action common fund settlement, specifically that they were excessive and did not employ a traditional sliding scale where the percentage of recovery for attorneys' fees decreases as the size of the settlement increases. Id. at 163.

Beginning in October of 2000, several plaintiffs filed federal securities fraud lawsuits under the Securities and Exchange Act of 1934, alleging that defendants made knowingly false

statements over the course of 7 months regarding anticipated performance for the year of 2000 to artificially inflate stock price. Id. at 162. After two years of discovery and two weeks of trial (beginning of October of 2004), the parties entered into a tentative settlement agreement in which AT&T agreed to a $100 million common settlement fund, with attorneys' fees set at 21.25%, or $21,500,000, and costs valued at $5,465,996.79. Id. at 163. The district court preliminarily approved the settlement agreement, and after notice was mailed to over one million potential class members, eight objections were received pertaining to the attorneys' fees arrangements. Id.

c. The District Court's Analysis of the Request for Attorneys' Fees

In this securities case brought under the Private Securities Litigation Reform Act, the district court noted that in the Third Circuit, attorneys' fees requests are presumed reasonable unless the district court finds the fee to be clearly excessive on its face. Id. at 167 (citing Cendant, 264 F.3d at 220). The district court found that the sliding scale arrangement between the parties, which resulted in the 21.25% attorneys' fee, was reasonable and had not been shown to be unreasonable by the challengers. Id. The district court concluded that the fee was also reasonable under the Gunter factors, specifically noting that the fee arrangements had been approved by each court-appointed lead plaintiff. Id. The district court subsequently found that a lodestar value of $16.6 million and a lodestar multiplier of 1.28 represented a "truly reasonable fee award." Id. at 169. The district court also approved reimbursement of costs. Id.

d. The Third Circuit's Affirmance of the District Court's Approval of Attorneys' Fees

The Third Circuit affirmed the district court's grant of attorneys' fees, finding that "[t]he district court's analysis and discussion demonstrates it considered the fee award reasonableness factors relevant to the facts of the case[.]" Id. The first Gunter factor—the size of the settlement

and the number of persons benefitted—did not require any analysis, as the settlement was for $100 million and the class could potentially consist of over a million members. Id. at 169-70.

i. The Second Gunter Factor: The Presence of Substantial Objections from Class Members on the Issue of Attorneys' Fees

The Third Circuit found that with regard to the second Gunter factor, the presence of eight objections out of a potential class of one million members represented a "low level of objection," and thus the district court did not abuse its discretion by not considering these objections "substantial." Id. at 170.

ii. The Third and Fourth Gunter Factors: The Skill and Efficiency of Counsel and the Complexity and Duration of Litigation

The Third Circuit found that the third and fourth factors—the skill/efficiency of counsel and the complexity/duration of litigation—also weighed in favor of granting the fee award, as the litigation was long and even began trial, on complex securities law issues. Id.

iii. The Fifth Gunter Factor: The Risk of Non-Payment

There was only a slight risk of nonpayment under the fifth factor, but the Third Circuit found that the district court did not abuse its discretion in finding such a risk. Id. at 171.

iv. The Sixth Gunter Factor: The Amount of Time Devoted by Class Counsel

The lengthy litigation lent support to the sixth factor—the amount of time devoted by counsel, which was apparent from the number of pre-trial motions, the scope of discovery, and two weeks of trial. Id. Typically, a discussion of the number of hours devoted takes place under this factor, but such a figure is absent in this Third Circuit opinion.

v. The Seventh Gunter Factor: Awards in Similar Cases

With regard to the seventh factor—awards in similar cases—the district court did not abuse its discretion when it held that objectors had failed to present sufficient evidence to rebut a

presumption of reasonableness (under the PSLRA). Id. Thus, under the Gunter factors and the lodestar cross-check, the Third Circuit found that the circumstances weighed toward granting the requested attorneys' fees. Id. at 173.

vi. The Prudential Factors: Whether the Entire Value of the Settlement is Attributable to Class Counsel, Whether the Fee Reflects What Private Parties Would Have Negotiated, and Whether the Settlement Contained Innovative Terms

Turning to the Prudential factors, the Third Circuit noted that there was no government investigation into the defendants' conduct, thus class counsel created the value of the settlement on their own. On the issue of privately negotiated contingency fees (the second *Prudential* factor), and in response to the appellants' contention that the percentage of recovery should not increase alongside the value of the settlement, the Third Circuit held that there is "no rule that a district court must apply a declining percentage reduction in every settlement involving a sizable fund." Id. at 174 (citing Rite Aid Corp. Sec. Litig., 396 F.3d 294, 303 (3d Cir. 2005)) (internal quotation marks omitted). As there were no particularly innovative terms of the settlement, the final Prudential factor was not analyzed. Thus, the district court's approval of the requested attorneys' fees was affirmed by the Third Circuit.

5. In re Diet Drugs Prod. Liab. Litig., 582 F.3d 524 (3d Cir. 2009)

a. Overview

In a case where $567 million in attorneys' fees were requested from a settlement valued at $6.44 billion, the Third Circuit found that the district court did not abuse its discretion in granting the requested amount. Since "the lawyers involved were primarily concerned with obtaining relief for their clients and members of the class," the district court "correctly applied the method better designed to 'reward counsel for success and penalize it for failure.'" In re Diet Drugs Prod. Liab. Litig., 582 F.3d 524, 541 (3d Cir. 2009) (citing GMC, 55 F.3d at 821).

b. Procedural Posture and Factual Background

In this case, the appellants challenged the district court's findings on three of the Gunter/Prudential factors in its opinion granting attorneys' fees in the amount of 6.75% of a settlement totaling $6.44 billion—a fee award of roughly $567 million. Id. at 537. Specifically, appellants challenged the district court's findings on the following factors:

(1) the presence or absence of substantial objections,

(2) the risk of nonpayment, and

(3) the value of benefits attributable to the efforts of other groups.

Id. at 541. Ultimately, the Third Circuit affirmed the findings of the district court, upholding the award of attorneys' fees. Id. at 553.

Beginning in 1997, a wave of products liability actions arose after researchers discovered a correlation between some then-commonly prescribed appetite suppressants and a heart disorder known as valvular heart disease ("VHD"). Id. at 559. Scientific evidence of serious coronary side effects from the drugs prompted the FDA to issue a public health alert, and prompted the pharmaceutical company responsible for the development of the drugs, Wyeth, to withdraw the drugs from the market. Id. In November of 1999, Wyeth, the plaintiffs' management committee of the class action, and counsel from state court class actions executed a nationwide settlement. Id. at 530. The settlement included several options for eligible class members, which were ultimately valued at a total of $6.44 billion. Id. at 536. Class counsel from 72 different firms filed a joint petition for attorneys' fees in which they requested a total of approximately $567 million. Id. at 533. An auditor reported that the 72 firms had performed 354,431.49 hours of work on the litigation and found a lodestar value of $101,076,658.54. Id.

c. The District Court's Analysis of the Requested Attorneys' Fees

When presented with class counsel's request for $567 million in attorneys' fees, the district court made several findings. First, the plaintiffs' management committee faced significant risk at the beginning of the litigation that their work would ultimately be unsuccessful and uncompensated. Id. at 534. Second, that the discovery undertaken by the plaintiffs' management committee paved the way for the class settlement and individual settlements—in other words, the plaintiffs' management committee could rightly be considered to have created the entire value of the settlement benefitting the class. Id. Thirdly and lastly, that the plaintiffs' management committee conferred great benefits on all litigants and performed well. Id. Ultimately, in April of 2008, eleven years after the commencement of litigation against Wyeth, the district court awarded class counsel attorneys' fees in the amount of approximately $567 million. Id. at 536.

When applying the percentage-of-recovery method, the district court concluded that an award equaling 6.75% of the recoveries under the settlement agreement was appropriate. Id. at 536. The lodestar cross-check yielded a lodestar multiplier of 2.6; while it recognized that this might have been artificially low, the district court was confident that the actual multiplier would not be excessive. Id.

d. The Third Circuit's Review and Affirmance of the District Court's Award of Attorneys' Fees

As to the first factor challenged—the presence or absence of substantial objections—the district court found it "remarkable" that there were fewer than thirty objections out of the approximately six million potential class members. Id. at 542 (citing In re Diet Drugs Prods. Liabl. Litig., 553 F. Supp. 2d 442, 473 (E.D. Pa. 2008) (internal quotation marks omitted). In response to appellants' argument that the district court inappropriately relied on the absence of

objections to the final joint fee petition, the Third Circuit stated that "[w]hatever weight the Court gave to this factor it gave based on the dearth of objections throughout the settlement and fee adjudication process, instead of focusing only on the objections to the final joint fee petitions." Id. This suggests that the scope of this factor takes into account the nature and volume of objections by class members throughout the litigation process, though arguably this is a fact-intensive inquiry.

As to the second factor challenged, the risk of nonpayment, the appellants argue that the district court erred as a matter of law when it considered the risk of nonpayment only at the beginning of litigation and not throughout the course of the action, as the risk of nonpayment dissipated after a settlement was reached. Id. at 543. However, the Third Circuit found that the district court indeed considered the risk of nonpayment throughout the action, specifically when it considered the risk of a "'second wave' of litigation" following the execution of the settlement agreement; the district court found that "[a]t the inception, and throughout this litigation, there was a substantial risk that the efforts of [Class Counsel] would not be successful." Id. (citing Diet Drugs, 553 F. Supp. 2d at 479).

As to the third factor challenged, the value of benefits attributable to others, the district court found that while class counsel was somewhat beholden to the researchers who linked the diet drugs to the illness, as well as to the FDA for its efforts to remove the drugs from the market, these entities had not performed the investigative legal work on which class counsel could then rely. Id. at 544. The appellants challenged the district court's finding as to this factor, pointing as well to the efforts of Texas lawyers in state litigation. Id. The Third Circuit upheld the reasoning of the district court on this factor, and noted that even if the efforts of the Texas state claim lawyers were undervalued, this alone is not grounds to vacate a fee award. "Our task

is to discern whether the Court's percentage-of-recovery analysis, when examined in its totality, supports the fee that it finally determined was appropriate," it held. Id. at 545. In Prudential, however, this factor was one of the overwhelming reasons (if not the primary reason) the Third Circuit vacated the fee award. However, this factor is one of degree; that is, the question is not whether there were efforts from outside groups, but rather whether class counsel relied on them to such an extent that it would not be appropriate to grant attorneys' fees based on the entire value of the settlement. The Third Circuit supported this notion when it stated that "the [District] Court determined that, whatever the Texas cases may have added, the recoveries arising from the MDL were due to the 'herculean efforts' of the [plaintiffs' management committee]—in developing the case against [the defendants], in negotiating an agreement that allowed [the defendants] to resolve the claims against it, and in amending the Settlement Agreement when it appeared to be in jeopardy." Id. at 544 (citing Diet Drugs, 553 F. Supp. 2d at 474).

6. In re Ins. Brokerage Antitrust Litig., 579 F.3d 241 (3d Cir. 2009)

In this case, the Third Circuit upheld the district court's award of attorneys' fees totaling $29,950,000, where the attorneys' fees were to be paid separately from the settlement fund benefiting class members, which was valued at $100,000,000. In re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 248 (3d Cir. 2009). Beginning in October of 2004, various state attorneys general and state insurance departments began investigating alleged bid-rigging and steering activities of insurance brokers and insurers in the property and casualty insurance industry, in violation of antitrust law; at the same time, private parties commenced class actions in federal courts throughout the country (which were consolidated in February of 2005 in the District of New Jersey). Id. One of the defendants, the Zurich Defendants, also subject to state-level investigations, entered into a Memorandum of Understanding ("MOU") with the class plaintiffs

in October of 2005, under which the Zurich Defendants would establish a settlement fund valued at $100,000,000. Id. at 250. Of the settlement fund, $29,900,000 would be earmarked to fund a separate settlement award. Id. at 252. The Zurich Defendants agreed to pay attorneys' fees up to $29,950,000, paid separately from the settlement fund. Id. at 253. After preliminary approval of the settlement, class counsel requested the distribution of the $29,950,000 as follows: $3,957,000 for litigation expenses, $150,000 for incentive awards for fifteen class representatives, and $25,803,000 for fees. Id.

The district court found that while attorneys' fees are to be paid separately from the settlement fund, this case was nevertheless analogous to the typical class action common fund settlement, in which attorneys' fees were drawn from the fund under the percentage-of-recovery method. Id. at 280. Thus, the value of the settlement would be a combined $129,950,000. Id. The district court then proceeded to engage in an abbreviated Gunter analysis.

7. In re Linerboard Antitrust Litig., MDL No. 1261, 2004 WL 1221350 (E.D. Pa. June 2, 2004)

a. Overview

In this case, the district court found that, after analysis of the Gunter/Prudential factors, the requested attorneys' fees of 30% of a $202,572,489 settlement was reasonable. In re Linerboard Antitrust Litig., MDL No. 1261, 2004 WL 1221350, at *19 (E.D. Pa. June 2, 2004). The district court also approved reimbursement of litigation costs in the amount of $1,391,203.36. Id. The court found that where class counsel was particularly skilled and able to litigate the case with fewer hours expended, attorneys' fees should serve to reward such efficiency, and any downward adjustment would inappropriately punish counsel for skilled lawyering. Id. at *16.

b. Procedural Posture/Factual Background

This district court opinion addresses the request for attorneys' fees resulting from an antitrust action involving allegations that a number of US manufacturers of linerboard engaged in a continuing combination of conspiracy and unreasonable restraint of trade and commerce in violation of the Sherman Act. Linerboard, 2004 WL 1221350, at *1. Seven lawsuits were instituted after an administrative complaint was filed by the FTC against defendant Stone Container Corporation was resolved by a consent decree. Id. The lawsuits were consolidated in the Eastern District of Pennsylvania by the Judicial Panel on Multidistrict Litigation. Id. The total settlement amount among all the defendants totaled $202,572,489, with class counsel requesting 30% of the settlement value (approximately $60 million) plus reimbursement of $1,391,203.36 in litigation costs. Id. at *2.

c. The District Court's Finding that the Requested Fees are Reasonable

i. The First Gunter Factor: The Size of the Fund Created and the Number of Persons Benefitted

The district court found that this factor weighed in favor of approving the attorneys' fees request, on the ground that the size of the fund represented more than half of the claimed damages, and the class size of 80,000 was sufficiently large. Id. at *4-5. The plaintiffs had retained an economic expert that estimated that during the class period, the costs of boxes and sheets were 2.7% higher than they would have been absent the alleged conspiracy, representing a total of $478 million. Id. Thus, the settlements represented about 55% of the damages. Id. Furthermore, the class size of 80,000 companies weighed in favor of granting the request. Id. at *5.

ii. The Second Gunter Factor: The Presence or Absence of Substantial Objections by Members of the Class to the Fee Request

The district court found that "in this case class members are represented by counsel. Further, the classes in this cases [sic] include many of the largest corporations in America . . . Based on the foregoing, the Court concludes that consideration of the of the second *Gunter* factor . . . supports granting the Fee Petition." *Id.*

iii. The Third Gunter Factor: the Skill and Efficiency of Counsel

The district court found that this factor weighed in favor of granting the requested attorneys' fees, observing that "[t]hroughout every phase of the litigation petitioners managed a major discovery effort . . . In terms of document discovery alone, defendants produced more than 430 boxes of documents containing more than one (1) million pages of records." Id. at *10. The district court also observed that "most [of the] informal efforts at resolution [between class and defense counsel] have proved successful and the Court's involvement has only been required on a few occasions." Id. (internal citations omitted). This suggests that under this factor, courts may consider the ability for counsel to resolve issues cooperatively and independently.

iv. The Fourth Gunter Factor: the Complexity and Duration of Litigation

The district court noted that the litigation had been going on for six years, and that there was a high possibility that should the case proceed to trial, it could continue for several more years. Id. The district court also noted that there was previous authority for granting a similar fee award in a case where the settlement occurred much earlier in the litigation process, such as in In re Ikon Office Solutions Inc. Sec. Litig., 194 F.R.D. 166, 194 (E.D. Pa. 2000), where the court had awarded 30% of a $111 million settlement in attorneys' fees after one and a half years of litigation. Linerboard, 2004 WL 1221350, at *10.

v. The Fifth Gunter Factor: the Risk of Non-Payment

The district court called attention to several important facts in this case pertaining to this factor. First, the district court noted that the FTC investigation into one of the defendants had been, according to one antitrust expert, "at the cutting edge of single firm antitrust liability." Id. at *11 (internal citations omitted) (internal quotation marks omitted). Because there had "never been a successfully litigated antitrust claim of a single firm attempt to conspire to raise prices or reduce out-put based solely, or even primarily, on market conduct by the defendant firm," the class faced significant risks of non-payment stemming from the uncertainty or the low success rate of this type of litigation. Id. (internal citations omitted) (internal quotation marks omitted).

Second, even though the district court found that the FTC had launched an investigation into one of the defendants, the district court adopted the view of the Second Circuit, which asked whether the defendants' liability was "prima facie established by the government's successful action." Id. (quoting City of Detroit v. Grinnell Corp., 495 F.2d 448, 455 (2d Cir. 1974), abrogated on other grounds by Goldberger v. Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000)). Here, the FTC did not successfully establish, prima facie, the defendant's liability. Linerboard, 2004 WL 1221350, at *11. The emphasis on this factor may also be considered to be an analysis under one of the Prudential factors, which analyzes the degree to which class counsel has relied on other entities to create the value of the settlement. In this case, the district court found that the FTC investigation had not played any significant role, and therefore class counsel could be considered to have created the entire value of the settlement. Id.

Finally, the defendants stated their intention to exploit several perceived weaknesses in the class' evidence of liability, such as the lack of direct evidence of a meeting among the defendants where the alleged conspiracy to violate antitrust laws would have taken place. This,

supplemented by the fact that there might have been other reasons for the increase of prices, made it much more difficult for the class to establish liability at trial. Id. at *12.

vi. The Sixth Gunter Factor: the Amount of Time Devoted by Counsel

Where counsel reported spending 51,268 hours on the litigation, the district court found it remarkable that "[f]ewer hours of attorney time were expended in this case than in comparable litigation. . . . This development should be rewarded when it reflects, as in this case, the efficiency of counsel in maximizing total recovery to the class by minimizing attorneys' fees expenses." Id. at *13. This weighed in favor toward granting the fee request.

vii. The Seventh Gunter Factor: Awards in Similar Cases

The district court found that this factor weighed in favor of granting the requested attorneys' fees, since "[m]any of the decisions cited by the Third Circuit involved settlements similar in size to the settlement in this litigation and the courts awarded fees in those cases comparable to the 30 percent fee requested by petitioners." Id. at *13 (citing Cendant, 243 F.3d at 737). The district court also took note of a then-recent Judicial Center study finding the median attorney fee awards in federal class actions to range between 27 and 30%. Id. at *14. The district court observed that "recent empirical data analyzing fee awards in securities cases indicates that regardless of size, fees average 32 percent of the settlement." Id. (internal citations omitted) (internal quotation marks omitted). The district court found these studies to be persuasive and that this factor weighed in favor of granting the requested fees.

viii. The Lodestar Cross-Check

At an average mixed rate of $440, the lodestar value for 51,268 hours of work would be $22,557,920. Id. at *16. This would mean that under the requested 30% fee, the lodestar multiplier would be 2.66. Id. The district court found that since the Third Circuit has found the

appropriate lodestar multiplier ceiling to be either 3 (Cendant, 243 F.3d at 742), or 4 (Prudential, 148 F.3d at 341), a lodestar multiplier of 2.66 was within the appropriate range. Id. Furthermore, the district court took note of empirics suggesting that "during 2001-2003, the average multiplier approved in common fund class actions was 4.35 and during the 30 year period from 1973-2003, the average multiplier approved in common fund class actions was 3.89." Id.

ix. An Exception to the Traditional "Sliding Scale" Approach

While most courts consider a sliding scale approach (where the percentage of recovery decreases as the settlement value increases) to be appropriate for awarding attorneys' fees, here the district court rejected that notion. The district court stated: "[o]ne might argue that a fee award of 20 percent of settlements in excess of $200 [sic] [million] is excessive given the absolute figure, approximately $60 million, that such an award produces. The Court rejects that thinking in this case because the highly favorable settlement was attributable to the petitioners' skill and it is inappropriate to penalize them for their success." Id. at *16.

8. In re Flonase Antitrust Litig., 951 F. Supp. 2d 739 (E.D. Pa. 2013)

a. Overview

In this case, the district court granted a request for attorneys' fees in the amount of one-third of the settlement fund—$50 million of $150 million—and reimbursement of expenses in the amount of $2,069,433. In re Flonase Antitrust Litig., 951 F. Supp. 2d 739, 746 (E.D. Pa. 2013). While class counsel also requested incentive awards of $85,000 and $75,000 for two of the class representatives, the district court reduced these awards to $50,000 and $40,000, respectively. Id. at 752.

b. Procedural Posture and Factual Background

In this opinion, the district court was presented with a request for attorneys' fees in the

amount of one-third of the settlement value, reimbursement of costs, and incentive awards. The plaintiff class of 33 direct purchasers of Flonase, a brand-name nasal corticosteroid used to treat nasal inflammation caused by allergies, brought suit alleging that defendant SmithKline Beecham Corporation ("GSK") improperly delayed the entry of a generic version of the drug, resulting in overcharges to the class. Id. at 741. The complaint was filed in 2008; discovery began in late 2008 and continued through mid-2010. Id. The class was certified after a round of oral argument in November of 2010. Id. Two years later, in November of 2012, the parties reached a settlement agreement whereby GSK agreed to create a $150 million common settlement fund. Id. at 742. The settlement itself was preliminarily approved in January of 2013. Id. Class counsel was requesting $50 million for attorneys' fees, $2,069,433 in costs, and $85,000 and $75,000 in incentive awards to two class representatives. Id. at 746.

c. The District Court's Gunter/Prudential Analysis

i. The First Gunter Factor: the Size of the Fund and the Number of Beneficiaries

The district court found that the $150 million settlement, distributed *pro rata* among the 33 class members, to be "sizable." Id. at 747. Even though the class size is small as compared to other antitrust litigation, the district court observed that the "immediate and certain payment" to class members weighed in favor of approving the fee. Id.

ii. The Second Gunter Factor: the Presence of Substantial Objections by Class Members to the Requested Fees

Succinctly, the district court found that "there are no objections by any class members to this settlement. This factor strongly supports approval of the requested fee." Id.

iii. The Third Gunter Factor: The Skill and Efficiency of Counsel

The district court found that this factor weighed in favor of granting the request for

attorneys' fees, stating that counsel "have extensive experience in plaintiff-side class action, with particular expertise in delayed generic entry cases. Indeed, counsel for both sides were knowledgeable, tenacious, and highly skillful. . . . [T]he $150 million settlement award represents a substantial amount and clearly demonstrates the value of class counsel's efforts." Id.

iv. The Fourth Gunter Factor: the Complexity and Duration of Litigation

With regard to this factor, the district court noted that the action "involve[d] highly complex antitrust issues, FDA bioequivalence standards for suspension nasal spray products, pharmaceutical manufacturing and supply issues, and pharmaceutical regulatory issues, all of which were investigated and litigated for more than four years." Id. at 743. Furthermore, the parties settled after performing significant trial preparation, including "litigating *Daubert* challenges, identifying hundreds of trial exhibits, and briefing over a dozen motions in limine between them." Id.

v. The Fifth Gunter Factor: the Risk of Non-Payment

The district court considered the risk of non-payment here "not negligible," as "success in this litigation was in no way guaranteed." Id. at 747-48. In addition, it was not enough to say that the plaintiff-class would likely have succeeded on the merits at establishing liability, as "there [was] no guarantee they would have recovered damages." Id. at 748. Of course, since most plaintiff-side counsel in class actions work on a contingency-basis, there was a risk of nonpayment in the event that the class was unsuccessful at trial. Id. All of these reasons supported granting the fee request.

vi. The Sixth Gunter Factor: the Time Devoted by Counsel to the Case

According to the declaration of class counsel, more than 40,000 hours was spent in total on the litigation in this case. Id. The district court noted that "[t]he record of this litigation also

indicated that the time spent by Plaintiffs' counsel was necessary for the successful prosecution of this case, considering the complexity of the issues and the robust defense mounted by the defendants." Id. The district court found this factor to weigh in favor of granting the fee request.

vii. The Seventh Gunter Factor: Awards in Similar Cases

The district court noted that, at the time of the opinion in 2013, "in the last two-and-a-half years, courts in eight direct-purchaser antitrust actions approved one-third fees." Id. The district court looked more to the subject matter of the underlying litigation when comparing class action settlements than to the size.

viii. The First Prudential Factor: the Value of Benefits Attributable to the Efforts of Class Relative to the Efforts of Other Groups

In this case, there was no government investigation on which class counsel could rely to aid in its litigation efforts. Id. at 748-49. This factor weighed strongly in favor of granting the fee request.

ix. The Second Prudential Factor: the Percentage that Would Have Been Negotiated

While other district court opinions have cited to empirical data on the average contingency fee set between parties, the district court here chose to "not give great weight to this hypothetical exercise," thus leaving the factor neutral. Id. at 749 (quoting Prudential, 148 F.3d at 340) (internal quotation marks omitted).

x. The Third Prudential Factor: Innovative Terms of Settlement

The district court also found this factor to be neutral, as the settlement agreement was fairly standard. Id.

xi. Lodestar Cross-Check

The lodestar value, based on nearly 41,000 hours and rates between $120 and $795, was

calculated to be $16,750,000 at an average of $407 per hour. Id. at 750. The lodestar multiplier was determined to be 2.99, which the district court found to be "generally within the acceptable range." Id. at 751.

d. The District Court's Grant of Litigation Costs

With litigation costs reported at $2,069,433, the district court found that the expenses, which were primarily attributable to the payment of experts and document management, to be reasonable. Id. at 750.

e. The District Court's Grant of Incentive Awards

Interestingly, the district court adjusted the value of the incentive awards downward from what was requested. While counsel requested $85,000 and $75,000 awards for two of the class representatives, the district court lowered the values to $50,000 and $40,000, respectively. Id. at 751. The district court provided a rather cursory reason for the downward adjustment, stating "[t]hough incentive awards are appropriate in this case, the requested amounts are too large." Id. The district court went on to state that "an incentive award of $50,000 and $40,000 is within the range of payments awarded by courts within the Third Circuit in other direct purchaser antitrust litigation." Id. at 752.

C. Summary of Conclusions

Considering the outstanding conduct of Plaintiffs' counsel throughout this litigation, as reflected in the opinions cited above, and the Third Circuit precedents on award of attorneys' fees, the Court now turns to counsel's performance in this case and in the context of the factors in Gunter and the other cases cited above (not necessarily in order of importance).

1. Plaintiffs' counsel are experienced antitrust lawyers who have been working in this field of law for many years and have brought with them a sophisticated and highly professional approach to gathering persuasive evidence on the topic of price-fixing.

2. The briefs filed by Plaintiffs' counsel were consistently of high quality.

3. Plaintiffs' counsel were up against highly skilled defense counsel, who represented the Defendants in this case with vigor and substantive briefing to try to persuade this Court that Plaintiffs did not have a case, and should not be allowed to represent a class of direct purchasers. The Court considered the defense arguments carefully and considerably, but generally sided with the Plaintiffs because of the outstanding work of Plaintiffs' counsel as presented in this petition for approval of fees.

4. There was no government case or investigation, on which Plaintiffs could build their own case. Few cases with no government action, or investigation, result in class settlements as large as this one.

5. The Plaintiffs' conduct in discovery, particularly the use of digital searching methods, yielded a number of incriminating documents, which together with deposition testimony and other evidence, persuaded the Court that Defendants' motions for summary judgments should be denied and that a class of direct purchasers should be certified.

6. The use of the conduit theory in pursuing third-party research/marketing firms in this industry was very innovative and important in gathering evidence.

7. The performance of Plaintiffs' counsel on the class action issues was imaginative, bringing forth great quantity of persuasive evidence that common issues predominated and that the Plaintiffs' case had merit.

8. These cases also attracted a number of very large homebuilders, who had filed their own Complaint in the Northern District of California, which was consolidated with these class actions. The Court believes that the Plaintiffs in those cases have benefitted greatly from the work done by the class plaintiffs who have filed this motion for attorneys' fee. The class attorneys are obviously not entitled to any compensation from the individual plaintiffs, but as a "reality check," the Court believes that the homebuilder plaintiffs have benefitted from the work of the class plaintiffs.

9. Number of persons benefitted – the Direct Purchasers of drywall constitute a very large class of both entities involved in distribution and resale of drywall such as major so-called "big box" retailers: Home Depot, Lowe's, e.g., and also Homebuilders (12 large homebuilders, as noted above, have their own litigation pending).

10. Skill and efficiency of the attorneys – although the Court has commented on this above, it bears repeating that the result attained is directly attributable to having highly skilled and experienced lawyers represent the class in these cases. The Court has had personal (and pleasant) experiences with many of the lawyers in this case, representing both Plaintiffs and Defendants, for many years, including during my extensive practice on antitrust litigation while in private practice, and is personally knowledgeable of the high degree of their competence.

11. Antitrust litigation is complex and challenging. This is particularly true for Plaintiffs' counsel in a case where there has been no government investigation.

12. Duration of the litigation – this case was filed in 2013 and although approximately years may seem like a long time for a case to be pending, it is not that long when compared to other antitrust cases brought as class actions.

13. Class action status – although much has been written of some abuses in the bringing of class actions, in the Court's view, the substantial results warrant a conclusion that in an antitrust price-fixing case, class actions have resulted in multi-billion dollars in damages, that have been paid out by defendants who were either convicted of price-fixing in criminal cases, found liable in civil cases, or as in this case, agreed to settle. Thus, as far as antitrust price-fixing cases are concerned, Rule 23 has been not only generous to the attorneys who bring these cases, but much more so to individuals who have paid higher prices for various goods, over many decades, and would not have collected anything but for the efforts of plaintiffs' class action counsel.

14. Innovative Terms in the Settlement Agreement – the Court is not aware of any innovative terms in this settlement agreement. However, class counsel have had extensive experience in other class settlements in antitrust cases and bring that experience to this case. Also, the Court is assured that the settlement process will be moving forward, including the distribution of the settlement funds to class members, will be handled efficiently and expertly.

15. The Amount of Costs – although the expenses involved are considerable, the costs involved in securing the facts, largely through detailed electronic discovery strategies, which inherently involve consultants and expertise, and through the experts retained on both the class action and liability aspects of the case. In addition, the Court finds that the expenses that will be incurred in the distribution of the funds are reasonable and that class counsel will be using firms with expertise in this area and will supervise them carefully.

Although the above discussion covers most of the Gunter issues, the Court will review them for sake of completeness:

1. The size of the fund created and the number of the class are both large and reflect outstanding work by counsel.

2. There are no objections to this settlement. The only opt-outs are the homebuilders who have filed their own separate case which is still pending on pretrial matters in this Court but will be remanded to the Northern District of California after the completion of pretrial proceedings.

3. As noted above extensively, the class counsel exhibited skill and efficiency at all times.

4. This case is obviously a complex price-fixing case which had large volumes of discovery and legal briefing on many issues.

5. The risk of non-payment is unknown but quite possible that some of the Defendants who were adversely affected by the recent recession may have been at risk of filing for bankruptcy.

6. Although Plaintiffs' counsel spent many hours working on this case, the Court finds that the amount of time was warranted and if Plaintiffs' counsel had not worked as many hours as they did, this case may have resulted in summary judgment being granted for all Defendants, or Plaintiffs being unable to proceed to trial.

7. Awards in similar cases support the award in this case. A cross-check of the percentage awarded with the multiplier, based on total hours multiplied by hourly rates, shows the total fee requested and awarded is not excessive.

8. Under many precedents, the general rubric in this geographical area is that a 1/3 attorneys' fee is often the standard in contingent fee cases in "routine" personal injury and product liability cases, plus reimbursement to counsel for expenses.

CONCLUSION

As the above discussion shows, very few precedents have awarded this percentage amount in antitrust and securities cases. The Court finds the total hours claimed is accurate and reasonable. The lodestar $38,058,631.50 is also reasonable because the rates claimed are well within the range of rates charged by counsel in this district in complex cases. The Court finds the hours and rates to have been presented in an accurate and credible manner.

The Court follows Judge Brody's decision in In re Flonase Antitrust Litig., 951 F. Supp. 2d 739 (E.D. Pa. 2013), which has many similar features to this case.

In considering all of the factors above, the Court has decided to award the requested one-third of the $190,059,056 Combined Settlement Fund as attorneys' fees, in the amount of $63,353,019. A significant factor in awarding the full one-third requested is the delay in payment. Class counsel have labored for approximately six years, including pre-suit investigation, without any payment.

Class counsel will also be awarded expenses in the amount of $2,925,629, and the funds in the opt-out fee and expense account of $610,236. The Court will award incentive awards to the four named Plaintiffs in the amount of $50,000 each as in line with other cases. The Court will not award accrued interest.

A cross-check with the lodestar confirms that this award of attorneys' fees is reasonable. Dividing the net amount of attorneys' fees, $63,353,019, by the lodestar, $38,058,631.50, yields a lodestar multiplier of 1.66, which is reasonable and lower than in some of the cases described above.

Applying a reasonable multiplier of the lodestar, for judicial factors such as contingency, delay and payment risk, etc., the Court finds there is a reasonable correlation between an award of fees of one-third of the Combined Settlement Fund plus costs.

BY THE COURT:

/s/ Michael M. Baylson

MICHAEL M. BAYLSON
United States District Court Judge

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TAB 8B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DOMESTIC DRYWALL ANTITRUST LITIGATION	**MDL No. 2437** **13-MD-2437**
THIS DOCUMENT RELATES TO: **ALL DIRECT PURCHASER ACTIONS**	**Hon. Michael M. Baylson**

MEMORANDUM OF LAW IN SUPPORT OF DIRECT PURCHASER PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND SERVICE AWARDS FOR THE CLASS REPRESENTATIVES

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Direct Purchaser Plaintiffs Sierra Drywall Systems, Inc., Janicki Drywall, Inc., New Deal Lumber & Millwork Co., and Grubb Lumber Co., Inc., as representatives of the direct purchaser class ("Class Representatives"[1] or "Plaintiffs"), respectfully move the Court for an Order (1) awarding Direct Purchaser Plaintiffs' Counsel ("Class Counsel") one-third of the Combined Settlement Fund as attorneys' fees,[2] (2) reimbursing Class Counsel's $2,925,628.98 in litigation costs and expenses, and (3) awarding each Class Representative a service award of $75,000 for its contributions to the litigation, to be paid from the Combined Settlement Fund.

I. INTRODUCTION

Through more than five years of litigation, Class Counsel devoted tremendous effort and expended millions of dollars of unreimbursed out-of-pocket expenses to pursue antitrust claims on behalf of direct purchasers of paper-backed gypsum wallboard ("Wallboard" or "Drywall").[3] This work included:

- ***Claim development.*** The initial complaint was filed in December 2012, and stemmed not from a prior government investigation but from Co-Lead Class Counsel's pre-filing factual investigation. The allegations of the consolidated class complaint were so robust that Defendants did not even seek to dismiss it.

- ***Merits discovery.*** Plaintiffs engaged in substantial merits discovery, including the review of voluminous business records from the nine Defendants and various third parties, and taking 33 depositions, as well as reviewing and producing the Class Representatives' documents and defending their depositions. Plaintiffs also worked with their economics expert who produced two rounds of reports

[1] The Court appointed Sierra Drywall Systems, Inc., Janicki Drywall, Inc., New Deal Lumber & Millwork Co., and Grubb Lumber Co., Inc. as representatives of the direct purchaser class. ECF No. 631, (class certification) Order, ¶ 3, and has also appointed them as class representatives for each of the direct purchaser settlement classes.

[2] As discussed below, Co-Lead Class Counsel also request that the Court award Class Counsel all funds that have been deposited in the Opt-Out Fee and Expense Account (currently $610,236, plus accrued interest) created by the settlement agreements.

[3] Class Counsel includes the three firms appointed as Co-Lead Class Counsel, as well as the other firms representing direct purchaser plaintiffs who contributed to the class litigation. *See* Class Counsel's Fee and Expense Declarations ("Class Counsel's Decls."), attached hereto as Exhibit 1. The extensive efforts of Class Counsel are detailed more fully in the Declaration of H. Laddie Montague ("Montague Decl.") attached hereto as Exhibit 2.

(regarding merits), and took and defended 6 expert depositions in the direct purchaser action.

- ***Summary judgment.*** Following extensive summary judgment briefing, covering hundreds of pages and thousands of exhibits, the Court largely denied Defendants' motions and permitted the majority of Plaintiffs' case to move forward.

- ***Class certification.*** Direct Purchaser Plaintiffs prevailed in a hotly-contested class certification process that involved six separate party expert submissions, a technical advisor's report, oral argument, and a two-day evidentiary hearing with live expert testimony.

- ***Trial Preparation.*** Prior to the Joint Settlement negotiations, Co-Lead Class Counsel had commenced preparing for trial, including conducting a mock trial exercise with a jury research firm.

The success of those efforts is evident in the four substantial settlements negotiated by Co-Lead Class Counsel. As a result of the efforts of Class Counsel and the initiative and participation of the Class Representatives, settlements with eight Defendants, totaling approximately $190.7 million plus interest,[4] have now been achieved.[5] The settlements were obtained after prolonged and difficult negotiations with Defendants, each of which had significant resources at its disposal and was represented by highly capable and experienced counsel. For each settlement, Co-Lead Class Counsel prepared the settlement agreement and the attendant notices, orders, and preliminary and final approval documents, and supervised the work of the settlement administrator. The work is, of course, not over, as Co-Lead Class Counsel are preparing for the June 28, 2018 final approval hearing on the Joint Settlement, and will oversee the claims processing and the distribution of settlement funds to the class member claimants.

[4] This total includes the $610,236, plus interest, that has been deposited in the Opt-Out Fee and Expense Account created by the settlements.

[5] By no later than March 28, 2018, all these funds have been deposited into a Qualified Settlement Account and are earning interest for the Class.

Despite over five years of litigation and tens of millions of dollars in accrued lodestar, and despite earlier settlements of $65.7 million, Co-Lead Class Counsel have waited until now—the conclusion of the litigation—to request an award of attorneys' fees, reimbursement of Class Counsel's out-of-pocket litigation expenses, and service awards for the Class Representatives. The record in this case and the law of this Circuit fully support Class Counsel's request for a fee award of one-third of the Combined Settlement Fund, a request that is reasonable and well within the range of approval in the Third Circuit. *See, e.g.*, *Kirsch v. Delta Dental*, 534 Fed. Appx. 113, 116 (3d Cir. 2013) (upholding fee of "roughly 36% of the District Court's conservative valuation" of the settlement value); *Marchbanks Truck Serv. v. Comdata Network, Inc.*, No. 07-1078-JKG, 2014 WL 12738907, at *2-3 (E.D. Pa. July 14, 2014); *In re Fasteners Antitrust Litig.*, No. 08-md-1912, 2014 WL 296954, at *7 (E.D. Pa. Jan. 27, 2014); *see also* § III.B.7, *infra*. Moreover, this fee request represents a multiple of only approximately 1.68 of Class Counsel's lodestar, based on historical hourly rates and time expended through December 31, 2017. Accordingly, Plaintiffs respectfully request that the Motion be granted.

II. BACKGROUND

A. Prosecution of the Case

This litigation began in 2012, when Plaintiffs filed lawsuits against Defendants on behalf of a class of direct purchasers of Drywall. The filing followed Co-Lead Class Counsel's investigation, which included interviews with many industry contacts and significant analysis of economic conditions, historical pricing, and the particular conduct that formed the gravamen of the claims. On February 7, 2013, the Court appointed the undersigned law firms to serve as interim co-lead counsel for the Direct Purchaser Plaintiffs. The Court also ordered consolidation of the

direct purchaser actions and instructed Direct Purchaser Plaintiffs to file a consolidated amended complaint.[6]

For over five years, Co-Lead Class Counsel, along with other Class Counsel working under their supervision, have devoted nearly 80,000 hours developing and advancing the direct purchasers' claims, without the benefit of any preceding government investigation or criminal indictment.[7] The work done by Class Counsel included, but was not limited to:

- Investigating the building products industry generally, and the Drywall market specifically, and working with the Class Representatives to draft and file a comprehensive consolidated amended class action complaint, Montague Decl. ¶¶ 5-6, 9, 12-13;

- Negotiating with Defendants and coordinating with the indirect purchaser plaintiffs on discovery matters and status reports to the Court, *id.* ¶¶ 14-15, 17, 113, 116;

- Negotiating a comprehensive protocol for production of electronically stored information, and consulting with an outside expert regarding technology-assisted methods of review, *id.* ¶ 14;

- Drafting and negotiating a Protective Order governing confidential information, *id.*;

- Responding to a multitude of written discovery requests (including several sets of interrogatories, requests for production of documents, and requests for admission), negotiating the scope of that discovery, and processing, reviewing, and analyzing document productions from each Class Representative for potential production to Defendants, *id.* ¶¶ 24-25;

- Drafting discovery requests directed to all Defendants, followed by extensive meet-and-confer negotiations, in coordination with the indirect purchaser plaintiffs, with counsel for each Defendant, *id.* ¶¶ 9, 20-21;

- Processing more than 1.4 million documents (over 3.5 million pages) produced by Defendants and third parties, and reviewing, analyzing and coding documents

[6] ECF No. 59, Pretrial Order No. 1 and Report of Pretrial Conference.

[7] While there was no preceding government investigation or criminal indictment at the time Plaintiffs initiated their cases in 2012, well into the direct purchaser case, and likely because of it, the United States Department of Justice ("DOJ") issued document subpoenas to some Defendants in July 2015. *See* July 13, 2015 letter from Steven Bizar to Hon. Michael M. Baylson. To the best of Co-Lead Class Counsel's knowledge, the DOJ has not pursued its investigation any further.

selected with the aid of technology-assisted review tools, in coordination with the indirect purchaser plaintiffs, *id.* ¶¶ 19-23;

- Briefing and arguing discovery motions, *e.g.*, *id.* ¶¶ 17, 25;

- Consulting with expert economists to analyze Defendants' transactional data, cost data, and other information produced in discovery to develop opinions relating to the Drywall market, antitrust impact, and damages, for purposes of class certification, summary judgment, and trial, *e.g.*, *id.* ¶¶ 39, 44, 67, 75, 90;

- Preparing for and taking the depositions of 33 defense and third-party fact witnesses, in coordination with the indirect purchaser plaintiffs, *id.* ¶¶ 26-27;

- Preparing for and serving as the lead examiners in the depositions of 3 defense expert witnesses, 2 of which were done in coordination with the indirect purchaser plaintiffs, *id.* ¶ 43, 72;

- Preparing for and defending 5 depositions of corporate representatives of the 4 Class Representatives,[8] *id.* ¶ 28;

- Preparing for and defending 3 depositions of Dr. Russell Lamb, Plaintiffs' expert economist, *id.* ¶¶ 40, 68, 77;

- Briefing and arguing multiple motions for summary judgment filed by Defendants, as well as successfully opposing Defendants' petition to the Third Circuit for an interlocutory appeal of the Court's decision denying four out of five of those motions, *id.* ¶¶ 45-59, 98-101;

- Successfully briefing and arguing their motion for class certification and opposing to Defendants' *Daubert* motion to exclude Plaintiffs' economist, including preparing for oral argument and a two-day evidentiary hearing with live expert testimony, *id.* ¶¶ 66-97;

- Providing responses to the report of a Court-appointed technical advisor on econometric issues relating to class certification, *id.* ¶¶ 89-90;

- Successfully opposing Defendants' Rule 23(f) petition for appeal of the Court's decision certifying the direct purchaser class, *id.* ¶¶ 95-97;

- Beginning preparations for trial against the remaining Defendants, including a full-day jury research exercise and other extensive work with jury consultants, *id.* ¶ 102;

[8] In addition, 2 of the 5 third party depositions noticed and taken by Defendants were of representatives from PRSCO, the purchasing group to which Class Representative New Deal belonged, and which assigned New Deal its own share of PRSCO's direct purchaser claims in this litigation.

- Selecting a mediator, and preparing for and attending a full-day mediation, which resulted in the Joint Settlement, *id.* ¶ 103;

- Negotiating 4 settlements with 8 Defendants and preparing the settlement agreements and attendant notices, orders, and preliminary and final approval briefs; obtaining approval from the Court; and working with the claims administrator to design and send notices to the members of the settlement classes and to create and maintain a settlement website, *id.* ¶¶ 30-38, 60-65, 103-107; and

- Co-Lead Class Counsel's directing and supervising the participation of numerous law firms to assist in Co-Lead Class Counsel's prosecution of the case, including efficiently managing all firms' assignments, *e.g.*, *id.* ¶¶ 21, 113.[9] Co-Lead Class Counsel performed these duties in accordance with Pretrial Order No.3, which included collecting time and expense reports from all Class Counsel on a monthly basis and submitting those reports to the Court on a quarterly basis. ECF No. 11 (Pretrial Order No. 3 – Case Management) at 6-8.

B. The Settlements and the Combined Settlement Fund

The Court approved three direct purchaser settlements (now final) in this case and dismissed those settling Defendants from the litigation. The first and second settlements, reached separately in February 2015 with Defendants TIN and USG[10] for $5.25 million and $39.25 million, respectively, were granted final approval on August 20, 2015.[11] In June 2016, Plaintiffs reached a settlement with Lafarge for $23 million, which was granted final approval on December 7, 2016.[12] While Co-Lead Class Counsel have not yet sought a fee or full reimbursement of their substantial

[9] The Court applauded Co-Lead Class Counsel for including such management procedures in Pretrial Order No. 3 and on their proposed management of plaintiffs' firms' assignments. *See* ECF No. 12, Memorandum Re: Plaintiffs' Attorneys' Fees and Expenses; ECF No. 11, Pretrial Order No. 3 – Case Management. On February 7, 2013, the Court appointed now-designated Co-Lead Class Counsel as "interim co-lead counsel," which allowed them to begin managing plaintiffs' firms' assignments. *See* Case No. 2:12-cv-07106, ECF No. 59, Pretrial Order No. 1 and Report of Pretrial Conference, at 2; *see also* ECF No. 11, Pretrial Order No. 3 – Case Management, at 5.

[10] The USG entities are Defendants USG Corporation and United States Gypsum Company, and USG Corporation's former subsidiary L&W Supply Corporation.

[11] ECF Nos. 273, Memorandum Approving Class Action Settlement; ECF No. 276, USG Settlement Final Judgment Order; ECF No. 277, TIN Settlement Final Judgment Order.

[12] ECF No. 503, Lafarge Settlement Final Judgment Order. The Lafarge settlement payment was reduced to $21,169,292 due to requests for exclusion. In accordance with paragraphs 34 and 35 of the Lafarge Settlement Agreement, $610,236 of the Lafarge settlement payment was placed in the Opt-Out Fee and Expense Account. *Id.* ¶ 12.

out-of-pocket costs from these first three settlements, the Court did authorize the use of (1) $300,000 from the four settlement funds for notice and administration expenses,[13] and (2) approximately $3,300,000 from the USG, TIN, and Lafarge settlement funds to pay ongoing pretrial litigation expenses incurred in connection with Plaintiffs' economic expert.[14]

On January 29, 2018, the Court preliminarily approved a $125 million Joint Settlement with AG, Eagle, NGC, and PABCO and authorized dissemination of notice to the class.[15] If the Joint Settlement is finally approved, the combined direct purchaser settlements in this case will total approximately $190.7 million. This total, plus accrued interest, but minus the funds in the Opt-Out Fee and Expense Account, constitutes the "Combined Settlement Fund" from which Co-Lead Class Counsel now seek an award of attorneys' fees, reimbursement of reasonable litigation expenses, and service awards to the Class Representatives.

[13] ECF No. 183, Order Granting Preliminary Approval of Direct Purchaser Plaintiffs' Proposed Settlement with Defendant TIN, Inc.; Certifying the TIN Settlement Class for the Purpose of Providing Notice; and Authorizing Dissemination of Notice to the TIN Settlement Class Members, ¶ 30; ECF No. 185, Order Granting Preliminary Approval of Direct Purchaser Plaintiffs' Proposed Settlement with Defendant USG Corporation, Defendant United States Gypsum Company, and L&W Supply Corporation; Certifying the USG Settlement Class for the Purpose of Providing Notice; and Authorizing Dissemination of Notice to the USG Settlement Class Members, ¶ 30; ECF No. 427, Order Granting Preliminary Approval of Direct Purchaser Plaintiffs' Proposed Settlement with Defendant Lafarge North America Inc.; Certifying the Lafarge Settlement Class for the Purpose of Providing Notice; and Authorizing Dissemination of Notice to the Lafarge Settlement Class Members, ¶ 30; ECF No. 695, Order Granting Preliminary Approval of Direct Purchaser Plaintiffs' Proposed Joint Settlement with American Gypsum Company LLC, Eagle Materials Inc., New NGC, Inc., and PABCO Building Products, LLC, Preliminary Approval of the Distribution Plan, and Authorization to Disseminate Notice, ¶ 27. To date, $190,485.13 has been spent from those authorized funds.

[14] ECF No. 275, Order Re DPP Settlement Class Counsel's Request to Utilize Settlement Funds for Ongoing Litigation Expenses; ECF No. 480, Order Authorizing Portion of USG and TIN Settlement Funds for Ongoing Litigation Expenses; ECF No. 659, Order.

[15] ECF No., 695, Joint Settlement Preliminary Approval Order. The Joint Settlement amount may be reduced due to requests for exclusion, which are not due until May 7, 2018. To date, no requests for exclusion have been received.

C. Notice Regarding Co-Lead Counsel's Request for Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards

In its Joint Settlement Preliminary Approval Order, the Court approved the dissemination of notice to the members of the four settlement classes (the "Notice").[16] As required by Fed. R. Civ. P. 23(h), the Notice (copy attached as Exhibit 4) informed potential members of all the settlement classes that Co-Lead Class Counsel would request attorneys' fees, reimbursement of litigation expenses, and service awards for the Class Representatives, and explained how class members could object to these requests:

> ***3.4 How will the lawyers be paid?***
>
> Since they filed this case, the attorneys representing the Litigation Class and the Settlement Classes have not received any payment for their services in prosecuting the lawsuit, nor have they been reimbursed for any out-of-pocket expenses. Consistent with disclosures in the prior notices, the Court previously approved payments totaling approximately $3.3 million from the TIN, USG, and Lafarge settlement funds to cover ongoing pretrial litigation expenses, primarily for expenses incurred in connection with economic experts.
>
> If the Court approves the proposed Joint Settlement, Co-Lead Counsel will ask the Court to award attorneys' fees of up to one-third of the Combined Settlement Fund, plus reimbursement of expenses that they incurred in the litigation and administering the settlement funds (not to exceed $4 million). Co-Lead Counsel will file their petition for attorneys' fees and reimbursement of expenses with the Court by April 9, 2018. A copy of the petition will be posted on www.DrywallDirectPurchaserLitigation.com or can be obtained by calling 1-888-706-3401.
>
> Any attorneys' fees and reimbursement of litigation expenses will be awarded only as approved by the Court in amounts determined to be fair and reasonable. If you wish to object to the petition for

[16] In accordance with the Court's Joint Settlement Preliminary Approval Order, the Notice was sent to more than 27,000 class members on February 14, 2018 and published in the March edition of the *LBM Journal*. *See* Affidavit of Markham Sherwood Regarding Dissemination of Notice to Potential Members of the American Gypsum Company LLC, Eagle Materials Inc., New NGC, Inc., and PABCO Building Products, LLC Settlement Class and to Potential Members of The Combined Settlement Class ("Sherwood Affidavit") attached hereto as Exhibit 3.

> attorneys' fees and reimbursement of litigation expenses, you may do so, but only by following the instructions in Section 3.6 below.

The deadline for objections is May 7, 2018, and Co-Lead Class Counsel will provide the Court with a final report on any objections and responses thereto on May 29, 2018.

III. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE

Plaintiffs, on behalf of Class Counsel, respectfully request an award of attorneys' fees of one-third of the Combined Settlement Fund ($190,059,056, plus accrued interest), as well as payment of the total Opt-Out Fee and Expense Accounts ($610,236, plus accrued interest).[17] Class Counsel's fee request is well within the range of awards regularly approved by courts in this Circuit, particularly in light of the length and complexity of this case, the nature and extent of Co-Lead Class Counsel's efforts in negotiating substantial settlements, and the litigation risks assumed. Moreover, cross-checking this fee request against Class Counsel's lodestar of $38,058,631.50 (based upon historical rates) validates its reasonableness.

A. A Reasonable Percentage of the Fund Recovered Is the Appropriate Method for Awarding Class Counsel's Attorneys' Fees in this Common Fund Settlement

In this Circuit, district courts have discretion to award fees in common fund cases based on either the lodestar/multiplier method or the percentage-of-the-fund method. *See In re Diet Drugs Prod. Liab. Litig.*, 582 F.3d 524, 539 (3d Cir. 2009); *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006). However, the percentage-of-the-fund method of awarding fees is the preferred method for awarding fees in common fund cases in this Circuit and throughout the United States. *See, e.g.*, *Kirsch*, 534 Fed. Appx. at 115 ("'The percentage of recovery method is generally favored in common fund cases.'") (quoting *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 280 (3d

[17] Depending on the final amount of opt-outs, if any, from the Joint Settlement Class, the total amount in the Combined Settlement Fund may decrease and the Opt-Out Fee and Expense Account may increase.

Cir. 2009)); *Diet Drugs*, 582 F.3d at 540 ("the percentage-of-recovery method is generally favored."); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 333 (3d Cir. 1998) ("percentage-of-recovery method preferred in common fund cases").[18] Courts have long recognized that "'a private plaintiff, or plaintiff's attorney, whose efforts create, discover, increase, or preserve a fund to which others also have a claim, is entitled to recover from the fund the costs of his litigation, including attorneys' fees.'" *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 187 (3d Cir. 2005) (quoting *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 820 n.39 (3d Cir. 1995)). The purpose of compensating counsel in this manner means that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994). Furthermore, the Supreme Court has consistently endorsed awarding attorneys' fees using the percentage-of-the-fund method. *See, e.g.*, *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984).[19] Thus, the percentage-of-the-fund method is properly applied here.

B. A Fee Award of One-Third of the Combined Settlement Fund Is Fair and Reasonable

In determining what constitutes a reasonable percentage fee award, a district court must consider the ten factors identified by the Third Circuit in *Gunter v. Ridgewood Energy Corp.*, 223

[18] *See also Report of Third Circuit Task Force: Court Awarded Attorney Fees*, 108 F.R.D. 237, 255-56 (1985); *Report of Third Circuit Task Force: Selection of Class Counsel*, 208 F.R.D. 340, 355 (2002) ("A percentage fee, tailored to the realities of the particular case, remains superior to any other means of determining a reasonable fee for class counsel."); *Castro v. Sanofi Pasteur Inc.*, Civ. No. 11-7178, 2017 WL 4776626, at *7 (D. N.J. Oct. 23, 2017) ("In common fund cases such as this one, attorneys' fees are typically awarded through the percentage-of-recovery method."); *In re Viropharma Inc. Sec. Litig.*, No. 12-2714, 2016 WL 312108, at *15 (E.D. Pa. Jan. 25, 2016) ("The percentage-of-recovery method is 'generally favored' in cases involving a settlement that creates a common fund."); *In re Linerboard Antitrust Litig.*, MDL 1261, 2004 WL 1221350, at *3 (E.D. Pa. June 2, 2004) ("the percentage of recovery method is the proper one to calculate attorneys' fees."); *Manual for Complex Litigation*, § 14.121 (4th ed. 2004) (reporting that "the vast majority of courts of appeals now permit or direct district courts to use the percentage method in common-fund cases").

[19] *See also Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79 (1980); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165-67 (1939).

F.3d 190 (3d Cir. 2000), and *Prudential*, 148 F.3d at 283. As the Third Circuit explained in *Diet Drugs*, the *Gunter/Prudential* factors for which this Court must conduct a "robust assessment" are:

> (1) the size of the fund created and the number of beneficiaries, (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel, (3) the skill and efficiency of the attorneys involved, (4) the complexity and duration of the litigation, (5) the risk of nonpayment, (6) the amount of time devoted to the case by plaintiffs' counsel, (7) the awards in similar cases, (8) the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations, (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained, and (10) any innovative terms of settlement.

582 F.3d at 541 (internal citations omitted). Applying these factors clearly demonstrates that Class Counsel's request for one-third of the Combined Settlement Fund as a fee award is reasonable.

1. An award of one-third is reasonable based on the size of the Combined Settlement Fund and the number of entities benefitted.

The total recovery achieved in this case—over $190 million—is substantial, particularly in light of the complexity, duration, and expense of ongoing litigation and the potential 27,000-plus class members who may participate. A one-third fee is routinely awarded for settlement funds of comparable size.[20] Establishing liability and damages at trial and securing recovery for those class members would have been risky and uncertain, and at the time of the Joint Settlement (which constitutes the majority of the Combined Settlement Fund), Plaintiffs also faced motions from the

[20] *See, e.g., In re Neurontin Antitrust Litig.*, No. 02-1830, ECF 114 (D.N.J. Aug. 6, 2014) (awarding one-third fee of $191 million settlement); *Marchbanks Truck Serv. v. Comdata Network, Inc.*, No. 07-1078-JKG, 2014 WL 12738907 (E.D. Pa. July 14, 2014) (awarding requested one-third of $130 million settlement fund); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 746, 748 (E.D. Pa. 2013) ("*Flonase Direct Purchasers*") (approving requested one-third of $150 million settlement fund); *In re OSB Antitrust Litig.*, 2:06-cv-00826-PD, Order, ECF 947, at *5 (E.D. Pa. Dec. 9, 2008) (approving requested one-third of $120 million settlement fund). *See also* § III.B.7 & ns.25-26, *infra* (citing numerous cases awarding one-third fee).

remaining Defendants to significantly limit Plaintiffs' damages at trial, as well as indications that Defendants were going to seek additional expert discovery. Accordingly, this factor weighs in favor of the requested fee award.

2. Analysis of any potential objections to the fee request is premature.

The Notice advised class members that Co-Lead Class Counsel would apply for an award of attorneys' fees, reimbursement of litigation expenses, and service awards for the Class Representatives. It also advised class members that they could object to Co-Lead Class Counsel's application or the Joint Settlement, and provided instructions on how to do so. Because the deadline for objections is May 7, 2018, Co-Lead Class Counsel will address this factor, and any objections to their application or the Joint Settlement, in their responsive filing due on May 29, 2018. As of April 9, 2018, no objections have been filed.

3. Class Counsel are skilled and efficient litigators.

Class Counsel are highly experienced in litigating complex class actions and antitrust cases. Class Counsel combed through millions of pages of documents and took scores of depositions to build the necessary evidentiary record in this case, successfully moved for class certification, defeated Defendants' 23(f) petition of the Court's class certification decision, largely defeated Defendants' multiple summary judgment motions, and defeated Defendants' 1292(b) appeal to the Third Circuit. Indeed, "[t]he result achieved is the clearest reflection of petitioners' skill and expertise." *Linerboard*, 2004 WL 1221350, at *5.[21] Here, the total recovery achieved over a span

[21] *See also In re OSB Antitrust Litig.*, No. 2:06-cv-00826-PD, Order, ECF 947 at *5 ("'[T]he most significant factor [in evaluating claims for counsel fees] . . . is the quality of representation, as measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel.'") (quoting *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000)); *Cullen v. Whitman Medical Corp.*, 197 F.R.D. 136 at 149 (E.D. Pa. 2000) ("[t]he single clearest factor reflecting the quality of class counsel's services to the class are the results obtained.").

of five years – over $190 million – is substantial, thus further evidencing the skill and efficiency of Class Counsel. Class Counsel achieved this result despite a vigorous defense by Defendants, which were represented by skilled counsel at some of the leading defense law firms in the United States. Accordingly, this factor weighs in favor of the requested fee award.

4. The complexity and duration of the litigation

"[C]omplex and/or novel legal issues, extensive discovery, acrimonious litigation, and tens of thousands of hours spent on the case by class counsel" are the "factors which increase the complexity of class litigation." *In re Cendant Corp. Prides Litig.*, 243 F.3d 722, 741 (3d Cir. 2001). This case involved extensive efforts by Class Counsel (as well as this Court) over a period of five years, as reflected in the over 700 entries in MDL Docket No. 2437.

During the course of the action, Plaintiffs were faced with several rounds of intense briefing, including summary judgment (spanning hundreds of pages and thousands of exhibits); a hard-fought class certification proceeding that included six separate expert submissions (including responses to the opinion of a Court-appointed technical advisor), *Daubert* briefing, argument, and two days of live testimony; and two separate petitions by Defendants for interlocutory appellate review. Moreover, the parties completed merits and class certification discovery, which included production of 1.4 million documents (amounting to over 3.5 million pages) from Defendants, Plaintiffs, and third parties; 43 depositions of fact witnesses, including 5 depositions of corporate designees of the Class Representatives; 6 expert depositions in the direct purchaser case; and the production by Plaintiffs of their Rule 26(a)(2) expert reports.

As to the complexity of the case, "'[a]n antitrust class action is arguably the most complex action to prosecute. . . . The legal and factual issues involved are always numerous and uncertain in outcome.'" *Linerboard*, 2004 WL 1221350, at *10 (quoting *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000)). This case is no exception. Regarding duration,

the case, now pending for more than five years, could continue for substantial additional time if it were to go to trial.[22] Accordingly, this factor weighs in favor of finding the fee request reasonable.

5. Class Counsel faced a risk of nonpayment.

Class Counsel undertook this case on a wholly contingent basis and ran a substantial risk of no recovery whatsoever, and "did not benefit from the fruits of a prior government investigation." *See Linerboard*, 2004 WL 1221350, at *11 (lack of prior government investigation or prosecution increased risk of nonpayment). Class Counsel have devoted enormous time and resources to the vigorous litigation of this case for more than five years, while deferring all compensation for their time during that lengthy period (and risking receipt of little or no compensation if the case was not litigated to a successful conclusion). *See In re Flonase Antitrust Litig.*, 291 F.R.D. 93, 104 (E.D. Pa. 2013) ("*Flonase Indirect Purchasers*") ("as a contingent fee case, counsel faced a risk of nonpayment in the event of an unsuccessful trial. Throughout this lengthy litigation, Class Counsel have not received any payment. This factor supports approval of the requested fee.").[23] Class Counsel advanced just under $3 million in unreimbursed expenses to prosecute the litigation,[24] which would not have been reimbursed absent a successful result. *See In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 516 (W.D. Pa. 2003) ("Aside from investing their time, counsel had to front copious sums of money . . . Thus, the risks that counsel incurred in prosecuting this case were substantial and further support the requested fee award."). Accordingly, this factor weighs in favor of the requested fee award.

[22] *See Linerboard*, 2004 WL 1221350, at *10 (noting "there is authority for approving a 30 percent fee in litigation that concluded much earlier in the proceeding.").

[23] *See also Hall v. Best Buy Co.*, 274 F.R.D. 154, 173 (E.D. Pa. 2011) ("while this case has been pending, Class Counsel have not received any payment, and, by proceeding on a contingent-fee basis, ran substantial risk of nonpayment….").

[24] *See* Montague Decl. ¶¶ 111, 117.

6. Class Counsel devoted nearly 80,000 hours to prosecuting this action.

Class Counsel devoted considerable time and effort to prosecuting the Direct Purchaser Plaintiffs' antitrust claims during the pendency of the litigation, and even beforehand in their investigation that led to the initial complaints. As set forth in the declarations submitted with this application, through December 31, 2017, Class Counsel devoted 79,998.05 hours to prosecuting this case, resulting in a total lodestar of $38,058,631.50. Class Counsel could have spent those attorney hours litigating other matters, which counsels in favor of awarding the requested fees. *See, e.g.*, *Flonase Direct Purchasers*, 951 F. Supp. 2d at 748 (finding factor weighed in favor of 33% fee award where class counsel devoted more than 40,000 combined hours to prosecuting the antitrust class action); *Lazy Oil Co. v. Wotco Corp.*, 95 F. Supp. 2d 290, 323 (W.D. Pa. 1997) ("In addition to noting the vast amount of work which was required in prosecuting this case, we also note Class Counsels' representation that their involvement in this litigation required them to abstain from working on other matters.").

7. One-third of the Combined Settlement Fund is a typical and reasonable fee award for cases like this one.

The law is well-established that a one-third fee is typical, reasonable, and justified by extensive authority from courts in this District and Circuit. *See, e.g.*, *Castro v. Sanofi Pasteur Inc.*, 2:11-cv-07178, 2017 WL 4776626, at *9 (D. N.J. Oct. 23, 2017) ("The one-third fee is within the range of fees typically awarded within the Third Circuit through the percentage-of-recovery method; the Circuit has observed that fee awards generally range from 19% to 45% of the settlement fund…Thus, the requested fee in this matter [of one-third of the settlement fund] is within the normal range." (internal citation omitted)); *In re K-Dur Antitrust Litig.*, No. 01-cv-1652, ECF 1058 (D.N.J. Oct. 5, 2017) (awarding 33⅓% of settlement). *See also Fasteners*, 2014 WL 296954, at *7 ("Counsel's request for one third of the settlement fund is consistent with other

direct purchaser antitrust actions.") (internal citation omitted); *Flonase Direct Purchasers*, 951 F. Supp. 2d at 746, 748 (approving requested one-third of $150 million settlement fund (plus interest), and noting that "in the last two-and-a-half years, courts in eight direct purchaser antitrust actions approved one-third fees"); *Flonase Indirect Purchasers*, 291 F.R.D. at 104 ("A one-third fee award is standard in complex antitrust cases of this kind."); *Marchbanks Truck Serv., Inc. v. Comdata Network, Inc.*, No. 07-1078-JKG, 2014 WL 12738907, at *2 (E.D. Pa. July 14, 2014) ("fee awards of one-third of the settlement amount are commonly awarded in this Circuit"); *In re Wellbutrin XL Antitrust Litig.*, No. 08-cv-2431, ECF 485 (E.D. Pa. Nov. 7, 2012) (awarding fee of 33⅓% of settlement); *In re Wellbutrin SR Antitrust Litig.*, No. 04-5525, 2011 U.S. Dist. LEXIS 158833, *14-15 (E.D. Pa. Nov. 21, 2011) (same); *In re Auto. Refinishing Paint Antitrust Litig.*, No. 1426, 2008 WL 63269, at *1, *8 (E.D. Pa. Jan. 3, 2008) (same); *OSB*, No. 2:06-cv-00826-PD, Order, ECF 947, at *3 (finding fee award of one-third of $120 million in settlement funds "reasonable and well-earned"); *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 342 (E.D. Pa. 2007) (approving a percentage of recovery of 35%, plus reimbursement of expenses).[25] Moreover, a one-third fee award is consistent with awards nationwide.[26] A fee that

[25] *See also Steele v. Welch*, No. 03-6596, 2005 WL 3801469, at *2 (E.D. Pa. May 20, 2005) (finding requested fee of 33%, plus expenses, to be reasonable) (Baylson, J.); *Mylan Pharms., Inc. v. Warner Chilcott Public Ltd., Co.*, No. 12-3824, 2014 WL 12778314 (E.D. Pa. Sept. 15, 2014) ("*Doryx*") (awarding 33⅓% of settlement); *In re Neurontin Antitrust Litig.*, No. 02-1830 (D.N.J. Aug. 6, 2014) (same); *In re Hypodermic Prods. Antitrust Litig.*, No. 05-1602, ECF 461 (D.N.J. Apr. 10, 2013) (same); *Rochester Drug Co-Operative, Inc. v. Braintree Labs., Inc.*, No. 1:07-cv-00142, ECF 243 (D. Del. May 31, 2012) ("*Miralax*") (same); *In re Metoprolol Succinate Antitrust Litig.*, No. 06-52, ECF 193 (D. Del. Feb. 21, 2012) (same); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-cv-340, 2009 U.S. Dist. LEXIS 133251, *17 (D. Del. April 23, 2009) (same); *In re Corel Corp. Sec. Litig.*, 293 F. Supp. 2d 484, 497-98 (E.D. Pa. 2003) (awarding 331/3% of settlement fund and noting, "[t]his District has observed that fee awards frequently range between nineteen and forty-five percent of the common fund."); *In re Ravisent Techs., Inc. Sec. Litig.*, No. Civ.A.00-CV-1014, 2005 WL 906361, at *11 (E.D. Pa. Apr. 18, 2005) ("courts within this Circuit have typically awarded attorneys' fees of 30% to 35% of the recovery, plus expenses"); *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 134 (D.N.J. 2002) ("Scores of cases exist where fees were awarded in the one-third to one-half of the settlement fund.") (citations omitted); *In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 433-34 (E.D. Pa. 2001) (approving one-third fee request).

[26] *See, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 460 (9th Cir. 2000) (affirming award of fees equal to one-third of total recovery); *In re U.S. Foodservice, Inc. Pricing Litig.*, No. 07-md-01894, ECF 521 (D. Conn. Dec. 9, 2014) (attorneys awarded one-third of a $297 million settlement fund); *Standard Iron Works v. ArcelorMittal*, No.

fully compensates counsel for their time and the inherent risk posed by antitrust litigation of this magnitude and complexity is also strongly supported by the policies favoring private enforcement of the antitrust laws.[27] Accordingly, this factor supports the requested fee.

8. Class Counsel prosecuted the litigation without help from government agencies.

Courts in this Circuit are instructed to consider whether counsel benefitted from "the efforts of other groups, such as government agencies conducting investigations." *AT&T*, 455 F.3d at 165 (citation omitted). As in *In re Diet Drugs Prods. Liab. Litig.*, "this case is quite different from the typical antitrust or securities litigation" in which the *Gunter/Prudential* factors are often considered, "where government prosecutions frequently lay the groundwork for private litigation." 553 F. Supp. 2d 442, 481 (E.D. Pa. 2008). Here, Class Counsel did not rely on "the Government or other public agencies to do their work for them as has occurred in some cases." *Id.* at 481-82. Indeed, Class Counsel conducted their own comprehensive investigation of the Drywall industry,

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08 C 5214, 2014 WL 7781572 (N.D. Ill. Oct. 22, 2014) (attorneys awarded 33% of a $163.9 million settlement fund); *Shaw v. Interthinx, Inc.*, No. 13–cv–01229–REB–NYW, 2015 WL 1867861 at *6 (D. Colorado Apr. 21, 2015) ("The customary fee awarded to class counsel in a common fund settlement is approximately one-third of the total economic benefit bestowed on the class."); *Menkes v. Stolt-Nielsen S.A.*, No. 3:03CV00409(DJS), 2011 WL 13234815 (D. Conn. Jan. 25, 2011) (granting fee request of 33⅓ percent of common fund in class action settlement); *In re Universal Service Fund Telephone Billing Practices Litigation*, No. 02–MD–1468–JWL, 2011 WL 1808038 at *2 (D. Kan. May 12, 2011) ("an award of one-third of the fund falls within the range of awards deemed reasonable by courts"); *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, No. 06 Civ. 4270 (PAC), 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009) (holding that "Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit" and collecting cases); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (33.33% fee award); *In re Blech Sec. Litig.*, No. 94 Civ. 7696 (RWS), 2002 WL 31720381, at *1 (S.D.N.Y. Dec. 4, 2002) (finding fee request of 33-1/3% reasonable); *see also* Denise N. Martin, Vinita M. Juneja, Todd S. Foster & Frederick C. Dunbar, *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions?* 2 STAN. J.L. BUS. & FIN. (1996) ("Regardless of case size, fees average approximately 32 percent of the settlement.").

[27] *See, e.g.*, *In re Southeastern Milk Antitrust Litig.*, No. 2:07-CV 208, 2013 WL 2155387, at *5 (E.D. Tenn. May 17, 2013) ("[F]ailing to fully compensate class counsel for the excellent work done and the various substantial risks taken would undermine society's interest in the private litigation of antitrust cases. Society's interests are clearly furthered by the private prosecution of civil cases which further important public policy goals, such as vigorous competition by marketplace competitors. Simply put, anti-competitive conduct such as that alleged in this case would likely go unchallenged absent the willingness of attorneys to undertake the risks associated with such expensive and complex litigation.").

developed their own theory of liability and damages, and reviewed millions of pages of documents, without the assistance of a federal investigation or government indictments. Accordingly, "the benefit to the Class is directly and entirely attributable to Class Counsel's efforts," *OSB*, No. 2:06-cv-00826-PD, Order, ECF 947, at *7, and this factor weighs in favor of the requested fee award.

9. The requested fee is consistent with the percentage fee that would have been negotiated in a private contingent fee arrangement.

"What the market would pay" for fees in a similar litigation is "significant because…the goal of the fee setting process it [sic] to 'determine what the lawyer would receive if he were selling his services in the market rather than being paid by Court Order.'" *Linerboard*, 2004 WL 1221350, at *15 (citing *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 568 (7th Cir. 1992)). There is widespread consensus that "a 33 1/3% contingent fee is [what is] commonly negotiated in the private market." *OSB*, No. 2:06-cv-00826-PD, Order, ECF 947, at *7 (citing *Linerboard*, 2004 WL 1221350, at *15); *see also* Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Stud. 27 (2004), at 35 ("Substantial empirical evidence indicates that a one-third fee is a common benchmark in private contingency fee cases.").[28] Indeed, "a one-third contingency fee arrangement is not out of the ordinary in a complex [antitrust] case like this one." *Fasteners*, 2014 WL 296954, at *7.[29] Therefore, this factor weighs in favor of approval of the fee request.

[28] *Accord In re Remeron Direct Purchaser Antitrust Litig.*, No. Civ. 03-0085, 2005 WL 3008808, at *16 (D.N.J. Nov. 9, 2005) ("Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation."); *Montague v. Dixie Nat. Life Ins. Co.*, No. 3:09-00687-JFA, 2011 WL 3626541, at *2 & *3 (D.S.C. Aug. 17, 2011) ("In non-class contingency fee litigation, a 30% to 40% contingency fee is typical.").

[29] *See also Mylan Pharms. Inc. v. Warner Chilcott Public Ltd. Co.*, 2014 WL 12778314 at *7 ("[A] one-third contingency is standard in individual litigation; in antitrust litigation, a higher contingency would be reasonable, given the complexities and risks involved. In these circumstances, the requested 33⅓% fee award is fair and reasonable."); *Mehling v. New York Life Ins. Co.*, 248 F.R.D. 455, 464 n.18 (E.D. Pa. 2008) (citing *Bradburn Parent Teacher Store, Inc.*, 513 F. Supp. 2d at 340 (finding a fee of 35% to be consistent with private contingent fee arrangements)); *In re Ikon*, 194 F.R.D. at 194 ("[I]n private contingency fee cases … plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery.").

10. The factor of any innovative terms is neutral.

This factor neither weighs in favor of nor detracts from a decision to award the requested fee. *See, e.g., In re Merck & Co. Vytorin ERISA Litig.*, Civ. No. 08-CV-285, 2010 WL 547613, at *12 (D.N.J. Feb. 9, 2010) (finding factor neutral when no innovative terms are highlighted).

* *

In sum, at least eight of the ten *Prudential/Gunter* factors support Class Counsel's request for one-third of the Combined Settlement Fund as a fee award, and none of the *Prudential*/*Gunter* factors counsels against that request.

C. A Cross-Check of Class Counsel's Lodestar Confirms the Reasonableness of the Requested Fee

Courts in the Third Circuit often examine the lodestar calculation as a cross-check on the percentage fee award. *See, e.g., Linerboard*, 2004 WL 1221350, at *4. The cross-check is not designed to be a "full-blown lodestar inquiry," but rather an estimation of the value of counsel's investment in the case. *Report of Third Circuit Task Force, Selection of Class Counsel*, 208 F.R.D. 340, 422-23 (2002) (noting that "[t]he lodestar remains difficult and burdensome to apply"); *In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294 at 307 n.17 (3d Cir. 2005) ("[T]he lodestar cross-check does not trump the primary reliance on the percentage of common fund method."). The Third Circuit recommends the use of the lodestar cross-check "as a means of assessing whether the percentage-of-recovery award is too high or too low," not as a substitute for the percentage-of-the-fund method. *Diet Drugs*, 582 F.3d at 545 n.42 (citing *Rite Aid*, 396 F.3d at 306-07).

The cross-check analysis is a two-step process. First, the lodestar is determined by multiplying the number of hours reasonably expended by the reasonable rates requested by the

attorneys.[30] Second, the court determines the multiplier required to match the lodestar to the percentage-of-the-fund request made by counsel, and determines whether the multiplier falls within the accepted range for such a case. Here, the lodestar cross-check confirms that the one-third fee request is eminently reasonable.

1. Class Counsel's lodestar is reasonable.

As of December 31, 2017, Class Counsel had spent 79,998.05 hours working on this case on behalf of the class.[31] As explained in the Declaration of Laddie Montague, Jr. and Class Counsel's Fee and Expense Declarations, the stated hours were incurred by, among other things, investigating the claims against Defendants; preparing the initial complaints and Consolidated Amended Class Action Complaint; conducting necessary legal research; conducting extensive discovery; briefing Defendants' multiple motions for summary judgment; briefing and presenting Plaintiffs' motion for class certification at the March 2017 oral argument and at a two-day evidentiary hearing with live testimony in April 2017; working with experts submitting Rule 26(a)(2) reports and responding to a Court-appointed technical advisor report; beginning trial preparation; engaging in a mediation and extensive negotiations of the initial three settlements; and preparing the necessary agreements and pleadings related to the four settlements.[32] Given this effort, the complexity of the legal issues involved, and the intensity of the defense mounted by skillfully-represented Defendants, the hours incurred by Class Counsel are reasonable. Further, Co-Lead Class Counsel has excluded from this petition time incurred in this litigation that did not

[30] *See Caudle v. Bristow Optical Co., Inc.*, 224 F.3d 1014, 1028 (9th Cir. 2000).

[31] *See* Class Counsel's Decls.; Montague Decl.

[32] "The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records." *Rite Aid*, 396 F.3d at 306-307. *See also Prudential*, 148 F.3d at 341 (finding no abuse of discretion where district court "reli[ed] on time summaries, rather than detailed time records"). Of course, Class Counsel will make detailed billing records available to the Court *in camera* upon request.

provide a common benefit to the Class. Co-Lead Class Counsel also audited and confirmed the validity of Plaintiffs' Counsels' time and expense submissions. Last, Co-Lead Class Counsel anticipate expending substantial additional hours on this litigation to bring it to a close, for which Co-Lead Class Counsel will not seek additional compensation; these additional hours should be considered in evaluating the reasonableness of the fee request.

The historical hourly rates charged by Class Counsel are reasonable based on each person's position, experience level, and location. Moreover, Co-Lead Class Counsel capped the hourly billing rate for attorneys conducting first-level document review. Taking into account the several factors discussed above, including the result achieved, the complexity and risk of the litigation, and the skill and experience of counsel, Class Counsel's rates are reasonable and appropriate. These reasonable rates resulted in a total lodestar of $38,058,631.50.

2. The multiplier mitigates in favor of the requested fee.

Courts may increase or decrease the lodestar amount by applying a multiplier. "Consideration of multipliers used in comparable cases may be appropriate" to gauge the reasonableness of a percentage fee award." *Rite Aid,* 396 F.3d at 307 n.17. Multipliers of up to four are frequently awarded in common fund cases.[33] Here, the multiplier, at 1.68, produced by cross-checking the requested one-third fee award against the reported lodestar of $38,058,631.50 (based upon historical hourly rates), is well ***below*** the accepted range in the Third Circuit.[34] The

[33] *See, e.g., Steele*, 2005 WL 3801469, at *2 (finding multiplier of two reasonable, "given the complexity of the case, the risk of undertaking a case of this nature, and the delay in payment following the performance of services") (Baylson, J.). *See also Meijer, Inc. v. 3M*, No. 04-5871, 2006 WL 2382718, at *24 (E.D. Pa. Aug. 14, 2006) (4.77 multiplier); *Nichols v. SmithKline Beecham Corp.*, No. Civ.A.00-6222, 2005 WL 950616, at *24 (E.D. Pa. April 22, 2005) (3.15 multiplier); *Ravisent*, 2005 WL 906361, at *12 (3.1 multiplier); *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 256 (D.N.J. 2005) (2.83 multiplier); *In re Automotive Refinishing Paint Antitrust Litig.*, MDL Docket No. 1426, 2004 U.S. Dist. LEXIS 29162, *35 (E.D. Pa. Oct. 13, 2004) (2.3 multiplier is within an acceptable range); *Linerboard*, 2004 WL 1221350, at *16 (2.66 multiplier); *Rent-Way*, 305 F. Supp. 2d at 517 (2.36 multiplier).

[34] *See, e.g., Diet Drugs*, 582 F.3d at 542 n.42 (finding that a multiplier, in a lodestar crosscheck, in the range of "2.6, 3.4, or somewhere in that neighborhood, [] is not problematically high. It is either below or near the average multiplier…."); *Cendant Prides*, 243 F.3d at 735-36, 742 ("strongly suggest[ing]" a multiplier of 3 as the ceiling for

settlements achieved here resolved this litigation before trial and any other steps in the proceedings that would have generated a substantially larger lodestar than presented at this point. Accordingly, a lodestar cross-check further evidences the reasonableness of the requested fee.

D. The Court Should Award Class Counsel the Funds in the Opt-Out Fee and Expense Account

Each of the settlement agreements established an Opt-Out Fee and Expense Account, though of the first three settlements, only the Lafarge settlement resulted in any funds being deposited in that account.[35] For any reductions to the settlement amount resulting from opt-outs, 25% of the reduction was deposited into the Opt-Out Fee and Expense Account, with the remainder returned to the settling Defendant.[36] It is appropriate to award Class Counsel the full amount contained in the Opt-Out Fee and Expense Account, in light of the significant benefit Class Counsel provided opt-out class members in litigating the action and developing the evidentiary record in the case. *See In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 644, 657 (E.D. Pa. 2003) (establishing an account to compensate class counsel using funds from settlements between defendants and plaintiffs in tag along actions, and noting that "[i]n carrying out the duties of lead and liaison counsel, designated counsel have done much to craft the case against defendants. That work has benefitted all litigants in the class action and the tag-along actions."); *OSB*, No. 2:06-cv-00826-PD, Order, ECF 947, at *3 (finding class counsel's fee request for one-third of the total

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an award in a simple case where "no risks pertaining to liability or collection were pertinent"); *Prudential*, 148 F.3d at 341 ("[M]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.") (internal quotation and citation omitted).

[35] *See* n.12, *supra*. The current value of the Opt-Out Fee and Expense Account is $610,236, plus accrued interest. Additional money may be deposited into the account as a result of any timely requests for exclusion from the Joint Settlement.

[36] *See* ECF No. 180-3, USG Settlement Agreement ¶ 34; ECF No. 276, USG Settlement Final Judgment Order ¶¶ 13, 16; ECF No. 180-2, TIN Settlement Agreement ¶ 23; ECF No. 277, TIN Settlement Final Judgment Order ¶¶ 13, 16; ECF No. 414-2, Lafarge Settlement Agreement ¶ 34; ECF No. 503, Lafarge Settlement Final Judgment Order, ¶¶ 12, 15; ECF No. 692-2, Joint Settlement Agreement ¶ 33.

settlement funds, and the funds that reverted back to class members from opt-outs that did not pursue separate claims against the defendants "reasonable and well-earned").

IV. CLASS COUNSEL SHOULD BE REIMBURSED FOR THEIR REASONABLE LITIGATION EXPENSES

Plaintiffs also request reimbursement to Class Counsel for the reasonable and necessary expenses they advanced to prosecute this litigation since its inception in December 2012. "Attorneys who create a common fund for the benefit of a class are entitled to reimbursement of reasonable litigation expenses from the fund." *Nichols*, 2005 WL 950616, at *24 (quoting *In re Aetna Inc. Securities Litig.*, No. CIV. A. MDL 1219, 2001 WL 20928 at *13 (E.D. Pa. Jan. 4, 2001)); *see also Rent-Way*, 305 F. Supp. 2d at 519 ("There is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of . . . reasonable litigation expenses from that fund."); *In re Corel Corp. Inc. Sec. Litig*., 293 F. Supp. 2d 484, 498 (E.D. Pa. 2003) (same) (quoting *Ikon*, 194 F.R.D. at 192).[37]

Since the inception of the case, Class Counsel have incurred $2,925,628.98 in unreimbursed expenses.[38] The categories of expenses for which reimbursement is now sought are

[37] *See also Meijer*, 2006 WL 2382718 at *18 (granting plaintiffs' motion for approval of expenses "incurred in connection with the prosecution and settlement of the litigation, and include costs related to the following: travel; computerized legal research; copying; postage; telephone and fax; transcripts; retention of a mediator; the document database; expert services; and claims administration.").

[38] These expenses are detailed in the Declaration of Jeffrey J. Corrigan Regarding Expenses Paid by Plaintiffs from the Domestic Drywall Litigation Fund (Corrigan Decl.), attached hereto as Exhibit 5 and Class Counsel's Fee and Expense Declarations. The Court previously (1) approved payments totaling approximately $3.3 million from the TIN, USG, and Lafarge settlement funds to cover ongoing pretrial litigation expenses for expenses incurred in connection with economic experts, and (2) authorized the use of $300,000 total from the four settlement funds for notice and administration expenses, of which $190,485.13 has been spent. Additionally, certain common expenses were paid from the common litigation fund, which was funded with assessments paid by Class Counsel. The requested reimbursement includes a reduction of $27,172.18 from the total expenses, reflecting the remaining balance in the common litigation fund. *See* Corrigan Decl. If the Court approves reimbursement of these expenses, total expenses for the case paid out of the Combined Settlement Fund (e.g., including the approximately $3.5 million previously authorized by the Court) will total approximately $6,412,924.51. *See* Corrigan Decl; Class Counsel's Decls.

There are additional expenses relating to settlement administration and the claims process that will necessarily be incurred if the Court grants final approval of the settlement. While Co-Lead Class Counsel have sought to ascertain and minimize these expenses, the exact amount will not be known until it is time to complete the distribution. Co-

the type of expenses routinely charged to hourly clients, such as expert costs, document repository rent, document management, travel,[39] photocopying, overnight mail, deposition services and transcripts, legal research, and jury research costs, among others. *See* Corrigan Decl. As the Court previously acknowledged, certain of these expenses, such as experts and "[d]ata collecting, storage and production" would be expensive, but "essential."[40]

V. CLASS REPRESENTATIVES SHOULD BE AWARDED THE REQUESTED SERVICE AWARDS

Plaintiffs also request approval for a $75,000 service award for each of the four named plaintiffs to be paid from the Combined Settlement Fund. Such awards are common in class actions resulting in a common fund for distribution to the class, because the class representatives "have conferred benefits on all other class members and they deserve to be compensated accordingly." *In re Linerboard Antitrust Litig.*, No. 98-5055, 2004 WL 1221350, at *18 (E.D. Pa. June 2, 2004), amended, 2004 WL 1240775 (E.D. Pa. June 4, 2004). As the Third Circuit has noted, such awards exist "to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 333 n.65 (3d Cir. 2011) (citation omitted). They are also "particularly appropriate" where, as in this case, "there was no preceding governmental action alleging a conspiracy and taking a high-profile role threatened to jeopardize class representatives' relationships with their suppliers." *Linerboard*,

Lead Class Counsel anticipate seeking approval for these expenses when they seek authority to distribute the settlement funds to class members, at the conclusion of the claim submission and evaluation process.

[39] Throughout the litigation, Class Counsel were careful to comply with the Court's instructions that, "As to travel expenses, government per diems will be a guideline as to what will be awarded . . . ." While government per diem rates vary by city, year and even month, Class Counsel were mindful of the Court's direction on this point. *See* ECF No. 12, Memorandum Re: Plaintiffs' Attorneys' Fees and Expenses, at 4 ("Counsel with appetites for luxury are welcome to spend more, but should not expect reimbursement for luxury travel out of a common fund achieved for the benefit of the class."). In addition, Co-Lead Class Counsel note that Class Counsel were not eligible for government discounted rates for hotels.

[40] *See* ECF No. 12, Memorandum Re: Plaintiffs' Attorneys' Fees and Expenses, at 4.

2004 WL 1221350, at *18. Factors that courts consider in determining service awards include the risks to the plaintiffs in commencing the litigation (financially and otherwise), the extent of the plaintiffs' personal involvement in the lawsuit, the duration of the litigation, and the plaintiffs' personal benefits (or lack thereof) purely in their capacity as members of the class. *McGee v. Ann's Choice, Inc.*, No. 12-2664, 2014 WL 2514582, at *3 (E.D. Pa. June 4, 2014) (citing *In re Plastic Tableware Antitrust Litig.*, No. 94-3564, 1995 WL 723175, at *2 (E.D. Pa. Dec. 4, 1995)).

Here, each of the four named plaintiffs spent a significant amount of time assisting the litigation of this case. Each plaintiff responded to written discovery and produced documents relating to its claims; at least one individual representing each plaintiff was examined at deposition by defense counsel for a full day regarding its claims; each plaintiff reviewed and approved the consolidated amended class action complaint and other substantive pleadings; and each plaintiff reviewed and approved the settlements.[41] The plaintiffs pursued the litigation with no preceding government investigation, and did so knowing that Defendants might—and in one instance did—retaliate against them and threaten their businesses.[42] The plaintiffs took on this risk and responsibility, on behalf of the entire class, even though their claims were not among the largest in the class.[43]

The requested service awards are also in accord with amounts approved in other class action litigations in this Circuit and around the country. *See, e.g.*, *Marchbanks Truck Serv. v. Comdata Network, Inc.*, No. 07-1078-JKG, 2014 WL 12738907, at *3-4 (E.D. Pa. July 14, 2014) (awarding $150,000 to one class representative and $75,000 each to two others); *Bradburn Parent*

[41] *See* Class Representative Declarations, attached hereto as Exhibit 6.

[42] *See id.*

[43] *See* ECF No. 432, Ex. 1, Expert Report Regarding Class Certification Issues, Impact, and Damages, Tables 1 & 2 (Aug. 3, 2016) (named plaintiffs' purchases from the alleged conspirators in 2012 and 2013 totaled $346,259, out of approximately $4.555 billion in class sales during the same period).

Teacher Store, Inc. v. 3M, 513 F. Supp. 2d 322, 342 (E.D. Pa. 2007) (awarding $75,000 to class representative); *In re Graphite Electrodes Antitrust Litig.*, No. 2:10-md-01244-NS, ECF 527 (E.D. Pa. Sep. 8, 2003) (awarding $80,000 each to three class representative); *McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448, 480 (D.N.J. 2008) (awarding $60,000 to each class representative); *Nitsch v. DreamWorks Animation SKG Inc.*, No. 14-CV-04062, 2017 WL 2423161, at *14-16 (N.D. Cal. June 5, 2017) (awarding each of three class representatives $100,000 total for all settlements); *In re High-Tech Employee Antitrust Litig.*, No. 11–CV–02509, 2015 WL 5158730, at *16-18 (N.D. Cal. Sept. 2, 2015) (awarding $100,000 to each of four original class representatives); *Velez v. Novartis Pharm. Corp.*, No. 04 Civ. 09194, 2010 WL 4877852, at *8, 25-28 (S.D.N.Y. Nov. 30, 2010) (awarding $125,000 each to multiple named plaintiffs); *In re Revco Securities Litig.*, Nos. 851 & 89CV593, 1992 WL 118800 (N.D. Ohio May 6, 1992) (awarding $200,000 to single class representative).

VI. CONCLUSION

For the reasons discussed above, Plaintiffs respectfully request that the Court: (1) award Class Counsel one-third of the Combined Settlement Fund, as well as the total amount in the Opt-Out Fee and Expense Account, as attorneys' fees; (2) order reimbursement of litigation expenses incurred by Class Counsel in the amount of $2,925,628.98; and (3) award each Class Representative a service award of $75,000.

Dated: April 9, 2018

Respectfully submitted,

/s/ H. Laddie Montague, Jr.
H. Laddie Montague, Jr.
Eric L. Cramer
Ruthanne Gordon
Michael C. Dell'Angelo
Candice Enders
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Tel: (215) 875-3000
Email: hlmontague@bm.net
ecramer@bm.net
rgordon@bm.net
mdellangelo@bm.net
cenders@bm.net

/ s / Kit A. Pierson
Kit A. Pierson
Brent W. Johnson
David A. Young
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave., NW, Suite 500
Washington, DC 20005
Tel: (202) 408-4600
Email: kpierson@cohenmilstein.com
bjohnson@cohenmilstein.com
dyoung@cohenmilstein.com

/s/ Jeffrey J. Corrigan
Eugene A. Spector
Jeffrey J. Corrigan
Rachel E. Kopp
Jeffrey L. Spector
SPECTOR ROSEMAN
& KODROFF, P.C.
1818 Market Street, Suite 2500
Philadelphia, PA 19103
Tel: (215) 496-0300
Email: espector@srkattorneys.com
jcorrigan@srkattorneys.com
rkopp@srkattorneys.com
jspector@srkattorneys.com

Co-Lead Counsel for Direct Purchaser Plaintiffs and the Class

TAB 9A

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE BROILER CHICKEN ANTITRUST LITIGATION	No. 16 C 8637 Judge Thomas M. Durkin

MEMORANDUM OPINION AND ORDER

In this lawsuit alleging a price-fixing conspiracy in the chicken industry against more than 20 defendants, the Court appointed interim counsel to represent a putative class of direct-purchaser plaintiffs (the "DPPs" and their "Appointed Counsel"). *See* R. 144.[1] The Court approved settlements Appointed Counsel negotiated with six defendant corporate families, totaling $170,261,600.00, while the case continues to proceed against the remaining defendants.[2] Appointed Counsel have now moved for: an interim fee award; reimbursement of litigation expenses; and incentive awards to the five named class representatives. R. 4550. That motion is granted in accordance with this order.

[1] The Court appointed Lockridge Grindal Nauen P.L.L.P. and Pearson, Simon & Warshaw, LLP as Interim Co-Lead Counsel, and Hart, McLaughlin & Eldridge, LLC as Interim Liaison Counsel.

[2] This Court granted final approval to settlements with: Fieldale Farms Corporation on November 16, 2018, R. 1414; Amick Farms LLC on October 26, 2020, R. 3934; George's Inc., George's Farms, Inc. and Peco Foods, Inc. on October 27, 2020, R. 3944; and Pilgrim's Pride Corp., Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Breeders, Inc., and Tyson Poultry, Inc. on June 29, 2021, R. 4789.

Background

Without the benefit of a prior government investigation to guide them, Appointed Counsel filed the first complaint in this case in September 2016. Since then, the Court has appointed counsel for two additional classes and more than 100 entities have opted out of the classes to file their own direct actions. The more than 20 defendants are represented by some of the most prominent law firms in the country.

Appointed Counsel successfully defended the case against a significant motion to dismiss. They have shepherded the case through extensive discovery, as is recounted in the declaration supporting their motion, *see* R. 4552, and is reflected in the more than 5,000 docket entries that make up the case, including 16 scheduling orders. Appointed Counsel have briefed numerous motions, including a motion for class certification that is currently pending.

Appointed Counsel have been assisted by 20 other firms. Appointed Counsel and the assisting firms have submitted their hours for the Court's review on a quarterly basis. Their collective lodestar is 100,608.25 hours representing $50,928.159.75 in fees. *See* R. 4552 ¶ 24.

Appointed Counsel seek a fee award of one-third of the settlement total of $170,261,600.00, or $56,753,866.00. They also seek payment of $4.5 million of the

$5,104,566.48 in litigation expenses they have incurred. And they seek a $25,000 incentive award for each of the five named plaintiffs.[3]

Analysis

It is customary for class counsel in large and complex cases to seek an interim fee award. *See, e.g.*, *Kleen Prod. LLC v. Int'l Paper Co.*, 2017 WL 5247928, at *4 (N.D. Ill. Oct. 17, 2017); *see also In re Endotronics, Inc.*, 1989 WL 6746, at *1 (D. Minn. Jan. 30, 1989) ("Untoward delay could discourage [class counsel] from engaging in matters such as these. The Court, therefore, must have discretion to award interim fees and costs."). The "starting point" for determining such an award is the "market rate" for such services. *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 719 (7th Cir. 2001); *see also Silverman v. Motorola Sols., Inc.,* 739 F.3d 956, 957 (7th Cir. 2013) ("[A]ttorneys' fees in class actions should approximate the market rate that prevails between willing buyers and willing sellers of legal services."); *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 635 (7th Cir. 2011) ("[T]he district court must try to assign fees that mimic a hypothetical *ex ante* bargain between the class and its attorneys."). Estimation of the market rate "is inherently conjectural," *In re Trans Union Corp. Priv. Litig.*, 629 F.3d 741, 744 (7th Cir. 2011), because "there is no market in class cases." Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 Fordham L. Rev. 1151, 1155 (2021). But the Seventh Circuit has explained that the goal of approximating the market rate can be "informed by a number of

[3] The named plaintiffs are: Maplevale Farms, Inc.; John Gross and Company, Inc.; Ferraro Foods, Inc. and Ferraro Foods of North Carolina, LLC; Joe Christiana Food Distributors, Inc.; and Cedar Farms Co., Inc. *See* R. 4552 ¶ 36.

factors, including: (1) the actual agreements between the parties as well as fee agreements reached by sophisticated entities in the market for legal services; (2) the risk of non-payment at the outset of the case; (3) the caliber of Class Counsel's performance; and [4] information from other cases, including fees awarded in comparable cases." *Hale v. State Farm Mut. Auto. Ins. Co.*, 2018 WL 6606079, at *8 (S.D. Ill. Dec. 16, 2018) (citing *Synthroid*, 264 F.3d at 719)).

A. Actual Agreements

Appointed Counsel in this case do not have a fee agreement with the named plaintiffs other than that they would take a percentage of any award. *See* R. 5048-1 ¶ 11, Fitzpatrick Decl. ("According to [Appointed Counsel], the representative class members signed retainer agreements that did not specify a fee percentage; they specified only that any fees would be awarded by the Court.").[4] However, 2,808 claims have been filed by potential class member entities in the class, the majority of whom are sophisticated business entities. *See id.*, Fitzpatrick Decl. ("In light of the sophistication of the class members, all of whom are businesses and some of whom are quite large, the conclusion that can be drawn from their decision not to object is that they favor the flat fee proposed by DPPs—not a sliding-scale fee."). None of them

[4] Appointed Counsel submitted a declaration from Brian Fitzpatrick, who is a professor at Vanderbilt University Law School and has studied and written about class action litigation. *See* R. 5048-1. In addition to requesting further briefing from Appointed Counsel, the Court invited briefs from counsel for the other two putative classes in the case. The Commercial and Institutional Indirect Purchaser Class submitted a declaration by Robert Klonoff, who is a professor at Lewis & Clark Law School, and who has also studied and written about class action litigation. *See* R. 5050-1. The Court found both declarations very helpful and has relied on them in preparing this opinion and order.

have objected to the fee award request. Courts have found that the lack of opposition by sophisticated business entities is evidence that the award is reasonable. *See Silverman*, 739 F.3d at 959 (holding that for large, sophisticated investors, it would be "worth a complaint to the district judge if the lawyers' cut seems too high. Yet none of the institutional investors has protested."); *In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d 838, 847 (N.D. Ill. 2015) (observing, in finding that the requested one-third fee award was reasonable, that "the plaintiffs here are sizable, sophisticated entities capable of reviewing (and objecting to) the proposed fee arrangement"),

No other actual agreements have been presented to the Court. There is, however, case law describing court-ordered auctions in which potential class counsel bid for appointment. *See In re Cap. One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 800 (N.D. Ill. 2015) (collecting cases, including *In re Amino Acid Lysine Antitrust Litig.*, 918 F. Supp. 1190 (N.D. Ill. 1996)). The courts in *In re Amino Acid* and the other cases collected by *In re Capital One* sought fee award structure bids from attorneys hoping to represent the classes in those cases. The courts in those cases chose counsel who submitted declining fee scale award structures. (In other words, counsel proposed that their fee percentage decrease as the settlement amount increased.) These cases are relatively outdated, none being less than 20 years old. *See* R. 5048-1 ¶ 8, Fitzpatrick Decl. (court "experimentation with auctions has all but ceased"). But the Court is also aware that counsel for the End-User Plaintiff Class in this case bid a declining fee scale in other cases within the last ten years. *See* R. 5182 (citing *In re Lithium Ion Batteries Antitrust Litig.*, Case No. 13-MD-2420-YGR (N.D.

Cal), Dkt. 2630-2; *In re Optical Disk Drive Prods. Antitrust Litig.*, Case No. 10-MD-2134-VRW (N.D. Cal) Dkt. 2900, reported in *In re Optical Disk Drive Antitrust Litig.*, 959 F.3d 922, 934 (9th Cir. 2020)).

The Court does not put much stock in these examples. First, no other attorneys bid to be appointed counsel for the DPPs in this case. Without competition, a bid auction was not feasible. And without competition, no attorney would offer to take a case under a declining fee scale award structure.

Furthermore, the Seventh Circuit has explained that declining fee scale award structures do not reflect market realities and impose a perverse incentive "ensuring that at some point attorneys' opportunity cost will exceed the benefits of pushing for a larger recovery, even though extra work could benefit the client." *Synthroid*, 264 F.3d at 721; *see also Silverman*, 739 F.3d at 957 ("[S]olvent litigants do not select their own lawyers by holding auctions, because auctions do not work well unless a standard unit of quality can be defined and its delivery verified. There is no 'standard quantity' of legal services, and verification is difficult if not impossible."). "Subsequent cases within the Seventh Circuit have similarly recognized that the auction concept is flawed[.]" R. 5050-1 at 17 n.15, Klonoff Decl. Of course, when confronted with a court ordered competitive auction that permits declining scale bids, some attorneys will likely make such a bid in order to win the auction. But for the reasons expressed by the Seventh Circuit, the Court questions whether it is appropriate to permit declining scale bids in an auction. Thus, cases with auctions that permitted such bids carry little weight in the Court's consideration here.

B. Risk of Non-Payment & Caliber of Class Counsel's Performance

A declining scale fee award structure might be appropriate in cases in which settlement is a more likely outcome and in which the "marginal costs" of increasing the settlement recovery amount are low. *See Silverman*, 739 F.3d at 959. As Professor Fitzpatrick surmised, this "may explain the use of [declining scale fee award structures] in the two [Telephone Consumer Protection Act] cases" the Court asked the parties to address. *See* R. 5048-1 at 17 n.6, Fitzpatrick Decl.

The Court ordered the parties to address the use of declining sliding scale fee award structures in *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 236 (N.D. Ill. 2016), and *In re Cap. One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 805 (N.D. Ill. 2015). *See* R. 4915. Unlike those cases in which "settlement was likely," *Gehrich*, 316 F.R.D. at 230, settlement in a complex antitrust case like this is far from a foregone conclusion. *See* R. 505-1 ¶ 37, Klonoff Decl. ("In terms of risk and complexity, TCPA cases are the polar opposite of the present case, a complicated multi-party antitrust conspiracy case.").[5] Appointed Counsel invested massive resources of time and money when no other counsel expressed interest, with little assurance of success. *See Silverman*, 739 F.3d at 958 ("When this suit got under way, no other law firm was willing to serve as lead counsel. Lack of competition not only implies a higher fee but also suggests that most members of the securities bar saw

[5] Moreover, research by both Professors Fitzpatrick and Klonoff shows that the use of declining sliding scale fee awards in the Seventh Circuit is rare. *See* R. 5048-1 at 13 n.5, Fitzpatrick Decl.; R. 5050-1 at 26-31, Klonoff Decl.

this litigation as too risky for their practices."). As noted, no government investigation preceded the complaint in this case for Appointed Counsel to piggy-back. And Plaintiffs have been opposed by many defendants, including a number of very large and well-funded corporations, which have retained some of the most prominent and sophisticated law firms in the United States. The Court's 92-page decision denying the motions to dismiss was a relatively close call. Discovery proceeded while the motions to dismiss were briefed and decided, so Appointed Counsel was immediately incurring costs of time and money without any assurance of an award. Furthermore, issues raised in the motions to dismiss show that success on class certification and summary judgment, let alone trial, is no guarantee.

Appointed Counsel have devoted thousands of hours to this case. Their performance to date has been exemplary. The road to some of the settlements was eventually smoothed by later criminal indictments. But Appointed Counsel's work appears to have prompted the government investigations that led to those indictments, rather than the reverse. A substantial award is warranted here as a proper incentive for high quality counsel to take on complex cases, requiring a massive investment of time and money, with such a high risk of non-payment.

C. Fee Awards in Comparable Cases

The Seventh Circuit has recognized that academic studies of attorney fees awards in common fund class settlement cases reveal a declining percentage with the size of the settlement. *See Silverman*, 739 F.3d at 959. But as Professor Fitzpatrick noted, "these findings are based on fee awards from other Circuits . . . that are not

even trying to capture how clients pay lawyers in the market like the Seventh Circuit does." R. 5048-1 at 20 n.7, Fitzpatrick Decl. These decisions are infected by default rules recommending smaller attorney fee award percentages for "megafunds." *See*, *e.g.*, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 123 (2d Cir. 2005) (affirming a 6.5 percent fee award from a common fund over $3 billion, reasoning that "the sheer size of the instant fund makes a smaller percentage appropriate"); *Dial Corp. v. News Corp.,* 317 F.R.D. 426 (S.D.N.Y. 2016) ("[I]n class actions where the recovered settlement fund runs into the multi-millions, courts typically decrease the percentage of the fees amount as the size of the fund increases."). The Seventh Circuit has expressly rejected a megafund rule because it is a perverse incentive. *See Synthroid*, 264 F.3d at 718 (reversing district court's fee award in part because it imposed a lower fee percentage because the settlement fund was more than $100 million, holding that "[m]arkets would not tolerate that effect"). Clients generally want to incentivize their counsel to pursue every last settlement dollar, and a declining percentage award operates to the contrary. Thus, to the extent that courts in other circuits have awarded percentages smaller than what Appointed Counsel seek here, the Court finds those awards relatively unpersuasive.

Most persuasive are the large number of antitrust cases in this circuit that have awarded one-third of the common fund as attorney's fees. *See* R. 5050-1 at 45-46 (table citing cases), Klonoff Decl. The fact that fee awards in antitrust cases in this circuit are almost always one-third is a strong indication that this should be considered the "market rate." *See* R. 5048-1 ¶ 14, Fitzpatrick Decl. (in "a series of

antitrust class actions . . . . recover[ing] more than $2 billion . . . . *not a single class member ever objected* to the fee request in any of these cases" showing that "sophisticated corporations are happy to play flat fees of 33.33% and they are happy to do so even in the largest cases."). There is simply little to no precedent recommending anything other than an award of 33 percent. With the only real evidence of the "market rate" being one-third, that is what the Court will award.

D. Expenses

Appointed Counsel seek $4.5 million out of $5,104,566.48 in expenses. Appointed Counsel "informed the class" that they would not seek to recover the full amount of their expenses at this time. *See* R. 4551 at 2 n.7. The request for $4.5 million in expenses is granted.

Expenses, however, should be deducted from the common fund before the fee award percentage is applied. The "ratio that is relevant to assessing the reasonableness of the attorneys' fee that the parties agreed to is the ratio of (1) the fee to (2) the fee plus what the class members received." *Redman v. RadioShack*, 768 F.3d 622, 630 (7th Cir. 2014). Out-of-pocket costs, although paid through the settlement fund, are not benefits to the class and thus not part of "what the class members received." *Id.*; *see also In re Wells Fargo Secs. Litig.*, 157 F.R.D. 467, 471 (N.D. Cal. 1994) ("If an attorney risks losing some portion of his fee award for each additional dollar in expenses he incurs, the attorney is sure to minimize expenses."). Therefore, Appointed Counsel will be paid fees of one-third of the settlement fund minus $4.5 million in expenses.

E. Named Plaintiff Incentive Awards

"Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). "To determine if an incentive award is warranted, a district court evaluates the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825, 834 (7th Cir. 2018) (citing *Cook*, 142 F.3d at 1016). Incentive awards based on a percentage of the settlement fund "are disfavored, if not altogether forbidden." *See* William B. Rubenstein, 5 Newberg on Class Actions § 17:16 (5th ed. 2018); *see also In Re EpiPen Mktg., Sales Pracs. & Antitrust Litig.*, 2021 WL 5369798, at *7 (D. Kan. Nov. 17, 2021).

The declarations submitted in support of incentive awards give no indication of the number of hours the named plaintiffs have spent on the case. Appointed Counsel relies on *Cook v. Niedert* in which the Seventh Circuit affirmed an incentive award of $25,000 per named plaintiff. *See* R. 4551 at 21 (citing 142 F.3d at 1016). But in *Cook* the named plaintiff was an individual who "reasonably feared workplace retaliation" by "filing the suit." *Id.* at 1016. No such risk is present here, and the named plaintiffs are business entities, not individual people. Presumably, businesses serving as named plaintiffs for the DPP class believe that the chance of collecting from this lawsuit was worth the cost of participating in it. Litigation is convenient for

no one. But business entities are in a much better position to devote time to a lawsuit and delegate the burdens among their officers and employees than a person who must bear the entire burden individually.

"Empirical evidence shows that incentive awards are now paid in most class suits and average between $10-$15,000 per class representative." *See* William B. Rubenstein, 5 Newberg on Class Actions § 17:1 (5th ed. 2018). Appointed Counsel cite one antitrust case from this district which awarded $15,000 to named plaintiffs from a $90 million settlement. *See In re Potash Antitrust Litig.*, No. 1:08-cv-06910 (ECF No. 589) (N.D. Ill. June 12, 2013). Without specific hour totals indicating a higher award is appropriate, and without evidence that the role of class representative imposed anything other than a professional (as opposed to a personal) burden, the Court will not ignore what appears to be a customary maximum of a $15,000 incentive award.

Conclusion

Therefore, Appointed Counsel's motion [4550] is granted as follows: (1) expenses are awarded in the amount of $4.5 million; (2) incentive awards in the amount of $15,000 are awarded to each of the five class representatives; and (3) fees are awarded in the amount of $55,228,866.70, which is one third of the settlement fund after deducting the expenses and incentive awards.

ENTERED:

Thomas M Durkin

Honorable Thomas M. Durkin
United States District Judge

Dated: November 30, 2021

TAB 9B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE BROILER CHICKEN ANTITRUST LITIGATION This Document Relates To: Direct Purchaser Actions	No. 1:16-cv-08637 Hon. Thomas M. Durkin Magistrate Judge Jeffrey T. Gilbert

MEMORANDUM IN SUPPORT OF DIRECT PURCHASER PLAINTIFFS' MOTION FOR INTERIM PAYMENT OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND CLASS REPRESENTATIVE INCENTIVE AWARDS

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I. INTRODUCTION

After more than four and one-half years of hard-fought litigation in this complex antitrust class action with no guarantee of compensation, Interim Co-Lead Counsel for the Direct Purchaser Plaintiffs ("Co-Lead Counsel")[1] have secured settlements with six Defendant families: Amick Farms LLC, Fieldale Farms Corporation, Peco Foods, Inc., Pilgrim's Pride Corporation, the George's Defendants,[2] and the Tyson Defendants[3] (collectively, "Settling Defendants").[4] Under the terms of these settlements, the Settling Defendants have paid into escrow a total of $170,261,600.00 ("Settlement Fund"), and Co-Lead Counsel have commenced the claims process to disburse the net proceeds of the Settlement Fund to qualified class members.

These settlements reflect the skill, expertise, and hard work of Co-Lead Counsel and other Direct Purchaser Plaintiff Counsel (collectively, "Class Counsel"),[5] and the benefit to class

[1] The Court appointed Lockridge Grindal Nauen P.L.L.P. ("LGN") and Pearson, Simon & Warshaw, LLP ("PSW") as Interim Co-Lead Counsel, and Hart, McLaughlin & Eldridge, LLC as Interim Liaison Counsel. (ECF No. 144, Oct. 14, 2016 Order.)

[2] The George's Defendants are George's Inc. and George's Farms, Inc. (ECF No. 3919, DPPs' Fifth Amended and Consolidated Class Action Complaint, ¶¶ 61-62.)

[3] The Tyson Defendants are Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Breeders, Inc., and Tyson Poultry, Inc. (*Id.*, ¶¶ 33-36.)

[4] This Court granted final approval to the DPPs' settlements with Defendant Fieldale Farms Corporation on November 16, 2018 (ECF No. 1414); Amick Farms LLC on October 26, 2020 (ECF No. 3934); and the George's Defendants and Peco Foods, Inc. on October 27, 2020 (ECF No. 3944). This Court granted preliminary approval to DPPs' settlements with Pilgrim's Pride Corporation and the Tyson Defendants on February 25, 2021 (ECF No. 4341). The Court has scheduled a fairness hearing on final approval of the Pilgrim's and Tyson settlements on June 29, 2021, at which time Co-Lead Counsel also will seek to have this motion heard.

[5] Under Co-Lead Counsel's direction, 20 other firms prosecuted this case on DPPs' behalf and, together with DPPs' Co-Lead Counsel, they are referred to collectively in this Memorandum as "Class Counsel." At all times, Co-Lead Counsel directed and organized Class Counsel's work. *See* Declaration of W. Joseph Bruckner in Support of Direct Purchaser Plaintiffs' Motion for Interim Award of Attorneys' Fees, Reimbursement Expenses, and Class Representative Incentive Awards, dated April 16, 2021 ("Bruckner Decl."). Co-Lead Counsel will have discretion to allocate an award of attorneys' fees among Direct Purchaser Plaintiff Counsel. Co-Lead Counsel's good-faith

members is substantial, real, and concrete, compared to the significant litigation risks in this case. As such, Direct Purchaser Plaintiffs ("DPPs") respectfully ask the Court to award Class Counsel 33 1/3% of the Settlement Fund or $56,753,866.00[6] as attorneys' fees, $4,500,000.00 as reimbursement for litigation expenses, and $25,000.00 in incentive awards to each of the five named class representatives.[7]

All class members will have notice and an opportunity to be heard on this motion. In the Court-approved notice to class members of the Tyson and Pilgrim's settlements, Class Counsel informed all class members that they would seek an award of attorneys' fees in an amount not to exceed 33 1/3% of the Settlement Proceeds and $4.5 million in litigation expenses.[8] As class members also were informed, this motion will be posted on the case website, https://www.broilerchickenantitrustlitigation.com, contemporaneously with the filing of this motion. Class Counsel also informed class members that the Court will determine the amount of the attorneys' fees and litigation expenses to be paid to Class Counsel in this case. Finally, class

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determination will reflect each individual Class Counsel's contribution to the commencement, prosecution, and resolution of the litigation.

[6] There are opt-out reduction mechanisms in the Pilgrim's and Tyson settlement agreements that could result in a reduction in the total amounts of those settlements, depending on how many class members opt out of those settlements (ECF No. 4259-1, at 22-24 (Pilgrim's) and 53-55 (Tyson)). The deadline to opt out of those settlements is May 17, 2021. If those reduction mechanisms are triggered, Plaintiffs will advise the Court in advance of the hearing on June 29, 2021, provide the amounts of the reductions, and provide a new calculation of 1/3 of the Settlement Fund as a proposed award of attorneys' fees.

[7] As discussed in Section IV below, although Class Counsel's current litigation expenses exceed $4.5 million, Class Counsel informed the class that their request for reimbursement of litigation expenses from these settlements would not exceed $4.5 million.

[8] See https://www.broilerchickenantitrustlitigation.com/admin/services/connectedapps.cms.extensions/1.0.0.0/asset?id=d1618bee-26ea-4ac1-8583-56e80f11113c&languageId=1033&inline=true (last visited April 8, 2021); *see also* ECF No. 4259-2 at 25 (proposed class notice); ECF No. 4341 (Feb. 25, 2021 Order granting DPPs' motion for preliminary approval of the Tyson and Pilgrim's settlements and accompanying class notice).

members were told that they may object to any aspect of the Tyson and Pilgrim's settlements and that the deadline to do so is May 17, 2021.[9] Prior to the Court's fairness hearing on June 29, 2021, Class Counsel will report to the Court on any objections received, including to this motion for fees and expenses.

II. CLASS COUNSEL DEDICATED ENORMOUS RESOURCES TO THIS MATTER AND FACED SIGNIFICANT RISKS TO SUCCESSFULLY RESOLVE THIS CASE WITH THE SETTLING DEFENDANTS

From the inception of their investigation into this matter, Class Counsel dedicated their time, expertise, and capital to ensure the Class would recover for Defendants' wrongful conduct. A summary of those efforts is provided below.

A. Class Counsel Dedicated Tremendous Resources to Resolve DPPs' Claims.

Class Counsel have dedicated tremendous time, effort, and expense to this litigation, and they have done so entirely on a contingent basis, with no guarantee of compensation or even reimbursement of expenses. Since the inception of this case (many months before it was actually filed in September 2016), Class Counsel invested 100,608.25 hours of attorney and other legal professional time through December 31, 2020.[10] (Bruckner Decl. ¶ 24.) Co-Lead Counsel have worked diligently to ensure that throughout the case, Class Counsel's efforts have been coordinated, detailed, vigorous, and efficient. To date, the result of these efforts is a substantial recovery for the DPPs: a Settlement Fund of $170,261,600.00.

[9] *Id.*

[10] Class Counsel have limited the reporting of their time and lodestar through December 31, 2020 for the purpose of this motion. They will continue to dedicate significant time and resources to the litigation until it is resolved.

This Court is well acquainted with the history of this case, so it is unnecessary to describe in depth the litigation, its procedural history, expert analysis, and other work needed to build a case of this magnitude. Instead, following is an overview of Class Counsel's efforts to date:

- Co-Lead Counsel filed the first antitrust complaint on behalf of Broiler chicken purchasers in September 2016. This complaint was the product of Co-Lead Counsel's extensive preparation, independent investigation, and research into the Broiler chicken industry. Unlike other matters, there were no prior or contemporaneous government investigations or enforcement proceedings; instead, the U.S. Department of Justice's ("DOJ") related investigation and criminal proceedings followed this civil litigation. Class Counsel have prepared and filed multiple amended and consolidated complaints reflecting information Class Counsel obtained from additional investigation and discovery. (Bruckner Decl. ¶ 4.)
- Class Counsel have developed numerous case management plans and worked cooperatively with indirect purchaser class counsel, direct action plaintiffs, the DOJ, and Defendants to implement those plans. (Bruckner Decl. ¶ 5.)
- Class Counsel have prepared and filed comprehensive memoranda of law: (a) in opposition to Defendants' motions to dismiss, (b) regarding numerous discovery issues, (c) in support of class certification, including expert reports and other exhibits, and (d) seeking preliminary and final approval of settlements with the Settling Defendants. (Bruckner Decl. ¶ 6.)
- Class Counsel have conducted extensive fact and expert discovery, including preparing for and taking well over 100 Rule 30(b)(1), 30(b)(6), and expert

depositions. Class Counsel reviewed, analyzed, and coded a database containing more than 8 million documents and other records produced by Defendants and third parties in the litigation, utilized in support of depositions, class certification, and additional facets of the case. (Bruckner Decl. ¶ 7.)

- Class Counsel have consulted with experts during their pre-suit investigation and the discovery phase of this case, including their agricultural economist Dr. Colin Carter, who prepared a 119-page opening report and a 137-page reply report in support of class certification. (Bruckner Decl. ¶ 8.)
- Class Counsel engaged in extensive adversarial negotiations and mediations and ultimately negotiated six settlement agreements with the Settling Defendants. (Bruckner Decl. ¶ 9.)
- Class Counsel have taken evidence proffers and interviewed witnesses made available by Settling Defendants. (Bruckner Decl. ¶ 10.)
- Class Counsel have prepared and executed the Court-approved class notice and settlement claims administration programs. (Bruckner Decl. ¶ 11.)

In addition to the 100,608.25 hours of attorney and other legal professional time invested in this case through December 31, 2020, to date Class Counsel have incurred total litigation expenses in the amount of $5,104,566.48.[11] These expenses, discussed in detail below, were required to carefully frame the complex issues of fact and law in the pleadings, to defeat Defendants' motions to dismiss, to effectively manage the case, to undertake well-organized

[11] As noted above at p. 2 and in Section IV below, in this motion Class Counsel seek payment of $4.5 million in litigation costs.

attempts to discover a complex antitrust case against enormous (and enormously wealthy) business entities, and to support class certification. (Bruckner Decl. ¶¶ 28-35.)

Class Counsel will continue to vigorously litigate this case against the remaining Defendants, including discovery, motion and litigation practice, and trial. With respect to the settlements, Class Counsel will seek final approval of the settlements preliminarily approved by this Court, supervise all aspects of settlement and claims administration, and supervise the final distribution of settlement proceeds to qualified DPPs. (Bruckner Decl. ¶ 12.)

B. Class Counsel Faced Significant Risk of Nonpayment.

A material consideration in determining an appropriate fee is the risk of nonpayment. *See Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958 (7th Cir. 2013); *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001). "The lawyers for the class receive no fee if the suit fails." *Matter of Cont'l Illinois Sec. Litig.*, 962 F.2d 566, 568 (7th Cir. 1992), *as amended on denial of reh'g* (May 22, 1992). "Contingent fees compensate lawyers for the risk of nonpayment. The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel." *Silverman*, 739 F.3d at 958 (citing *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986)).

To determine a fee award in a class action settlement, a court must assess counsel's risk of taking a particular case and the probability of success as it existed "*at the outset* of the litigation." *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 565 (7th Cir. 1994). Therefore, a court must do its best to estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers at the outset of the case, when the risk of loss still existed, rather than at the end of a successful case:

> The best time to determine this rate is the beginning of the case, not the end (when hindsight alters the perception of the suit's riskiness,

> and sunk costs make it impossible for the lawyers to walk away if the fee is too low). This is what happens in actual markets.

In re Synthroid, 264 F.3d at 718; *see also In re Capital One Telephone Consumer Protection Act Litig.*, 80 F. Supp. 3d 781, 788–89 (N.D. Ill. 2015) (the probability of success at the outset of litigation helps determine the reasonableness of the fee).

As discussed below, Class Counsel faced a significant risk of nonpayment. The scope of this case is extensive: DPPs alleged a price-fixing conspiracy by the United States' leading Broiler chicken producers and claimed that they and the Class paid significant overcharges as a result. Class Counsel believed in DPPs' case, invested extensive time, effort, and money, and prosecuted it vigorously. Class Counsel did so at the risk of no recovery and declined other opportunities because of the complexity, time, and expense this case demanded. (Bruckner Decl. ¶ 13.)

Class Counsel also conceived and brought this case without the benefit of any related government investigation or enforcement action. (Bruckner Decl. ¶ 4.) Indeed, only after DPPs had prosecuted this case for two-and-a-half years did the DOJ convene grand jury proceedings. And then, the first step the DOJ took was to *subpoena DPP Co-Lead Counsel* for the documents they already obtained in discovery from Defendants and third parties, after which the DOJ moved to intervene in this case. (Bruckner Decl. ¶ 4; ECF No. 2302.)

In the face of these risks, Class Counsel have achieved significant recoveries on behalf of the DPP Class after over four years of litigation, with 14 Defendants left in the case. (Bruckner Decl. ¶¶ 9, 12-13.) A brief overview of the relevant factors considered by courts is provided below.

1. Antitrust Class Actions are Inherently Risky.

In a study analyzing class actions against insurers, only 12% of 564 attempted class actions led to a class settlement. Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. EMPIR. L. STUD. 248, at 24 (2010) (citing Nicholas

M. Pace, Stephen J. Carroll, Ingo Vogelsang, & Laura Zakaras, *Insurance Class Actions in the United States*, 47 tbl.3.16 (2007)). Antitrust class actions are riskier still, due in part to their unpredictable nature, as well as the tremendous time and expense required to obtain a successful resolution. *In re Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917, 2016 WL 721680, at *17 (N.D. Cal. Jan. 28, 2016) (quoting *In re NASDAQ Mkt-Makers Antitrust Litig.*, 187 F.R.D. 465, 475 (S.D.N.Y. 1998)); *see In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 530 (E.D. Mich. 2003) (emphasizing a strong public interest in encouraging settlement of complex, class-action lawsuits because they are "notoriously difficult and unpredictable" and settlement preserves judicial resources). "The 'best' case can be lost and the 'worst' case can be won, and juries may find liability but no damages. None of these risks should be underestimated." *Matter of Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 127 (N.D. Ill. 1990).

Here, the stakes were extremely high. DPPs alleged a nationwide conspiracy to fix, raise, maintain, and stabilize the price of Broilers—the nation's most popular meat product. While Fieldale settled prior to November 2017 when the Court denied Defendants' motions to dismiss DPPs' complaint (ECF No. 541), the other five Settling Defendants continued to aggressively litigate the case, fighting DPPs on the merits. In the face of these risks, Class Counsel vigorously represented DPPs and obtained a substantial recovery on behalf of the Class.

2. Class Counsel Faced Complex Issues.

Investigating and proving an unlawful conspiracy is difficult, especially when not derived from a related criminal investigation. *In re Linerboard Antitrust Litig.*, No. 2:98-cv-05055, 2004 WL 1221350, at *10 (E.D. Pa. June 2, 2004), *amended*, No. 2:98-cv-05055, 2004 WL 1240775 (E.D. Pa. June 4, 2004) (observing that "an antitrust class action is arguably the most complex action to prosecute."). DPPs allege that Defendants conspired to artificially inflate prices by, among other things, suppressing production and manipulating the Georgia Dock price index.

Defendants spared no effort in challenging DPPs' complaint. They argued that DPPs' claims were conjectural and implausible under *Twombly,* that DPPs did not allege facts showing that Defendants acted in parallel to reduce output or to raise prices for Broilers, and that their parallel production and pricing decisions were the result of legitimate market forces. (ECF Nos. 274-298; 360; 363-373; 471.) After extensive briefing, the Court denied each of Defendants' motions to dismiss. (*id.*; *see also* ECF Nos. 343-345; 440; 541.)

DPPs then turned to litigating the case against 20 Defendants. Discovery has involved more than 200 document custodians, more than 8 million documents and communications, millions of telephone calls and messages, many third parties, and the depositions of more than 120 fact witnesses (with more than 200 anticipated by the time depositions end). (Bruckner Decl. ¶ 7.) Class Counsel took the lead in coordinating this discovery with Defendants, two other classes, and nearly 100 Direct Action Plaintiffs. Plaintiffs and Class Counsel also fulfilled their own discovery obligations, in response to fulsome discovery by Defendants.

3. Defendants Marshalled Tremendous Resources for Their Defense.

Not only did Class Counsel confront the inherent uncertainties of an antitrust class action alleging a global conspiracy, but they also faced some of the world's wealthiest multinational corporations, whose skilled and experienced legal counsel mounted a strong, united defense. The fact that the nation's top legal counsel represented Defendants is an important factor in analyzing the value of Class Counsel's services. *E.g.*, *In re Schering-Plough Corp. Enhance Secs. Litig.*, No2:08-cv-02177, 2013 WL 5505744, at *25 (D.N.J. Oct. 1, 2013) (emphasizing the importance of evaluating the result in light of the fact that the case was "litigated to the hilt by highly-experience [*sic*] and first-rate defense counsel to the eve of trial"); *In re Avandia Mktg., Sales Practices and Prods. Liab. Litig.*, MDL No. 1871, 2012 WL 6923367, at *5 (E.D. Pa. Oct. 19, 2012) (collecting cases) (considering "the performance and quality of opposing counsel" as a

factor in awarding attorneys' fees); *In re Ins. Brokerage Antitrust Litig.* ("*In re Ins. Brokerage II*"), 282 F.R.D. 92, 121 (D.N.J. Mar. 30, 2012) (concluding the skill and efficiency of the attorneys involved favored approval of attorneys' fees in part because the settling defendants were represented by experienced attorneys from prominent law firms); *In re WorldCom, Inc. Secs. Litig.*, 388 F. Supp. 2d 319, 357-58 (S.D.N.Y. 2005) (finding that counsel "obtained remarkable settlements for the Class while facing formidable opposing counsel from some of the best defense firms in the country."); *In re Warner Comm'ns. Secs. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) ("The quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work."); *Arenson, et al. v. Bd. of Trade of City of Chicago*, 372 F. Supp. 1349, 1354 (N.D. Ill. 1974) (noting that the quality, vigor, and prior success of opposing counsel is an important factor when assessing the quality of work performed by plaintiffs' counsel).

Here, Settling Defendants were represented by Weil, Gotshal & Manges LLP; Skadden, Arps, Slate, Meagher & Flom LLP; Axinn, Veltrop & Harkrider LLP; Alston & Bird LLP; Stinson LLP; and Dykema Gossett PLLC, leading multinational and national law firms, three of which are ranked among the Vault Law 100 for most prestigious law firms. (Bruckner Decl. ¶ 9.)

The breadth and disparity of resources available to opposing parties is also significant when considering the gravity of the risk class counsel faced. *See Brewer v. S. Union Co.*, 607 F. Supp. 1511, 1531 (D. Colo. 1984); *Trist v. First Fed. Savings & Loan Ass'n of Chester*, 89 F.R.D. 8, 13 (E.D. Pa. 1980). In *Brewer*, the court remarked that inequality of resources available to the parties greatly increases the risk to class counsel. *Brewer*, 607 F. Supp. at 1531. That inequality was prominent here; available resources vastly favored Defendants, who are among the world's largest

and wealthiest businesses. The class, meanwhile, was represented by small regional distributors who purchased Broilers.

III. THE REQUESTED INTERIM FEE AWARD IS APPROPRIATE UNDER CONTROLLING LAW

A. DPPs Seek a Percentage of the Settlement Fund as an Interim Award of Fees.

When a party obtains compensation for the class's benefit in the form of a common fund, courts have long recognized that the costs of the litigation, including an award of attorneys' fees, should be recovered from that common fund. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392 (1970). This approach equitably apportions the costs of litigation, including attorneys' fees, among the class members who benefit from the common fund. *Boeing Co.*, 444 U.S. at 478.

The Seventh Circuit has repeatedly endorsed the percentage-of-the-fund methodology. *See Gaskill v. Gordon* ("*Gaskill II*"), 160 F.3d 361, 363 (7th Cir. 1998) (collecting cases) ("When a class suit produces a fund for the class, it is commonplace to award the lawyers for the class a percentage of the fund, in recognition of the fact that most suits for damages in this country are handled on the plaintiffs' side on a contingent-fee basis."); *Williams v. Gen. Elec. Cap. Auto Lease*, No. 1:94-cv-07410, 1995 WL 765266, at *9 (N.D. Ill. Dec. 26, 1995) (collecting cases) ("The approach favored in the Seventh Circuit is to compute attorney's fees as a percentage of the benefit conferred on the class."); *see also Williams v. Rohm & Haas Pension Plan* ("*Rohm & Haas II*"), 658 F.3d 629, 635-36 (7th Cir. 2011); *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 408 (7th Cir. 2000); *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 3:12-cv-00660, 2018 WL 6606079, at *7 (S.D. Ill. Dec. 16, 2018); *Heekin v. Anthem, Inc.*, No. 1:05-cv-01908, 2012 WL 5878032, at *2 (S.D. Ind. Nov. 20, 2012); *In re Northfield Lab., Inc. Secs. Litig.*, No. 1:06-cv-01493, 2012 WL 2458445, at *3 (N.D. Ill. June 26, 2012). The percentage-of-the-fund method utilizes an *ex ante*

approach, in which courts award a fee approximating a hypothetical *ex ante* bargain between the class and its attorneys. *Americana Art China Co., Inc. v. Foxfire Printing and Packaging, Inc.*, 743 F.3d 243, 246-47 (7th Cir. 2014); *Rohm & Haas II*, 658 F.3d at 635.

A contingent fee based on a percentage of the recovery is the most common form of compensation for counsel representing classes in class action litigation. Similarly, in antitrust class action litigation, "the 'market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time' is a contingent fee in the amount of one-third (1/3) of the common fund recovered." *In re Ready-Mixed Concrete Antitrust Litig.*, No. 1:05-cv-00979, 2010 WL 3282591, at *3 (S.D. Ind. Aug. 17, 2010) (citing *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007)); *In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d 838, 862 (N.D. Ill. 2015); *In re Lithotripsy Antitrust Litig.*, No. 1:98-cv-08394, 2000 WL 765086, at *2 (N.D. Ill. June 12, 2000) (emphasis in original) (noting that "[m]any courts in this district have utilized" the percentage method to set fees in class actions); *Kirchoff*, 786 F.2d at 324 ("When the 'prevailing' method of compensating lawyers for 'similar services' is the contingent fee, then the contingent fee *is* the 'market rate.'").

The percentage-of-the-fund method also conserves judicial resources. Unlike a lodestar calculation, percentage fees are easy to calculate and are not subject to manipulation by counsel. Courts are not forced to review years of bills or scrutinize each decision made by counsel during the course of a complex, multi-year case. *See Florin*, 34 F.3d at 565-66 (noting "there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration."); *Gaskill v. Gordon* ("*Gaskill I*"), 942 F. Supp. 382, 386 (N.D. Ill. 1996) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (observing that "the percentage of the fund method saves the court the time it would have to spend reviewing eight years of billing

documents."). Instead, compensation is based on the level of class counsel's success, as it would be in a similar contingency case on behalf of a private party. The percentage-of-the-fund method also allows a court to "dispose of [the] last issue in [] prolonged proceedings as expeditiously as possible." *Gaskill I*, 942 F. Supp. at 386. (quoting *Sec. & Exch. Comm'n v. First Secs. Co. of Chicago*, 528 F.2d 449, 454 (7th Cir. 1976)).

B. Plaintiffs' Requested Fee is an Appropriate Market-Based Fee.

A fee award of 33 1/3% in this case reflects a real-world arm's length transaction between the Class and Class Counsel, and is a generally accepted percentage in the Seventh Circuit. *In re Dairy Farmers*, 80 F. Supp. 3d at 846; *In re Lithotripsy*, 2000 WL 765086, at *2. It is justified by the remarkable results obtained for the Class and the risks faced by Class Counsel. The fee award requested here is well within the acceptable range of attorneys' fee awards in protracted, complex, and expensive litigation such as this.

Thirty-three and one-third percent is a standard percentage in many fee agreements, including large, complex non-class cases. *See* Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 248 (1996) (noting that "standard contingency fees" are "usually thirty-three percent to forty percent of gross recoveries"); *see also Blum v. Stenson*, 465 U.S. 886, 903 (1984) (Brennan, J., concurring) ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.").

Courts in the Seventh Circuit routinely award contingency fees of 33 1/3% or more. *E.g.*, *In re Dairy Farmers*, 80 F. Supp. 3d at 862 (awarding one-third of the common fund); *In re Potash Antitrust Litig.*, No. 1:08-cv-06910 (ECF No. 589) (N.D. Ill. June 12, 2013) (Bruckner Decl. Ex. 32) (awarding fees of one-third of the $90 million fund, plus $791,124.63 in expenses); *Heekin*, 2012 WL 5878032, at *5 (awarding one-third fee of $90 million fund, plus $6,243,278.10 in

expenses); *Pavlik v. FDIC*, No. 1:10-cv-00816, 2011 WL 5184445, at *4 (N.D. Ill. Nov. 1, 2011) (one-third fee); *In re Lithotripsy*, 2000 WL 765086, at *2 ("33.3% of the fund plus expenses is well within the generally accepted range of the attorneys' fee awards"); *Goldsmith v. Tech. Sols. Co.*, No. 1:92-cv-04374, 1995 WL 17009594, at *8 (N.D. Ill. Oct. 10, 1995) (citing *Cont'l Illinois*, 962 F.2d at 572) ("Thirty three percent appears to be in line with what attorneys are able to command on the open market in arms-length negotiations with their clients."); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 597 (N.D. Ill. 2011) (one-third fee); *Retsky Family Ltd. Partnership v. Price Waterhouse LLP*, No. 1:97-cv-07694, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) ("A customary contingency fee would range from 33 1/3% to 40% of the amount recovered."); *Martin v. Caterpillar Inc.*, No. 1:07-cv-01009, 2010 WL 11614985, at *4 (C.D. Ill. Sept. 10, 2010) (one-third fee); *Kitson v. Bank of Edwardsville*, No. 3:08-cv-00507, 2010 WL 331730, at *2 (S.D. Ill. Jan. 25, 2010) (one-third fee); *Will v. Gen. Dynamics Corp.*, No. 3:06-cv-00698, 2010 WL 4818174, at *3 (S.D. Ill. Nov. 22, 2010) (one-third fee); *Burkholder v. City of Ft. Wayne*, 750 F. Supp. 2d 990, 997 (N.D. Ind. 2010) (one-third fee); *Campbell v. Advantage Sales & Mktg. LLC*, No. 1:09-cv-01430, 2012 WL 1424417, at *2 (S.D. Ind. Apr. 24, 2012) (one-third fee); *In re Ready-Mixed Concrete*, 2010 WL 3282591, at *3 (one-third fee).

Public policy also favors an attorneys' fee award at the market rate. The Supreme Court has repeatedly held that private enforcement of antitrust laws is essential to effective antitrust enforcement. *See, e.g.*, *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982); *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 130–31 (1969). And a market-rate fee award incentivizes competent, experienced counsel to take on high-risk, complex class action litigation.

1. Judicial Fee Awards in Other Class Actions Using a Form of Market-Mimicking Approach Support a 30% to 40% Fee as the Market Rate Here.

When a court employs the market-mimicking approach, "[o]ther judicial fee awards are relevant" because they "affect the expectations of lawyers, and therefore, what they might agree to in a voluntary negotiation." *Nilsen v. York Cnty.*, 400 F. Supp. 2d 266, 282–83 (D. Me. 2005); *In re Trans Union Corp. Privacy Litig.*, No. 1:00-cv-04729, 2009 WL 4799954, at *10 (N.D. Ill. Dec. 9, 2009), *order modified and remanded*, 629 F.3d 741 (7th Cir. 2011) (explaining the Seventh Circuit has endorsed the market-mimicking approach). These results inform the market-mimicking approach, which tries to reach the market price for legal services "in light of the risk of nonpayment and the normal rate of compensation in the market." *Nilsen*, 400 F. Supp. 2d at 278 (quoting *In re Synthroid*, 264 F.3d at 718) (internal quotation marks omitted).

The market-mimicking approach led the Seventh Circuit to expressly reject a "megafund" cap on attorneys' fees:

> We have never suggested that a 'megafund rule' trumps these market rates, or that as a matter of law no recovery can exceed 10% of a 'megafund' even if counsel considering the representation in a hypothetical arms' length bargain at the outset of the case would decline the representation if offered only that prospective return . . . Why there should be such a notch is a mystery. Markets would not tolerate that effect . . . .

In re Synthroid, 264 F.3d at 718. Imposing such a cap could chill the willingness of counsel to take large cases and change the expectation that negotiated fee percentages in market-determined fee agreements would prevail.

Likewise, courts in other class actions using a form of market-mimicking have determined that the market rate for legal services warrants a fee award of 30% to 40%. *See In re Aftermarket Filters Antitrust Litig.*, No. 1:08-cv-04883 (ECF No. 1063) (N.D. Ill. Feb. 22, 2013) (Bruckner Decl. Ex. 31) (utilizing percentage-of-the-fund method in antitrust class action to award attorneys'

fees of 30% of common fund); *In re Ins. Brokerage Antitrust Litig.* ("*In re Ins. Brokerage I*"), MDL No. 1663, 2009 WL 411856, at *56–58 (D.N.J. Feb. 17, 2009) (determining market rate for privately-negotiated contingent fees was between 30% and 40% in non-class, commercial litigation); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1212 (S.D. Fla. 2006) (requested 31 1/3% fee was "within the range of, if not below, the market rate" using Seventh Circuit "market approach"); *In re Remeron Direct Purchaser Antitrust Litig.*, No. 2:03-cv-00085, 2005 WL 3008808, at **14, 16 (D.N.J. Nov. 9, 2005) (employing percentage-of-the-fund method to approximate a fee negotiated in the private marketplace, emphasizing risk of nonpayment, noting "the sometimes undesirable characteristics" of contingent-fee antitrust class actions, including "the uncertain nature of the fee, the wholly contingent outlay of large out-of-pocket sums by plaintiffs, and the fact that the risk of failure and nonpayment in an antitrust case are extremely high," and determining market rate between 30% and 40%).

2. Reported Statistical Data Support a Market Rate in Antitrust Class Actions of 30% to 40%.

Courts often rely on academic and government reports to determine the "market price" for class action contingent fees. *See, e.g.*, *In re Cabletron Sys., Inc. Secs. Litig.*, 239 F.R.D. 30, 41-42 (D.N.H. 2006) (relying on "comprehensive studies evaluating fee awards in class action cases" and collecting those studies).

Relevant here is a study of 40 antitrust class actions . Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879 (July 2008). The study shows that courts in the majority of antitrust class actions awarded a contingent fee of 30% or more where the recoveries were up to $100 million. *Id.* at 911, tlb.7A. The median fee was 33.3% and the average 28.2%. *Id*. The majority of courts in antitrust class actions where the recoveries ranged from $100 million to $500 million also awarded attorney's

fees in excess of 30% of the fund. *Id.* at 911, tbl.7B. A more recent study found the same results. Joshua P. Davis, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 SEATTLE U.L. REV. 1269, 1293-95 (2013) ("[I]n the twenty newer cases counsel tended to recover approximately 30% to 33.3% in cases with recoveries below $100 million and a similar or smaller percentage in cases with recoveries between $100 and $500 million").

C. A Lodestar Cross-Check Confirms that the Fee Requested is Proper.

While the percentage-of-the-fund method is favored in the Seventh Circuit for calculating fees in common fund cases, *In re Dairy Farmers*, 80 F. Supp. 3d at 844, courts may use a lodestar cross-check to understand class counsel's time and effort and determine the reasonableness of a fee. *Id.* But this cross-check is not required. *Rohm & Haas II*, 658 F.3d at 636 ("[C]onsideration of a lodestar check is not an issue of required methodology"); *accord Leung v. XPO Logistics, Inc.*, 326 F.R.D. 185, 204 (N.D. Ill. 2018) ("The Court is not required to check its percentage-of-fee determination against the lodestar."); *Wright v. Nationstar Mortg. LLC*, No. 1:14-cv-10457, 2016 WL 4505169, at *17 (N.D. Ill. Aug. 29, 2016) (noting that a lodestar cross-check is not required); *Heekin*, 2012 WL 5878032, at *2 (criticizing a class member for "overstat[ing] the importance of the lodestar method in this Circuit."). In fact, "[t]he use of a lodestar cross-check has fallen into disfavor." *George v. Kraft Foods Glob., Inc.*, Nos. 1:08-cv-03799; 1:07-cv-01713, 2012 WL 13089487, at *3 (N.D. Ill. June 26, 2012). And the Seventh Circuit has "never ordered [a] district judge to ensure that the lodestar result mimics that of the percentage approach." *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998).

The lodestar is derived by multiplying the hourly rate of the attorney or professional by the number of hours reasonably expended. *Wright*, 2016 WL 4505169, at *14. A reasonable hourly rate is one that is consistent with the common rate in the "community for similar services by lawyers of reasonably comparable skill, experience and reputation." *See Jeffboat, LLC v. Dir.,*

Office of Workers' Comp. Programs, 553 F.3d 487, 489 (7th Cir. 2009); *see also Denius v. Dunlap*, 330 F.3d 919, 930 (7th Cir. 2003) (holding that the attorney's billing rate for comparable work is generally appropriate).

The base lodestar is often augmented by a multiplier that takes into account factors that affect the amount of the fees awarded. *See Cook*, 142 F.3d at 1015; *Florin*, 34 F.3d at 565; *Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 255 (7th Cir. 1988). These include the complexity of the legal issues, the degree of success, and the public interest advanced by the litigation. *Paz v. Portfolio Recovery Assocs., LLC*, 924 F.3d 949, 954 (7th Cir. 2019); *Gastineau v. Wright*, 592 F.3d 747, 748 (7th Cir. 2010). Also considered is the risk of non-payment. *See Harman v. Lyphomed, Inc.*, 945 F.2d 969, 976 (7th Cir. 1991).

A lodestar cross-check in this case supports the requested fee. The risks, complexities and challenges Class Counsel faced are discussed in detail above. During that time, Class Counsel invested 100,608.25 hours of attorney and other professional time from case inception through December 31, 2020. (*See* Bruckner Decl. ¶ 24; Bruckner Decl. Exs. 5-24, and 29.) The average hourly rate by Class Counsel and their associated professional staff is approximately $506 (with a cap of $350.00 per hour on document review (*see* Bruckner Decl. ¶ 17)), a rate comparable to those charged by other law firms with similar experience, expertise, and reputation, for similar services in the nation's leading legal markets. Class Counsel's base lodestar is $50,928,159.75.[12] Awarding a 33 1/3% fee would result in a conservative multiplier of 1.114. Such a multiplier is well within accepted ranges,[13] and is warranted here.

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[12] Since the inception of this litigation Co-Lead Counsel have submitted Class Counsel's lodestar and expense information to the Court *in camera* on a quarterly basis and have further reviewed it in preparing this motion. (Bruckner Decl. ¶¶ 20, 22.)

[13] *E.g.*, *Cook*, 142 F.3d at 1015 (upholding the district court's decision to "enhance[] the lodestar by a multiplier of 1.5"); *Florin*, 34 F.3d at 565 ("Because class counsel have requested a

IV. COUNSEL'S LITIGATION EXPENSES WERE REASONABLY INCURRED AND SHOULD BE APPROVED, AND AT THIS TIME THEY SHOULD BE REIMBURSED UP TO $4.5 MILLION

Under the common fund doctrine, class counsel customarily are entitled to reimbursement of reasonable expenses incurred in the litigation. Fed. R. Civ. P. 23(h); *Mills*, 396 U.S. at 392 (recognizing the right to reimbursement of expenses where a common fund has been produced or preserved for the benefit of a class); Alba Conte, *Attorney Fee Awards* § 2.08, at 50-51 (3d ed. 2004). Reimbursable expenses are those "that are consistent with market rates and practices." *In re Ready-Mixed Concrete*, 2010 WL 3282591, at *3; *see also In re Synthroid*, 264 F.3d at 722 ("Reducing litigation expenses because they are higher than the private market would permit is fine; reducing them because the district judge thinks costs too high in general is not.").

In notifying class members of the Tyson and Pilgrim's settlements, Class Counsel informed class members that they would seek repayment of such litigation expenses in an amount not to

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multiplier of 1.53, the district court need not worry about exceeding what we have suggested is a sensible ceiling of double the lodestar."); *Harman*, 945 F.2d at 976 (internal citations omitted) (observing that "[m]ultipliers anywhere between one and four have been approved."); *Skelton*, 860 F.2d at 258 (suggesting "that a doubling of the lodestar would provide a sensible ceiling."); *In re Dairy Farmers*, 80 F. Supp. 3d at 849 (awarding a fee that equated to a multiplier of 1.34 on a lodestar cross-check); *Standard Iron Works v. ArcelorMittal*, No. 1:08-cv-05214, 2014 WL 7781572, at *2 (N.D. Ill. Oct. 22, 2014) (finding that the requested lodestar multiplier of approximately 1.97 was "well within the range of reasonable multipliers awarded in similar contingent cases."); *Schulte*, 805 F. Supp. 2d at 598 (approving an award that "represent[s] a multiplier of less than 2.5, which is not an unreasonable risk multiplier."); *In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig.*, 733 F. Supp. 2d 997, 1015 (E.D. Wis. 2010) (awarding a fee that represented a multiplier of 2.07 on a lodestar cross-check and recognizing that "the mean risk multiplier in cases involving class settlements comparable in size to the present settlement is 2.70.") (citing Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees & Expenses in Class Action Litigation: 1993–2008*, 7 J. OF EMPIRICAL LEGAL STUD. 248, 274 tbl.15 (2010)); *accord In re Hyundai and Kia Fuel Economy Litig.*, 926 F.3d 539, 572 (9th Cir. 2019) (affirming lodestar multipliers of 1.5521 and 1.22 as "modest or in-line with others"); *Kelly v. Wengler*, 822 F.3d 1085, 1093, 1105 (9th Cir. 2016) (affirming lodestar multipliers of 2.0 and 1.3); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002) (upholding a lodestar multiplier cross-check showing a multiplier of 3.65).

exceed $4.5 million.[14] Class Counsel's actual current and ongoing expenses total $5,104,566.48, and consist of the following three categories of expenses: (1) $585,059.45 in expenses incurred individually by each firm (primarily travel-related expenses), (2) $3,811,209.23 in expenses paid by the common Litigation Fund, and (3) $708,297.80 in invoiced but as-yet unpaid amounts relating to expert and consultant costs, and database and deposition expenses (which are not contingent, and will be paid regardless of the outcome of this motion or the action).[15] Expenses in each of these categories are described in detail in the Bruckner Decl. ¶¶ 28-35 and its exhibits, and were reasonably necessary to advance the interests of the Class and to obtain the favorable results achieved to date. Due to the risk that they might never be recovered, Class Counsel endeavored to keep expenses to a minimum. Accordingly, DPPs respectfully request that the Court approve these

[14] *See* https://www.broilerchickenantitrustlitigation.com/admin/services/connectedapps.cms.extensions/1.0.0.0/asset?id=d1618bee-26ea-4ac1-8583-56e80f11113c&languageId=1033&inline=true (last visited April 8, 2021); *see also* ECF No. 4259-2 at 25 (proposed class notice); ECF No. 4341 (Feb. 25, 2021 Order granting DPPs' motion for preliminary approval of the Tyson and Pilgrim's settlements and accompanying class notice).

[15] In addition to the expenses described here and for which Class Counsel now seek reimbursement, payments totaling $365,597.10 have been made from the settlement escrow accounts for settlement-related expenses; specifically, class notice as directed by the Court, related expenses regarding preliminary or final approval of the settlements, and related bank fees. These payments were made pursuant to each Settling Defendant's Settlement Agreement which reserved a specific amount of such Settling Defendant's payment to be used to pay notice and related costs, and which would be non-refundable to the Settling Defendant in the event the settlement was not finally approved. (ECF No. 447-2 at 18, ¶ II(C)(2) (Fieldale); ECF No. 3324 at 18-19, ¶ II(C)(2), 46-47, ¶ II(C)(2), and 74-75, ¶ II(C)(2) (Peco, George's, and Amick); ECF No. 4259-1 at 15, ¶ 6(c)-(d), 45, ¶ 6(c)-(d) (Tyson and Pilgrim's).) While these payments are not included in the requested reimbursement in this petition and have already been paid or may be paid from those escrow accounts, we describe those expenditures here to fully describe all litigation-related expenses incurred in this case. (Bruckner Decl. ¶ 28 n.2.)

expenses in their total amount of $5,104,566.48, and that the Court presently award litigation expenses in the amount of $4,500,000.00.[16]

V. THE CLASS REPRESENTATIVES SHOULD RECEIVE INTERIM SERVICE AWARDS

Courts regularly grant service awards to class representatives in recognition of the time and effort they invested in the case. Like in this case, class representatives frequently contribute to the successful resolution of a class action by assisting with the preparation of the pleadings, participating in discovery, continually providing information to class counsel, and participating in settlement negotiations. *Williams v. Rohm & Haas Pension Plan* ("*Rohm & Haas I*"), No. 4:04-cv-00078, 2010 WL 4723725, at *2 (S.D. Ind. Nov. 12, 2010), *aff'd*, 658 F.3d 629 (7th Cir. 2011) ("Because a named plaintiff plays a significant role in a class action, an incentive award is appropriate as a means of inducing that individual to participate in the expanded litigation on behalf of himself and others."). Their contributions undoubtedly benefit the class as a whole, and courts in this circuit often see fit to compensate class representatives for their service to the class. *See Cook*, 142 F.3d at 1016 (affirming $25,000.00 incentive award); *In re Potash Antitrust Litig.*, No. 1:08-cv-06910 (ECF No. 589) (N.D. Ill. June 12, 2013) (Bruckner Decl. Ex. 32) (awarding $15,000.00 apiece in incentive awards).

Courts consider various factors when determining an appropriate service award, including "the actions the [representative] has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the [representative]

[16] In the event of future recoveries for the DPP Class, Class Counsel will petition the Court for reimbursement of the difference, $604,566.48, together with necessary and reasonable expenses incurred in the remainder of the litigation.

expended in pursuing the litigation." *Cook*, 142 F.3d at 1016 (citing *Spicer v. Chicago Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1267 (N.D. Ill. 1993)).

Here, DPPs request that the Court confer an interim service award of $25,000.00 on each of the five Class Representatives: Maplevale Farms, Inc.; John Gross and Company, Inc.; Ferraro Foods, Inc. and Ferraro Foods of North Carolina, LLC; Joe Christiana Food Distributors, Inc.; and Cedar Farms Co., Inc. Throughout this litigation, the Class Representatives advised Class Counsel and approved pleadings, reviewed and responded to written discovery, searched for, gathered, preserved, and produced documents, prepared for and stood for depositions, kept up to date on the progress of the case, and performed other similar activities. (Bruckner Decl. ¶ 37; *see also* ECF Nos. 3962-39 to 3962-43 (declarations from each class representative in support of DPPs' motion for class certification).) They were never promised that they would receive any additional compensation for leading the case. (*Id.* ¶ 38.) Rather, they devoted their time and efforts solely to recovery some portion of their own overcharges and to enable other class members to recover theirs. (*Id.*) Their help has been instrumental to the success of this litigation and, DPPs respectfully submit, they are deserving of these service awards.

VI. CONCLUSION

For these reasons, DPPs respectfully request that this Court award interim attorneys' fees in the amount $56,753,866.00, which is equivalent to 33 1/3% of the Settlement Fund, litigation expenses in the amount of $4,500,000.00, and incentive awards to the five Class Representatives in the amount of $25,000.00 apiece.

Dated: April 16, 2021

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

s/W. Joseph Bruckner
W. Joseph Bruckner
Brian D. Clark
Simeon A. Morbey
100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401
T: (612) 339-6900
F: (612) 339-0981
wjbruckner@locklaw.com
bdclark@locklaw.com
samorbey@locklaw.com

Bruce L. Simon
Neil Swartzberg
PEARSON, SIMON & WARSHAW, LLP
350 Sansome Street, Suite 680
San Francisco, CA 94104
T: (415) 433-9000
F: (415) 433-9008
bsimon@pswlaw.com
nswartzberg@pswlaw.com

Clifford H. Pearson
Daniel L. Warshaw
Thomas J. Nolan
Michael H. Pearson
Bobby Pouya
PEARSON SIMON & WARSHAW, LLP
15165 Ventura Boulevard, Suite 400
Sherman Oaks, CA 92403
T: (818) 788-8300
F: (818) 788-8104
cpearson@pswlaw.com
dwarshaw@pswlaw.com
tnolan@pswlaw.com
mpearson@pswlaw.com
bpouya@pswlaw.com

Direct Purchaser Plaintiffs
Interim Co-Lead Class Counsel

Steven A. Hart (#6211008)
Brian Eldridge (#6281336)
John Marrese (#6306516)
Kyle Pozan (#6306761)
HART MCLAUGHLIN & ELDRIDGE, LLC
22 West Washington Street, Suite 1600
Chicago, IL 60602
T: (312) 955-0545
F: (312) 971-9243
shart@hmelegal.com
beldridge@hmelegal.com
jmarrese@hmelegal.com
kpozan@hmelegal.com

Direct Purchaser Plaintiffs
Interim Liaison Class Counsel

TAB 10A

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Northern Division)

IN RE: TITANIUM DIOXIDE ANTITRUST LITIGATION	Master Docket No. 10–CV–00318(RDB)
THIS DOCUMENT RELATES TO: All Actions	

ORDER GRANTING MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND PAYMENT OF SERVICE AWARDS TO THE CLASS REPRESENTATIVES

The Court has considered Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and for Service Awards to the Class Representatives (ECF No. 546), including all materials filed in support thereof (collectively, "Fee Motion"), as well as Plaintiffs' Motion for Final Approval of Class Action Settlements with Defendants E. I. du Pont de Nemours and Company ("DuPont"), Cristal USA, Inc., formerly known as Millennium Inorganic Chemicals, Inc. ("Cristal"), Kronos Worldwide, Inc. ("Kronos"), and Huntsman International LLC ("Huntsman") (ECF No. 545), and the Settlement Agreements between Plaintiffs and DuPont (ECF No. 496-3), Cristal (ECF No. 530-1), Kronos (ECF No. 530-2) and Huntsman (ECF No. 480-3); and the Court has held a duly noticed Final Approval Hearing on November 25, 2013, at which the Fee Motion was considered by the Court.

For good cause shown, and for the reasons set forth in detail on the record by this Court at the Final Approval Hearing, and after consideration of the factors set forth in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 n. 28 (4th Cir. 1978) and in *Singleton v. Domino's Pizza,*

LLC, ___ F. Supp. 2d ___ , 2013 WL 5506027, at *10 (D. Md. Oct. 2, 2013), and having received no objections to the requests for attorneys' fees, reimbursement of expenses, and payment of service awards to the Class Representatives, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. The Court finds that due and adequate notice was given to the Class of the requests by Class Counsel for an award of attorneys' fees, reimbursement of expenses, and for service awards to the Class Representatives; that the form and content of the notices and the publication, mailing, and distribution thereof satisfy the requirements of both Rule 23(e) of the Federal Rules of Civil Procedure and due process, and constitute the best notice practicable under the circumstances; and that no objections to the requests for an award of attorneys' fees, reimbursement of expenses, and for service awards were received;

2. Class Counsel is hereby awarded thirty-three and one-third percent (33⅓ %) in reasonable attorneys' fees from the $163.5 million in Settlement Funds that have been or will be deposited in the Escrow Account at Union Bank, N.A. that has been established pursuant to the Settlement Agreements to receive the funds by DuPont, Cristal, Kronos and Huntsman (specifically, $54,500,000); Class Counsel are also authorized to allocate to other Plaintiffs' counsel the fees awarded herein, taking into account their relative contributions to this litigation;

3. Class Counsel shall be paid $4,569,271.86 from the Settlement Funds as reimbursement for the costs and expenses incurred by Plaintiffs' counsel during the course of this litigation;

4. Class Representative Haley Paint Company shall be paid $125,000, and Class Representatives Isaac Industries Inc. and East Coast Colorants d/b/a Breen each shall be paid

$25,000, from the Settlement Funds as service awards for their respective contributions to this litigation;

5. After payment to Class Counsel of the award of attorneys' fees and the amount for reimbursement of costs and expenses, and the payment of service awards to the Class Representatives, and after the Claims Administrator concludes its processing and auditing of claims, Class Counsel shall file a Motion for Distribution of Settlement Funds for consideration by the Court, and the balance of the Settlement Funds shall be distributed in accordance with the Plan of Allocation to those claimants who submitted valid and timely claims, upon further order of the Court;

6. Without affecting the finality of this Order, the Court retains exclusive jurisdiction over: (a) the enforcement of this Order; (b) the enforcement of the Settlement Agreements; and (c) the distribution of the balance of the Settlement Funds.

Dated: December 13, 2013

Richard D. Bennett
United States District Judge

TAB 10B

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Northern Division)

IN RE: TITANIUM DIOXIDE ANTITRUST LITIGATION	Master Docket No. 10-CV-00318 (RDB)
THIS DOCUMENT RELATES TO: All Actions	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND FOR SERVICE AWARDS TO THE CLASS REPRESENTATIVES

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I. INTRODUCTION

Pursuant to the Order of this Court dated September 10, 2013 (ECF No. 533), Plaintiffs respectfully submit this memorandum of law in support of their motion for an attorneys' fee award of thirty-three and one third (33⅓) percent of the $163,500,000 total Settlement Funds (collectively, "Settlement Funds") achieved in the settlements with the Defendants[1], as well as reimbursement of the costs and litigation expenses incurred by Class Counsel and the nine firms that assisted them (collectively, "Plaintiffs' Counsel" [2]), and payment of service awards to the three class representatives. This motion is also supported by the Declaration of Lewis A. Noonberg, Class Counsel's Expert Witness on the Reasonableness of Class Counsel's Request for Final Approval of Attorneys' Fees (the "Noonberg Decl."), filed herewith.

This action was investigated beginning in September 2008 and then commenced more than three years ago on February 9, 2010. (ECF No. 1) During the course of prosecuting the claims on behalf of the Class, Plaintiffs' Counsel engaged in extensive discovery and motion practice, obtained class certification, opposed numerous motions filed by the Defendants (including *Daubert* motions and motions for summary judgment), prepared extensive expert damages analyses, and prepared the case up to the eve of trial. *See generally*, Declaration of C.

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[1] "Defendants" are Huntsman International, LLC ("Huntsman"), E. I. du Pont de Nemours and Company ("DuPont"), Cristal USA, Inc. ("Cristal USA," formerly known as Millennium Inorganic Chemicals, Inc. ("Millennium")), and Kronos Worldwide, Inc. ("Kronos").

[2] "Plaintiffs' Counsel" consists of the firms of (1) Gold Bennett Cera & Sidener LLP, (2) Joseph Saveri Law Firm, Inc., and (3) Lieff Cabraser Heimann & Bernstein LLP (collectively, "Class Counsel"); (4) Shapiro Sher Guinot & Sandler (Liaison Counsel); (5) Berger & Montague P.C. and (6) Grant & Eisenhofer P.A. (Executive Committee members along with Class Counsel and Liaison Counsel); (7) Heins Mills & Olson P.L.C.; (8) Cohen Milstein Sellers & Toll PLLC; (9) Faruqi & Faruqi LLP; (10) Criden & Love P.A.; (11) Freed Kanner London & Millen LLC; and (12) Lite DePalma Greenberg LLC. Pursuant to Case Management Order No. 2 (ECF No. 106), Class Counsel continue to be responsible for coordinating and organizing Plaintiffs in the conduct of this litigation, including allocating fees among Plaintiffs' Counsel. (ECF No. 106 at 4).

Andrew Dirksen in Support of Plaintiffs' Motion for Final Approval of Class Action Settlements with Defendants and Plan of Allocation; and Plaintiffs' Motion for an Award of Attorneys' Fees and Reimbursement of Expenses, and for Service Awards to the Class Representatives ("Dirksen Decl.").[3]

The Settlement Funds were obtained solely through the efforts of Plaintiffs' Counsel after more than three years of intense litigation with the Defendants. In light of the risks and costs of continued litigation and trial, the Settlement Funds represent an outstanding result for the Class.

As reflected in their firms' respective declarations submitted herewith, Plaintiffs' Counsel expended more than 45,000 hours litigating this highly complex action, with an unpaid lodestar of approximately $23 million. *See* Exs. A - M. These hours comprise the professional services that were rendered by the twelve law firms that worked for Plaintiffs on a wholly contingent basis. This huge effort was necessary in the context of this action, which was vigorously defended by experienced and well-financed defense counsel. As discussed below, the attorneys' fees requested amount to a risk multiplier of 2.39, which is lower than the risk multipliers awarded in many other complex antitrust cases, including those that settled long before trial, and even before class certification. *See, e.g.*, *Nichols v. SmithKline Beecham Corp. (Paxil Antitrust Litig.)*, 2005 WL 950616 at *24 (E.D. Pa. 2005) (multiplier of over 3.15 awarded as fees before the class was certified); *In Re Linerboard Antitrust Litig.*, 2004 WL 1221350, *12, *16 n. 9 (E.D. Pa. 2004) (awarding attorneys' fees of 30% of the $202.6 million recovery months before trial, which corresponded with a multiplier on lodestar of 3.67 using current hourly rates).

[3] Unless otherwise stated, references herein to "¶__" and "Ex. __" are to paragraphs within, and exhibits to, the Dirksen Declaration, filed herewith and also in support of the Motion for Final Approval of Class Action Settlements with Defendants.

Plaintiffs' Counsel also incurred $4,555,204.66 in expenses. *See* Ex. A, a summary of each firm's total expenses, and the accompanying declarations from the twelve firms comprising Plaintiffs' Counsel.[4] These expenses were reasonably and necessarily incurred by Plaintiffs' Counsel in the course of efficiently prosecuting this action, without any guarantee that these sums would be reimbursed.

Notice of Plaintiffs' request for an award of attorneys' fees, reimbursement of expenses, and payment of service awards to the class representatives was disseminated to the Class by mail and publication, including publication on a publicly accessible website[5], as well as nationwide publication in *The Wall Street Journal*, ICIS Chemical Business magazine, and Paint & Coatings Industry Magazine. *See* Declaration of Markham Sherwood Regarding Dissemination of Notices to the Settlement Class and Status of Claims Administration (hereinafter "Sherwood Decl."), accompanying Plaintiffs' Motion for Final Approval of Class Action Settlements (also filed herewith), at ¶¶7-11. Notice of the hearing on the motion for final approval of the settlements with the Defendants, the Plan of Allocation, and the motion for attorneys' fees, reimbursement of expenses, and for payment of service awards to the class representatives, was mailed on September 19, 2013 directly to more than 5877 addresses of known Class members. *Id*. at ¶7. Publication of the notice of the settlements occurred nationwide in *The Wall Street Journal* on September 23, 2013. *Id*. at ¶¶9-10. The last day to object to the terms of the settlements between Plaintiffs and the Defendants, or to the Plan of Allocation, the request for attorneys' fees and reimbursement of expenses, and for payment of service awards to the class representatives, is November 4, 2013. No Class members have objected to date. *Id*. at ¶16. In

[4] Exhibit A to the Dirksen Declaration lists each firm's incurred expenses. Exhibit B to the Dirksen Declaration is the Declaration of Solomon B. Cera, which includes a list of the expenses paid out of the Plaintiffs' litigation fund at Exhibit 3 thereto.

[5] *http://www.tio2antitrustlitigation.com/*

fact, even though the deadline for the submission of Proofs of Claim is January 31, 2014, at least 58 companies already have submitted Proofs of Claim. *Id*. at ¶15. In addition, one company that previously opted-out has requested to re-enter the Class and participate in the distribution. *Id*. at ¶17. This indicates widespread support from many Class members for the significant settlements achieved by Class Counsel.

Plaintiffs respectfully request that the Court approve the 33⅓% fee request, the reimbursement of expenses, and payment of service awards to the class representatives. Payment of attorneys' fees from a common fund settlement is established in the Fourth Circuit. *See, e.g.*, *Marino v. Pioneer Edsel Sales, Inc.*, 349 F.3d 746, 753 (4th Cir. 2003) ("To be sure, in a class action, whether the attorney's fees come from a common fund or are otherwise paid, the district court must exercise its inherent authority to assure that the amount and mode of payment of attorney's fees are fair and proper."). An attorney fee award of 33⅓% is within the guidelines for awards of attorneys' fees in antitrust and other contingent class action cases. As discussed below, the amount requested is warranted given the factors considered by courts in this circuit and elsewhere in determining such awards. *See, e.g., In re Royal Ahold N.V. Sec. & ERISA Litig.*, 461 F. Supp. 2d 383, 385-87 (D. Md. 2006) (using percentage method to award attorneys' fees in the amount of $130.65 million, or 12% of a $1.1 billion settlement fund, where settlements were achieved well before trial).

The settlements with the Defendants were achieved through the skill, expertise, creativity, perseverance and hard work of Plaintiffs' Counsel. Significantly, there was no federal or state government civil or criminal action to pave the way. The result here is solely the result of counsel's work. Plaintiffs' Counsel's extensive efforts in obtaining the Settlement Funds, and in achieving an outstanding result for the benefit of the Class, are summarized below. Indeed, Class

Counsel believe that should the settlements with Defendants be finally approved in this matter, the resulting $163.5 million in Settlement Funds will constitute one of the largest recoveries in an antitrust action in the Fourth Circuit. In sum, the requested attorneys' fees, expenses, and service awards are fair, reasonable and adequate. Accordingly, Plaintiffs respectfully submit that this motion should be granted.

II. HISTORY OF THE LITIGATION

The relevant background of this case—from its investigation through the eve of trial, including a summary of the risks undertaken, the obstacles overcome, and the results achieved—is described in detail in the Dirksen Declaration, which is incorporated herein by reference.

III. THE COURT SHOULD AWARD THE REQUESTED FEES

A. Class Counsel's Fees Should Be Calculated By The Percentage Of The Common Fund Approach

A common fund exists when there is a sum of money to be shared by class members, created as a consequence of litigation. *Brzonkala v. Morrison*, 272 F.3d 688, 690-91 (4th Cir. 2001) (citing *Mills v. Electric Auto-Lite Co*., 396 U.S. 375, 393-95 (1970)). Where, as here, a common fund has been created for the general benefit of a class as a result of litigation, an attorneys' fee award is generally considered appropriate. *Brewer v. School Bd. of City of Norfolk Virginia,* 456 F.2d 943, 948 (4th Cir. 1972) (allowing for an award of fees where a plaintiff has maintained a suit that generates a fund in which others share.). "In common fund cases, attorneys' fees are borne not by the defendants, 'but by members of the plaintiff class, who shoulder the burden of paying their own counsel out of the common fund.'" *DeLoach v. Philip Morris Companies*, 2003 WL 23094907 at *3 (M.D.N.C. Dec. 19, 2003) (citation omitted).

The Supreme Court has consistently held that, in common fund cases such as this, it is appropriate for attorneys' fees to be determined on a percentage-of-fund basis. *See Blum v.*

Stenson, 465 U.S. 886, 900 n. 16 (1984) ("[U]nder the 'common fund doctrine' . . . a reasonable fee is based on a percentage of the fund bestowed on the class."); *see also Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."). The same holds true in district courts within the Fourth Circuit. "The percentage-of-fund recovery method is generally favored in cases involving a common fund, and is designed to allow courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'" *Teague v. Bakker*, 213 F. Supp. 2d 571, 582 (W.D.N.C. 2002) (citing *In re Cendant Corp. Prides Litig.*, 243 F.3d 722, 732 (3d Cir. 2002)); *see also Kay Co. v. Equitable Prod. Co.*, 749 F. Supp. 2d 455, 463 (S.D. W.Va. 2010) ("In light of the prevailing view among courts that the percentage method is the superior method for calculating attorneys' fees from a common fund, and with special concern for the perverse incentives associated with the lodestar method, I find that the percentage method is the appropriate method for determining reasonable attorneys' fees in this case.").

"[C]ourts have become increasingly critical of the lodestar method, which requires scrutiny of Class Counsel's billing practices—a time consuming process—whereas the percentage method is more akin to the common litigation practice of setting contingency fees based on a percentage of the recovery." *Goldenberg v. Marriott PLP Corp.*, 33 F. Supp. 2d 434, 437 (D. Md. 1998). "In all, eight Circuits (the Third, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and District of Columbia) have adopted the percentage method." *Id.* (citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 821-22 (3d Cir. 1995) (approving use of the percentage-of-recovery approach); *Longden v. Sunderman*, 979 F.2d 1095, 1099 (5th Cir. 1992) (same); *Rawlings v. Prudential-Bache Properties*, 9 F.3d 513, 517

(6th Cir. 1993) (same); *In Re Continental Illinois Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (same); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (same); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 456 (10th Cir. 1998) (same); *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 775 (11th Cir. 1991) (requiring use of the percentage-of-recovery approach); *Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) (also requiring use of the percentage-of-recovery approach)).

"[I]n the Fourth Circuit, courts have discretion to choose between the lodestar method and the percentage method in the common fund cases." *DeLoach v. Philip Morris Companies*, 2003 WL 23094907 at *3 (M.D.N.C. December 19, 2003) (referring to *Teague*, 213 F. Supp. 2d at 583). "The United States Court of Appeals for the Fourth Circuit has not decided which of the general approaches to adopt, although the 'current trend among the courts of appeal favors the use of a percentage method to calculate an award of attorneys' fees in common fund cases.'" *Singleton v. Domino's Pizza, LLC*, 2013 WL 5506027, *10 (D. Md. Oct. 2, 2013) (quoting *Goldenberg v. Marriott PLP Corporation*, 33 F. Supp. 2d 434, 438 (D. Md. 1998)); *Temp. Servs., Inc. v. Am. Int'l Grp., Inc.*, 3:08-CV-00271-JFA, 2012 WL 4061537, *8-*9 (D.S.C. Sept. 14, 2012) ("[T]he requested percentage award in this case of one-third of the common fund for past work, future work, and future expenses is reasonable in light of the evidence establishing that the market rate for private contingency fees is in the range of 33 1/3 percent to 40 percent, the precedent finding that attorneys' fees in the range of one-third of a settlement fund are reasonable, and the additional circumstances of this case addressed in further detail below."); *In re Vitamins Antitrust Litig.*, 2001 WL 34312839, at *3 (D.D.C. July 16, 2002) ("A growing number of courts, including those in this Circuit, recently have embraced the percentage-of-recovery method in common fund cases."); *Kidrick v. ABC Television & Appliance Rental*, 1999

WL 1027050, at *1 (N.D. W.Va. May 12, 1999) ("Where there is a common fund in a class settlement, application of a percentage method to calculate an attorney's fee award is now favored.") (citations omitted); *Strang v. JHM Mortgage Sec. Ltd. Partnership*, 890 F. Supp. 499, 502 (E.D. Va. 1995) (holding that although the Fourth Circuit has not yet ruled on this issue, the current trend among the courts of appeal favors the use of a percentage method to calculate an award of attorneys' fees in common fund cases, and adopting the percentage method); *Edmonds v. U.S.*, 658 F. Supp. 1126, 1143 (D.S.C. Mar. 24, 1987) ("[T]he preferred method of computation of fees in this common fund case is the percentage of the fund method.").

B. The Fee Requested By Plaintiffs Is Fair And Reasonable.

Class Counsel request that this Court grant a fee award of 33⅓% of the $163.5 million in Settlement Funds, with interest from the dates of the deposits of each settlement fund at the same rate earned by the funds. This is a fair and reasonable request in light of the numerous obstacles overcome, the significant risks undertaken, and the outstanding result achieved.

The Court's docket in this action is a testament to the complex nature of this case and how hard the parties litigated. This action was investigated beginning in September 2008, when Defendants and Tronox announced an identical price increase over three days to be effective immediately, not only in a period of dramatically declining demand, but also after Defendants had increased prices numerous times earlier in the year. (¶¶13, 22) Unlike many other cases, there was no criminal proceedings and no federal or state investigation upon which Class Counsel could rely. Class Counsel's prefiling investigation was thorough, lasting for more than a year. Then the first action was filed by class representative Haley Paint on February 9, 2010 (ECF No.1). (¶20) Thereafter, Plaintiffs' Counsel vigorously litigated this matter for more than three and a half years. The parties engaged in extensive motion practice, including numerous

dispositive motions. (¶¶78-91) These motions presented formidable risks, including from adverse rulings in other circuits, or even by the Supreme Court, that could have delayed, complicated or even overturned this Court's rulings. The parties took nearly 100 depositions in Maryland, Pennsylvania, California, Texas, Florida, Nevada, Illinois, New York, New Jersey, Ohio, Kentucky, Georgia, Alabama, Oklahoma, Delaware and Washington, D.C., and also in Canada, Italy, Singapore (by telephone), and the United Kingdom. (¶¶74-76) More than one million documents, constituting over 14.4 million pages, were analyzed and organized by Plaintiffs' Counsel. (¶¶62-65)

The Defendants were represented by some of the leading law firms in the United States. They mounted an aggressive, vigorous and well-financed defense from the inception of this action and throughout its course. Plaintiffs faced substantial factual and legal hurdles in establishing their core allegations at every turn. These circumstances show that Plaintiffs' Counsel undertook enormous risks in their pursuit of this litigation, which was brought with no guarantee of success, and without piggybacking on any federal or state government, civil or criminal, antitrust investigation. *See, e.g.*, Thomas E. Kauper & Edward A. Snyder, *Symposium: An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-on and Independently Initiated Cases Compared*, 74 Geo. L.J. 1163, 1166-68 (1986) ("[T]he filing of an antitrust complaint or the return of an antitrust indictment by the government sends a signal to potential plaintiffs and plaintiffs' counsel that the defendant may have violated the antitrust laws and thereby triggers the filing of private suits. . . . [P]laintiff's counsel can increase its gain by depending upon the government to undertake 'test runs' of liability in advance. . . . [C]ounsel can then profitably free ride on the government's successes by initiating their own actions once liability has been established. . . . A more significant advantage . . . is the availability to private

plaintiffs of data that the government has collected in preparation of its case. . . . Plaintiffs may also obtain access to other data including, in some instances, government staff memoranda . . ." (internal quotation marks and citations omitted)).

The requested 33⅓% fee is appropriate and justified under the circumstances of this case. Courts have consistently found 33⅓% or more to be reasonable in the class action context. Indeed, there are numerous common fund antitrust class actions in which courts have awarded attorneys' fees equivalent to those being claimed here. *See, e.g., In re Polyester Staple Antitrust Litig.*, MDL 3:03CV1516, Order and Final Judgment at ¶10 (W.D.N.C. June 24, 2008) (awarding 33% of $33 million fund before rulings on *Daubert* and summary judgment) (a copy of this order is attached to the Dirksen Decl. as Ex. N); *Vitamins*, 2001 WL 34312839 at *14 (the court awarded counsel 34.6% of $365 million in an early settlement of a case in which there had been government criminal investigation and prosecution); *In re Automotive Refinishing Paint Antitrust Litig.*, 2008 WL 63269 at *3 (E.D. Pa. Jan. 3, 2008) (33⅓% of $39 million); *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 342 (E.D. Pa. 2007) (approving a percentage recovery of 35% of a $39,750,000 settlement); *In re Microcrystalline Cellulose Antitrust Litig.*, 01-CV-111; 01-MDL-1402 (E.D. Pa. Nov. 22, 2006) (awarding 33⅓% of a $50 million settlement fund); *In re Flat Glass Antitrust Litig.*, MDL No. 1200 (W.D. Pa. May 28, 2003) (awarding 33% of $54 million settlement fund); *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 WL 3008808 at * 17 (D.N.J. Nov. 9, 2005) (approving a fee award of 33⅓% of a $75 million settlement); *In re Ins. Brokerage Antitrust Litig.*, MDL 1663, 2013 WL 3956378 at *19 (D.N.J. Aug. 1, 2013) (awarding 33% of $10.5 million fund); *In re Terazosin Hydrochloride Antitrust Litig.*, 99-MDL-1317 (S.D. Fla. April 19, 2005) (awarding attorneys' fees of 33⅓% of $75 million); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 82 (D. Mass. 2005) (approving an

award of one third of the $75 million fund); *In re Relafen Antitrust Litig.*, No. 01-12239 (D. Mass. April 9, 2004) (awarding 33⅓% fee of a $175 million settlement); *In re Buspirone Antitrust Litig.*, 01-MD-1413 (S.D.N.Y. April 17, 2003) (awarding 33⅓% of a $220 million settlement fund).

Accordingly, as illustrated by the case law, a 33⅓% fee award is routinely accepted by the courts and is reasonable in light of the circumstances of this action.

C. Class Counsel's Fee Request Is Fair And Reasonable Under Numerous Fourth Circuit Authorities

Under Fourth Circuit precedent, a district court is required to consider certain factors when evaluating the reasonableness of an attorneys' fee award. *See Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 n. 28 (4th Cir. 1978); *Nigh v. Koons Buick Pontiac GMC, Inc.*, 478 F.3d 183, 189 (4th Cir. 2007); *Royal Ahold*, 461 F. Supp. 2d at 385 n. 5 (D. Md. 2006). The twelve factors set forth in *Barber* are: (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs of accepting the case; (5) the customary fee for similar work; (6) counsel's expectations at the outset of the litigation; (7) the time limitations imposed by the client or the circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fee awards in similar cases. *Barber*, 577 F.2d at 226 n. 28. These factors "can be used in analyzing a fee either based on the percentage method, or the lodestar method." *Edmonds*, 658 F. Supp. at 1143 n. 37. The Fourth Circuit has stated that while these twelve factors should be considered in determining a reasonable fee, some factors may "not seem to affect the fee" in certain cases, and therefore each

factor need not be strictly applied. *See E.E.O.C. v. Service News Co.*, 898 F.2d 958, 965-66 (4th Cir. 1990). Thus, while the Court should review all of the factors, it need only issue specific findings regarding those factors it deems relevant to its determination. *Id.*

More recently, however, courts in the Fourth Circuit have focused on the following seven factors in awarding fees using a percentage-of-fund approach: "(1) the results obtained for the class; (2) the quality, skill, and efficiency of the attorneys involved; (3) the risk of nonpayment; (4) objections by members of the class to the settlement terms and/or fees requested by counsel; (5) awards in similar cases; (6) the complexity and duration of the case; and (7) public policy." *Singleton*, 2013 WL 5506027 at *11 (D.Md. Oct. 2, 2013) (citing *Kay Company*, 749 F. Supp. 2d at 464 (S.D. W.Va. 2010), and other cases). Although these seven factors are largely duplicative of the twelve *Barber* factors, there are areas that do not entirely overlap. These and the *Barber* factors are addressed below. Consideration of each of these factors provides support for the fee requested here. When taken together, they show that the requested fee is deserved and has been earned.

1. <u>The Amount In Controversy And The Results Obtained</u>

"The result achieved by the attorneys for the class is often cited as one of the most significant factors in determining the reasonableness of a fee award." *Jones v. Dominion Res. Servs., Inc*., 601 F. Supp. 2d 756, 761 (S.D. W.Va. 2009). A "central advantage of the percentage of the fund method is that it looks to the results actually obtained by Lead Counsel rather than just the number of hours they expended, which should be an important point in awarding fees." *In re The Mills Corp. Sec. Litig*., 265 F.R.D. 246, 261 (E.D. Va. 2009). Indeed, in the Fourth Circuit, "the most critical factor in calculating a reasonable fee award is the degree

of success obtained." *McKnight v. Circuit City Stores, Inc.*, 14 Fed.App'x. 147, 149 (4th Cir. 2001).

If the Court were to approve the settlements, Plaintiffs' Counsel will have obtained a common fund of $163,500,000 for the benefit of the Class. This is an outstanding result given the enormous risks described above, and particularly because there was no state or federal government criminal or civil action. Many antitrust class actions, especially those alleging secret price-fixing, follow a government criminal or civil investigation. *See, e.g.*, *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 681 F. Supp. 2d 141, 147 (D. Conn. 2009); *In re Auction Houses Antitrust Litig.*, 00 CIV. 0648 (LAK), 2001 WL 170792 at *1 (S.D.N.Y. Feb. 22, 2001), *aff'd* 42 F. App'x. 511 (2d Cir. 2002); *In re Blood Reagents Antitrust Litig.*, 283 F.R.D. 222, 231 (E.D. Pa. 2012); *In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 453 (D.P.R. 2011); *In re Packaged Ice Antitrust Litig.*, 723 F. Supp. 2d 987, 998 (E.D. Mich. 2010); *In re Bromine Antitrust Litig.*, 203 F.R.D. 403, 405 (S.D. Ind. 2001); *In re Aftermarket Auto. Lighting Prods. Antitrust Litig.*, 09 MDL 2007-GW PJWX, 2013 WL 4536569 at *1 (C.D. Cal. Aug. 26, 2013); *In re Nasdaq Mkt.-Makers Antitrust Litig.*, 94 CIV. 3996 (RWS), 1997 WL 805062 at *2 (S.D.N.Y. Dec. 31, 1997); *In re Polyester Staple Antitrust Litig.*, MDL 3:03CV1516, 2007 WL 2111380 at *8 (W.D.N.C. July 19, 2007); *In re Elec. Carbon Prods. Antitrust Litig.*, 447 F. Supp. 2d 389, 408 (D.N.J. 2006).

This case was fully investigated and brought by Class Counsel, and then litigated for more than three years to the verge of trial. Even though Defendants' experts contended that there were zero damages resulting from Plaintiffs' alleged claim of price-fixing, Plaintiffs' experts estimated damages of potentially more than $2 billion to the originally certified Class, and damages of hundreds of millions of dollars after the Class was re-defined by the Court, and

certain members of the Class were excluded, in the weeks before trial. The amount in controversy was thus potentially so great that had a verdict at trial been achieved in Plaintiffs' favor, and then the judgment trebled in accord with the law, it plausibly could have caused the bankruptcy of more than one Defendant. Should the settlements and the Plan of Allocation be approved, hundreds of direct purchasers of TiO2 not only will be compensated in cash for a portion of their estimated damages from the alleged price-fixing, but also their competitive options for purchasing TiO2 (a key ingredient in the manufacture of coatings, plastics, and paper products) will be preserved. This is an excellent result for Class members given the risks of this case, the financial circumstances of several Defendants, and the nature of the oligopolized TiO2 industry in which consumers depend upon competition among manufacturers.

The settlements with Defendants also represent a cash payment of approximately 1.2% of the amount of the Defendants' and Tronox's estimated sales of TiO2 to members of the Class during the 2003-2010 time period.[6] This compares favorably, in terms of percentage of sales recovered, with other class action antitrust settlements, including where the actions followed on the heels of government investigations. *See, e.g., In re Automotive Refinishing Paint Antitrust Litig.*, 2004 WL 1068807 at *2 (E.D. Pa. May 11, 2004) (recovery represented approximately 2% of sales); *In Re Linerboard Antitrust Litig.*, 321 F. Supp. 2d 619, 627 (E.D. Pa. 2004) (recovery represented 1.62% of sales); *Fisher Bros., Inc. v. Mueller Brass Co.*, 630 F. Supp. 493, 499 (E.D. Pa. 1985) (noting recoveries from certain defendants equal to 0.2%, 0.3%, 0.65%, 0.88% and 2.4% of total sales, and finding the recovery of 0.2% of sales from one defendant to be reasonable because of "its financial condition" and status in the case).

[6] The Settlement Funds represent approximately 1.5% of Defendants' estimated 2003-2010 sales of TiO2 to Class members.

2. The Time And Labor Expended

As detailed in the declarations submitted by the twelve law firms comprising Plaintiffs' Counsel (*see* the Dirksen Decl. and Exs. A through M thereto), Class Counsel began to investigate this case more than five years ago, and Plaintiffs' Counsel have been prosecuting it since February 9, 2010. (ECF No. 1) Plaintiffs' Counsel have spent more than 45,000 hours on work performed during the course of the litigation, including:

- Investigating the background facts giving rise to Plaintiffs' claims, and analyzing hundreds of documents in connection with preparing and filing the complaints (¶¶22-23);
- Analyzing and organizing over one million documents, constituting more than 14 million pages, produced by the parties and many non-parties during discovery (¶¶56-66);
- Developing a protocol for the production of electronically stored information (¶¶32, 35, 38);
- Propounding and responding to written discovery (¶¶67-70);
- With the assistance of professional economists, analyzing more than ten years of economic information and transactional sales data from each of the Defendants and non-party Tronox (¶¶15-16, 40);
- Opposing motions to dismiss (¶¶27-30);
- Defending or taking nearly 100 depositions in numerous states throughout the United States and in four foreign countries (¶¶74-76);
- Engaging in extensive motion practice addressing class certification, not only before this Court, but also before the Fourth Circuit (¶¶40-54);
- Attending numerous conferences and hearings before this Court in person and by telephone and arguing motions not specifically identified here (¶¶38, 71, 73);
- Extensive research and briefing of various other legal issues litigated throughout this action (*Id.*);
- Completion of fact and expert discovery (¶¶55-77);
- Opposing *Daubert* motions brought by the Defendants (¶¶78-81);

- Opposing Defendants' motions to amend the class definition in order to exclude hundreds of purchasers as class members who had arbitration, forum selection, class action waiver, and jury waiver clauses within their contracts with Defendants (¶¶85-91);

- Opposing summary judgment motions filed by each Defendant individually, and all Defendants jointly (¶¶82-84);

- Participating in a two-day mock trial before two mock juries, with experts and others, and with the assistance of a nationally prominent jury consultant (¶93);

- Completion of virtually all pretrial tasks, *e.g.*, service of trial subpoenas; exchange of witness lists and lists of trial exhibits and designations of deposition testimony; filing of motions in *limine* and opposing of Defendants' motions *in limine*; exchange of *voir dire* and verdict forms; drafting and filing of the joint pretrial order and attendance at the pretrial conference; arguments before the Court on the motions in *limine*; conferences with defense counsel, and with the Court, regarding the admissibility of certain trial exhibits and demonstratives, and deposition testimony (¶¶93-94);

- Engaging in extensive settlement discussions with each Defendant, and preparing the appropriate papers in connection with preliminary and final approval of the four settlements reached in the litigation (¶¶95-105); and

- Responding to Class member inquiries (¶112).[7]

The demands and risks of complex antitrust litigation involving multi-national corporate adversaries are great. Class Counsel very closely managed and coordinated the efforts of the lawyers and paralegals who worked on this matter, in order to maximize efficiency. The substantial expenditure of time in this case was reasonable given the nature of the work

[7] If the settlements are approved, Class Counsel will also spend many hours in the future with the Escrow Agent, the Claims Administrator and members of the Class concerning the processing of their claims and distribution of the Settlement Funds (net of any Court-approved attorneys' fees, interest, expenses, service awards, and claims administration costs). Class Counsel will also file a motion in 2014 requesting authorization to distribute the net Settlement Funds pursuant to the Court-approved Plan of Allocation to authorized claimants (members of the Class who timely submitted claims on or before January 31, 2014, that were approved by the Claims Administrator). Although it is not possible now to quantify this time, the attorneys' fees requested by Class Counsel by this motion necessarily include this additional work to be performed for the benefit of the Class through the distribution of all net Settlement Funds and the termination of this action.

performed, especially during discovery, when a mountain of relevant evidence produced by the parties and non-parties needed to be analyzed and organized (and numerous witnesses deposed) in a short amount of time. This factor supports the requested fee award.

3. The Novelty And Difficulty Of The Questions Raised

Antitrust law is a complex and specialized area of the law, requiring the engagement of attorneys who practice in the field on a national level and who devote considerable time both to keeping up with the ever-evolving body of law, and to gaining the experience necessary to successfully litigate such cases. Plaintiffs' Counsel were opposed by highly skilled lawyers from some of the finest law firms in the country. There were many contentious, hard-fought issues in this case, including, for example: (1) the plausibility of the allegations of the complaint; (2) the propriety of jurisdiction in Maryland over the Saudi Arabian parent company of defendant Cristal USA, which had been named originally as a defendant; (3) whether questions concerning proof of liability, impact and damages were sufficiently common among those who had purchased TiO2 directly from the Defendants such that they predominated over individualized issues and warranted certification of a class; (4) the nature and extent of Defendants' and their co-conspirators' alleged price-fixing conspiracy and anti-competitive conduct, including the details of meetings among competitors and the identities and whereabouts of meeting participants, and the specifics of the (formerly secret) Global Statistics Program and the Program's purported impact on industry price increases and pricing generally; (5) whether any testimony of three of Plaintiffs' experts should be excluded at trial under *Daubert*; (6) whether Defendants' pricing practices were illegally coordinated or simply expressions of lawful conscious parallelism; (7) whether the characteristics of the TiO2 industry were conducive to collusion, or innocuous traits of lawful oligopolistic interdependence; (8) whether the

econometric tool of multiple regression analysis was capable in this case of reliably estimating the level of the overcharge from Defendants' alleged price-fixing to members of the Class on a classwide basis, and the measure of such damages; and (9) the admissibility of certain deposition testimony, and important documentary trial exhibits and demonstratives. Many of these issues were central to various rulings of the Court throughout the litigation, including in its orders certifying the Class and denying Defendants' motions for summary judgment. *See, e.g., Haley Paint Co. v. E.I. DuPont de Nemours and Co.*, 804 F. Supp. 2d 419, 426 (D. Md. 2011); *In Re Titanium Dioxide Antitrust Litig*., 284 F.R.D. 328, 351 (D. Md. 2012); *In re Titanium Dioxide Antitrust Litig.*, -- F. Supp. 2d ---, 2013 WL 4110501 (D. Md. Aug. 14, 2013). The legal questions raised were often challenging, and they were also invariably intertwined with complex factual questions. Simply put, there was great complexity and difficulty in the issues addressed in this case by the Court and the parties. This factor also supports the requested fee award.

4. <u>The Skill Required To Properly Perform The Legal Services</u>

The Supreme Court considers class actions such as this one alleging a price-fixing claim—a violation of Section 1 of the Sherman Act—against numerous defendants on a global basis to be "complex." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 163-64 (2004). Indeed, "[a]ntitrust class actions are particularly complex to litigate and therefore quite expensive. An antitrust class action is arguably the most complex legal issue to prosecute. . . .." *In re Flonase Antitrust Litig.*, 291 F.R.D. 93, 99 (E.D. Pa. 2013) (citations and quotations omitted) (approving a fee award of one-third of a $35 million common fund).

Plaintiffs' Counsel have vast experience in complex federal civil litigation, particularly in antitrust and other class actions. As a result of this professional expertise, Plaintiffs' Counsel adeptly and efficiently analyzed the facts, legal claims, and defenses in this litigation, employing

various strategies to prosecute this matter to the eve of trial and, ultimately, to settle this litigation in the most efficient and effective manner possible in light of the great factual and legal complexity of the claims. The skill of Plaintiffs' Counsel made certain that the settlements were negotiated at arm's length on the sole basis of an informed and realistic weighing of the merits of the claims and the risks of trial. Further, Plaintiffs' Counsel were opposed by sophisticated corporate defendants with highly qualified defense counsel, requiring additional skill. *Id.*

5. The Attorneys' Opportunity Costs In Pressing The Litigation

This factor requires the Court to examine how the demands of the present litigation foreclosed other opportunities for Plaintiffs' Counsel. As demonstrated by the factors discussed above, the sheer magnitude of time and effort involved in litigating this complex action over more than three years required counsel to forgo other opportunities, particularly Class Counsel and the three Executive Committee firms. Plaintiffs' Counsel invested more than 45,000 hours in this case and incurred $4,555,204.66 in costs and expenses with no guarantee of payment either for their time or expenses. Ex. A; *see also* Exs. 2 and 3 of the Cera Decl. (which is Ex. B to the Dirksen Decl.). In addition, each law firm involved in this litigation enjoys a national reputation for their work in this field and is highly regarded, with considerable demands for their expertise in numerous matters. While the firms devoted the time and effort to this case, it meant that these firms could not pursue other matters, represent other clients, or provide legal services to others. *See, e.g., Braun v. Culp, Inc.*, 1985 WL 5857, at *2 (M.D.N.C. April 26, 1985) ("In the complex field of securities class actions, there are only a few cases that may be worked on at a time.").

6. Customary Fee For Like Work (Fee Awards In Similar Cases)

As discussed above, and below, the requested fee in this case is similar to those awarded in numerous comparable antitrust and other complex class actions. *See* Section III(B) above, and

III(D) below; *see also, e.g., Linerboard*, 2004 WL 1221350 at *14-*15 (noting opinions of experts that the request for 30% of a $202.6 million recovery as a fee was "at or below the market rate."); *Smith v. Krispy Kreme Doughnut Corp.*, 2007 WL 119157 at *2 (M.D.N.C. Jan. 10, 2007) ("In this jurisdiction, contingent fees of one-third [33.3%] are common."); *Clark v. Cameron-Brown Co.*, 1981 WL 1637 at *2 (M.D.N.C. April 6, 1981) (applying the *Barber* factors to a class action and noting "that in matters in which fees are contingent upon recovery, the fee is usually expressed as a percentage of the recovery and ranges from 25% to 40%, depending on the stage of the litigation at which recovery occurs."). Here, as in *Linerboard*, Class Counsel offer expert testimony in the form of a declaration on the reasonableness of the fee request in this case as compared with fee awards in other class actions. *See* the Noonberg Decl., submitted herewith. This factor likewise supports the requested fee award.

7. The Attorneys' Expectation At The Outset Of The Litigation

From the time they undertook this litigation to the present, Plaintiffs' Counsel understood that they faced a significant risk that, if they were unsuccessful, they would receive nothing. They accepted the risk they would receive no compensation for their time and no reimbursement for their substantial expert and other expenses. In cases such as this, a determination of a fair fee must include consideration of the unfavorable characteristics of a contingent antitrust action, including the uncertain nature of the fee, the wholly contingent expenditure of large out-of-pocket sums by Plaintiffs' Counsel, and the fact that the risk of failure and nonpayment in an antitrust case is extremely high. Indeed, in the Second Circuit, courts "have recognized the risk of litigation to be perhaps the foremost factor to be considered in determining the award of appropriate attorneys' fees [in part because] despite the most vigorous and competent of efforts,

success is never guaranteed." *Tiro v. Public House Investments, LLC*, 2013 WL 4830949 at *13 (S.D.N.Y. Sept. 10, 2013) (citations and quotations omitted).

From the outset, this case had enormous risks. There was no amnesty application. There was no government investigation of the TiO2 industry. There was no direct evidence of the conspiracy alleged. In fact, Plaintiffs relied wholly on circumstantial evidence to prove liability. This is a case in which Plaintiffs had to prove an illegal cartel or conspiracy. Such cases are notoriously hard to prove because price-fixing is inherently self-concealing. At the same time, this case was taken on a fully contingent basis with Plaintiffs' Counsel's compensation to occur only at the discretion of the Court upon achieving success for the Class. There were thus formidable risks in not achieving a result that would allow for compensation sufficient to justify the large outlay of hours and money that Plaintiffs' Counsel knew would need to be invested to successfully prosecute this litigation.

8. <u>The Time Limitations Imposed By The Client Or Circumstances</u>

Much of the work in this case was performed under deadline pressures according to a strict, ambitious schedule set by the Court. That schedule required Plaintiffs to review and assimilate the mammoth discovery record in a short period of time to propound written discovery and to take depositions. At the same time, Plaintiffs had to meet deadlines for class certification, summary judgment, and other key milestones. Meeting these deadlines required Class Counsel to muster significant resources without delay. For example, the discovery schedule required Plaintiffs' Counsel to master over 14 million pages of documents produced by Defendants and non-parties, and to prepare for and take depositions of more than seventy witnesses, in only six months, at the same time that class certification was being litigated. (¶¶41-49, 58-62) This priority work precluded the performance of valuable services by Plaintiffs' Counsel in other

pending litigation. Such time pressures are atypical of ordinary federal civil litigation and, in fact, discovery in even typical complex antitrust class actions occurs over the course of several *years*, not months.

9. The Experience, Reputation, And Ability Of The Attorneys

This Court has recognized that Plaintiffs' Counsel are highly competent in successfully prosecuting antitrust class actions. "This case was hard fought by experienced, highly qualified counsel on both sides. Their [settlement] negotiations certainly raise no suspicion of collusion." (ECF No. 534 at 8); *see also In re Titanium Dioxide Antitrust Litig.*, 2013 WL 5182093 at *4 (D. Md. Sep. 12, 2013). In granting class certification, the Court also noted the qualifications of Class Counsel. *See In re Titanium Dioxide Antitrust Litig.*, 284 F.R.D. 328, 351 (D. Md. 2012) (". . . Plaintiffs' proposed co-lead counsel are well qualified to represent the class in this case."). The experience, reputation, and skill for which each of the Plaintiffs' firms is known, as recognized by the Court, supports the reasonableness of the requested fee award.

10. The Undesirability Of The Case Within The Legal Community Within Which The Suit Arose

Cartel cases require a commitment of large amounts of time and money to have a reasonable chance at success, and even that is far from guaranteed. After Class Counsel initiated this litigation in the District of Maryland, no other cases were filed on behalf of a direct purchaser of TiO2 anywhere, by anyone. Given how antitrust class action cases usually proceed, this fact suggests that at least at the inception of this case, many highly skilled class action plaintiffs' firms located nationwide viewed this case as too risky to pursue, and chose to devote their time and resources elsewhere. (¶¶20,126) Thus, despite the participation in this case by 12 firms, there is no question that many other lawyers found this case undesirable to file and litigate.

11. The Nature And Length Of The Professional Relationship Between The Attorney And Client

The nature and length of the relationship between attorneys and clients is not particularly relevant here because this is a class action. "While the court must consider all of the [*Barber*] factors, they need not be applied in any strict manner as not all may affect the fee in a given case." *All American Title Loans, Inc. v. Title Cash of South Carolina, Inc.*, 2007 WL 1464580 at *4 (D.S.C. May 17, 2007) (citing *E.E.O.C. v. Service News Co.*, 898 F.2d 958, 965 (4th Cir. 1990)). As a class action, there is little likelihood that this representation will lead to other business matters between members of the Class and Plaintiffs' Counsel that might arguably warrant a reduction in the requested fee in this case. This is true even though some members of the Class (which comprises hundreds of companies) are current or former clients of some of the law firms who assisted Plaintiffs in this case. Class members and, indeed, Plaintiffs' Counsel, are scattered throughout the country, and complex antitrust litigation involving alleged cartel practices has a scope that is nationwide and usually global. Therefore, "[t]he attorneys' relationship with class members is thus not analogous to one in which a lawyer may 'discount' certain work to a client because of the likelihood of a continuing profitable association." *Clark v. Cameron-Brown Co.*, 1981 WL 1637 at *3 (M.D.N.C. April 6, 1981).

12. Risk Of Non-Payment

As discussed above, there were substantial risks that Plaintiffs could have recovered nothing from this suit. Moreover, had Plaintiffs obtained a verdict at trial in the full amount of the damages they sought, and had this amount been trebled in accord with the law, Defendants would have been jointly and severally liable for at least hundreds of millions if not billions of dollars. If a judgment in excess of a billion dollars had been entered, there was a theoretical risk

that one or more Defendants would have declared bankruptcy, even before the exhaustion of any appeals.

13. Objections To The Settlements Or Fees Requested

Members of the Class have until November 4, 2013, to submit any objections to the settlements or to the requests for attorneys' fees, reimbursement of expenses, and service awards for the class representatives. Pursuant to the Order of the Court, thousands of detailed notices concerning the settlements and requests for fees, reimbursement of expenses, and payment of service awards were mailed to members of the Class in September. *See* Sherwood Decl. at ¶¶7-8. A summary notice concerning the settlements and foregoing requests was published in the *Wall Street Journal* and in industry publications. *Id*. at ¶¶9-10. The Class includes hundreds of business entities, sophisticated in class action settlements of this type.

To date, no objection has been received. *Id*. at ¶16. In fact, one direct purchaser of TiO2 who opted-out of the Class in January 2013 recently requested permission to re-enter the Class and participate in the distribution of the Settlement Funds. [8] *Id*. at ¶17. In addition, at least 58 members of the Class already have submitted proof of claim forms to the Claims Administrator, even though the deadline for submission of such forms is January 31, 2014. *Id*. at ¶15. These responses indicate widespread support of the Settlements.

[8] Class Counsel do not oppose this company's request because its request to opt-out was apparently based on mistake and because its claim will not materially affect the recoveries of the other claimants. Class Counsel will permit this entity to submit its claim before the deadline. When Class Counsel seek an order of the Court in 2014 authorizing distribution of the Settlement Funds (net of any Court-approved attorneys' fees, interest, expenses, and claims administration costs) pursuant to the Plan of Allocation, Class Counsel will request that the Court permit this entity to re-enter the class at that time.

14. Complexity And Duration Of The Case

It has been more than five years since the allegations of the complaint were first investigated, and more than three years since Haley Paint filed the initial complaint. (ECF No. 1) Although this case involves only a single claim—a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1—Plaintiffs alleged a secret conspiracy involving cartel practices lasting nearly a decade in a global industry dominated by five companies with combined annual global revenues in the billions. The alleged cartel and conspiracy also involved a number of individuals located in the United States and Europe, who had participated in dozens of multi-lateral meetings in many different locations over many years. In addition, as acknowledged by the Court in its order denying summary judgment, even after Plaintiffs' Counsel had pored through millions of pages of documents and conducted or participated in nearly 100 depositions nationwide and abroad, there was no direct evidence discovered of a price-fixing agreement among the Defendants. The effort to prove a decade-long price-fixing conspiracy at trial based on circumstantial evidence thus would have been very complicated and risky, particularly because Plaintiffs would have had to rely largely on their experts and on the live and videotaped testimony of hostile witnesses who vociferously denied wrongdoing.

Beyond the factual complexity of this case, as the Court is aware, this case raised a number of complex and difficult legal issues. Plaintiffs' Counsel also researched, briefed and argued numerous partially or fully dispositive motions throughout this case that raised issues of great complexity, including motions to dismiss on jurisdictional and other grounds, for class certification, to exclude expert testimony under *Daubert*, for re-definition of the Class, for arbitration, and for summary judgment. *See, e.g.*, ¶¶40-44, 78-89. Many issues were novel or

involved evolving legal precedent. Some of the issues in these motions were impacted by rulings of circuit courts and even the Supreme Court throughout the history of the case.

15. Public Policy

"Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965). In complex cases, fee awards have been enhanced by courts in order to encourage the filing of meritorious claims by future plaintiffs. *See, e.g., In Re Microstrategy, Inc. Sec. Litig.*, 172 F. Supp. 2d 778, 788 (E.D. Va. 2001) (permitting the use of a multiplier in a securities case "to provide an incentive for competent lawyers to pursue such actions in the future."). Public policy "generally favors attorneys' fees that will induce attorneys to act and protect individuals who may not be able to act for themselves but also will not create an incentive to bring unmeritorious actions." *Jones,* 601 F. Supp. 2d at 765 (*citing In re Merrill Lynch Tyco Research Sec., Litig.*, 249 F.R.D. 124, 142 (S.D.N.Y. 2008); *Microstrategy,* 172 F. Supp. 2d at 789 n. 36). "The cost and difficulty [of bringing a meritorious complex class action] naturally stands as a deterrent from doing so, and one object of an award of attorneys' fees should be to counteract this deterrence and incentivize competent attorneys to pursue these cases when necessary." *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 263 (E.D. Va. 2009).

The federal government and the states as well have limited resources. The enforcement of antitrust law is crucial to the United States economy. "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the

protection of our individual freedoms." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

Plaintiffs' Counsel have recovered Settlement Funds of $163.5 million in a case they investigated and filed many years ago without the help of a government investigation. They then prosecuted this case to the eve of trial in September 2013. Tens of thousands of hours of time were committed by Plaintiffs' Counsel in litigating this case without any guarantee of success or compensation. They also risked millions of dollars in expenses with no guarantee of reimbursement. Attorneys who face substantial costs and risks with no guarantee of recovery should be encouraged to investigate and file meritorious claims on behalf of their clients and those injured by anti-competitive conduct. They should also be rewarded when having to face multi-national Defendants with significant resources who are represented by lawyers of the highest caliber. A substantial fee will provide the proper incentives for expert lawyers to pursue vigorously antitrust claims and to enforce the antitrust laws.

In Re Titanium Dioxide Antitrust Litigation has truly been an action brought and litigated by "private attorneys' general" on behalf of purchasers of TiO2 at considerable sacrifice. It is a type of action that ought to be encouraged by reasonably compensating counsel for their risk and their ultimate success.

D. A Lodestar Cross-Check Confirms The Reasonableness Of The Requested Fee

Although it is not necessary for the Court to conduct a lodestar analysis, most courts in this and other circuits use the lodestar methodology as a "cross-check" on the reasonableness of the fee derived using the percentage-of-the-fund methodology. "Where the lodestar fee is used as a mere cross-check to the percentage method of determining reasonable attorneys' fees, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Royal Ahold,*

461 F. Supp. 2d at 385 (internal quotations and citations omitted); *see also In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-07 (3d Cir. 2005) ("[T]he lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records.").

The aggregate unpaid lodestar of the firms comprising Plaintiffs' Counsel is $22,812,576.12. Ex. A. This figure is based on a total of 45,585.33 professional hours of work on this matter. *Id*. The requested fee of 33⅓% of the Settlement Funds, or $54,500,000, thus results in a lodestar cross-check calculation, also known as a multiplier, of 2.39.

This multiplier is on the low end of the range when compared with similar cases. Many courts nationwide have noted that a multiplier within the range of 2 and 4.5 is a reasonable multiplier that is warranted in complex class actions such as this one, in order to take into account the tremendous risk inherent in such contingent representations, and the long delay in payment. *See, e.g., Jones*, 601 F. Supp. 2d at 766 ("Courts have generally held that lodestar multipliers falling between 2 and 4.5 demonstrate a reasonable attorneys' fee."); *Kay Company*, 749 F. Supp. 2d at 470 (same); *Goldenberg v. Marriott PLP Corp.*, 33 F. Supp. 2d 434, 439 n. 6 (D. Md. 1998) (citing *Behrens v. Wometco Enter., Inc*., 118 F.R.D. 534, 549 (S.D. Fla.1988) *aff'd* 899 F.2d 21 (11th Cir.1990) ("[L]odestar multiples in large and complicated class actions ranges from a low of 2.26 to a high of 4.5.")); *Deloach v. Philip Morris Companies*, 2003 WL 23094907, *9 (M.D.N.C. Dec. 19, 2003) (citing numerous cases awarding fees with multipliers greater than 3); *Cendant Corp*., 243 F.3d at 737-42 (recommending on remand that the district court award fees at a multiplier of 3, after surveying cases with funds over $100 million and finding lodestar multipliers of 1.35 to 2.99 common). *See also Singleton*, 2013 WL 5506027 at *10 (summarizing the range of multipliers in Fourth Circuit and other cases in reducing class

counsel's requested multiplier of 3.8 to a figure "closer to 3," because of the nature of the litigation "and the limited discovery" it involved).

Indeed, in the *Linerboard* antitrust class action, which was also litigated without any government action, the attorneys received a fee approximating a lodestar multiplier of 3.67 using current hourly rates. *Linerboard*, 2004 WL 1221350 at *12, *16 n. 9 (E.D. Pa. 2004) (awarding attorneys' fees of 30% of the $202.6 million recovery months before trial). The *Linerboard* multiplier was thus far higher than the 2.39 requested here, which is also lower than the multiplier in *Royal Ahold*, even though—quite unlike the situation here—that case settled "well before trial" and there were parallel criminal proceedings. *See also Royal Ahold*, 461 F. Supp. 2d at 387 (awarding fees of 12% of the $1.1 billion common fund, which translated to a multiplier of 2.57). Moreover, in *Linerboard* as here, expert testimony has confirmed the reasonableness of Class Counsel's fee request. *See* Noonberg Decl., submitted herewith.

Accordingly, the use of the lodestar methodology—whether used as a cross-check or otherwise—also supports the requested fee.

IV. REIMBURSEMENT AND PAYMENT OF EXPENSES

Class Counsel also request reimbursement of unpaid litigation costs and expenses which Plaintiffs' Counsel have incurred in connection with the prosecution of this action in the amount of $4,555,204.66. *See* Ex. A (a summary of each firm's incurred expenses), and Ex. B, Cera Decl. at Ex. 3 (litigation fund's incurred expenses). In the Fourth Circuit, expenses are compensable in a common fund case if they are reasonable in nature and amount. "It is well-established that plaintiffs who are entitled to recover attorneys' fees are also entitled to recover reasonable litigation-related expenses as part of their overall award." *Singleton*, 2013 WL 5506027 at *17 (D. Md. Oct. 2, 2013) (citing cases). Such costs may include "those reasonable

out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services." *Spell v. McDaniel*, 852 F.2d 762, 771 (4th Cir. 1988) (internal quotations omitted). In addition, the fact that Plaintiffs' Counsel were willing to expend their own money, as an investment whose reimbursement was entirely contingent on the success of this litigation, is perhaps the best indicator that the expenditures were reasonable and necessary. *See In re Lorazepam & Clorazepate Antitrust Litig.*, 2003 WL 22037741 at *10 (D.D.C. June 16, 2003) (approving reimbursement of expenses that equaled "only about 3% of the total recovery obtained for the Direct Purchaser Class.").

The amount requested, approximately 2.8% of the Settlement Funds, is based on the declarations of all Plaintiffs' Counsel submitted herewith. Expenses are broken down in each declaration by the type of expense. The total amount of the incurred expenses is 17% less than the amount stated in the Notice to members of the Class, which stated that Class Counsel would request up to $5,500,000 for reimbursement of litigation expenses.

These expenses were incurred by counsel for, among other things, computerized research, photocopying and duplicating, travel expenses, and contributions to a common litigation fund. This fund was used primarily to pay the fees and costs of economic consultants and experts, which usually constitute the largest type of expense incurred in antitrust cases. These expenses thus were the type of costs typically billed by attorneys to paying clients in the marketplace. *Spell*, 852 F.2d at 771. Accordingly, the request by Class Counsel for the reimbursement of expenses from the common fund is reasonable and should be approved.

V. THE PROPOSED PLAINTIFF SERVICE AWARDS ARE REASONABLE

Plaintiffs also request that the Court approve incentive awards for the class representatives of $125,000 for Haley Paint, and $25,000 each for Isaac Industries and East

Coast Colorants (d/b/a Breen). The notices informed the Class of Plaintiffs' request for these awards, and allowed for members of the Class to object to them. No objection has been received to date.

Many courts have approved "incentive" or service awards to class representative plaintiffs on the basis that they take on risks and perform services for the benefit of the class. Albert Conte and Herbert B. Newberg, 4 *Newberg on Class Actions*, §11:38 (4th ed.). Such awards are common in complex class action cases. *See, e.g.*, Ex. O, *Ivax Corp. v. Aztec Peroxides, LLC, et al.*, Case No. 1:02CV00593 (D.D.C. Aug. 24, 2005) (awarding service awards to each class representative plaintiff in an antitrust price-fixing class action of $100,000 each); *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 1000 (D. Minn. 2005) ($100,000 collectively to the lead plaintiff group); *In re Dun & Bradstreet Credit Services Customer Litig.*, 130 F.R.D. 366, 376 (S.D. Ohio 1990) (court approved two incentive awards of $55,000.00 and three of $35,000.00 to five representative plaintiffs); *Franklin Container Corp. v. Int'l Paper Co.*, No. 77-3204 (E.D. Pa. 1987) (court awarded $100,000.00 to each of two named plaintiffs in an antitrust case).

Indeed, "[s]uch awards are particularly appropriate in this case because there was no preceding governmental action alleging a conspiracy and taking a high-profile role threatened to jeopardize class representatives' relationships with their suppliers." *Linerboard*, 2004 WL 1221350 at *18 (E.D. Pa. 2004), citing *Cullen v. Whiteman Medical Corp.*, 197 F.R.D. 136 (E.D. Pa. 2000) ("Courts routinely approve incentive awards for the services they provide and the risks they incurred during the course of the class action litigation."). *See also Singleton*, 2013 WL 5506027 at *18 (D. Md. Oct. 2, 2013) ("Incentive payments to class representatives have been awarded in Rule 23 class actions.").

The class representatives in this case performed many hours of work on behalf of the Class. The representatives "fully complied with all demands placed on them during this litigation and assisted Class Counsel's investigation of this case by providing documents and information to aid counsel, and undergoing cross examination during depositions." *Cohen v. Chilcott Pub. Ltd. Co.*, 522 F. Supp. 2d 105, 124 (D.D.C. 2007). For example, the President of Haley Paint Company, Robert Haley, who participated in the prefiling investigation and first brought this action on February 9, 2010, sat for a deposition in March 2011 that lasted approximately nine hours on the record. ¶129. Three of his former employees also were deposed by the Defendants. *Id.* Mr. Haley's company produced thousands of documents responsive to Defendants' document requests, and Mr. Haley reviewed and verified numerous responses to Defendants' interrogatories and other discovery. *Id.* Mr. Haley participated in the mock trial, prepared for trial, and planned to attend the trial before the settlement with Kronos occurred on the last business day before trial. *Id.* The other representatives, Isaac and Breen, also produced documents, responded to Defendants' discovery requests, and sat for deposition. *Id.* The service awards to them are fair and reasonable in light of their respective investments of time and effort for the benefit of the Class, and the awards should be approved.

VI. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion awarding attorneys' fees, reimbursement of expenses, and payment of service awards to the class representatives.

Dated: October 18, 2013

GOLD BENNETT CERA & SIDENER, LLP

By: /s/ Solomon B. Cera
Solomon B. Cera *(Pro hac vice)*
C. Andrew Dirksen *(Pro hac vice)*
Louis A. Kessler *(Pro hac vice)*

TAB 11A

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STANDARD IRON WORKS, on behalf of itself and all others similarly situated,

Plaintiffs,

v.

ARCELORMITTAL; ARCELORMITTAL USA, INC.; UNITED STATES STEEL CORPORATION; NUCOR CORPORATION; GERDAU AMERISTEEL CORPORATION; STEEL DYNAMICS, INC.; AK STEEL HOLDING CORPORATION; SSAB SWEDISH STEEL CORPORATION; COMMERCIAL METALS, INC.,

Defendants.

Case No. 08 C 5214

Judge James B. Zagel

ORDER AWARDING ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES TO CLASS COUNSEL FROM THE COMMON SETTLEMENT FUNDS, AND APPROVING PLAN OF ALLOCATION AND DISTRIBUTION

The Court, having considered Class Counsel's Motion for Award of Attorneys' Fees and Reimbursement of Litigation Expenses and the Memorandum of Law and exhibits in support thereof (Dkt. No. 519); having held hearings on October 17, 2014 and October 21, 2014 concerning final settlement approval, attorneys' fees and other related issues; and having considered all of the submissions and arguments with respect thereto, pursuant to Rules 23 and 54 of the Federal Rules of Civil Procedure it is hereby ORDERED, ADJUDGED AND DECREED that Class Counsel's Motion for Attorneys' Fees and Reimbursement of Litigation Expenses is GRANTED as follows:

1. Settlement Class Counsel have moved for attorneys' fees and reimbursement of litigation expenses out of the total common settlement funds in this litigation. As a result of the Settlements with ArcelorMittal and U. S. Steel, and prior settlements with Defendants Commercial Metals, AK Steel, and Gerdau Ameristeel, Class Counsel has secured a total common fund recovery of $163.9 million for the benefit of the Settlement Class.

2. After two appropriate notices to the Settlement Class of their intention to seek up to one-third of the total common settlement fund as attorneys' fees and to seek reimbursement of litigation expenses, and after a third notice to the Class providing a third opportunity to object to Class Counsel's motion for attorneys' fees after that motion was filed, and upon consideration of the motion and all related submissions and argument, and the response of the Settlement Class thereto; now therefore pursuant to Rules 23(h) and 54(d) of the Federal Rules of Civil Procedure, this Court awards Settlement Class Counsel 33% of the total Settlement Fund (*i.e.*, 33% of the sum of all five settlements obtained to date) as a fair and reasonable attorneys' fee.

3. The Court finds that a 33% fee comports with the prevailing market rate for legal services of similar quality in similar cases. The Court rests this conclusion on, *inter alia*, data provided by Class Counsel concerning market rates; the Court's consideration of fee awards in similar complex litigation, including many recent antitrust class actions in which 33% fees were awarded for similar work; the nature and complexity of this particular litigation; the substantial risks of non-recovery borne by Class Counsel in prosecuting this matter on a purely contingent basis while advancing all litigation costs; the amount and quality of Class Counsel's work; and the results obtained on behalf of the Class.

4. Class Counsel initiated and developed this case with no assistance from any prior government investigation or prosecution, and handled the matter effectively and without

compensation through more than six years of hard-fought litigation. The issues were risky and difficult, and Class Counsel's ultimate success in recovering $163.9 million for the Class—payable promptly in cash—supports the requested fee award.

5. A lodestar "cross check" further supports a 33% fee award. Class Counsel devoted more than $27.7 million in professional time at current billing rates (or approximately $23.6 million at historical rates) to litigating this case. The work involved, *inter alia,* extensive pre-complaint investigation; motion to dismiss and case management briefing; litigating numerous discovery issues with all eight Defendants; reviewing over 3.5 million pages of documents produced in class certification discovery; collecting, reviewing and producing documents from the five class representatives; preparing for and taking the depositions of defendants' expert and lay witnesses; preparing for and defending the depositions of the class representatives; preparing for and conducting a 3-day class certification hearing and numerous other hearings, arguments and conferences over the past six years; preparing thousands of pages of class certification, *Daubert* and expert submissions; and much more. All of this work led directly to the creation of the common Settlement Fund.

6. The Court finds that Class Counsel performed their work reasonably and efficiently, that their billing rates are appropriate and consistent with market rates for attorneys of similar skill doing similar work, and that the lodestar totals are reasonable.

7. Based on current billing rates, the requested lodestar "multiplier" is approximately 1.97, which the Court finds is well within the range of reasonable multipliers awarded in similar contingent cases. The requested multiplier is further supported by the fact that Class Counsel bore all the risk of litigating this complex case (including millions of dollars in litigation expenses) with no guarantee of reimbursement. Having shouldered these risks, and

having achieved outstanding results for the Class, Class Counsel have earned their requested multiplier.

8. The reaction of the Class supports the requested fee award. The Settlement Class in this case includes approximately 5,300 direct purchasers, many of which are sophisticated business entities. The absence of objections indicates that the fee is fair and reasonable and consistent with prevailing market rates.

9. The Court directs that Co-Lead Counsel allocate the fee award among co-counsel in a reasonable manner consistent with Co-Lead Counsel's assessment of each firm's contribution to the prosecution of the case.

10. Class Counsel also requests reimbursement for $406,850.08 in expenses they have advanced in the prosecution of this lawsuit. The Court grants that request and finds the expenses to be fair and reasonably incurred to achieve the benefits to the Settlement Class obtained in the Settlement, as well as the continued litigation of this Action against non-settling Defendants.

11. After deducting Court-approved attorneys' fees and expenses (including the previously approved costs of notice and settlement administration), the balance of the common settlement funds shall be distributed to Class members in accordance with Plaintiffs' proposed Plan of Allocation and Distribution, attached hereto as Exhibit 1. The Court finds that the Plan of Allocation and Distribution is fair, reasonable and adequate, and the Court therefore approves the proposed Plan of Allocation and Distribution as submitted. After final approval of the Settlements and entry of this order awarding attorneys' fees and expenses, the claims administrator (Garden City Group) will mail pre-printed claim forms to all Class members identified as direct purchasers in Defendants' transaction data. The pre-printed claim forms shall be in a format substantially similar to the proposed claim form contained in Exhibit 1. Class members will be asked to verify the accuracy of certain purchase information on the pre-printed claim forms and return those forms to the

claims administrator, and they will be given an opportunity to submit additional or corrective information if they wish. Following expiration of the deadline for the return of claim forms, and after consideration of any supplemental information submitted by Class members, the claims administrator will calculate each claiming Class member's *pro rata* share of the Settlement Funds, net of then-due and estimated future settlement administration costs. Class Counsel will supervise the claims process, and Class Counsel will file a motion to update the Court on the claims process and to request approval of the final schedule of distributions prior to any checks being mailed to the Class.

WHEREFORE the Court grants an attorneys' fee award of 33% of the total common settlement funds (*i.e.*, 33% of $163.9 million, or a total fee of $54,087,000), authorizes Co-Lead Counsel to allocate the fee award among co-counsel at Co-Lead Counsel's discretion, awards Class Counsel reimbursement of their requested "out of pocket" litigation costs and expenses from the Settlement funds in the amount of $406,850.08 (in addition to the reimbursement of $5,064,908.97 in litigation expenses approved in connection with the earlier Settlements), and approves the proposed Plan of Allocation and Distribution for the Settlement funds.

SO ORDERED this the 22nd day of October, 2014.

Honorable James B. Zagel
United States District Judge

TAB 11B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

IN RE: STEEL ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO ALL DIRECT PURCHASER ACTIONS:

***Standard Iron Works v. ArcelorMittal, et al.*, Case No. 08-cv-5214**

***Wilmington Steel Processing Co., Inc. v. ArcelorMittal, et al.*, Case No. 08-cv-5371**

***Capow, Inc. d/b/a Eastern States Steel v. ArcelorMittal, et al.*, Case No. 08-cv-5633**

***Alco Industries, Inc. v. ArcelorMittal, et al.*, Case No. 08-cv-6197**

***Gulf Stream Builders Supply, Inc. v. ArcelorMital, et al.*, Case No. 10-cv-4236**

Case No. 08-cv-5214

Honorable James B. Zagel

MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

INTRODUCTION

Since this case began in 2008, Plaintiffs' counsel have represented the proposed Class vigorously, effectively, and without compensation through years of hard-fought litigation. With the recent all-cash settlements totaling $163.9 million, and the case continuing against three remaining Defendants, counsel have achieved an outstanding result for the Class, supporting a reasonable fee award from the settlement funds. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("this Court has recognized consistently that a [lawyer] who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole").

Class Counsel respectfully move for attorneys' fees of one-third (33.33%) of the common settlement funds as fair and reasonable compensation for their work—a percentage well within the range accepted by this Court, others in the Seventh Circuit, and courts around the country. *See* page 10, *infra*. Indeed, a one-third fee is particularly warranted here. This case was not the product of a government investigation or prosecution, but was developed solely by Plaintiffs' counsel and litigated effectively at every stage against eight sophisticated Defendants and dozens of well-compensated lawyers from prestigious defense firms. Prosecuting the matter has required more than $33 million dollars of attorney time and litigation expenses, all of which was advanced by Class Counsel on a fully contingent basis with no guarantee of recovery. If the claims had failed for any reason, Class Counsel would have gotten nothing. Having incurred these substantial risks, and having secured a very large settlement fund for the benefit of the Class, Class Counsel have earned their requested fee.

BACKGROUND

I. CLASS COUNSEL'S WORK

A. Pre-Complaint Investigation and Motion to Dismiss

This action began in September 2008 with the filing of a detailed complaint alleging that Defendants, the nation's largest steelmakers, conspired to restrict raw steel output on an industry-wide basis, causing injury to a class of direct purchasers. Dkt. No. 1. Unlike most other large antitrust class actions, Class Counsel built the case from the ground up. Class Counsel developed the theory in the first instance, interviewed witnesses and steel buyers, studied industry documents, retained experts, and performed extensive legal research to evaluate the claims—all of which informed the complaint.

The next stage was opposing Defendants' motion to dismiss. In the wake of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), Defendants introduced a lengthy factual record in support of their arguments for dismissal, requiring considerable time and effort to respond. *See* Dkt. Nos. 111-115; Dkt. No. 132 (Plaintiffs' memorandum). Class Counsel then prepared for and argued the motion on February 26, 2009.

The detailed factual record developed by Class Counsel ultimately informed the Court's June 12, 2009, order and opinion denying Defendants' motion. *See* Dkt. No. 170; *see also* Ex. 1, Joint Declaration of Co-Lead Counsel Jeffrey Istvan and Michael Guzman ("Joint Decl."), ¶ 45 (approximately 9,488 hours and $5.4 million of time required to investigate, draft complaint, organize the related cases, and prevail on motion to dismiss).[1]

[1] The Joint Declaration includes, *inter alia*, an overview of the case, a summary of Class Counsel's work, detail on time and expenses, information on fees in similar cases, and an assessment of the risks of continued litigation and the benefits of settlement.

B. Discovery, Class Certification, and Settlements

Discovery and document review often requires substantial time and expense in complex litigation, and this case was no exception. Class Counsel's discovery-related work included, *inter alia*:

- Drafting and negotiating proposed case management, discovery, and protective orders (*see, e.g.*, Dkt. Nos. 19, 31, 40, 78, 181, 221, 226-235);
- Drafting and serving discovery requests on all eight Defendants;
- Filing motions and briefs on various case management and discovery issues (*see, e.g.*, Dkt. Nos. 211, 261-63, 276 and 343);
- Resolving dozens of discovery issues and disputes through meet and confers with Defendants, without the need for Court involvement;
- Reviewing and synthesizing over 3.5 million pages of documents produced by Defendants;
- Collecting, reviewing, and producing requested document discovery from the named Plaintiffs, and preparing for and defending their depositions;
- Coordinating discovery and analysis of Defendants' transactional, financial and operational data, including sales data for nearly 30 million steel transactions as well as monthly price, cost, production, margin and other data from all eight Defendants;
- Serving, negotiating, and reviewing discovery from various trade associations and other non-parties.

Class Counsel also managed the work relating to class certification, which required years of legal, factual, and strategic development. Specific tasks included drafting hundreds of pages of class certification and *Daubert* briefs; identifying and organizing thousands of pages of exhibits; working with three experts on a total of five expert reports; researching, preparing for and deposing Defendants' experts and witnesses; preparing for and defending Plaintiffs' expert depositions; preparing and presenting Plaintiffs' argument during a three-day class certification and *Daubert* hearing; and drafting proposed post-hearing findings of fact and conclusions of law.

See Ex. 1, Joint Decl. ¶ 45 (approximately 38,400 hours and $19.6 million in time devoted to class certification and *Daubert* discovery, briefing and case management).[2]

All of this work was necessary to advance Plaintiffs' claims and lay the groundwork for the recent settlements: a total of $163.9 million from Commercial Metals ($3.99 million), AK Steel ($5.8 million), Gerdau ($6.1 million), ArcelorMittal ($90 million), and U.S. Steel ($58 million). Furthermore, each of the settlements required protracted negotiation and drafting on monetary and other terms, as well as extensive work with the class administrator and bank on class notice, administration and escrow issues, representing another key aspect of the case handled effectively by Class Counsel.

C. Outstanding Result for the Class

The Settlements provide for a guaranteed cash recovery payable promptly to Class members upon final approval, with no funds reverting to the Defendants at any time or for any reason. In other words, all of the settlement money will go directly to the Class in cash after deducting Court-approved attorneys' fees and expenses.

The reaction of Class members has been overwhelmingly favorable. Direct notice was mailed to the vast majority of the approximately 5,300 direct purchaser Class members, and (to date) no Class member has objected to the Settlements or the proposed one-third fee award. The number of opt outs (between 3 and 6, depending on the settlement) is miniscule. And given that Class members include many large and sophisticated businesses, this response underscores the value of the Settlements and the reasonableness of the requested fee award.

[2] Additional time and expense detail is provided in the attached Joint Declaration of Co-Lead Counsel, Ex. 1 hereto, which underscores that all of Class Counsel's efforts were reasonable and necessary given the complexity of the issues, the number of Defendants, the volume of discovery, and the length of the case.

D. Total Time and Expense

In total, Class Counsel devoted more than 53,000 hours and $27.7 million in time to prosecuting the claims on behalf of the Class while advancing $5.5 million in litigation expenses, all of which was advanced on a fully contingent basis with no guarantee of recovery. *See* Ex. 1, Joint Decl., at ¶¶ 18, 44, 53.

The requested one-third fee award of $54.63 million thus represents a "multiplier" of 1.97 on Class Counsel's total hourly fees (or "lodestar"), which is well within the range of multipliers awarded in similar common fund antitrust litigation, particularly in light of the success achieved on behalf of the Class. *See* page 16-19, *infra* (collecting cases).

ARGUMENT

I. THE REQUESTED ATTORNEYS' FEES ARE FAIR AND REASONABLE

A. Legal Standards

It is well-established that attorneys whose work creates a common class action settlement fund are "entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. at 478; *see also Sutton v. Bernard*, 504 F.3d 688, 691 (7th Cir. 2007) ("this payment scheme is based on the equitable notion that those who have benefited from litigation should share in its costs.") (internal quotation marks and citations omitted); *In re Continental Illinois Sec. Litig.*, 962 F.2d 566, 568 (7th Cir. 1992) ("Having employed their professional skills to create a cornucopia for the class, the lawyers for the class were entitled under the principles of restitution to suitable compensation for their efforts."); Fed. R. Civ. P. 23(h) (authorizing reasonable fee awards to class counsel).

It is equally well-established that attorneys' fees are properly awarded where, as here, common fund settlements are achieved with certain defendants while the litigation continues

against others. *See, e.g.*, *In re Plasma-Derivative Protein Therapies Antitrust Litig.*, 1:09-cv-07666, Dkt. No. 693 (N.D. Ill. 2014) (awarding one-third interim fee from initial settlement in multi-defendant case) (copy attached as Ex. 2); *In re Southeastern Milk Antitrust Litig.*, 2:08-MD-1000, 2013 WL 2155387, at *1 (E.D. Tenn. May 17, 2013) (noting initial one-third fee award from early settlements and approving additional fee from later settlements); *In re Urethane Antitrust Litig.*, MDL No. 1616, Dkt. No. 2210 (D. Kan. Dec. 13, 2011) (awarding one-third fee from initial settlements with litigation continuing) (copy attached as Ex. 3); *In re Automotive Refinishing Paint Antitrust Litig.*, No. MDL 1426, 2008 WL 63269, *1 (E.D. Pa. Jan. 3, 2008) (noting prior 32% fee award from initial settlements and approving additional fee from later settlements).

Courts in the Seventh Circuit take a market-based approach in evaluating class action fee requests. *See, e.g.*, *Americana Art China Co., Inc. v. Foxfire Printing and Packaging, Inc.*, 743 F.3d 243, 246-47 (7th Cir. 2014) ("because we always seek to replicate the market value of an attorney's services—and because the market would assign value up front—a district court that leaves the matter of fees until the end of the litigation process must set a fee by approximating the terms that would have been agreed to *ex ante*, had negotiations occurred.") (internal quotation marks and citations omitted); *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 744 (7th Cir. 2011) (same); *Williams v. Rohm and Haas Pension Plan*, 658 F.3d 629, 635-36 (7th Cir. 2011) (same).

Relevant considerations include, *inter alia*, the ordinary market rate for class counsel's services, fee awards in similar matters, the nature of the particular case (including the risks of non-recovery), and the amount and quality of class counsel's work. *See, e.g.*, *In re Synthroid Marketing Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("courts must do their best to award counsel

the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time."); *id.* at 721 ("The market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case."); *see also Taubenfeld v. Aon Corp.*, 415 F.3d 597, 600 (7th Cir. 2005) (affirming fee award based on "awards made by courts in other class actions"; "the quality of legal services rendered"; and "the contingent nature of the case"); *Williams*, 658 F.3d at 636 (7th Cir. 2011) (affirming award based on "available market evidence"; "the amount of work involved, the risks of nonpayment, and the quality of representation").

Balancing these and any case-specific factors is a matter committed to the sound discretion of the trial court. *See, e.g., Americana Art*, 743 F.3d at 246 (court of appeals reviews attorney fee methodology *de novo* and reviews trial court's application of an accepted methodology for abuse of discretion).

B. The Requested Fees Are Fair and Reasonable as a Percentage of the Fund

Two approaches are commonly used in awarding class action attorneys' fees: (i) the "percentage of recovery" method, under which the Court awards a percentage of the total common settlement fund; and (ii) the "lodestar" method, under which the fee award is a function of class counsel's lodestar (*i.e.*, reasonable hourly rates multiplied by the hours devoted to the case) times a "multiplier" adjustment to account for risk, quality, and outcome. *See generally Pearson v. NBTY, Inc.*, No. 11 CV 7972, 2014 WL 30676, *5-6 (N.D. Ill. Jan. 3, 2014). The Court has discretion to apply either method, *see Americana Art*, 743 F.3d at 247, but because the requested fee here falls squarely within the customary range of outcomes in similar cases, the Court should reach the same conclusion regardless of the methodology used.

The "percentage of recovery" method is a framework accepted by the private market and often used by courts in antitrust class actions, particularly where, as here, class counsel secures an all-cash settlement fund for the benefit of the class. *See* Ex. 4, Declaration of Professor Geoffrey P. Miller in Support of Class Counsel's Motion for Attorneys' Fees and Expenses ("Miller Decl."), at ¶ 26 (percentage method is overwhelmingly favored by the market in contingent cases); *In re ShagrinGas Co. v. BP Products*, No. 1:06-cv-03621, Dkt. No. 209 (N.D. Ill. June 24, 2010) (Zagel, J.) (applying percentage methodology) (copy attached as Ex. 5); *In re Plasma-Derivative Protein Therapies Antitrust Litig.*, Dkt. Nos. 693 and 701 (N.D. Ill. 2014) (awarding one-third percentage fee in similar antitrust class action involving $128 million in total settlements) (Ex. 2); *see generally Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998) ("When a class suit produces a fund for the class, it is commonplace to award the lawyers for the class a percentage of the fund[.]").

The percentage of recovery method has many advantages, including ease of administration, consistency with traditional "common fund" principles, and alignment of class/lawyer interests. *See, e.g.*, Miller Decl. ¶ 26; *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 566 (7th Cir. 1994) ("there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration"); *Blum v. Stenson*, 465 U.S. 886, 890 n.16 (1984) ("under the common fund doctrine . . . a reasonable fee is based on a percentage of the fund bestowed on the class"); *Kirchoff v. Flynn*, 786 F.2d 320, 326 (7th Cir. 1986) (contingent percentage fee "automatically aligns interests of lawyer and client, rewards exceptional success, and penalizes failure").[3]

[3] *See also* Federal Judicial Center, *Manual For Complex Litigation* § 14.121 (4th ed. 2004) ("the vast majority of courts of appeals now permit or direct district courts to use the

As explained in more detail below, Class Counsel's one-third fee request is consistent with the market rate for comparable legal services as demonstrated by Co-Lead Counsel's representation of sophisticated paying clients in other contingent matters, as well as fee awards in similar class actions. Furthermore, a one-third fee is appropriate to compensate Class Counsel for the risks of the case, the amount and quality of their work, and the success achieved on behalf of the Class.

1. A One-Third Contingent Fee Is Consistent with Class Counsel's Market Rate in Similar Cases.

The attached Joint Declaration of Co-Lead Class Counsel details the extent to which a one-third contingent fee comports with the *ex ante* market rate for Class Counsel's services. *See* Ex. 1 ¶¶ 54-61. Class Counsel, including Co-Lead Counsel, are recognized nationally as effective high-stakes litigators; are retained often by sophisticated clients in antitrust and other complex matters; and commonly negotiate retainer agreements providing for a one-third (or sometimes greater) contingent fee from any successful recovery. *Id*.

Where, as here, a proposed contingent case involves large claims against sophisticated parties, Class Counsel typically negotiate for (i) full reimbursement of all litigation expenses, either concurrently or from any settlement or judgment and (ii) a percentage of recovery fee in the range of 25-50%. *Id*. A one-third fee falls well within that range and is both standard and accepted by the market, including in cases with large potential recoveries. *Id*. This data

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percentage-fee method in common-fund cases" in part because "[i]n practice, the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation" and "creates inherent incentive to prolong the litigation"); *In re Skelaxin (Metaxalone) Antitrust Litig.*, MDL No. 2343, 2014 WL 2946459, *1 (E.D. Tenn. Jun. 30, 2014) ("The percentage-of-the-fund method is the proper method to compensate Class Counsel" in antitrust litigation because "the lodestar method is cumbersome; the percentage-of-the-fund approach more accurately reflects the result achieved; and the percentage-of-the-fund approach has the virtue of reducing the incentive for plaintiffs' attorneys to over-litigate or 'churn' cases.") (citations omitted).

provides direct evidence of Counsel's standard market rate. *See, e.g.*, *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 408 (7th Cir. 2000) (one "measure of what is reasonable is what an attorney would receive from a paying client in a similar case.").

The same contingent rate typically applies when Co-Lead Counsel represents a class. *See* Ex. 1, Joint Decl. ¶¶ 56-58 (collecting cases). In the recent *Urethane Antitrust Litigation*, for example, Co-Lead Counsel handled complex claims for nearly a decade on behalf of direct purchasers. As in *Steel*, *Urethane* settled with some (but not all) defendants before trial and, consistent with the common fund principles described above, the court awarded one-third of the settlement amounts as an interim fee award to compensate class counsel for years of hard-fought litigation. *See In re Urethane Antitrust Litig.*, MDL No. 1616, Dkt No. 2210 (D. Kan. Dec. 13, 2011) (Ex. 3). After the settlements, Co-Lead Counsel successfully tried the case to verdict against the last remaining defendant. *In re Urethane Antitrust Litig.*, No. 13-3215 (10th Cir. Sept. 29, 2014) (affirming judgment on behalf of class).

2. A One-Third Contingent Fee Is Consistent with the Market Rate Approved by Courts in Similar Cases.

"[A]ttorneys' fees from analogous class action settlements" can be used to evaluate the market rate for legal services, *Taubenfeld*, 415 F.3d at 600, and further demonstrate the reasonableness of Class Counsel's requested fee.

In fact, "[c]ourts throughout the Seventh Circuit routinely . . . conclude that a one-third contingency fee is standard" in class actions. *City of Greenville v. Syngenta Crop Prot., Inc.*, 904 F. Supp. 2d 902, 909 (S.D. Ill. 2012) (collecting cases and awarding one-third fee from $105 million settlement fund). *Accord In re ShagrinGas Co.*, No. 1:06-cv-03621, Dkt. No. 209 (N.D. Ill. June 24, 2010) (Zagel, J.) (crediting plaintiffs' evidence "that the market range for legal service in a contingency matter such as this . . . is 30-33%") (Ex. 5); *In re Plasma-Derivative*

Protein Therapies Antitrust Litig., 1:09-cv-07666, Dkt. Nos. 693, 697, 697-1 and 701 (N.D. Ill. 2014) (awarding one-third fee from settlements totaling $128 million) (Ex. 2); *Gaskill*, 160 F.3d at 364 (7th Cir. 1998) (affirming 38% fee award); *cf. Pearson*, 2014 WL 30676, at *6 (Zagel, J.) (noting that 25% is the benchmark but special risks and circumstances can justify a higher award). *See also Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 598 (N.D. Ill. 2011) ("common-fund cases from within the Seventh Circuit show that an award of 33.3% of the settlement fund is within the reasonable range."); *Retsky Family Ltd. Partnership v. Price Waterhouse LLP*, No. 97 C 7694, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) (in a complex class action, "[a] customary contingency fee would range from 33 1/3% to 40%"); *In re Lithotripsy Antitrust Litig.*, No. 98 C 8394, 2000 WL 765086, *2 (N.D. Ill. June 12, 2000) ("33.3% of the fund plus expenses is well within the generally accepted range of attorneys[']fees in class-action antitrust lawsuits"); *Goldsmith v. Tech. Solutions Co.*, 92 C 4374, 1995 WL 17009594, at *8 (N.D. Ill. Oct. 10, 1995) ("courts in this District commonly award attorneys' fees equal to approximately one-third or more of the recovery"); *Heekin v. Anthem, Inc.*, No. 1:05-CV-01908-TWP-TAB, 2012 WL 5878032 (S.D. Ind. Nov. 20, 2012) (reviewing Seventh Circuit authority and awarding one-third fee from $90 million settlement fund); *In re Ready-Mixed Concrete Antitrust Litig.*, 1:05-CV-00979-SEB-TAB, 2010 WL 3282591, at *3 (S.D. Ind. Aug. 17, 2010) (approving one-third fee).

The recent *Plasma-Derivative Protein Therapies* case is illustrative. As here, *Plasma* involved complex antitrust claims including alleged supply restriction. As here, *Plasma* class counsel devoted tens of millions of dollars in time and expenses to litigating the case on a purely contingent basis. As here, *Plasma* settled favorably before class certification, for a total recovery of $128 million. And the *Plasma* court awarded a one-third fee as a fair and reasonable

percentage from the settlement fund. *See* Ex. 2.

Many recent complex antitrust cases are in accord, including many with comparable class recoveries. *See, e.g. In re Southeastern Milk Antitrust Litig.*, No. 2:08–MD–1000, 2013 WL 2155387, *8 (E.D. Tenn. May 17, 2013) (one-third fee from settlements totaling $158.6 million); *In re Titanium Dioxide Antitrust Litig.*, 10–CV–00318(RDB), 2013 WL 6577029, *1 (D. Md. Dec. 13, 2013) (one-third fee from $163.5 million fund); *Skelaxin*, 2014 WL 2946459 at *1 ("one third fee is fair and reasonable and fully justified" and "within the range of fees ordinarily awarded" in case involving $73 million settlement fund) (collecting cases); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 748-52 (E.D. Pa. 2013) (noting that "in the last two-and-a-half years, courts in eight direct purchaser antitrust actions approved one-third fees" and awarding one-third fee from $150 million fund); *In re Fasteners Antitrust Litig.*, CIV.A. 08-md-1912, 2014 WL 296954, *7 (E.D. Pa. Jan. 27, 2014) ("Co–Lead Counsel's request for one third of the settlement fund is consistent with other direct purchaser antitrust actions."); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-340-SLR, Dkt. No. 543 (D. Del. 2009) (copy attached as Ex. 6) (one-third fee from $250 million settlement fund); Miller Decl. at ¶¶ 34-40 (empirical data supports one-third fee award).[4]

This authority confirms that a one-third fee award is within the range of reasonableness in comparable antitrust litigation, particularly given the case-specific risks described below.

[4] *See also Automotive Refinishing Paint*, 2008 WL 63269, *1 ($34.5 million attorneys' fee from settlements totaling $105.75 million); *In re Linerboard Antitrust Litig.*, No. MDL 1261, 2004 WL 1221350, *19 (E.D. Pa. June 2, 2004) (30% fee from $202.6 million settlement fund); *In re Relafen Antitrust Litig.*, No. 1:01-cv-12239-WGY, Dkt. No. 297, at 8 (D. Mass. 2004) (copy attached as Ex. 7) (one-third fee from $175 million settlement fund); *In re Vitamins Antitrust Litig.*, No. Misc. 99-197(TFH), 2001 WL 34312839, *10, 14 (D.D.C. July 16, 2001) (34% fee from $359 million settlement fund); William B. Rubenstein, *Newberg on Class Actions* § 14:6 (4th ed.) ("Empirical studies show that … fee awards in class actions average around one-third of the recovery.")

3. A One-Third Contingent Fee Is Justified by the Risks of the Litigation.

The Seventh Circuit has emphasized that fee awards must be evaluated "in light of the risk of nonpayment," *Synthroid*, 264 F.3d at 718, and that "a higher risk of loss does argue for a higher fee." *In re Trans Union*, 629 F.3d at 746. *See also Florin*, 34 F.3d at 565 ("a court must assess the riskiness of the litigation by measuring the probability of success of this type of case *at the outset* of the litigation.") (emphasis in original).

The risk here was significant. From an *ex ante* perspective, Class Counsel bore the risks of (i) motions to dismiss under the Supreme Court's then relatively new *Twombly* standard; (ii) potential discovery limitations and delays; (iii) dozens of defense arguments and *Daubert* challenges relating to class certification; (iv) the possibility of Rule 23(f) review and attendant delays; and, of course, (v) all the post-certification risks of litigation on the merits, including summary judgment, renewed *Daubert* motions, other evidentiary challenges, trial risks on liability and damages, post-trial motions, appeals, and much more. *See* Ex. 1 (Joint declaration detailing case-specific risks); *Linerboard*, 2004 WL 1221350, at *10 ("an antitrust class action is arguably the most complex action to prosecute" because the "legal and factual issues are always numerous and uncertain in outcome") (citations omitted).

Given these potential pitfalls, the *ex ante* risk of the case justifies a substantial fee award to compensate Class Counsel for pursuing the claims in the first instance, litigating effectively for years without compensation, financing millions of dollars of case costs with no guarantee of reimbursement, and ultimately achieving outstanding results. *See, e.g., Syngenta*, 904 F. Supp. 2d at 909 ("Given the extreme difficulty presented by this matter and the attendant risk in investing years of attorney time carrying millions of dollars in litigation expenses with no guarantee of recovery, a substantial risk multiplier is warranted" and a "fee award of one-third of

the fund is thus appropriate[.]"); *Southeastern Milk Antitrust Litig.*, 2013 WL 2155387, at *5 ("counsel undertook this case on a contingency-fee basis and accepted a substantial risk of non-payment for legal work and reimbursement of out-of-pocket expenses advanced. The Court finds that the fee awarded should fully reflect the risk taken by these lawyers and is a very substantial factor in this case that weighs in favor of the requested [one-third] fee."); Miller Decl. at ¶¶ 36-40 (risks of the litigation support one-third fee award).

The risks are further underscored by the fact that Class Counsel investigated and developed this case on their own. There were no government investigations or indictments available to use as foundation for the claims. Counsel handled the case alone, with their own resources, and courts have long recognized that class counsel should be awarded a larger percentage fee in this situation to account for the greater risk of loss and the fact that, absent class counsel's independent work, class members would not have recovered anything at all.[5]

As Professor Miller has explained, it is important to reward class counsel in this situation to incentivize "capable attorneys to act as 'private attorneys-general' in policing against illegal anticompetitive behavior" and to enforce the "antitrust laws [which are] essential to a market economy." Miller Decl. at ¶ 23. *See also Southeastern Milk Antitrust Litig.*, 2013 WL 2155387 at *5 ("failing to fully compensate class counsel for the excellent work done and the various

[5] *See, e.g., Automotive Refinishing Paint Antitrust Litig.*, 2008 WL 63269, at *5 ("The risk of nonpayment is even higher when a defendants' *prima facie* liability has not been established by the government in a criminal action" and thus "warrants approval" of class counsel's one-third fee request.); *Linerboard Antitrust Litig.*, 2004 WL 1221350, at *11 (same); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 2000 WL 204112, at *1 (N.D. Ill. Feb. 10, 2000) ("This case was not marked by any governmental investigations or prosecutions, leaving the development of the facts in the hands of private litigants . . . Because of the uncertainty of the outcome of the case and the enormous amount of work necessary to the prosecution of the charges, counsel for the Class Plaintiffs had to invest a great deal of time and money even while faced with the risk of non-recovery.").

substantial risks taken would undermine society's interest in the private litigation of antitrust cases. Society's interests are clearly furthered by the private prosecution of civil cases which further important public policy goals, such as vigorous competition by marketplace competitors."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("[w]ithout doubt, the private cause of action plays a central role in enforcing this [antitrust] regime."); *Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983) ("This court has emphasized the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws."); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 664 (7th Cir. 2002) (same).

4. A One-Third Fee Is Supported by the Amount and Quality of Class Counsel's Work and the Results Achieved for the Class.

The Court should further consider the amount and quality of Class Counsel's work in its fee analysis, *Synthroid*, 264 F.3d at 721, as well as "the litigation's ultimate degree of success." *Americana Art*, 743 F.3d at 247 (court is permitted to consider success of the case as another factor supporting fee award). *Accord In re Brand Name Prescription Drugs*, 2000 WL 204112, at *2 ("There is no question that the results achieved by class counsel were extraordinary and that they are entitled to a substantial award."). Both factors fully support a one-third fee.

A large volume of work supports the requested fee. Reaching this point has required six years and more than 53,000 hours of Class Counsel's time, and the very nature of the case—a nationwide antitrust class action against eight large Defendants represented by dozens of lawyers from the country's preeminent defense firms—underscores the scope of the undertaking. *See Linerboard Antitrust Litig.*, 2004 WL 1221350, at *8 ("the quality and vigor of opposing counsel is relevant in evaluating the quality of plaintiffs' counsel."). The Court is well aware of the

hundreds of docket entries that comprise only the most public aspects of the litigation.[6]

The quality of counsel's work and the outcome achieved also supports a one-third fee. On each and every issue raised by Defendants and their capable lawyers—from the motion to dismiss stage, to major discovery disputes, to dozens of contested class certification and *Daubert* issues—Class Counsel have argued their case professionally, and kept the litigation moving forward. Class Counsel also have attempted to minimize the number of disputes requiring Court involvement by meeting and conferring exhaustively (and often productively) with defense counsel. Class Counsel believe the case has been relatively unusual in that regard, allowing the Court to focus the bulk of its attention on the central substantive issues rather than skirmishes among the parties. *Id.* at *10 (similar case management efforts demonstrate "skill and efficiency" and support requested fee).

Class Counsel respectfully submit that their representation has been vigorous, efficient and effective, and that the facts, arguments and credibility they developed over the past six years played the central role in achieving the recent settlements for the Class. As such, the quality of Class Counsel's representation supports the requested fee.

Finally, Class Counsel believe the results speak for themselves. *Id.* at *5 ("The result achieved is the clearest reflection of petitioners' skill and expertise."). A class action settlement fund of $163.9 million (in cash) with no possibility of reversion to a defendant and no reduction

[6] Class Counsel have made every effort to work the case efficiently and, in Co-Lead Counsel's experience, the total reported lodestar is reasonable for a multi-defendant case of this nature. *See, e.g.*, *Plasma Antitrust Litig.*, MDL No. 2109, Dkt. No. 697-1, at 9 (N.D. Ill. 2014) (lodestar of $39 million at class certification stage); *Southeastern Milk Antitrust Litig.*, 2013 WL 2155387, at *5, 7 (lodestar over $53 million after five years of litigation); *Brand Name Prescription Drugs Antitrust Litig.*, 2000 WL 204112, at *3 (lodestar of $84 million after approximately six years of litigation).

for opt outs represents an outstanding outcome.[7] And because the proposed claims process is straightforward, Class members will be in a position to receive their *pro rata* share of the settlement fund with a minimum of effort and delay after this Court rules on the motion for final settlement approval and attorneys' fees. *See* Plaintiffs' Plan of Allocation and Distribution (attached as Exhibit 5 to contemporaneously-filed motion for final settlement approval). Furthermore, the Class will enjoy these Settlement benefits now while the case proceeds against three remaining Defendants under principles of joint and several liability. *See* Dkt. No. 494-1, at 8 (explaining that non-settling Defendants remain jointly and severally liable for the full damages caused by the alleged conspiracy).

Accordingly, for all the reasons stated in Plaintiffs' final approval papers, see Dkt. No. 517 (incorporated herein by reference), the settlements deliver a significant common fund benefit for class members, and support the requested one-third fee award.

C. Lodestar/Multiplier Analysis Supports the Requested Fee Award

The Court may in its discretion "cross-check a percentage of recovery fee award with the lodestar method" to confirm its reasonableness. *Pearson*, 2014 WL 30676, at *6 (citing *Synthroid*, 264 F.3d at 718). As explained at page 7, *supra*, the lodestar method involves multiplying the hours devoted to the case by the relevant professional's hourly rate, then applying a case-specific "multiplier" to compensate class counsel for risk, outcome, and quality

[7] As the Court is aware, class action settlements sometimes raise challenging issues of valuation and claims administration, *e.g.*, in cases involving coupon settlements, reversion of unclaimed funds to defendants after the claims process, or reduction of the settlement to account for opt outs. Here, in contrast, the Class will benefit substantially from the straightforward nature of the deals: large all-cash settlement funds with no possibility of reversion, no opt out reductions, and a simple claims process.

of work. *Id.*[8]

When using the lodestar method, a multiplier is generally "mandated" in successful contingent cases in which counsel bore the risk of loss. *See, e.g.*, *Florin*, 34 F.3d at 565; *Continental*, 962 F.2d at 659 ("the need for such an adjustment is particularly acute in class action suits"); *Florin II*, 60 F.3d 1245, 1247 (7th Cir. 1995) ("court[s] must also be careful to sustain the incentive for attorneys to continue to represent such clients on an 'inescapably contingent' basis"); *Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 253 (7th Cir. 1988) ("the higher the risk . . . the greater the multiplier necessary to compensate plaintiff's attorney for bringing the action").

Typical multipliers range from 1-4 depending on the facts. *See, e.g.*, *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 976 (7th Cir. 1991) (multipliers from 1-4 have been approved); *Southeastern Milk Antitrust Litig.*, 2013 WL 2155387, at * 4 (awarding one-third fee and "multiplier of 1.9, clearly within, but in the bottom half of, the range of typical lodestar multipliers"); *Skelaxin Antitrust Litig.*, 2014 WL 2946459, at *2 (collecting cases and awarding "multiplier between 2.1 and 2.5," which is "reasonable in light of what has been routinely accepted as fair and reasonable in complex matters such as this one"); *Flonase Antitrust Litig.*, 951 F. Supp. 2d at 750-51 ([m]ultipliers of 1-4 are common in antitrust cases, and awarding one-third fee and 2.99 multiplier); Miller Decl. at ¶¶ 53-61 (empirical data on multipliers supports requested fee in this case); *Newberg on Class Actions* §14.6 (4th ed. 2009) ("multiples ranging

[8] The hourly rates on which this calculation is based are the same rates charged to paying clients for similar work. *See Jeffboat, LLC v. Dir., Office of Workers' Comp. Programs*, 553 F.3d 487, 489-90 (7th Cir. 2009) (recognizing "presumption that an hourly rate is reasonable where the attorney demonstrates that the hourly rate she has requested is in line with what she charges other clients for similar work."); Joint Decl., Ex. 1, at ¶ 48 (lodestar submissions here are based on the same rates charged to paying clients for similar work); Miller Decl. at ¶¶ 47-52 (Class Counsel rates are reasonable and consistent with the market).

from one to four frequently are awarded in common fund cases when the lodestar method is applied.").

Here, the lodestar method shows that the requested fee award falls squarely within the range of reasonableness. Depending on whether Class Counsel's current or historical rates are used for the analysis, the total lodestar from the inception of the case to the present is $27.7 million (using current rates) or $23.6 million (using historical rates, *i.e.*, the rates that were in effect at the time each hour was billed), which translates to a requested multiplier of 1.97 based on current rates, or 2.31 based on historical rates.[9]

Whether based on current or historical rates, Class Counsel's requested multiplier falls well within the range of reasonableness and properly compensates Class Counsel for bearing the significant litigation risks described above. Success did not come easy in this matter. After six years, millions of dollars in expenses, tens of millions of dollars in professional time, material risk of loss at every step, and outstanding results for the Class, Class Counsel believe a one-third fee and multiplier of 1.97 on current rates (or 2.31 on historical rates) is fair and reasonable. *See* Miller Decl. at ¶¶ 37, 53-61 (requested multiplier is appropriate given risks and results achieved); *Southeastern Milk Antitrust Litig.*, 2013 WL 2155387, at*4-5 (one-third fee and 1.9 multiplier from settlements totaling $158.6 million); *Skelaxin Antitrust Litig.*, 2014 WL

[9] Use of current billing rates is permitted under Seventh Circuit authority to account for the delay of payment in a protracted case (as distinct from the risk of loss, which is compensated by the "multiplier"). *Smith v. Vill. of Maywood*, 17 F.3d 219, 221 (7th Cir. 1994). The Court has discretion to rely on either current or historical rates in its lodestar analysis, *Mather v. Board of Trustees of Southern Illinois University*, 317 F.3d 738, 744-45 (7th Cir. 2003), but Class Counsel respectfully submit that, after six years of litigation, the use of current rates is appropriate to account for the passage of time without payment. *See, e.g.*, *In re Southwest Airlines Voucher Litig.*, 11-cv-8176, 2014 WL 2809016, at *5 n.2 (N.D. Ill. June 20, 2014) (using current rates to account for payment delay and awarding multiplier on current rates to compensate for risk); *Smith*, 17 F.3d at 221 (reversing fee award for failure to compensate for delay in payment). Regardless, the requested multiplier is reasonable under either approach.

2946459, at *2 (one-third fee and multiplier of 2.1-2.5 from $73 million settlement fund); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2013 WL 1365900, at *8 (N.D. Cal. Apr. 3, 2013) (average multiplier of 2.4-2.6 from $1.08 billion settlement fund); *Flonase Antitrust Litig.*, 951 F. Supp. 2d at 750-51 (one-third fee and 2.99 multiplier from $150 million fund); *Tricor Antitrust Litig.*, Ex. 6 attached (one-third fee and 3.93 multiplier from $250 million fund); *Linerboard Antitrust Litig.*, 2004 WL 1221350, at *16 (2.66 multiplier to "reflect the risks of nonpayment facing counsel, to serve as an incentive for counsel to undertake socially beneficial litigation" and "as a reward to counsel for an extraordinary result"); *Brand Name Prescription Drugs Antitrust Litig.*, 2000 WL 204112, at *3 ($175 million fee and 2.06 multiplier from $696.7 million settlement fund); *see generally Gaskill*, 160 F.3d at 363 ("Because they shift part of the risk of loss from client to lawyer, contingent-fee contracts usually yield a larger fee in a successful case than an hourly fee would.").

D. The Absence of Objections Supports the Requested Fee Award.

As of the date of this filing, not one of the more than 5,300 class members has objected to Class Counsel's fee request. Two Class Notices expressly informed class members of Class Counsel's intention to seek attorneys' fees of up to one-third of the common settlement funds, *see* Dkt. No. 488-4 at 6 and Dkt. No. 496-3 at 6, and the Notices were disseminated by direct mail to over 5,300 entities identified as direct purchasers, including many large and sophisticated businesses.

In these circumstances, the absence of objections supports Class Counsel's requested one-third fee award. *See, e.g.*, *Flonase*, 951 F. Supp. 2d at 747 (lack of objections "strongly supports approval of the requested fee"); *Automotive Refinishing Paint*, 2008 WL 63269, at *4 ("A lack of objections demonstrates that the Class views the settlement as a success and finds the request for counsel fees to be reasonable."); *Linerboard*, 2004 WL 1221350, at *5 ("The absence

of objections supports approval of the Fee Petition," particularly given that class members "include many of the largest corporations in America—entities that are hardly unfamiliar with civil litigation.").[10]

II. THE REQUESTED EXPENSE REIMBURSEMENT IS FAIR AND REASONABLE

Beyond attorneys' fees, Class Counsel are entitled to reimbursement of litigation costs of the type ordinarily charged to paying clients. *See Synthroid*, 264 F.3d at 722; *Pearson*, 2014 WL 30676, at *8 (awarding costs and expenses incurred by class counsel).

Here, Class Counsel previously moved for reimbursement of several major categories of litigation expenses from the "icebreaker" (CMC, Gerdau and AK Steel) settlement funds. *See* Dkt. No. 494-1 at 15 (seeking reimbursement of $5,064,098.97 in litigation expenses, including expert fees, e-discovery and deposition costs, courtroom technology, etc.); *see also* 7/10/2014 Final Approval Hearing Tr. at 13-14 (Class Counsel submitting backup for all requested expenses).

Class Counsel now respectfully move for reimbursement of the balance of their litigation expenses in the amount of $406,850.08 which represents "out of pocket" costs incurred by Class Counsel for, *inter alia*, inside and outside copying, travel, computer research (*e.g.*, Westlaw, LEXIS and PACER costs), filing fees, phone charges, courier and postage costs, and the like, all of which was necessary to the prosecution of the case. *See* Ex. 1, Joint Decl. ¶ 52 (detailed

[10] To assure compliance with the Seventh Circuit's recent decision in *Redman v. RadioShack Corp.*, No. 11-cv-6741, 2014 WL 4654477 (7th Cir. Sept. 19, 2014) (expressing preference for objection deadline closing after fee petition is submitted), a third notice was mailed to all Class members on September 30, 2014, advising that Plaintiffs' final settlement approval and attorneys' fee submissions are now available on the *Steel* website at www.steelantitrustsettement.com, and that the objection deadline has been extended to October 15, 2014. *See* Dkt. No. 514 (Plaintiffs' motion to extend objection deadline); Dkt. No. 516 (granting motion).

itemization). Such costs are billed routinely to paying clients in similar matters, *id.*, and are well accepted as recoverable in the class action context. *See, e.g., In re ShagrinGas*, Dkt. No. 209 ("under the common fund doctrine attorneys may collect their related expenses") (copy attached as Ex. 5); *Syngenta*, 904 F. Supp. 2d at 910 (approving similar cost reimbursement); *Brown v. Pro Football, Inc.*, 839 F. Supp. 905, 916 (D.D.C. 1993) ("Plaintiffs' out-of-pocket costs for telephone, telecopier, air and local couriers, postage, photocopying, WESTLAW research, secretarial overtime, and counsel's travel expenses are routinely billed to fee-paying clients, and thus are all compensable") (citations omitted), *rev'd on other grounds*, 50 F.3d 1041 (D.C. Cir. 1995).

CONCLUSION

Based on the foregoing, Class Counsel respectfully request that their Motion for Attorneys' Fees and Reimbursement of Litigation Expenses be granted.[11]

[11] Having managed the litigation from the outset, Co-Lead Counsel are familiar with the contributions of the various law firms and, consistent with standard practice in similar cases, propose to handle the allocation of any fee award among co-counsel without the need for further Court involvement. *See, e.g., Plasma*, Dkt. No. 693 at 3 (recent case in this district awarding one-third fee and authorizing co-lead counsel to allocate fee based on each law firm's respective contributions to the litigation) (copy attached as Ex. 2); *Urethane*, Dkt. No. 2210 (same) (Ex. 3); *Auto Refinishing Paint*, 2008 WL 63269, at *7 ("Courts generally approve joint fee applications which request a single aggregate fee award with allocations to specific firms to be determined by Co-Lead Counsel, who are most familiar with the work done by each firm and each firm's overall contribution to the litigation."); *Linerboard*, 2004 WL 1221350, at *17 (same); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 533 n.15 (3d Cir. 2004) (noting "the accepted practice of allowing counsel to apportion fees among themselves").

TAB 12A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
GREENEVILLE DIVISION

IN RE: SOUTHEASTERN MILK ANTITRUST LITIGATION	)	
	)	**Master File No. 2:08-MD-1000**
THIS DOCUMENT RELATES TO: ***Sweetwater Valley Farm, Inc., et al. v. Dean Foods Co., et al., No. 2:07-CV 208.***	)	**Judge J. Ronnie Greer**

MEMORANDUM OPINION AND ORDER

This matter has come before the Court on the "Plaintiffs' Motion For Award Of Attorneys' Fees, Reimbursement Of Expenses, And Incentive Awards For Class Representatives," [Doc. 1926]. The motion is supported by the declaration of Robert G. Abrams, [Doc. 1927], the declaration of Boies Schiller & Flexner, LLP, [Doc. 1927-5], the declaration of Brewer & Terry, P.C., [Doc. 1927-6], the declaration of Cohen Milstein Sellers & Toll, PLLC, [Doc. 1927-7], the declaration of Fine, Kaplan & Black, R.P.C., [Doc. 1927-8], the declaration of Hausfeld, LLP, [Doc. 1927-9], the declaration of Jessee & Jessee, [Doc. 1927-10], the declaration of Whitfield Bryson & Mason, LLP, [Doc. 1927-11], and the declaration of Freed Kanner London & Millen, LLC, [Doc. 1927-12]. The Court conducted a hearing on the motion on April 3, 2013. For the reasons set forth below, the Court GRANTS the motion and awards attorneys' fees, expenses, and incentive awards as detailed below.

I. Background

This is a multi-district antitrust case involving allegations by the plaintiffs that defendants violated §§ 1 and 2 of the Sherman Act. The plaintiffs have previously entered into settlement

agreements with Dean Foods Company, Southern Marketing Agency, Inc. and James Baird, [*see* Docs. 1889, 1890], and final judgment was entered as to those defendants on June 15, 2012, [Doc. 1892]. The Court previously awarded attorneys' fees in the amount of $48,333,333.00 (one-third of the recovery from the previously settling defendants), reimbursement of expenses for class counsel in the amount of $7,408,920.00, and incentive awards for the class representatives in the amount of $10,000.00 each, [Doc. 1897].

The plaintiffs have now entered into a settlement agreement with the remaining defendants, Dairy Farmers of America, Inc., Dairy Marketing Services, LLC, Mid-Am Capital, LLC, National Dairy Holdings, LP, and Gary Hanman, (collectively "DFA Defendants"), [see Doc. 1922-3]. In short, plaintiffs have now negotiated a settlement with the remaining defendants in an amount totaling $158,600,000 and substantial structural changes with respect to how these defendants conduct their business in the Southeast. The Court has now, by order filed contemporaneously with this order, given final approval to the settlement, [Docs. 1941, 1942]. Through the motion currently pending before the Court, plaintiffs request an additional award of attorneys' fees of $52,866,666.67 from the settlement reached with the DFA defendants (one-third of the settlement), $798,237.66 as reimbursement for class counsel's unreimbursed out-of-pocket expenses, and an additional $10,000.00 incentive award for each of the class representatives.

II. Analysis

A. Applicable Law

"In a certified class action, the court may award reasonable attorney's fees . . . that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). The Court must ensure "that counsel is fairly compensated for the amount of work done as well as for the results achieved."

Rawlings v. Prudential-Bache Props., Inc., 9 F.3d 513, 516 (6th Cir. 1993). Courts have broad discretion in determining an award of attorney's fees in class actions. *See Bowling v. Pfizer, Inc.*, 102 F.3d 777, 779 (6th Cir. 1996); *Rawlings*, 9 F.3d at 516.

One of two methods for calculation of attorney's fees is generally employed in the Sixth Circuit: The lodestar [1] and the percentage-of-the-fund. [2] The district court may "select the more appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them." *Van Horn v. Nationwide Prop. and Cas. Ins. Co.*, 436 Fed. App'x 496, 2011 WL 3792362, at *1 (6th Cir. Aug. 26, 2011) (quoting *Rawlings*, 9 F.3d at 516). The district court, however, generally must explain its "reasons for adopting a particular methodology and the factors considered in arriving at the fee." *Moulton v. U.S. Steel Corp*., 581 F.3d 344, 352 (6th Cir. 2009) (internal quotation marks omitted).

This is a common fund case and plaintiffs urge the Court to apply the percentage of the fund method. As a general matter, "[t]he lodestar method better accounts for the amount of work done, while the percentage of the fund method more accurately reflects the results achieved." *Rawlings*, 9 F.3d at 516. It appears that the trend in the Sixth Circuit is "toward adoption of a percentage of the fund method" in common fund cases. *Stanley v. United States Steel Company*, 2009 WL 4646647 (E.D. Mich. Dec. 8, 2009) (quoting *Rawlings*, 9 F.3d at 515). "[T]he vast majority of courts of appeal now permit or direct district courts to use the percentage-fee in common-fund cases." *Manual For Complex Litigation Fourth* ("MCL") § 14.121. "In practice, the lodestar

[1] With the lodestar method, the Court multiplies the number of hours reasonably expended on the litigation by a reasonable hourly rate. *Reed v. Rhodes*, 179 F.3d 453, 471 (6th Cir. 1999).

[2] When using the percentage-of-the-fund method, the Court simply determines a percentage of the settlement to award to class counsel. *Rawlings*, 9 F.3d at 516.

method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation" and "creates inherent incentive to prolong the litigation." *Id*. At least one circuit court of appeals has recognized that the percentage method "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005).

1. Selecting the Method

In the Sixth Circuit, it is within the discretion of the district court to decide which method to use in a given case. *Bowling*, 102 F.3d at 779; *Rawlings*, 9 F.3d at 516. The percentage-of-the-fund method, however, clearly appears to have become the preferred method in common fund cases. *Stanley*, *supra*; *see* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7; J. Empirical Legal Stud. 811, 832 (December, 2010).

As noted above, plaintiffs urge the Court to award a percentage of the common fund in this case. Although the Court acknowledges its discretion to use the lodestar method, the Court finds that the percentage-of-the-fund method is the more appropriate method in this case, especially when employed with a lodestar cross-check. Here, a substantial common fund has been established for the benefit of class members through the efforts of class counsel. Given the commitment of time and resources committed by class counsel and the complexity of this litigation, it simply would not have been practicable for individual members of this class to pursue litigation challenging the alleged illegal conduct in this case. Given the clear trend in the Sixth Circuit and the Court's belief that the percentage-of-the-fund method, when employed in connection with a lodestar cross-check, accounts for both the amount of the work done and reflects the results achieved by class counsel,

this Court will use the percentage-of-the funds method and a lodestar cross-check. [3] In addition, given the number of hours expended by counsel in this case (approximately 127,000) use of a percentage-of-the-fund method here is much more efficient and less time consuming for the Court to administer.

2. The Reasonableness of the Requested Fee

As noted above, the attorneys' fees requested represent one-third of the settlement fund. Although the total fee requested is a very large amount ($52,866,667, for a total fee award of $101,200,000 when combined with the previously awarded fees of $48,333,333), the percentage requested is certainly within the range of fees often awarded in common fund cases, both nationwide and in the Sixth Circuit. *Bessey v. Packerland Plainwell, Inc*., 2007 WL 3173972, at *4 (W.D. Mich. Oct. 26, 2007) (approving an award of 33 percent, including costs and expenses, and noting that "[e]mpirical studies show that . . . fee awards in class actions average around one-third of recovery") (quoting *Shaw v. Toshiba America Inf. Sys., Inc*. 91 F.Supp.2d 942, 972 (E.D. Tex. 2000)); *Worthington v. CDW Corp*. 2006 U.S. Dist. LEXIS 23100, at *22 (S.D. Ohio May 22, 2006); MCL § 14.121 ("[a]ttorney fees awarded under the percentage method are often between 25% and 30% of the fund."); *see also* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?* 158 U. Pa. L. Rev. 2043, 2063 (2010) ("although the mean and median fee awards in federal court are 25%, there are many awards at the 33% level, ...").

In the Sixth Circuit, several factors have been identified for consideration in

[3] Counsel have provided to the Court summary schedules indicating the number of hours spent by the attorneys involved in this litigation and the lodestar calculation based on historical billing rates. Those schedules were prepared from contemporaneous time records not produced by counsel. Unlike the situation when the Court employs the lodestar method in full, "the hours documented by counsel need not be exhaustively scrutinized by the district court" where a lodestar cross-check is used. *In re WorldCom Sec. Litig*., 388 F. Supp.2d 319, 355 (S.D.N.Y. 2005) (citing *Goldberger v. Integrated Res., Inc*., 209 F.3d 43, 50 (2d Cir. 2000)).

determining the reasonableness of the requested fee. These include:

> (1) the value of the benefit rendered to the plaintiff class . . . ; (2) the value of services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides."

Bowling, 102 F.3d at 780. *See also Smillie v. Park Chemical Co.*, 710 F.2d 271, 275 (6th Cir. 1983).

All of the relevant factors here support the requested fee. First, the result obtained by counsel for the plaintiff class is extraordinary and will result in an average total cash payment to each class member of more than $25,000 after payment of attorneys' fees, out of pocket expenses and incentive awards to class representatives. The total settlement, when combined with the prior settlement, is over 70% of the total damages calculated by plaintiffs' damages expert.[4] [5] In addition, the settlement will result in very significant structural changes in the way milk is marketed in the future in the Southeast. The structural changes agreed to by DFA go to the very heart of some of the challenged conduct in this case, such as the use of full supply agreements, and will almost certainly result in increased uniform milk prices in Orders 5 and 7. DFA members will have greater access to information about DFA's operations and greater ability to terminate their membership agreements with DFA. The dollar value of these significant structural changes cannot be reasonably estimated; however, there is no doubt they address many of the concerns voiced by dairy farmers and the lone objection to the Dean settlement. The overall value of the settlement to the class is further illustrated

[4] Plaintiffs claim the settlement is likely the largest settlement of any antitrust case litigated in this district. Although the Court has not attempted to confirm the accuracy of that claim, the Court is not aware of any settlement for a larger amount.

[5] The Court has not considered the possibility of treble damages. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 955 (9th Cir. 2009).

by the relative lack of objections from class members to the requested fees. Of the more than 7000 members of the class, none objected to the settlement, and that only three have voiced objection to the requested fees. Their objections will be discussed below.

Second, there is absolutely no question that counsel has spent a remarkable amount of time preparing and litigating this case-- more than 126,000 hours of legal work. Counsel spent a year investigating the antitrust allegations, consulting experts and mapping strategy before filing suit. The case has been extensively and vigorously litigated for more than five years and all defendants, especially those now settling, have aggressively defended the suit. Counsel has reviewed and organized over 5,000,000 pages of documents and multiple motions to compel discovery have been litigated. Over 100 depositions have been conducted, including those of numerous plaintiff and defense experts. The Court's docket entries for the case are approaching 2,000, fully illustrating the extensive nature of the legal work done, from the initial motions to dismiss through the summary judgment stage and extensive litigation of a host of other pretrial motions. Counsel have participated in extensive and lengthy court ordered mediation sessions, as well as settlement discussions with defendants. There have been two requests for interlocutory appeal to the Sixth Circuit, requiring extensive briefing in that court. The quality of the work done by class counsel has been exceptional, not only with respect to the pleadings filed but also the oral advocacy during oral argument on various motions.

Using the lodestar method as a cross-check on the reasonableness of the requested fee likewise supports the award of fees requested. As noted above, counsel spent nearly 127,000 hours on this case, which, when multiplied by a reasonable hourly rate, results in a lodestar of $56,126,310.17, combined with the fees previously awarded. The requested fee represents a lodestar

multiplier of 1.90, clearly within, but in the bottom half of, the range of typical lodestar multipliers. *See In re Cardinal Health, Inc. Sec. Litig*., 528 F. Supp.2d 752, 767 (S.D. Ohio 2007) (typical lodestar in large securities class actions ranges from 1.3 to 4.5); *Newberg on Class Action* § 14.6 (4th ed. 2009) ("Multiples ranging from one to four frequently are awarded in common fund cases when the lodestar method is applied."). *See also In re TFT-LCD* (Fleet Panel) Antitrust Litig., 2013 WL 1365900 (N.D. Cal. April 3, 2013) (awarding $309,725,250 in attorney's fees to class counsel, 28.63 percent of the settlement fund and employing a lodestar multiplier averaging 2.4-2.6 as a "cross-check"). It is also worth noting that class counsel seek no fees related to the structural relief achieved by the settlement, except for the $18.6 million to be paid into the settlement escrow fund to guarantee the DFA defendants' promise to increase uniform prices to farmers in Orders 5 and 7 in calendar years 2014-2015.

The complexity of the litigation also supports the requested fees. This Court has observed several times the complexity of the case. Almost every aspect of this case has been hotly contested and litigated extensively and the case presents several somewhat novel issues. The complexity of the case is further illustrated by the number of pages of documents produced, as noted above, a list of potential trial exhibits that numbers in the thousands and literally hundreds of potential witnesses who have been interviewed and/or deposed in preparation for trial. Class counsel, who have extensive experience in complex class action litigation, have efficiently and competently managed their enormous task and have vigorously and effectively prosecuted the case on behalf of the class. They have also been opposed by equally experienced and highly competent counsel for defendants and have achieved an excellent result for their clients.

Furthermore, counsel undertook this case on a contingency-fee basis and accepted

a substantial risk of non-payment for legal work and reimbursement of out-of-pocket expenses advanced. This Court finds that the fee awarded should fully reflect the risk taken by these lawyers and is a very substantial factor in this case which weighs in favor of the requested fee. Not only did counsel risk not being paid for more than $53 million in legal work, they also ran the risk of losing nearly $8.2 million in out-of-pocket expenses. If counsel are not rewarded for this risk, few attorneys will undertake "the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing." *Behrens v. Wometco Enter., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988). Indeed, it was represented to the Court at the hearing that "not every firm wanted the milk case" given the enormous commitment of time and money required and the attendant risk.

Finally, failing to fully compensate class counsel for the excellent work done and the various substantial risks taken would undermine society's interest in the private litigation of antitrust cases. Society's interests are clearly furthered by the private prosecution of civil cases which further important public policy goals, such as vigorous competition by marketplace competitors. *See Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983) ("This court has emphasized the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws.").

Simply put, anti-competitive conduct such as that alleged in this case would likely go unchallenged absent the willingness of attorneys to undertake the risks associated with such expensive and complex litigation. No single class member could have undertaken the litigation prosecuted here on his own. The sheer size of the outlay for out-of-pocket expenses by class counsel illustrates one of the reasons why. Awards of substantial attorneys' fees in cases like this are

necessary to incentivize attorneys to shoulder the risk of nonpayment to expose violations of the law and to achieve compensation for injured parties.

Finally, the issues raised by the objectors need to be addressed. The class notices mailed informed the entire class that plaintiffs "will ask the Court for one-third of the settlement funds in attorneys' fees, plus reimbursement of the costs and expenses . . ." In response, the Court received two letters from class members regarding plaintiffs' requests for attorneys' fees. One, [Doc. 1928], from Weldon J. Keiger of Tobaccoville, North Carolina, opines that $52.86 million in attorneys' fees "is obscenely excessive" and a "huge amount of money per lawyer," especially when considered in the context of the amount of attorneys' fees already awarded from the Dean settlement. Keiger asked the Court to consider providing more of the settlement fund to the dairy farmers of the Southeast and awarding a "reasonable" fee of "10-12 percent."

The second letter, [Doc. 1930], from Tom Mareth, T&M Dairy, LLC, refers to plaintiffs' request as "excessive" and "double billing for work already done . . . given they have been compensated once" (presumably referring to the prior award of fees from the Dean settlement). Mr. Mareth acknowledges, however, that he is "not privy to all the dealings necessary on behalf of the attorneys." A third class member, Craig Frazier, and one of the DFA member subclass representatives, made an oral objection of a different sort at the Court's April 3 hearing. Mr. Frazier claims that his fee agreement with counsel was for one-third of the ***net*** settlement, *i.e.* after payment of expenses, not one-third of the settlement before deduction of counsels' out-of-pocket expenses.

Plaintiffs' respond to the letters of Mr. Keiger and Mr. Mareth that the letters do not constitute a "cognizable objection to a request for attorneys' fees," and that such generalized objections do not suffice, citing *McLennan v. LG Elecs. USA, Inc.*, 2012 WL 686020, at *8 (D. N.J.

March 2, 2012). Plaintiffs suggest that such generalized objections should be summarily overruled. Plaintiffs may be correct as a legal matter; however, the Court, as a matter of basic fairness, will consider the letters as objections from members of the class worthy of consideration.

Mr. Mareth's reference to "double billing" is interpreted by the Court as an argument that counsel should receive a lower fee than their contingency agreement provides because they have already "been compensated once," that is, from the Dean/SMA/Baird settlement. It is true that the prior award of fees from the earlier settlement comes close to compensating counsel for their substantial investment of time and advanced expenses in the case, considering only their lodestar. Such an approach, however, is flawed from both a legal and policy perspective.

Other courts have considered similar requests for an award of attorney's fees based on successive settlements with different defendants. In *Lobatz v. U.S. West Celluar of California, Inc*., 222 F.3d 1142 (9th Cir. 2000), the Ninth Circuit considered and rejected a very similar claim. There, the objector argued that fees for a second settlement two years after the first should be awarded by reference to counsel's time spent on the case after the first settlement and not for the time spent on the entire litigation. The Ninth Circuit correctly disagreed and affirmed the district court's award of fees by considering all of the litigation effort, and cross-checking the fees requested with a lodestar multiplier, while subtracting the fees counsel had been paid from the first settlement. *Id*. at 1149-50. *See also In re Insurance Brokerage Antitrust Litig*., 282 F.R.D. 92 (D. N.J. March 30, 2012) (calculating attorney's fees from second settlement based on total lodestar for entire litigation). The same legal principles apply to Mr. Keiger's suggestion that 10-12 percent of the current settlement is a reasonable attorney's fee.

The approach taken by Mr. Mareth and Mr. Keiger is likewise flawed from a policy

perspective. First, if an award of fees for a successive settlement were limited and calculated only on the basis of time and expenses incurred since the preceding settlement, counsel would have little or no incentive to vigorously or efficiently pursue litigation or settlement of claims with non-settling defendants, or to seek non-monetary relief, even though the remaining defendants might be equally as culpable or have greater culpability. Secondly, such an approach would effectively eliminate consideration of the risk taken by counsel who take on these kind of cases where liability is hotly contested and the chances of recovery uncertain. Here, as plaintiffs point out, counsel invested very significant time worth $53,126,310 if compensated at usual hourly rates plus $8,207,158 in out-of-pocket expenses with no guarantee of recovery or return. Plaintiffs correctly point out that no law firm, or association of firms, would chance over $61,000,000 million pursuing risky, complex and lengthy litigation if the possibility of return was less than or only equal to the amount invested. In other words, counsel should be rewarded commensurate with the risk taken.

The objection made by Mr. Frazier at the April 3 hearing is different. Mr. Frazier, one of the class representatives for the DFA member subclass, while expressing some concern about the settlement because it gives up the breach of contract claims originally asserted by plaintiffs, nonetheless expressed his comfort with the "compromise" agreement. He did argue, however, that the attorneys' fee award should be based on the net settlement after deduction of out-of-pocket expenses, consistent with the contingency contract he believed he signed with class counsel. The contract, delivered to chambers for *in camera* review, does not support Mr. Frazier's recollection. The contract clearly and unambiguously provides for a contingency fee "not to exceed 33 1/3 percent by all counsel" of the "total amount recovered." The contract further provides that "costs and expenses are to be paid out of the recovery after deduction of attorney's fees." This part of Mr.

Frazier's objection lacks merit. Mr. Frazier also claimed that some hours[6] , in particular those invested by counsel appointed by the Court to represent the DFA member subclass, were unnecessary and caused by original counsel's failure to recognize the potential conflict of interest by counsel representing both subclasses. That development in the case was not entirely foreseeable, however, at an earlier stage of the litigation, and is not a proper basis for reducing the requested fees. Even if the Court disregarded the hours spent on the case by court appointed counsel for the DFA member subclass, it would only slightly change the lodestar and would not otherwise affect the Court's decision on the fee award.

One more thing should be addressed. Some studies have identified the size of the underlying class action settlement as the factor with the most influence on the fee and have found an inverse relationship between fee percentage and size of the settlement fund. *See* Fitzpatrick, *Do Class Action Lawyers Make too Little?*, at 2055 (citing Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees In Class Action Settlements: An Empirical Study*, *1* J. Empirical Legal Stud. 27, 35-36 (2004)). Indeed, it is fairly widely recognized that lower percentages are often appropriate in cases in which large settlements serve as the basis for calculating a percentage. MCL, § 14.121 (citing *In re Prudential Ins. Co. of Amer. Sales Practices Litig.* 148 F.3d 283, 339-40 (3d Cir. 1998) (remanding award of 6.7% of common fund for further consideration "in light of the magnitude of the recovery")). In cases involving settlements exceeding 100,000,000, fee percentages have ranged from 4.1% to 17.92%. *Id.*

This Court finds, however, that such an inverse approach would not be appropriate

[6] Mr. Frazier stated that the number of hours was 4,800; however, the declaration submitted by Gary E. Brewer, Esquire, clarifies that about 500 of these hours were attributable to time spent by "other professionals" and generally paid at a much lower hourly rate.

in this case for several reasons. First, the Court has not found any Sixth Circuit case endorsing such an approach. Second, a declining percentage-of-the fund based on the size of the settlement "can create an incentive to settle quickly and cheaply when the returns to effort are highest" and discourage counsel from "investing additional time and maximizing plaintiffs' recovery." *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71, 80 (S.D. N.Y. 2000). In addition, the Court sees no good reason why class action lawyers who represent clients on a contingency-fee basis in a case such as this should receive lower fees on a percentage basis than due contingency-fee lawyers in litigation representing individual clients, which typically amount to 33% or more of the recovery. Lastly, such an approach would penalize these class action attorneys given the actual number of hours spent on the case, rather than compensate them fairly. In other words, the requested fees do not result in an excessive windfall for class counsel.[7]

After consideration of all these factors and the entire and lengthy record of this complex litigation, the Court concludes that, although the requested fee is a very, very substantial amount, it is fair and reasonable under the circumstances. Accordingly, the Court will approve the requested fees in the amount of thirty-three and one-third percent (33 1/3%) of the common fund, i.e. $52,866,667 and will authorize lead counsel to allocate fees to specific firms.[8]

B. Reimbursement of Expenses

In addition to their petition for attorney's fees, class counsel seek reimbursement of out-of-

[7] The Court acknowledges that it has been bothered somwhat by the sheer size of the fee awarded and the need for the dairy farmers class members to receive the maximum possible amount of money, especially in view of the difficult economic environment in which they toil. The Court has ultimately decided, however, that it is not the size of the request, although a very large number, that is necessarily relevant but the size of the award when compared to the size of the risk taken.

[8] The Court, of course, retains jurisdiction to resolve any fee disputes which may arise.

pocket expenses incurred during the representation of the class in the additional amount of $798,237.66. "Expense awards are customary when litigants have created a common settlement fund for the benefit of a class." *See In re F & M Distributors, Inc.*, 19 U.S. Dist. LEXIS 11090, at *19 (E.D. Mich. June 29, 1999). Based upon the Court's review of the various declarations submitted by class counsel, it appears that the requested expenses are the type typically billed by attorneys to paying clients in similar cases, *see In re Synthroid Marketing Litig*., 264 F.3d 712, 722 (7th Cir. 2001), and are fair and reasonable under the circumstances of this case. Although the declarations submitted by class counsel are not itemizations of all of the expenses incurred but rather an aggregate listing of the expenses for each category, the Court finds the declarations submitted sufficiently detailed and the Court is persuaded that the expenses are legitimate and are reasonable in the case and will approve payment to class counsel from the common settlement fund in the amount of $798,237.66 as reimbursement for their out-of-pocket expenses.

C. Incentive Awards to Class Representatives

Plaintiffs request that the Court approve additional incentive awards for the sixteen (16) class representatives in the amount of $10,000 each. "Such awards are discretionary and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. West Publ'g. Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009) (citations omitted). Based on this Court's knowledge of these lengthy proceedings, it appears that the class representatives have had extensive involvement in this litigation and deserve compensation above and beyond the amounts they will be entitled to by virtue of class membership

alone.[9] They have been crucial in the preparation of the case and the requested incentive awards are reasonable in light of other incentive awards approved by courts in this circuit. *See Hainey v. Parrott*, 2007 WL 3308027 at * 5 (S.D. Ohio Nov. 6, 2007) (approving $50,000 incentive awards); *Worthington*, 2006 U.S. Dist. LEXIS 32100, at *24 (approving $10,000 incentive awards); *In re F&M Distributors*, 1999 U.S. Dist. LEXIS 11090, at * 20-21 (approving $2,500 incentive awards).

III. Conclusion

For all the foregoing reasons, plaintiffs' motion for award of attorneys' fees, reimbursement of expenses, and incentive awards for class representatives, [Doc. 1926], will be GRANTED and the Court will award $52,866,667 in attorneys' fees, reimbursement for out-of-pocket expenses in the amount of $798,237.66, and$10,000.00 as an incentive award to each of the class representatives. The clerk is ORDERED to mail a copy of this order to Mr. Keiger, Mr. Mareth and Mr. Frazier.

So ordered.

ENTER:

s/J. RONNIE GREER
UNITED STATES DISTRICT JUDGE

[9] No affidavits or other documentation have been submitted in support of the incentive award request. Class representatives, however, have clearly been extensively involved in the litigation, settlement discussions and court proceedings and have committed substantial time to the case as confirmed by the Court's own observations. *See also* Declaration of Robert G. Abrams, [Doc. 1927]. ("During the litigation, class representatives have communicated with class counsel regarding case issues, produced documents and information, been deposed, and prepared for trial.")

TAB 12B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
GREENEVILLE DIVISION

IN RE SOUTHEASTERN MILK ANTITRUST LITIGATION	)	**Master File No. 2:08-MD-1000**
	)	**Judge J. Ronnie Greer**
THIS DOCUMENT RELATES TO:	)	
***Sweetwater Valley Farm, Inc., et al. v. Dean Foods, et al.*, No. 2:07-CV-208**	)	

PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND INCENTIVE AWARDS FOR CLASS REPRESENTATIVES

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Plaintiffs submit this motion seeking an award of attorneys' fees, reimbursement of expenses, and incentive awards for class representatives as a result of the settlement of this case with remaining Defendants DFA, DMS, Mid-Am Capital, NDH, and Gary Hanman (collectively "DFA Defendants"). Consistent with the DFA Settlement Agreement and the Class Notice, Plaintiffs request an award of attorneys' fees of $52,866,666.67 from the settlement reached with DFA Defendants (one-third of the settlement), $798,237.66 as reimbursement for Class Counsel's unreimbursed out-of-pocket expenses, and $10,000 for each of the class representatives.[1]

The current settlement of $158,600,000 is in addition to $145,000,000 in prior settlements with Dean and SMA/Baird, resulting in a total settlement for the class of $303,600,000. Plaintiffs believe this is by far the largest and most substantial antitrust settlement obtained in this District. The settlement with DFA Defendants also provides substantial changes to how they conduct their business – greater transparency, reduction of full-supply agreements to less than 30 percent of the market, increased prices, greater access to markets, and better access to information – in addition to the structural relief provided in the prior settlements.

In approving counsel's prior request for fees, reimbursement of expenses, and incentive awards as a result of the Dean and SMA/Baird settlements, the Court analyzed and applied the relevant standards for those awards. Application of those standards support the awards requested as a result of the current settlement with DFA Defendants.

- The requested fee award of one-third of the settlement is the same percentage previously approved by the Court in connection with the first settlements which

[1] Class Counsel incurred over $8,200,000 in expenses throughout the prosecution of this case. The Court previously reimbursed Class counsel $7,408,920. Class Counsel now seeks reimbursement only for those expenses not reimbursed by the Court's July 11, 2012 Order.

was, as the Court noted, "certainly within the range of fees often awarded in common fund cases, both nationwide and in the Sixth Circuit." 7/11/12 Order at 4, Dkt No. 1897.

- It is also supported by Class Counsel's actual lodestar (fees absent any multiplier), as well as the factors considered by the Sixth Circuit for determining the reasonableness of a fee award. Class Counsel's lodestar in this matter is over $53,000,000, and out-of-pocket expenses of more than $8,200,000 have been incurred. Combining the requested fee with fees previously awarded would yield a lodestar multiplier of 1.90, which is well within the "typical" lodestar range of one to four. *See id*. at 6-7.[2]
- The Court recognized that the prior settlement was an "extraordinary" result for class members. *Id*. at 5. The current settlement more than doubles the class recovery to about three-quarters of the total damages calculated by plaintiffs' damages expert. *Compare id*. at 5 (prior settlement represented "approximately one-third" of total damages). In addition, the settlement with DFA Defendants provides important behavioral and market-structural relief to class members.
- The requested award is also supported by the complexity of the matter and the critical public policies advanced by private actions to enforce the antitrust laws. The Court has "observed several times the complexity of the case," *id*. at 7, as well as the fact that "society's interests are clearly furthered by the private prosecution of civil cases [such as this one] which further important public policy

[2] Counsel's fee request of $52,866,666.67 plus $48,333,333.33 previously awarded in connection with the Dean and SMA Settlements would result in a total of $101,200,000 in fees. Given Counsel's investment of $53,126,310.17, the lodestar multiplier would be 1.90 percent.

goals, such as vigorous competition by marketplace competitors" *id*. at 8.

- Of particular importance is the fact that although the U.S. Department of Justice investigated the alleged anticompetitive conduct of some Defendants, the government never brought lawsuits against Defendants. Thus, unlike many antitrust class actions, Class Counsel conducted the pre-complaint investigation and discovery largely on a clean slate.
- The requested fee award also is appropriate because of the degree of risk entailed in this litigation. As the Court noted, Class Counsel "undertook this case on a contingency-fee basis, and accepted a substantial risk of non-payment for legal work and reimbursement of out-of-pocket expenses advanced." *Id*. at 7. "Almost every aspect of this case has been hotly contested and litigated extensively" and "opposed by equally experienced and highly counsel for Defendants", *id*., who were represented by premier law firms – Williams & Connolly (DC), Dechert (DC), Winston & Strawn (Chicago), Andrews Kurth (Dallas), Stinson Morrison Hecker (Kansas City), and Patton Tidwell Schroeder (Texas).
- Finally, Plaintiffs believe the quality of the representation in this case supports the requested award. As the Court recognized in approving the prior award, "class counsel…have efficiently and competently managed their enormous task and have vigorously and effectively prosecuted the case on behalf of the class." *Id*.

The factual predicate for this fee and expense request are set forth in the accompanying declarations by Class Counsel. (*See* Declaration of Robert G. Abrams, Lead Class Counsel, Baker & Hostetler ("Abrams Decl."), and attached supporting Declarations from individual

Plaintiffs' firms.)[3]

I. THE REQUESTED AWARD OF FEES IS FAIR AND REASONABLE

A. An Award of Fees Based on a Percentage of the Common Fund Created by the Settlement Is Appropriate

Class Counsel created a substantial benefit for the Settlement Class and are entitled to reasonable attorneys' fees. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."); *Stanley v. U.S. Steel Co.*, 2009 U.S. Dist. LEXIS 114065, at *4 (E.D. Mich. Dec. 8, 2009) ("[W]here counsel's efforts create a substantial common fund for the benefit of [ ] a class, they are entitled to payment from the fund based on a percentage of that fund.").

This award is particularly appropriate here, where Defendants' conduct could not practicably have been challenged without the commitment of significant time and resources by Class Counsel willing to pursue Plaintiffs' claims on a contingency basis. (*See* 7/11/12 Order at 8 ("Simply put, anti-competitive conduct such as that alleged in this case would likely go unchallenged absent the willingness of attorneys to undertake the risks associated with such expensive and complex litigation."); 9/7/10 Order, Dkt No. 934 ("This litigation is complex, its prosecution costly, and the [class] members with smaller damages claims likely have fewer resources with which to fund individual litigation.")). Defendants vigorously defended the case and had great resources at their disposal, requiring Class Counsel to devote substantial amounts of time and resources at a significant risk.

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[3] The Petition is supported with the lodestar and expense information for nine firms: Baker & Hostetler LLP/Howrey LLP; Boies Schiller & Flexner LLP; Brewer & Terry P.C.; Cohen Milstein Sellers & Toll, PLLC; Fine, Kaplan, & Black R.P.C.; Freed Kanner London & Millen, LLC; Hausfeld LLP; Jessee & Jessee; and Whitfield Bryson & Mason LLP.

As the Court previously ruled, in awarding fees paid out of a common fund, the Court has the discretion to apply either the percentage of the fund or lodestar methods in determining the appropriate amount of the award. *See* 7/11/12 Order at 4; *Stanley*, 2009 U.S. Dist. LEXIS 114065, at *3-4; *In re Sulzer Ortho. Inc*., 398 F.3d 778, 780 (6th Cir. 2005) ("it is within the district court's discretion to determine the appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before it") (quoting *Rawlings v. Prudential-Bach Prop.*, 9 F.3d 513, 516-17 (6th Cir. 1993)).

In approving the requested fee award in connection with the prior settlements, the Court found that the percentage-of-the-fund method is the more appropriate method, especially when employed with a lodestar cross-check. *See* 7/11/12 Order at 3. Plaintiffs believe the same approach should be adopted here and that all of the reasons why the Court adopted that approach in connection with the prior settlements are equally applicable to the settlement with the DFA Defendants. *See id*. at 3 (quoting *Stanley*, 2009 U.S. Dist. LEXIS 114065, at *4).[4] When courts employ the percentage of the fund method, the lodestar may still be useful to cross-check the reasonableness of the percentage. *See Stanley*, 2009 U.S. Dist. LEXIS 114065, at *9-10 (citing Manual for Complex Litig. (Third) § 14.121, n.504 (1995)); *Cardinal Health*, 528 F. Supp. 2d at

[4] The percentage-of-the-fund method prevents "inequity by assessing attorneys' fees against the entire fund," and "decreases the burden imposed on the [c]ourt by eliminating a full-blown, detailed and time consuming lodestar analysis." *Stanley*, 2009 U.S. Dist. LEXIS 114065, at *4-5; *see also In re Cardinal Health Sec. Litig.*, 528 F. Supp. 2d 752, 762 (S.D. Ohio 2007) ("[T]he [c]ourt [is] spared from the costly task of scrutinizing counsel's billable hours"). The percentage-of-the-fund method is also advantageous because it "establish[es] reasonable expectations on the part of class counsel as to their expected recovery and encourag[es] early settlement before substantial fees and expenses have accumulated." *Rotuna v. W. Customer Mgm't Group, LLC*, 2010 U.S. Dist. LEXIS 58912, at *20 (N.D. Ohio June 15, 2010). In addition, the percentage of the fund approach "more accurately reflects the results achieved." *Rawlings*, 9 F.3d at 516.

767 (performing lodestar cross-check). Under either method, the fees requested here are appropriate. Plaintiffs accordingly seek fees based on a percentage of the common fund, with a lodestar cross-check, the approach previously employed by this Court in awarding fees from the Dean and SMA/Baird settlements. (*See* 7/11/12 Order.).

B. Application of the Sixth Circuit's Test for Reasonableness Strongly Supports the Requested Award

Plaintiffs' requested fee of one-third of the settlement fund falls well within the 20-50% range of fees awarded in the Sixth Circuit on a percentage basis in complex common fund cases. *See id.* at 4 (explaining one-third requested fee was "certainly within the range of fees often awarded in common fund cases, both nationwide and in the Sixth Circuit"); *Worthington v. CDW Corp.*, 2006 U.S. Dist. LEXIS 32100, at *22 (S.D. Ohio May 22, 2006) ("[C]ounsel's requested percentage of 38 and one-third of the total gross settlement is solidly within the typical 20 to 50 percent range."); *Rotuna*, 2010 U.S. Dist. LEXIS 58912, at *23 ("one-third of the total award[] is…reasonable"); *Bessey v. Packerland Plainwell, Inc.*, 2007 WL 3173972, at *4 (W.D. Mich. Oct. 26, 2007) (approving award of approximately 33% and noting "[e]mpirical studies show that…fee awards in class actions average around one-third of the recovery") (internal quotations omitted); *Sulzer Ortho.*, 398 F.3d at 779, 782 (affirming award of "thirty-two per cent of the settlement fund"); *Kogan v. AIMCO Fox Chase, L.P.*, 193 F.R.D. 496, 505 (E.D. Mich. 2000) (awarding approximately 31%); *In re Cardizem CD Antitrust Litig.*, Case No. 99-md-1278 (E.D. Mich. Nov. 26, 2002) (unreported, Edmunds, J.) (awarding 30% of settlement to counsel for "Sherman Act Plaintiffs")[5]; *In re F&M Distrib., Inc. Sec. Litig.*, 1999 U.S. Dist. LEXIS 11090, at *10 (E.D. Mich. June 29, 1999) ("the excellent performance of the attorneys merits an award

[5] This unreported decision (hereafter "*Cardizem* (unreported)") is attached hereto as Exhibit A.

of thirty percent of the settlement fund"); *In re Foundry Resins Antitrust Litig*., Case No. 2:04-md-1638 (S.D. Ohio Mar. 31, 2008) (unreported, Frost, J.) (awarding approximately 30%).[6]

Plaintiffs' requested fee is fair and reasonable compensation for Class Counsel's efforts in light of the following factors considered by the Sixth Circuit: (1) "the value of the benefit rendered to the plaintiff class"; (2) "the value of the services on an hourly basis"; (3) "the complexity of the litigation"; (4) "whether the services were undertaken on a contingent fee basis"; (5) "the professional skill and standing of counsel involved on both sides"; and (6) "society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others." *Bowling v. Pfizer, Inc*., 102 F.3d 777, 780 (6th Cir. 1996); *see also Kogan*, 193 F.R.D. at 503 (laying out factors). As the Court previously found, "[a]ll of the relevant factors here support the requested fee." (7/11/12 Order at 5.)

1. Class Counsel Secured a Valuable Benefit for the Class

A recovery of $303,600,000 from Defendants is a significant success and of substantial benefit to the class. These settlements are likely by far the largest settlement of any antitrust case litigated in this District. Class members will be eligible to receive settlement payments based on their *pro rata* share of the class-eligible milk volume, estimated to be, on average, $26,000 per class member. (*See* 2/14/12 Order, Ex. A at ¶ 15, Dkt No. 1782-1 (estimating $13,000 per class member for the first $145 million payments).) In addition, $303,600,000 is almost three-quarters of the total damages calculated by Plaintiffs' expert in December 2012. (*See* 12/5/12 Supp. Rpt. of Dr. Gordon Rausser at 12 (calculating class damages of $415,000,000).) It is unquestionable that this monetary recovery is of substantial benefit to the class. *See Lazy Oil Co. v. Witco Corp*., 95 F. Supp. 2d 290, 339 (W.D. Pa. 1997) ("[C]ourts have determined that a settlement can

[6] This unreported decision is attached hereto as Exhibit B.

be approved even if the benefits amount to a small percentage of the recovery sought.… '[T]here is no reason…why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.'") (quoting *Detroit v. Grinnell Corp*., 495 F.2d 448, 455 n.2 (2d Cir. 1974)).

The settlements with DFA Defendants and SMA/Baird include many valuable and important changes in the manner in which DFA and SMA conduct business, the way in which milk is marketed in the Southeast, and how DFA and SMA interact with Southeast dairy farmers.[7] (1/17/13 DFA Defs. Settlement Agmt. § 7, Dkt No. 1922-3.) The significance of the conduct and structural remedies has already been demonstrated: For example, Dean recently cancelled its Outsourcing Agreement with DMS; Dean cancelled full-supply agreements for several of its Southeast bottling plants; and, as a result of the present settlement, DFA will remove the penalty provisions for the cancellation of additional full-supply agreements. With these changes, DFA has gone from controlling approximately 90% of the fluid Grade A milk produced in the Southeast (*see* Amend. Compl. at ¶ 36) to only 30% of the Class I volume in the Southeast (*see* DFA Defs. Settlement Agmt. at ¶ 7.4(a)).

In addition to the structural relief obtained in the SMA/Baird settlement, DFA Defendants have agreed to implement the following meaningful changes in how they conduct their business. First, DFA will increase Class I utilization by reducing or eliminating milk shipped to one or more facilities in Orders 5 and 7 where milk is currently processed for Class III usage, pursuant to Settling Defendants' guarantee to increase uniform prices in those Orders by $9.3 million per year. (*See id.* at ¶ 7.2(a)-(c).) Second, DFA will remove monetary penalties for

[7] Class Counsel previously explained in detail the structural relief achieved in the SMA/Baird Settlement. (*See* 4/2/12 Mot. for Attorneys' Fees at 6-7, Dkt No. 1808.)

cancellation of full-supply agreements for Country Delite in Nashville and Ryan Foods in Murray. (*See id*. at ¶ 7.4(a).) Also, DFA will not, during the term of the Agreement, enter into any other full-supply agreements with bottling plants in Orders 5 or 7. (*See id*.) Third, Settling Defendants agree to release the materials previously agreed in filings at Docket Nos. 1829 and 1848, which amounts to hundreds of documents, in addition to all discovery materials previously made public. (*See id*. at ¶ 7.4(b).) Fourth, DFA will amend the membership agreements for Orders 5 and 7 members to make it easier for them to change marketers.[8] (*See id.* at ¶ 7.4(c).) Fifth, DFA will reconfigure checks for Orders 5 and 7 members to reflect the monies received for their milk and the deductions from their mailbox price.[9] (*See id.* at ¶ 7.4(d).) Sixth, DFA financial reports will be prepared in accordance with generally accepted accounting principles (*see id*. at ¶ 7.4(e)), and DFA will be audited by a nationally-recognized accounting firm (*see id*. at ¶ 7.4(e)(vi)). Seventh, DFA senior management and Audit Committee members will affirmatively represent they are responsible for the preparation, integrity, and accuracy of DFA's annual financial report. (*See id*. at ¶ 7.4(e)(vii).) Eighth, DFA will post on its member-only website an annual disclosure of all material related-party transactions, specifically broken out and identified by transaction. (*See id*. at ¶ 7.4(e)(iii).) Ninth, at its annual meeting, DFA will disclose to its delegates all material related-party transactions (*see* above) as well as DFA's

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[8] DFA Defendants agreed to add this language: "However, this Agreement may be terminated by either party during the ninety (90) day period immediately prior to the Anniversary Date by giving at least thirty (30) days written notice to the other party. The termination will be effective on the Anniversary Date unless otherwise modified, at the request of the member, for a period not to exceed fifteen days after the Anniversary Date to accommodate members' particular milk marketing needs." (*See* DFA Defendants' Settlement Agmt, at ¶ 7.4(c).)

[9] Specifically, DFA Defendants agreed to reconfigure milk checks to reflect revenues received/proceeds available to pay, agency and cooperative deductions, each shown as an average per hundredweight of milk, and the individual member's applicable premiums, incentive payments, and mailbox price. Also, the checks will show the average Federal Order blend price for each member's pay zone. (*See id.* at ¶ 7.4(d).)

financial results from its participation in joint ventures and off-balance sheet transactions, specifically broken out and identified by transaction. (*See id*. at ¶¶ 7.4(e)(iii) and (v).) Tenth, DFA will disclose the identity of the members of its board of directors and its committees and their generally applicable per diem payment rate compensation. (*See id.* at ¶ 7.4(e)(ii).) Eleventh, DFA senior executive management and board members will execute annual conflict of interest certifications, which will be subject to review by DFA's Audit Committee and a report by the Committee at DFA's annual meeting. (*See id*. at ¶ 7.4(e)(iv).) Twelfth, DFA will facilitate a vote by its delegates on resolutions considering whether: (1) DFA should annually disclose its top five senior executives' compensation and incentives; (2) DFA members should be allowed to opt out of DFA's block vote; and (3) delegates and candidates to be delegates may obtain a list of DFA members in their districts. For each resolution, DFA's CEO will provide a neutral presentation as to the pros and cons as part of DFA's communications to delegates regarding its annual meeting. In addition, DFA's Southeast Area Council will provide to its members the text of the CEO's pros and cons as well as the names and contact information for the council member and delegate from each member's district who will be attending the annual meeting at which the resolutions will be considered. (*See id*. at ¶¶ 7.4(e)(i), 7.4(f), and 7.4(g).)

This important structural relief, which would not have been undertaken absent this litigation, will provide significant long-term economic benefits to all Southeast dairy farmers in addition to the substantial cash payments. Achieving these significant benefits for thousands of dairy farmers supports Class Counsel's fee request. *See In re Visa Check/ Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 524 (E.D.N.Y. 2003) (considering the injunctive relief awarded in determining an appropriate fee award).

2. Class Counsel Expended Significant Time and Labor

Final approval of the DFA Settlements will represent a benefit obtained from over 126,000 hours of legal work. (*See* Abrams Decl., ¶ 3.) This matter involves very complex issues, which where vigorously litigated by all nine Defendants. Unquestionably, Class Counsel's efforts in this case have been extensive. Class Counsel began prosecuting this case over five and a half years ago, after a one-year investigation of the dairy industry in the Southeast. The formidable defense began shortly after the complaints were filed, when Class Counsel (and separate counsel prior to consolidation) responded to numerous motions to dismiss. (*See id*. at ¶ 4.) The Court previously acknowledged "there is absolutely no question that counsel has spent a remarkable amount of time preparing and litigating this case…[and] [t]he quality of the work done by class counsel has been exceptional, not only with respect to the pleadings filed but also the oral advocacy during oral argument on various motions." (7/11/12 Order at 6.)

During discovery, Class Counsel reviewed, analyzed, and organized for use over 5,000,000 pages of documents produced by Defendants, in addition to the over 95,000 pages produced by third parties. (*See* Abrams Decl., ¶ 5.) Obtaining these documents from Defendants and third parties required hundreds of hours of Class Counsel's time participating in meet and confer sessions and exchanging dozens of letters, in an effort to resolve discovery issues without Court intervention. (*See id*.) While disputes were sometimes resolved informally, the parties were often unable to reach agreement, forcing Plaintiffs to file 17 motions to compel and other discovery motions. (*See id*. at ¶ 6.) Many of these motions were subject to another round of briefing after both sides moved to reconsider or appeal Magistrate Judge Inman's decisions, and sometimes decisions of this Court. (*See id*.) In addition, Plaintiffs produced over ten thousand pages of documents, (*See id*. at ¶ 5), and opposed several discovery motions filed by Defendants.

(*See id*. at ¶ 6.) Class Counsel and Plaintiffs also produced hundreds of pages of interrogatory responses. (*See id*. at ¶ 5.)

During discovery, Class Counsel took 80 depositions of fact witnesses, and defended or otherwise attended 30 depositions taken by Defendants. (*See id*.) Plaintiffs also conducted extensive expert discovery. In the class certification phase of the case, Class Counsel consulted extensively with John Beyer, Plaintiffs' expert, and deposed Defendant's class expert, Catherine Morrison-Paul. (*See id*. at ¶ 7.) Towards the end of discovery and throughout trial preparation, Class Counsel frequently consulted with two experts, Frank Scott and Gordon Rausser. (*See id*.) In addition, Class Counsel deposed Defendants' five experts (Kalt, Elzinga, Peterson, Ortego, and Herbein). (*See id*.) Class Counsel also filed three *Daubert* motions to exclude Defendants' experts, and opposed Defendants' five motions to exclude Professors Scott and Rausser. (*See id*.)

Class Counsel filed extensive briefs and evidence in support of class certification and responded to Defendants' six motions for summary judgment and voluminous statements of fact. (*See id*.) Class Counsel also performed significant work in opposing Defendants' two Rule 23(f) Petitions for Leave to Appeal (which entailed supplemental briefing) as well as several motions to decertify the class. (*See id*.)

Class Counsel's ability to prosecute this case was further complicated by the robust protection afforded by the Protective Order. (*See id*. at ¶ 8.) Defendants designated significant parts of their document productions and almost all deposition transcripts as "Confidential" or "Highly Confidential." (*See id*.) These designations prohibited Class Counsel from filing many of its briefs and supporting evidence on the public record. (*See id*.) Plaintiffs filed multiple motions requesting the Court modify the Protective Order, and were also required to follow the

sealing procedures put in place by the Court. (*See id*.) Accordingly, for many of Plaintiffs' filings, Class Counsel would: (1) file a brief and exhibits under seal, which required multiple hard copies and a CD hand delivered to the Court; (2) confer with Defendants and third parties about the materials contained in the briefs to determine whether information must remain sealed; (3) file a redacted version of the brief and exhibits, redacting all purported "Confidential" and "Highly Confidential" information; and (4) draft responses to Defendants' objections to unsealing the information. (*See id*.) Complying with this procedure required a significant amount of time and resources by Class Counsel. (*See id*.)

As trial approached, Class Counsel prepared pretrial submissions including over 1,000 exhibits and hundreds of deposition designations, and identified dozens of potential witnesses. (*See id.* at ¶ 9.) Class Counsel filed 18 motions *in limine*, and opposed Defendants' 57 motions *in limine*. (*See id*.) Plaintiffs and Class Counsel were prepared to commence the 6-7 week trial when the trial was postponed in August 2011. (*See id*.) Plaintiffs and Class Counsel continued to prepare for trial after it was rescheduled several times until the settlement with DFA Defendants was reached in January 2013.

Finally, Class Counsel participated in many mediation sessions over the past five years. (*See id.* at ¶ 10.) Each of these sessions required preparation of materials for the mediator's consideration and took the time of Class Counsel's most senior lawyers. (*See id*.) Class Counsel also participated in countless settlement meetings and discussions with DFA Defendants, Dean, SMA, and Baird to secure the settlements.

In total, Class Counsel spent over 126,000 hours prosecuting this case. In addition, Class Counsel will continue to spend time handling the administration and payment of the three settlements over the next four years. Presently, for example, Class Counsel confers with Rust

Consulting on an almost daily basis regarding submitted claim forms, audits of those claim forms, distribution of payments, and correspondence with Class members. (*See id.* at ¶ 12.) Class Counsel also frequently consults with JPMorgan, the bank maintaining the escrow accounts with the Settling Defendants' settlement payments. (*See id.*)

The Court "cross-checked" the prior percentage-of-the-fund fee request by using the lodestar method. Cross-checking the current percentage of the fund fee request using the lodestar method confirms that the requested award is fair and reasonable. As the Court is aware, a lodestar calculation requires the court to multiply the number of hours counsel reasonably expended on the case by their reasonable hourly rate. *See Isabel v. City of Memphis*, 404 F.3d 404, 415 (6th Cir. 2005). The Sixth Circuit also typically adds a "multiplier" to that number to account for the risk in handling the case on a contingency basis. *Id.; see also Stanley*, 2009 U.S. Dist. LEXIS 114065, at *9.

Here, Class Counsel expended over 126,000 hours during the litigation, and multiplying the historical hourly rates of counsel (with no multiplier) results in a lodestar of $53,126,310.17. (*See* Abrams Decl., ¶ 3.) Plaintiffs recognize that the Court previously awarded counsel $48,333,333.33 in fees in connection with the Dean and SMA/Baird settlements. Taking this into account results in a total fee request of $101,200,000 for the three settlements. Thus, Class Counsel's request for $101,200,000 in total fees from all settlements against an investment of $53,126,310 yields a lodestar multiplier of 1.90 percent, which is well within the range permitted in this Circuit. *See* 7/11/12 Order at 7 (citing *In re Cardinal Health*, 528 F. Supp. 2d at 767 (noting that "[m]ost courts agree that the typical lodestar multiplier in a large . . . class action[] ranges from is 1.3 to 4.5")); *Worthington*, at *19 (range of 1.5 to 5 is appropriate lodestar multiplier); *Cardizem* (unreported) (approving 30% fee award that equates to lodestar multiplier

of 3.7). Notably, in *Cardinal Health*, counsel and their staff worked 51,970 hours at a "reasonable average hourly billing rate of approximately $353.63" for a total lodestar of $18,378,122.75. 528 F. Supp. 2d at 767. The court approved a $108,000,000 fee award – 18% of the settlement, but almost *six times* the counsel's lodestar. *Id.* at 768. The court reasoned that it was "not uncomfortable with deviating from the normal range of lodestar multipliers.…[g]iven the outstanding settlement in this case and the noticeable skill of counsel." *Id*.

3. The Complexity of the Litigation Supports the Requested Award

Antitrust class actions are "arguably the most complex action[s] to prosecute. The legal and factual issues involved are always numerous and uncertain in outcome." *In re Linerboard Antitrust Litig*., 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003) (quoting *In re Motorsports Merchandise Antitrust Litig*., 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000)); *see also In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 533 (E.D. Mich. 2003) (observing that "[a]ntitrust class actions are inherently complex"); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc*., 396 F.3d 96, 122 (2d Cir. 2005) (affirming district court's [fee award] because, *inter alia*, "antitrust cases, by their nature, are highly complex"); *In re Shopping Carts Antitrust Litig*., 1983 WL 1950, at *1, *7 (S.D.N.Y. Nov. 18, 1983) ("antitrust price fixing actions are generally complex, expensive and lengthy"). This Court previously recognized the complexity of this case, explaining that "[a]lmost every aspect of this case has been hotly contested and litigated extensively and the case presents several somewhat novel issues." (7/11/12 Order at 7.) In addition, unlike many private antitrust class actions brought on a contingency basis, Plaintiffs did not have the benefit of the Department of Justice narrowing complex issues through prior pleas, agreements, or lawsuits against Defendants.

This case also required Class Counsel to become well-versed in the "inner workings of the dairy industry [which] are complicated in the extreme." (12/8/10 Order at 3, Dkt No. 1186.) Class Counsel consulted extensively with the class representatives, industry and economic experts, and other witnesses to master the complex concepts at issue in this case. The Court has repeatedly acknowledged the complexity of this case: "This is an incredibly complex case, involving arcane issues far beyond the understanding of the average juror." (12/8/10 Order at 4, Dkt No. 1193; *see also* 1/6/09 Tr., at 13, Dkt No. 214 ("THE COURT: I don't think in the years I practiced law I was ever involved in a case that is quite this complicated"); 8/17/10 Order at 23, Dkt No. 934 ("This litigation is complex.").)

In addition to the issues, this litigation was procedurally complex. It began with six different dockets, all of which were consolidated into one MDL. (*See* Abrams Decl. at ¶ 4.) Defendants were located in several different states, requiring substantial coordination and negotiation with defense counsel on scheduling matters – including the dates and locations of over 100 depositions. (*See id*. at ¶ 5.) As described in part I.B.2, *supra*, millions of pages of documents were reviewed, over 100 depositions taken or defended, scores of briefs filed – including multiple motions to dismiss, class certification, summary judgment, and *Daubert* motions – and nine different expert opinions provided. (*See id.* at ¶¶ 4-7.)

The *Cardizem* court's reasoning for awarding a 30% fee to the Sherman Act plaintiffs is instructive. In that case, the court explained:

> The complexity of this case cannot be overstated. Antitrust class actions are inherently complex. The complexity of this antitrust case was enhanced by additional, highly technical, causation-related issues; i.e., regulatory issues . . . . Despite its complexity, Class Counsel was able to efficiently and effectively prosecute and settle this matter.

Id. (unreported), at 20-21. The extensive amount of work and coordination by Class Counsel supports the award here. *See F&M*, 1999 U.S. Dist. LEXIS 11090, at *12 (approving fee award

because attorneys had to "survive numerous motions to dismiss," "face[] vigorous opposition to their efforts to obtain class certification," and "manage complex discovery").

4. The Contingent Nature of the Fee and the Financial Risk Carried by Class Counsel

Courts in this Circuit recognize that the risk of the litigation is an important factor to consider when awarding fees. *Stanley*, 2009 U.S. Dist. LEXIS, at *8 ("Numerous cases recognize that the contingent fee risk is an important factor in determining the fee award."); *see also* 7/11/12 Order at 7 (factor weighs in favor of fee award where "counsel undertook this case on a contingency-fee basis and accepted a substantial risk of non-payment for legal work and reimbursement of out-of-pocket expenses advanced"). Class Counsel undertook this case on a contingency basis with the expectation that a successful result would be rewarded with a fee to reflect the risk of non-payment. "Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of the result." *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981), *overruled on other grounds by Int'l Woodworkers of Am. v. Champion Int'l Corp.*, 790 F.2d 1174 (5th Cir. 1986). "If this 'bonus' methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing." *Behrens v. Wometco Enter., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988).

An antitrust case of this complexity and magnitude, involving monopsony claims, which are rarely brought, and in which Defendants have significant resources, experienced counsel, and a long track record of litigating rather than settling, posed very significant risks for Plaintiffs. Plaintiffs successfully navigated Defendants' pretrial challenges over the course of five years including motions to dismiss, class certification, summary judgment, *Daubert* motions, motions

in limine and two petitions to appeal. To do so, Plaintiffs needed to overcome Defendants' vigorous arguments concerning the relevant market, the relative merits of full-supply agreements, Capper-Volstead immunity, filed rate exemption, and alleged class conflicts. Even if Plaintiffs succeeded in overcoming those arguments and established liability at trial, Plaintiffs would risk recovering minimal – or no – damages. *See, e.g.*, *United States Football League v. NFL*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) (finding liability, but awarding nominal damages). And, even if Plaintiffs were to establish liability and damages at trial, they would still be at risk of having the judgment overturned after years of appeal.

This case is no exception to the rule. Here, Class Counsel have invested tens of thousands of hours and advanced many millions of dollars, despite the very real risk of recovering nothing for their efforts. Class Counsel alone have borne the risk of the case being dismissed or of not prevailing at trial. This risk carried by Class Counsel supports the requested fee award. *See Kogan*, 193 F.R.D. at 504 (factor weighed in favor of fee where "[p]laintiffs' counsel undertook this action on a contingency fee basis and made significant cash outlays to finance it"); *Stanley*, 2009 U.S. Dist. LEXIS 114065, at *8 (awarding fees because, *inter alia*, "class counsel worked for over four years without payment, risking recovery of nothing in the event they were to generate no benefit for the class").

5. Skill and Experience of Class Counsel

Class Counsel – and defense counsel – have extensive experience in complex litigation, antitrust litigation, and class actions. (*See* Abrams Decl. at ¶ 3; *see also* 7/11/12 Order at 7 (explaining that Class Counsel "have efficiently and competently managed their enormous task and have vigorously and effectively prosecuted the case on the behalf of the Class. They have also been opposed by equally experienced and highly competent counsel for defendants and have achieved an excellent result for their clients.").) The Settlements were reached only after

vigorous prosecution of the case and significant arms-length negotiations with highly-competent and experienced opposing counsel. A recovery of $303,600,000 plus substantial and valuable conduct and structural relief is a significant success and of enormous benefit to class members, and speaks volumes to Class Counsel's competence, experience, and diligence in obtaining the Settlements. As the Court previously observed, "Class Counsel in this case are experienced in antitrust and class action litigation…and they have to date aggressively and vigorously prosecuted this case." (9/7/10 Order, Dkt No. 934.) Class Counsel have been confronted with highly-skilled attorneys and have achieved an excellent result for the class in the face of such challenges. *See F&M*, 1999 U.S. Dist. LEXIS 11090, at *19 ("The skill and competence of the attorneys for the plaintiffs was evident, especially when viewed on the basis of the results that they obtained in this case, while the excellent advocacy skills of the defense counsel . . . were equally evident").

6. Society Has an Important Stake in this Lawsuit

It is well-established that there is a "need in making fee awards to encourage attorneys to bring class actions to vindicate public policy (e.g., the antitrust laws) as well as the specific rights of private individuals." *In re Folding Carton Antitrust Litig*., 84 F.R.D. 245, 260 (N.D. Ill. 1979). Courts in the Sixth Circuit weigh "society's stake in rewarding attorneys who [win favorable outcomes] in order to maintain an incentive to others.… Society's stake in rewarding attorneys who can produce such benefits in complex litigation such as in the case at bar counsels in favor of a generous fee.…Society also benefits from the prosecution and settlement of private antitrust litigation." *Cardizem*, 218 F.R.D. at 534 (quoting *F&M*, 1999 U.S. Dist. LEXIS 11090, at *18).

Further, the Supreme Court has recognized the need for private litigation to enforce the antitrust laws. *See Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983) ("This Court has

emphasized the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws."). Here, the significant recovery Class Counsel achieved makes clear to the dairy industry, and to other businesses, that collusion will not be tolerated. Society as a whole stands to benefit from the work of Class Counsel.

Fee awards in cases like this incentivize attorneys to act as private attorneys' general to enforce compliance with the antitrust laws and secure relief for injured parties (particularly injured parties challenging anticompetitive conduct by defendants with far greater resources). Awards of attorneys' fees allow and ensure the zealous enforcement of class members' legal rights. *See* 7/11/12 Order at 8 ("anti-competitive conduct such as that alleged in this case would likely go unchallenged absent the willingness of attorneys to undertake the risks associated with such expensive and complex litigation"); *Kogan*, at 504 (approving 31% fee because "the amount…is substantial and therefore, would create an incentive for other attorneys to take on similar cases").

C. The Court Should Authorize Lead Counsel to Determine Allocations to Specific Firms

Class Counsel have collaborated on this litigation for five years under the supervision of Lead Counsel appointed by the Court in accordance with the Court's Case Management Order. (*See* Abrams Decl. at ¶ 3.) Courts generally approve joint fee applications that request a single aggregate fee award with allocations to specific firms determined by lead counsel. *See, e.g., In re Linerboard Antitrust Litig*., 2004 WL 1221350, at *17-18 (E.D. Pa. June 2, 2004) (approving joint fee petition with specific allocations to be determined by liaison counsel); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 357 (N.D. Ga. 1993) ("Ideally, allocation is a private matter to be handled among class counsel."). Class Counsel has directed this case from

its inception and are "better able to describe the weight and merit of each [counsel's] contribution." *Linerboard*, 2004 WL 1221350, at *18. Allowing lead counsel to allocate the fee award "relieves the Court of the difficult task of assessing counsels' relative contributions." *Id.* (internal quotations omitted).

Plaintiffs request that the Court approve the aggregate amount of the fee award and allow Lead Counsel to allocate the fee among the firms representing Plaintiffs, in Lead Counsel's good faith judgment, and consistent with the authority delegated to Lead Counsel by the Case Management Order. The Court would, of course, retain jurisdiction for any disputes that cannot be resolved by counsel over the allocation of the award. *See In re Automotive Refinishing Paint Antitrust Litigation*, 2008 WL 63269, at *8 (E.D. Pa. Jan. 3, 2008) (holding lead counsel shall allocate the fees, but the court will retain jurisdiction to address any disputes).

II. THE EXPENSES REQUESTED ARE REASONABLE

Plaintiffs request reimbursement of costs incurred in litigating this case and obtaining the settlements through February 28, 2013, in the amount of $798,237.66. (*See* Abrams Decl. at ¶ 3.) It is well-settled that plaintiffs who have created a common fund for the benefit of a class are entitled to be reimbursed for their out-of-pocket expenses reasonably incurred in creating the fund. *See F&M*, 1999 U.S. Dist. LEXIS 11090, at *20 ("Expense awards are customary when litigants have created a common settlement fund for the benefit of a class."). The touchstone for reimbursing expenses is whether they are of the type typically billed to paying clients in the similar cases. *See Cardizem* (unreported), at 22.

Here, a large percentage of Class Counsel's out-of-pocket expenses consist of fees paid to experts who were pivotal in helping Plaintiffs to certify the class, defend against summary judgment, prepare for trial, and obtain these settlements. (*See* Abrams Decl. at ¶¶ 13-14.) In addition, Class Counsel had to travel across the country for depositions, hearings, and meetings

with witnesses, experts, and class representatives. (*See id.*) Other expenses include the cost of payments to court reporters for depositions, computerized research, copying costs, and delivery. (*See id.*) These are the types of expenses customarily charged to paying clients. Class Counsel's expenses, detailed in the attached declarations, are reasonable and should be reimbursed in full. *See* 7/11/12 Order at 10 (approving reimbursement of $7,408,920.39 in expenses as "legitimate and [] reasonable"); *Cardizem* (unreported) at 22 ("The Court finds that the categories of expenses for which Class Counsel seek reimbursement are the type routinely charged to their hourly fee-paying clients and thus should be reimbursed out of the Settlement Fund.").

III. THE COURT SHOULD APPROVE THE REQUESTED INCENTIVE AWARD TO CLASS REPRESENTATIVES

Plaintiffs request that the Court approve incentive awards for the 16 class representatives, in the amount of $10,000 each, or $160,000 total.[10] The Notice to the Settlement Class advised class members that Class Counsel would apply for incentive awards for the class representatives. (*See* Settlement Notice at 1, Dkt No. 1922-5.)

"Incentive awards are fairly typical in class action cases. Such awards are discretionary and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009) (citations omitted). The common fund theory allows courts to award additional compensation to the class representatives for their efforts including investigation, document production, and deposition appearances. *Hainey v. Parrott*, 2007 WL

[10] The class representatives are: Sweetwater Valley Farm, Inc., Barbara & Victor Arwood, Jeffrey Bender, Randel Davis, Farrar & Farrar Dairy, Inc., Fred Jaques, John Moore, D.L. Robey Farms, Robert Stoots, Virgil Willie, Thomas Watson, James & Eva Baisley, Stephen Cornett, McCain Dairy, Payne Dairy, and Jerry Holmes.

3308027, at *5-6 (S.D. Ohio Nov. 6, 2007) (approving incentive awards of $50,000 each for class representatives out of a settlement fund of $6 million); *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 787 (N.D. Ohio 2010) ("Courts within the Sixth Circuit…recognize that, in common fund cases and where the settlement agreement provides for incentive awards, class representatives who have had extensive involvement in a class action litigation deserve compensation above and beyond amounts to which they are entitled to by virtue of class membership alone.").

Throughout this litigation, the class representatives have communicated closely with Class Counsel, provided documents and information essential to the litigation of this case, submitted to depositions, and assisted with the preparation of this case for settlement and trial. (*See* Abrams Decl. at ¶ 16.) This Court previously observed that "it appears that the class representatives have had extensive involvement in this litigation and deserve compensation above and beyond the amounts they will be entitled to by virtue of class membership alone." (7/11/12 Order at 11.) The amounts requested by Plaintiffs are reasonable in light of other incentive awards approved by courts in this Circuit. *See Hainey*, 2007 WL 3308027, at *5 (approving $50,000 incentive awards); *Cardizem* (unreported) at 23 (approving $20,000 incentive awards); *Worthington*, 2006 U.S. Dist. LEXIS 32100, at *24 (approving $10,000 incentive awards); *F&M*, 1999 U.S. Dist. LEXIS 11090, at *20-21 (approving $7500 incentive awards).

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court grants its motion and award $52,866,666.67 in attorneys' fees, reimburse $798,237.66 in expenses, and award $160,000 in incentive awards for the class representatives.

TAB 13A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In re Polyurethane Foam Antitrust Litigation	Case No. 1:10 MD 2196
	MEMORANDUM OPINION AND ORDER GRANTING SETTLEMENT MOTIONS
This document relates to: DIRECT PURCHASER CLASS	JUDGE JACK ZOUHARY

INTRODUCTION

Pending before this Court are the Direct Purchaser Class's Motion for Final Approval of the Leggett & Platt and Carpenter Settlements (Doc. 1439) and Motion for an Award of Attorneys' Fees and for Reimbursement of Expenses (Doc. 1441).

BACKGROUND

In these consolidated proceedings, direct purchasers allege Defendants conspired to fix, raise, and maintain the price of slabstock, fabricated foam, and carpet underlay. The litigation has been lengthy, hard fought, and complex. A substantial segment of this multidistrict litigation -- representing about three-quarters of Defendants' sales to direct purchasers -- involves the claims of a nationwide class of direct purchasers ("Direct Purchasers"). Direct Purchasers and Defendants have battled through motions to dismiss; engaged in extensive document, deposition, and expert discovery, including many discovery disputes; litigated class certification (which this Court granted in April 2014), including a Federal Civil Rule 23(f) petition for review (which the Sixth Circuit denied in September 2014), and briefed a pending petition for writ of *certiorari*, seeking review of the Sixth

Circuit's order declining to accept Defendants' petition; and (most recently) briefed summary judgment, which this Court largely denied. Trial will begin in April 2015.

The Proposed Settlement Terms

In November 2014, Direct Purchasers moved for preliminary approval of a classwide settlement with Defendant Leggett & Platt, Inc. ("Leggett & Platt"), and for approval of notices of class certification and settlement (Doc. 1379). Later that month, Direct Purchasers moved for preliminary approval of a classwide settlement with Defendants Carpenter Co., E.R. Carpenter L.P, and Carpenter Holdings, Inc. (the "Carpenter Defendants"), and for approval of notices of class certification and settlement (Doc. 1400). This Court granted the motions, as well as related stipulations (Docs. 1391, 1397, 1406 & 1411).

Under the proposed settlements, and in exchange for a release of all Direct Purchaser claims against Leggett & Platt (as well as the "Leggett & Platt Released Parties") and the Carpenter Defendants (as well as the "Carpenter Released Parties"), Direct Purchasers receive:

- $39.8 million from Leggett & Platt, including an initial $4 million cash payment;
- $108 million from the Carpenter Defendants, including an initial $20 million cash payment (this Court refers to the two funds together as the "Settlement Fund"); and
- Trial testimony from up to two Leggett & Platt employees and up to two Carpenter Defendant employees for the purpose of admitting Leggett & Platt and Carpenter documents at trial.

Leggett & Platt and the Carpenter Defendants deny all allegations of wrongdoing.

Expert discovery in this case helps put those sums in perspective. Direct Purchasers' primary impact and damages expert, Dr. Jeffrey Leitzinger, constructed multiple regression models to

calculate whether and to what extent class members suffered antitrust impact. He then used those impact results to calculate a classwide damages figure. If credited by a jury, and based on best-case-scenario liability findings and late-December 2014 opt-out estimates, Leitzinger's model estimates classwide overcharges (prior to trebling) of $815 million. (At the fairness hearing, and based on the result of the opt-out period, Class Counsel put the figure closer to $750 million) (Doc. 1499 at 6). Leggett & Platt and Carpenter Defendant sales would account for nearly $310 million of those overcharges, based on their 38 percent share of the affected product markets. The Settlement Fund therefore equals roughly 48 percent of the Leggett & Platt and Carpenter Defendant overcharges Direct Purchasers might prove following a best-case outcome at trial.

This Court set a January 26, 2015 deadline for commenting on or objecting to the proposed settlements. Direct Purchasers' approved short- and long-form notice (issued to class members by direct mail and by publication notice) explained how an absent class member could comment on or object to the proposed settlements. Out of more than 48,000 direct mail recipients and the likely thousands more class members who received publication notice of the settlement (*see* Doc. 1475-1 at 3), only one individual, Michael Narkin ("Narkin"), and one business, Hall Furniture ("Hall"), objected to the settlement. Narkin objects to both settlements (*see* Doc. 1475-6), Hall, only to the Leggett & Platt settlement (*see* Doc. 1475-7). Direct Purchasers responded to the objections (*see* Doc. 1475).

Leggett & Platt and the Carpenter Defendants also complied with the Class Action Fairness Act of 2005 ("CAFA") requirement to provide certain federal and state government officials notice of the settlement (*see* Docs. 1413 & 1427). Leggett & Platt's CAFA notice period expired on

February 11, 2015 (*see* Doc. 1498), and the Carpenter Defendants' CAFA notice period expired on February 22, 2015 (*see* Doc. 1521). No CAFA-noticed parties objected to either settlement.

Class Counsel's Fee And Expense Request

Following preliminary settlement approval and dissemination of class notice, in late December 2014 Direct Purchaser Class Counsel ("Class Counsel")[1] moved for an award of attorneys' fees and reimbursement of expenses, to be paid out of the $147.8 million Settlement Fund. Specifically, Class Counsel seek a $52,473,855.80 cut of the Settlement Fund, including:

- Thirty percent of the Settlement Fund for attorneys' fees, or roughly $44.34 million; and
- Reimbursement of Class Counsel's incurred expenses, amounting to $8,133,855.80.

If granted, Class Counsel's fee and expense award would leave roughly $95,326,144.20 to be divided among class members, or 64.5 percent of the Settlement Fund.

The Leggett & Platt and Carpenter Defendant settlements are (respectively) the second and third cash settlements in the Direct Purchaser case. In June 2013, this Court granted final approval of a Direct Purchaser settlement with (among others) Vitafoam, Inc. and Vitafoam Products Canada Ltd. (*see* Doc. 597). This Court also granted Class Counsel's motion for an award of attorneys' fees and reimbursement of costs. Class Counsel received as a fee award $3,101,267.63, a 30 percent share of the Vitafoam settlement fund (*see* Doc. 1441 at 8). Class Counsel received an additional $908,315.35 for reimbursement of expenses (Doc. 598 at 4). As a cross-check to the Vitafoam

[1] Class Counsel includes an Executive Committee comprised of six law firms, in addition to the Co-Lead Counsel firms of Boies, Schiller & Flexner LLP and Quinn Emanuel Urquhart & Sullivan, LLP.

settlement fee request, Class Counsel provided a lodestar of roughly $25 million, an estimate supported by time logs submitted upon this Court's request (*see* Doc. 556 at 50; *see also* Doc. 561-1).

Class Counsel again estimate a lodestar cross-check for their percentage-of-the-fund fee request, and this Court again requested time logs supporting that request (*see* Doc. 1492). Through late December 2014, Class Counsel's estimated lodestar totals $52,274,968.55. Accounting for the portion of the Vitafoam settlement paid over to attorneys' fees, Class Counsel's request would leave them roughly $4,833,700.92 short of their December 2014 lodestar.

This Court held a fairness hearing on February 3, 2015 to consider the proposed settlements, objections to the settlements, and Class Counsel's request for an award of attorneys' fees and reimbursement of costs (*see* Doc. 1499).

STANDARDS OF REVIEW

"The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Federal Civil Rule 23(e). When a settlement proposal "would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate." Federal Civil Rule 23(e)(2). The fairness hearing should provide interested parties an opportunity to comment on or object to the proposed settlements; the hearing may otherwise be limited to probing only those issues necessary for finding that a proposed settlement is fair, reasonable, and adequate. *See Tenn. Ass'n of Health Maint. Orgs. v. Grier*, 262 F.3d 559, 567 (6th Cir. 2001).

"Several factors guide the inquiry: (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives;

(6) the reaction of absent class members; and (7) the public interest." *Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007). A settlement class, like a litigation class, must satisfy Federal Civil Rules 23(a) and 23(b). While this Court has discretion to accept or reject a proposed settlement, federal law favors settlement of complex class actions. *See In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 535 (3d Cir. 2004).

In a common-fund case like this one, this Court's award of attorneys' fees need only be "reasonable under the circumstances." *In re Sulzer Orthopedics, Inc*., 398 F.3d 778, 780 (6th Cir. 2005) (internal quotations marks omitted).

> In assessing the reasonableness of requests for fees in class actions resulting in the creation of a common fund, a court must consider factors that are not present in statutory fee shifting cases. The interest of class counsel in obtaining fees is adverse to the interest of the class in obtaining recovery because the fees come out of the common fund set up for the benefit of the class. In addition, there is often no one to argue for the interests of the class (that their recovery should not be unfairly reduced), since it is to be expected that class members with small individual stakes in the outcome will not file objections, and the defendant who contributed to the fund will usually have scant interest in how the fund is divided between the plaintiffs and class counsel.

Rawlings v. Prudential-Bache Prop., Inc., 9 F.3d 513, 516 (6th Cir. 1993). Facing a percentage-of-the-fund fee request, "[i]t is not difficult to demonstrate why courts cannot rationally apply any particular percentage -- whether 13.6 percent, 25 percent or any other number -- in the abstract, without reference to all the circumstances of the case." *In re Wash. Pub. Power Supply Sys. Sec. Litig*., 19 F.3d 1291, 1298 (9th Cir. 1994). Therefore, a district court may consider: "(1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation;

and (6) the professional skill and standing of counsel involved on both sides." *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996) (internal quotation marks and ellipsis omitted). And of course, different approaches to awarding fees come with different strengths and weaknesses. *See Rawlings*, 9 F.3d at 516–17 (comparing percentage-of-the-fund and lodestar fee awards).

ANALYSIS

The Class Settlements are Fair, Reasonable, and Adequate

Risk of Fraud or Collusion in Negotiating the Class Settlements. "Courts presume the absence of fraud or collusion in class action settlements unless there is evidence to the contrary." *Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d 521, 531 (E.D. Ky. 2010) (internal quotation marks omitted). There is no hint in the record that the $147.8 million Settlement Fund is the result of fraud or collusion between Class Counsel and defense counsel. Rather, the parties employed experienced mediators to engage in extensive discussions in four cities over the course of many weeks (*see* Doc. 1441-1 at 11–12). This Court is confident that the settlement terms are the product of hard-fought, arms-length negotiation between experienced antitrust lawyers.

Complexity, Expense, and Likely Duration of Litigation. In five weeks, Direct Purchasers will begin presenting their case to a jury. The trial will be lengthy, costly, and time consuming. If Direct Purchasers obtain a jury verdict, they then would have to defend that verdict through post-trial motions (inevitable in any complex litigation) and on appeal, when this Court's class certification decision (among other important interlocutory rulings) also will be fair game for appellate review. Direct Purchasers' lodestar cross-check reflects that the largest portion of attorney time and expense has been spent in discovery, which has now run its course. But, this litigation is far from complete.

See In re Telectronics Pacing Sys., Inc., 137 F. Supp. 2d 985, 1013 (S.D. Ohio 2001). Settlement avoids further expense, as well as the risks associated with further litigation.

Amount of Discovery to Date. The discovery record in this case is enormous. Direct Purchasers combed through 219 Defendant and third-party document productions, totaling 2.4 million documents that (combined) span 5.4 million pages and participated in or attended over 200 depositions (Doc. 1441-1 at 7).

They and their experts engaged in complex expert discovery. Leitzinger (for example) constructed several dozen multiple regression models to assess impact (if any) suffered by Direct Purchasers. He worked with a transactional dataset with roughly 50 million entries. Direct Purchasers and their experts then responded to many defense expert reports submitted by nearly a dozen experts. And each expert -- plaintiff and defendant -- was then deposed, some multiple times. This Court examined some of the experts during an evidentiary hearing.

All of this discovery matters for settlement purposes because it provides Direct Purchasers and the settling Defendants a clear picture of the relative merits of claims and defenses. The parties entered into these settlements with full view of the evidentiary record to assess the class claims.

Likelihood of Success on the Merits. "The fairness of each settlement turns in large part on the bona fides of the parties' legal dispute. Although this inquiry understandably does not require [this Court] to decide the merits of the case . . . [it] cannot judge the fairness of a proposed compromise without weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement." *Int'l Union, UAW*, 497 F.3d at 631 (internal quotation marks omitted).

The recent summary judgment briefing provides this Court insight into the relative strengths and weaknesses of Direct Purchasers' claims. The merits of those claims need not be recited here in detail except to note Defendants have strong jury arguments regarding how a fact-finder should treat competitor communications, industry competition, price increase announcement history and usage, market structure, and "opportunities-to-conspire" evidence. Defendants also have retained prominent economists and a statistician to testify that the jury should not credit Direct Purchasers' expert evidence. And Direct Purchasers, who carry the burden of proof, face the threat that their experts will fail to communicate their testimony in a way that is comprehensible to laypeople. All of which is to say, "[e]xperience proves that, no matter how confident trial counsel may be, they cannot predict with 100% accuracy a jury's favorable verdict, particularly in complex antitrust litigation." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 523 (E.D. Mich. 2003). In this Court's view, a jury could return (1) a no-liability verdict with respect to some or all Defendants, or (2) a substantially smaller damages figure than is contemplated by Leitzinger's best-case scenario assumptions, or (3) a "home run" for the Class. A settlement figure that equates to roughly 18 percent of the best-case-scenario classwide overcharges is an impressive result in view of these possible trial outcomes.

Opinions of Class Counsel. "Class Counsel's judgment that settlement is in the best interests of the class is entitled to significant weight, and supports the fairness of the class settlement." *In re Packaged Ice Antitrust Litig.*, 2011 WL 717519, at *11 (E.D. Mich. 2011) (internal quotation marks omitted). Class Counsel are rightly proud of the result in these settlements. At the fairness hearing, Class Counsel further explained the risks they run litigating this case on (effectively) a contingency fee basis and without the benefit of an active parallel criminal investigation, which exists in some other antitrust multidistrict litigation. Class Counsel compared the workload in this case to similar

cases (*see* Doc. 1499 at 8–15, 29–32, 36–37). Settling defense counsel likewise agreed that the settlement result is impressive, given the substantial risks Direct Purchasers face in further litigation (*see id*. at 20, 23).

Reaction of Absent Class Members to the Proposed Settlements. The Direct Purchaser Class reacted favorably to news of the settlement. First, the overwhelming majority of direct purchasers opted to remain members of the settlement classes. Substantial direct purchasers did not, but because those same direct purchasers have proceeded directly against Defendants (more or less actively) for several years, Class Counsel, Leggett & Platt, and the Carpenter Defendants no doubt anticipated these opt outs. Second, despite tens of thousands of class members receiving notice of the class settlement, only one class member objected.

Hall "objects to final approval of the proposed settlement on grounds that the the [*sic*] Notice does not include the Plan of Allocation which will describe the manner in which the net settlement funds will be distributed" (Doc. 1475-7 at 3). Hall "is left to decide whether the [*sic*] participate in the settlement without knowing whether, for example, the proposed plan will impose a minimum payment, cap his [*sic*] recovery, force him [*sic*] to choose between remedies or otherwise value his [*sic*] claim differently from those of other class members" (*id*. at 12). Hall likewise lacks information on how the Leggett & Platt settlement fund will be reduced if a certain opt-out threshold is crossed, triggering a settlement agreement provision that would reduce the size of the Leggett & Platt settlement fund (*id*.).

But the Leggett & Platt opt-out threshold has not been triggered. Hall's objection is therefore moot to that extent. This Court overrules Hall's objection to the extent it argues the approved notice is insufficient because it fails to explain the basis for divvying up the Settlement Fund among class

members. Even assuming the notice must contain an explanation of the plan of allocation (*see* Doc. 1475 at 12) (extensively collecting case law for the proposition that a plan of allocation need not be proposed prior to final settlement approval), Hall received an adequate explanation of how funds will be allocated to class members -- on a *pro rata* basis, based on Class Period purchases.

Narkin also objects. Direct Purchasers give this objection more attention than it deserves in their response, which this Court adopts. Narkin may not even be a class member -- no evidence, offered by Narkin or accessible to the Direct Purchaser Class, substantiates his vague claim of class membership. Further, he raises meritless allegations of collusion; worries about whether the settlement protects "sub-classes," which do not in fact exist; complains about his need to review discovery in this matter to assess his "claim," despite caselaw that states a class member has no such right to discovery (or only a qualified right, which Narkin's meritless objection does not warrant); speculates that Class Counsel "may have seen no need to engage in real discovery to determine what the case was worth," speculation that is resoundingly rejected by the discovery record; implies that courts have removed "Class Counsel" from class leadership positions they held in other cases, owing to "lack of integrity," when in fact Class Counsel in this case have no connection with the cases he cites; appears to believe attorneys' fees were part of the settlement agreement and "were acceptable to the defense," when in fact defense counsel played no role in Class Counsel's separately filed fee motion; and is a serial objector, whose carbon-copy objections district courts frequently reject as baseless (*see* Doc. 1475-6; *see also* Doc. 1475 at 4–11). This Court overrules his objection.

The Public Interest. Finally, there is a strong public interest in voluntary resolution of complex antitrust actions, *see In re Cardizem CD Antitrust Litig.*, 218 F.R.D. at 530, and no legitimate countervailing interest that weighs in favor of denying settlement approval.

Based on these considerations, the Leggett & Platt and Carpenter settlements are finally approved.

Class Counsel's Fee and Expense Request

Class Counsel seek a 30 percent share of the Settlement Fund, or roughly $44.34 million. In their briefs and during the fairness hearing, Class Counsel emphasized that they have pursued this case on their own. With the exception of certain information gained early in this litigation from government investigations, "[t]his is certainly not a case where class counsel have simply 'piggy-backed' on a government investigation or the work of others" (Doc. 1441 at 8).

For many of the reasons supporting a finding that the settlement is fair, reasonable, and adequate, this Court concludes Class Counsel's fee request is reasonable. The value of Class Counsel's work to the Direct Purchaser Class is apparent. Even deducting fees from the Settlement Fund, to date Direct Purchasers have recovered more than $100 million from settling Defendants. Counsel will still be substantially "under water," relative to their estimated lodestar, even after a second 30 percent fee award. Class Counsel represented to this Court that work in this case caused them to turn away billable hours from other clients, who would have been willing to pay Class Counsel's full hourly rates on a rolling basis (Doc. 1499 at 32). Finally, Class Counsel are respected antitrust practitioners. Class Counsel faced off against top members of the antitrust defense bar. *See Bowling*, 102 F.3d at 780. Considering these and other circumstances, this Court grants the 30 percent fee request with respect to each settlement fund.

In approving Class Counsel's prior fee request, this Court noted a 30 percent fee award "is not an indicator of future fee awards" and that this Court "may adjust fee awards downward to achieve a reasonable benchmark and prevent windfall" (Doc. 598 at 3). It reiterates that point today. As in

this ruling, this Court will assess any future fee requests in the context of prior settlements, prior fee awards, and updated lodestar cross-checks and supporting time logs. Today's fee award makes Class Counsel substantially whole. Depending on the nature of any future settlement, another 30 percent fee request may not be appropriate.

Finally, this Court awards Class Counsel $8,113,855.80 for reimbursement of expenses (*see* Doc. 1441-1 at 13 (listing expense categories)). "[T]he categories of expenses for which Plaintiffs' Counsel seek reimbursement are the type routinely charged to their hourly fee-paying clients and thus should be reimbursed out of the Settlement Fund." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. at 535.

This Court grants Co-Lead Counsel authority to "distribute the fees in a manner that, in the judgment of Co-Lead Counsel, fairly compensates each firm for its contribution to the prosecution of Plaintiffs' claims" (Doc. 1441 at 13 n.3).

CONCLUSION

For these reasons, Motion for Final Approval of the Leggett & Platt and Carpenter Settlements (Doc. 1439) and Motion for an Award of Attorneys' Fees and for Reimbursement of Expenses (Doc. 1441) are granted. Therefore:

1. Final approval of the Settlement Agreements is granted pursuant to Federal Civil Rule 23(e).

2. The Direct Purchaser Settlement Class consists of the certified Direct Purchaser Litigation Class minus the persons and entities who request exclusion from the Direct Purchaser Settlement Class. For the reasons explained in this Court's Order on Class Certification (*see* Doc. 1408), the Direct Purchaser Settlement Class meets the requirements of Rule 23 and is therefore certified for the purposes of this settlement.

3. The persons and entities identified in Exhibit A (for the Leggett & Platt settlement) and Exhibit B (for the Carpenter Settlement) have timely and validly requested exclusion from the specified Direct Purchaser Settlement Class and therefore are excluded from the Direct Purchaser Settlement Class and not bound by this Order, and may not make any claim or receive any benefit from the settlement, whether monetary or otherwise. These excluded persons and entities may not pursue any Released Claims on behalf of those who are bound by this Order. Each Direct Purchaser Settlement Class member who has not requested to be excluded from the Direct Purchaser Settlement Class, and is not listed in Exhibit A, is bound by this Order, and will remain forever bound.

4. As to the Leggett & Platt Released Parties and the Carpenter Released Parties, as defined in the respective Settlement Agreements, the Class Action and any and all currently pending direct purchaser class action lawsuits directly related to the subject matter of this litigation are dismissed with prejudice and in their entirety, on the merits, and, except as provided for in the Settlement Agreement, without costs. This dismissal shall not affect, in any way, Direct Purchasers' right to pursue claims, if any, outside the scope of the releases set forth in the Settlement Agreement.

5. The Releasing Parties are permanently enjoined and barred from instituting, commencing, or prosecuting any action or other proceeding asserting any claims released in the Settlement Agreement (1) against any Leggett & Platt Released Party or (2) against any Carpenter Released Party, either directly, individually, representatively, derivatively, or in any other capacity, by whatever means, in any local, state, or federal court, or in any agency or other authority or arbitral or other forum wherever located.

6. The Releasing Parties release, forever discharge, and covenant not to sue the Leggett & Platt Released Parties from and for claims as set forth in the Settlement Agreement. Likewise, the Releasing Parties release, forever discharge, and covenant not to sue the Carpenter Released Parties from and for claims as set forth in the Settlement Agreement

7. This Order does not settle or compromise any claims by Class Representatives or the Direct Purchaser Settlement Class against the Defendants or other persons or entities other than the Leggett & Platt Released Parties or the Carpenter Released Parties, and all rights against any other Defendant or other person or entity are specifically reserved. The sales of Polyurethane Foam to members of the Direct Purchaser Settlement Class by the Leggett & Platt Released Parties and the Carpenter Released Parties shall remain against the non-settling Defendants as a basis for damage claims, and shall be part of any joint and several liability claims against any non-settling Defendant or other person or entity other than the Leggett & Platt Released Parties or the Carpenter Released Parties.

8. Pursuant to Federal Civil Rule 54(b), this Court directs entry of final judgment of dismissal as to the Released Parties.

9. Without affecting the finality of this Order, this Court retains exclusive jurisdiction over the Class Action and the Settlement Agreements, including the administration, interpretation, consummation, and enforcement of the Settlement Agreements.

10. The Escrow Account established by certain of the parties, and into which Settlement Funds have been and will be deposited, plus accrued interest, is approved as a Qualified Settlement Fund pursuant to Internal Revenue Code Section 468B and related Treasury Regulations.

IT IS SO ORDERED.

s/ *Jack Zouhary*
JACK ZOUHARY
U. S. DISTRICT JUDGE

February 26, 2015

TAB 13B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

In re POLYURETHANE FOAM ANTITRUST LITIGATION	MDL Docket No. 2196 Index No. 10-MD-2196 (JZ)
This document relates to: ALL DIRECT PURCHASER CLASS ACTIONS	

MEMORANDUM OF LAW IN SUPPORT OF
DIRECT PURCHASER CLASS PLAINTIFFS' MOTION FOR
AN AWARD OF ATTORNEYS' FEES AND FOR REIMBURSEMENT OF EXPENSES

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I. INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the Direct Purchaser Class representatives ("Plaintiffs"), through Boies Schiller & Flexner, LLP and Quinn Emanuel Urquhart & Sullivan, LLP ("Co-Lead Counsel"), as well as the Direct Purchaser Class Executive Committee,[1] respectfully move for an award of attorneys' fees and reimbursement of litigation expenses from the settlement with Leggett & Platt, Incorporated (the "L&P Settlement") and the settlement with Carpenter Co., E. R. Carpenter, L.P., and Carpenter Holdings, Inc. (the "Carpenter Settlement"). These settlements are the product of the initiative, investigation, and hard work of skilled counsel over the course of more than four years. They provide significant benefits to members of the proposed Settlement Classes (which overlap with the certified Direct Purchaser Class): cash payments totaling $147.8 million ($108 million from Carpenter, and $39.8 million from L&P), and important trial cooperation that will enhance Plaintiffs' ability to prosecute this action against non-settling Defendants.[2]

Class counsel have achieved extraordinary results for the class in a case with only limited government activity. These highly valuable settlements were achieved only after counsel spent years and expended millions of dollars in expenses, working doggedly to build a compelling factual and expert record in support of class certification, winning certification in the District Court and also defeating Defendants' related *Daubert* motions; and after class counsel brought their experience and insight to bear in lengthy arms' length settlement negotiations. Even before

[1] The Executive Committee consists of the following law firms: Bernstein Liebhard LLP; Grant & Eisenhofer P.A.; Hausfeld LLP; Pearson, Simon, Warshaw & Penny LLP; Robins, Kaplan, Miller, Ciresi LLP; Seeger Weiss LLP; Strange & Carpenter; and Weinstein Kitchenoff & Asher LLC. (Co-Lead Counsel and the Executive Committee firms are collectively referred to herein as "Designated Counsel").

[2] Plaintiffs have moved for final approval of the proposed L&P and Carpenter Settlements concurrently with this application.

filing preliminary approval papers, class counsel also defeated Defendants' Rule 23(f) petition to the Sixth Circuit, earning a unanimous written opinion from the three-judge panel. Moreover, class counsel respectfully submit that their work to date has created a very credible trial threat reflected in the value of the settlements. This is certainly not a case where class counsel have simply "piggy-backed" on a government investigation or the work of others.

In light of the substantial benefits Designated Counsel conferred on members of the proposed Settlement Classes, Plaintiffs and Designated Counsel respectfully request an award of 30% of the L&P Settlement and Carpenter Settlement Funds for attorneys' fees, as well as an additional $8,133,855.80 for reimbursement of expenses to date. The requested attorneys fees, even when added to the $3,101,267.63 million in fees previously awarded in connection with the Vitafoam settlement, are still substantially below plaintiffs' counsel's total lodestar to date of $52,274,968.55 million). The total amount proposed to be paid to Designated Counsel remains well within the parameters established by courts in this Circuit.

II. BACKGROUND

A. Designated Counsel's Vigorous Prosecution of the Case.

Over the past four years, Designated Counsel has expended significant time and effort pursuing Plaintiffs' claims against all Defendants. As set forth in Direct Purchaser Plaintiffs' Memorandum of Law in Support of Their Motion for an Award of Attorneys' Fees and for Reimbursement of Expenses ("Prior Fee Application") (Dkt. 539-1), Designated Counsel undertook significant investigation prior to filing their initial complaints and Consolidated Amended Complaint, expended significant effort opposing Defendants' motions to dismiss and motions for reconsideration, organizing and managing the case, negotiating the Vitafoam and Domfoam Settlements and opposing Defendants' efforts to prevent approval of these settlements

and distribution of notice to the Settlement Classes. As set forth below, since the time of the Prior Fee Application, Designated Counsel have continued to expend significant time litigating Plaintiffs' claims, while being cognizant of the need to work efficiently, avoid duplication, and prudently manage expenses.

1. Meet and confers and disputes concerning discovery.

Designated Counsel have continued to expend considerable effort in addressing discovery issues with the numerous Defendants in this case on a Defendant-by-Defendant basis. These individual negotiations and meet and confers—which spurred several different motions to compel and hearings with the Court—spanned several years and have even continued into the current post-fact discovery period. Neuwirth Decl. ¶¶ 5-6. Throughout, Designated Counsel coordinated with other plaintiffs' counsel, including counsel for the Direct Action Plaintiffs and Indirect Purchaser Plaintiffs. Neuwirth Decl. ¶ 7.

2. Review of Defendants' voluminous document productions.

Designated Counsel have continued to review and analyze documents and data produced by Defendants. As the direct result of Designated Counsel's efforts, Defendants and third parties have produced 5.4 million pages of responsive materials in 219 separate productions, representing 2.4 million total documents. Neuwirth Decl. ¶ 15. Defendants have also produced transactional data that encompasses millions of transactions. *Id.*

It is no exaggeration to say that reviewing and analyzing these productions has been a monumental task. As the collective size of Defendants' productions indicates, Designated Counsel have had to spend a huge amount of time, money, and effort separating the wheat from the chaff and identifying the documents and data that prove liability, damages, and the bases for class certification, summary judgment, and claims at trial.

3. Deposition discovery.

In addition to document discovery, Designated Counsel also spent a substantial amount of time preparing for, taking, and attending the more than 200 fact and expert depositions in these consolidated actions, approximately 100 of which were of Defendants and third parties. Neuwirth Decl. ¶¶ 16. These depositions yielded an extensive amount of useful liability and class certification evidence, which Plaintiffs extensively cited in their class certification and more recent summary judgment briefing.

4. Class certification.

Toward the end of fact discovery, Plaintiffs moved for litigation class certification. Their opening brief was 45 pages and included 91 numbered exhibits and a collection of declarations and deposition transcripts, along with the expert reports of Dr. Jeffrey Leitzinger and Dr. Matthew Gordon. In all, Plaintiffs' opening submission totaled over 1500 pages. Dkt. 584. Defendants opposed with their own brief and exhibits totaling 1716 pages, including the expert reports of Drs. Janusz Ordover and Michelle Burtis. Dkt. 682. Plaintiffs' reply again was an extremely voluminous submission and included the rebuttal expert reports of Dr. Leitzinger, Dr. Abba Krieger, and Dr. Matthew Gordon. Dkt. 744. Following this reply, Defendants submitted even more materials that required Plaintiffs' attention, reply, and, in some cases, briefing.

Ultimately, the Court held oral argument on Plaintiffs' class certification motion on January 15, 2014, at which time Plaintiffs presented their case for certification in response to multiple detailed questions from the Court. This Court granted class certification. Dkt. 1102, 1115. On numerous occasions, Defendants subsequently attempted to negate this Court's certification order and/or to delay the case because of it, and Plaintiffs have expended significant time and resources opposing Defendants' efforts. Dkt. 1169, 1384, 1415.

5. Summary judgment briefing.

On August 25, 2014, all of the then-non-settling Defendants, which included Carpenter and L&P, filed separate motions for summary judgment and collective *Daubert* motions against all of Plaintiffs' merits experts. Dkt. 1321-1329. Plaintiffs responded to these motions on September 25, 2014, submitting with their briefs a voluminous set of exhibits demonstrating why summary judgment is not warranted. Dkt. 1343. Defendants replied and the parties are currently scheduled to argue the motions before the Court on January 15, 2015. In all, the summary judgment briefing was an enormous task, yielding 140 pages of briefing from Plaintiffs, 276 pages from Defendants, and hundreds of exhibits.

6. Trial preparation.

Trial is now scheduled to being on March 31, 2015. Designated Counsel is engaged in substantial preparations for trial and will continue to prepare through the time trial begins.

B. Notice of Proposed Settlements, Plan of Allocation, and Petition for Attorneys' Fees, Reimbursement of Expenses and Incentive Awards.

Consistent with the Class Action Fairness Act, 28 U.S.C.§ 1711 *et seq.*, counsel for L&P sent notice of the proposed settlement to the appropriate State and Federal Officials on November 13, 2014. Dkt. 1413. Carpenter sent notice of the proposed settlement to the appropriate State and Federal Officials on November 22 and 24, 2014. Dkt. 1427. To date, those entities have not lodged any objections to the settlement. *Id.*

By Order of the Court, the Garden City Group, which Designated Counsel retained to serve as the settlement claims administrator, directly mailed the Notice to approximately 48,624 unique addresses on November 24, 2014. Neuwirth Decl. ¶ 39. This Notice advised potential Class Members of the material terms of the proposed L&P and Carpenter Settlements, including the intent of Designated Counsel to apply to the Court for an award on attorneys' fees and

expenses. The notice further stated that Designated Counsel could seek up to 30% of the settlement fund, as well as expenses. *Id.* ¶ 40.

The potential Class is composed of thousands of entities nationwide, many of which are sophisticated companies with their own in-house legal counsel. As of the date of this brief, no potential Class member has made any objection to the proposed settlement or to the notice of the anticipated fee and expense request. Neuwirth Decl. ¶ 2.

III. DESIGNATED COUNSEL SHOULD BE AWARDED THE REQUESTED FEES AND REIMBURSEMENT OF LITIGATION EXPENSES.

To date, Designated Counsel have received $3,101,267.63 in fees and $908,315.35 in expenses, (Dkt. 598), the combined total of which represents only a small portion of what Designated Counsel have incurred in prosecuting this case. Given this, Designated Counsel respectfully request that the Court award to them 30% of each of the L&P and Carpenter Settlement Funds for fees and an additional $8,113,855.80 for reimbursement of expenses. This will result in an award of $52,453,855.80, total, which is less than total amount of fees and expenses Designated Counsel has incurred to date.

The proposed award would be well within the range approved by Courts in this and other districts. *See In re Scrap Metal Antitrust Litig.*, No. 1:02-cv-0844 (N.D. Ohio Mar. 24, 2005) (awarding 30% fee plus expenses); *In re Southeastern Milk Antitrust Litig.*, No. 2:08-MD-1000, 2013 WL 2155387 (E.D. Tenn. May 17, 2013) (awarding antitrust counsel 33% fee plus expenses from $158.6 million settlement); *In re Cardizem CD Antitrust Litig.*, No. 99-md-1278 (E.D. Mich. Nov. 25, 2002) (granting antitrust class action counsel 30% fee award plus expenses); *In re F&M Distribs. Inc. Sec. Litig.*, 1999 U.S. Dist. LEXIS 11090 (E.D. Mich. June 29, 1999) (awarding a 30% fee award plus expenses in common fund case).

Plaintiffs respectfully submit that the requested fees and expenses award is appropriate, given (a) the nature and extent of Designated Counsel's efforts in creating settlements beneficial to the Class in this hard-fought litigation, and (b) the risks Designated Counsel assumed in prosecuting this complex matter with no guarantee of recovery. Notably, no Class member has objected to the potential for this fee award or expense reimbursement.

A. Plaintiffs' Request for Attorneys' Fees Falls Within The Range of Approval.

Courts have long recognized that a lawyer who recovers a "common fund" is entitled to a reasonable attorneys' fee from the fund as a whole. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993).[3] The rationale for such awards is that "persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched . . ." *Boeing*, 444 U.S. at 478; *see also Rosenbaum v. Macallister*, 64 F.3d 1439, 1444 (10th Cir. 1995); *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974).

"[T]he preferred method in common fund cases has been to award a reasonable percentage of the fund." *Bowling v. Pfizer,* 922 F. Supp. 1261, 1278–79 (S.D. Ohio 1996) (discussing the method's return to favor in the 1980s), *aff'd,* 102 F.3d 777 (6th Cir. 1996). This is because the lodestar method is cumbersome and often wasteful of the Court's resources, and disincentivizes counsel from achieving efficient results. *Rawlings*, 9 F.3d at 516 ("[T]he lodestar

[3] As with the Vitafoam Settlement, Co-Lead Counsel also requests the Court's authorization to distribute the fees in a manner that, in the judgment of Co-Lead Counsel, fairly compensates each firm for its contribution to the prosecution of Plaintiffs' claims. This is consistent with the Co-Lead Counsel's duties (Dkt. 29) to "[c]oordinat[e] the activities of Plaintiffs' counsel and implement[] procedures to ensure that schedules are met and avoid[] unnecessary expenditures of time and funds," and to "[c]ollect[] time and expense reports on a periodic basis, endeavor[] to keep attorneys' fees reasonable, and choos[e] appropriate levels of staffing for the tasks required." Dkt. 598 at 4 (granting the same request in connection with the Vitafoam settlement).

method has been criticized for being too time-consuming of scarce judicial resources."). A one-third recovery is a common percentage arrived at in private contingency fee cases. Dkt. 598 at 3 (awarding 30% of Vitafoam Settlement Fund to Designated Counsel); *In re Vitamins Antitrust Litig.*, 2001 WL 34312839 at *12 (D.D.C. July 16, 2001).

In this circuit, typically, the fee percentage awarded in a common fund case ranges from 20 to 50 percent of the fund. *See In re Rio Hair Naturalizer Products Liab. Litig.*, MDL 1055, 1996 WL 780512 (E.D. Mich. Dec. 20, 1996) (observing that "more commonly, fee awards in common fund cases are calculated as a percentage of the fund created, typically ranging from 20 to 50 percent of the fund"); *In re Cincinnati Gas & Electric Co. Securities Litigation*, 643 F. Supp. 148, 150 (S.D. Ohio 1986) (same). In antitrust common fund cases, fee awards in this district have commonly been 30 percent plus expenses. *In re Scrap Metal Antitrust Litig.*, No. 1:02-cv-0844 (N.D. Ohio Mar. 24, 2005) (Neuwirth Decl., Ex. C); *In re Cardizem CD Antitrust Litig.*, No. 99-md-1278 (Neuwirth Decl., Ex. D) (E.D. Mich. Nov. 26, 2002).

For a total award of fees and expenses, "[u]sually 50 per cent of the fund is the upper limit of a reasonable fee award from a common fund, in order to assure that fees do not consume a disproportionate part of the recovery obtained for the class, though somewhat larger percentages are not unprecedented." *Newberg on Class Actions*, §14:6; *see also In re Scrap Metal Antitrust Litig.*, No. 1:02-cv-0844 (March 24, 2005 N.D. Ohio); *Maley v. Del Global Technologies Corp.*, 186 F. Supp. 2d 358, 367–68, 370 (S.D.N.Y. 2002) (awarding 33.3% of an $11.5 million settlement fund as fees, plus $200,371 in expenses, and noting that "courts in this Circuit have awarded fees ranging from 15% to 50% of the settlement fund"); *Vitamins*, 2001 WL 34312839 at *10 (approving award of 34 percent of settlement fund as fees alone, before expenses, and noting that "while fee awards in common fund cases range from fifteen to forty-

five percent, the normal range of fee recovery in antitrust suits is twenty to thirty percent of the common fund").

In determining what exact percentage fee is appropriate, "[a]ll the Sixth Circuit requires is that the award of attorneys' fees in common fund cases must be reasonable under the circumstances." *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 911 (S.D. Ohio 2001) (citing *Rawlings,* 9 F.3d at 516). Courts within the Sixth Circuit weigh six factors when making this analysis: "(a) the value of the benefits rendered to the class; (b) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (c) whether the services were undertaken on a contingent fee basis; (d) the value of the services on an hourly basis; (e) the complexity of the litigation; and (f) the professional skill and standing of all counsel." *In re Telectronics Pacing System, Inc.*, 137 F. Supp. 2d 1029, 1042 (S.D. Ohio 2001). "Most important among these factors are the value of the benefit rendered to the plaintiff class and the value of Counsel's services on an hourly basis." *Bowling*, 922 F. Supp. at 1280. Nevertheless, "[t]here is no formula for weighing these factors. Rather, this Court must be mindful to the facts and circumstances of this specific case." *Godec v. Bayer Corp.*, 2013 WL 1089549 at *2 (N.D. Ohio Mar. 14, 2013).

1. Designated Counsel secured significant benefits for the Class.

The result achieved is a major factor to consider in making a fee award. *Hensley v. Eckhart*, 461 U.S. 424, 436 (1983) ("the most critical factor is the degree of success obtained"); *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 55 (2d Cir. 2000) ("the quality of representation is best measured by results").

The results achieved from the settlements and Designated Counsel's other efforts fully support the requested fee. The collective proposed $147.8 million collection, plus accrued

interest, is substantial in both absolute terms and in light of the circumstances of this litigation. Specifically, the cash payment is not just a considerable sum (which it is), but also an indication of the further total damages the Class may collect, whether in settlement or at trial. In addition, both L&P and Carpenter have offered cooperation at trial, as set forth in their respective settlements submitted concurrently with this fee application in support of Plaintiffs' motion for final approval of the Settlements. This cooperation will help Plaintiffs introduce evidence at trial that will be critical in prosecuting the remainder of the case against the non-settling Defendants.

Moreover, considering L&P and Carpenter's size relative to the remaining Defendants, the payments constitute a substantial recovery for the Class. L&P and Carpenter collectively constitute approximately 38% of the overall market. Based on the current known opt outs from the Direct Purchaser Class, Plaintiffs expect to seek between $815-867 million at trial, before trebling. The L&P and Carpenter Settlements thus represent a substantial portion of Plaintiffs' proposed trial damages.

2. The value of Designated Counsel's services on an hourly basis in comparison to the settlement amount is extremely high.

Designated Counsel have been litigating this case for over four years. Thousands of hours were—and continue to be—spent developing a case against Defendants, obtaining relevant and critical documents from Defendants and third parties, obtaining damages information, eliciting admissible testimony from witnesses, working with experts, briefing large motions (including, among other things, class certification and summary judgment), and negotiating, documenting, and moving for approval of the previous Vitafoam and Domfoam Settlements and the current L&P and Carpenter Settlements. Neuwirth Decl. ¶¶ 9-40.

A lodestar cross-check confirms that to date, Designated Counsel have incurred fees of $52,274,968.55. Because there is no question that the considerable amount of time and effort

Designated Counsel expended to date resulted in excellent positioning for trial and continuing value in the litigation for the Class, this factor weighs in favor of the requested fee award.

3. Designated Counsel's efforts significantly benefit society and thus merit a reward in order to maintain an incentive to others.

The Supreme Court has repeatedly recognized the importance of private antitrust litigation as a necessary and desirable tool to assure the effective enforcement of the antitrust laws. *Pillsbury Co., v. Conboy*, 459 U.S. 248, 262–63 (1983); *Reitner v. Sonotone Corp.*, 442 U.S. 330, 344 (1979); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 265–66 (1972); *Minnesota Min. & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 317–18 (1965). Fee awards similar to that requested here encourage and support meritorious class actions, and thereby promote private enforcement of, and compliance with, the antitrust laws. Here, through their efforts, Plaintiffs have substantially contributed to enforcement of the antitrust laws and have helped restore market efficiency in an important segment of the U.S. economy that yields such everyday and commonplace products as mattresses, packaging, and carpet underlay.

Additionally, this litigation, and the amount of money that L&P and Carpenter will pay to the Class, sends a clear message that direct purchasers of flexible polyurethane foam will not tolerate collusive and conspiratorial behavior. The settlements will hopefully lead to increased competition because they will deter foam manufacturers from similar future misconduct.

Moreover, encouraging qualified counsel to bring highly risky but beneficial class actions like this one benefits society in general. *In re M.D.C. Holdings Sec. Litig.*, 1990 WL 454747 at *10 (S.D. Cal. Aug. 30, 1990) ("[W]ithout able lawyers handling these matters not only do some of them go unprosecuted, but . . . you don't get the highest recovery"). Payment of attorneys' fees in the requested amount fairly compensates Designated Counsel for the significant risk they undertook and the benefits they have achieved for the class.

4. Designated Counsel undertook their services on a contingent fee basis.

Designated Counsel undertook this action on a wholly contingent basis, assuming significant risk with the possibility of no recovery whatsoever. In addition, Designated Counsel advanced significant expenses over the past four years that, absent a successful result, would not be reimbursed. All of this supports an award to Designated Counsel from the common fund. *In re Sulzer Hip Prosthesis and Knee Replacement Liability Litig.*, 268 F. Supp. 2d 907, 936–38 (N.D. Ohio 2003).

5. The complexity of the litigation supports the application.

It is no exaggeration to say that this case represents multidistrict litigation at its most complex. As is evident from the summary of Designated Counsel's efforts provided in Section II.B., *supra*, this case has involved a large expenditure of time and effort against up to fourteen different Defendant groups. Moreover, "[a]n antitrust class action is arguably the most complex action to prosecute . . . The legal and factual issues involved are always numerous and uncertain in outcome." *In re Linerboard Antitrust Litig.*, 2004 WL 1221350 at *10 (E.D. Pa. June 2, 2004) (quotations omitted). As the Court is aware, this case presents no exception.

6. Designated Counsel have exhibited professional skill.

The benefit conferred on Class members here is the result of the skill and efficiency of Co-Lead Counsel and other Designated Counsel. Without these efforts, the entities that will benefit from this settlement may never have seen any recovery for what Plaintiffs allege was a nationwide price-fixing conspiracy causing significant overcharge damages to flexible polyurethane foam purchasers. Designated Counsel submit that they exhibit the highest levels of professional skill and standing in the antitrust field. For their part, the Defendants, including L&P and Carpenter, have all been zealously represented by preeminent defense counsel from large, national law firms and with decades of experience litigating antitrust actions.

B. Designated Counsel Has Not "Piggybacked" On A Government Investigation.

This is not a case where Plaintiffs and Designated Counsel have "piggybacked" off a government investigation. The government's ongoing investigation has proceeded slowly over the past four years. Because of this, Plaintiffs have developed their case against Defendants largely on their own and without government aid or pressure. This fact warrants a higher attorneys' fee, given the heightened risk Designated Counsel faced without the aid that an active governmental investigation or set of indictments brings. *In re Flonase Antitrust Litig.*, 291 F.R.D. 93, 104-05 (E.D. Pa. 2013) (awarding proposed fee because, *inter alia*, "class counsel was not assisted by a government investigation."); *Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 219 (E.D. Pa. 2011) ("All of the benefits obtained for class members are due to the efforts of class counsel; there were no government agencies or other groups conducting investigations and contributing to this settlement."); *see also Boyd v. Coventry Health Care Inc.*, 299 F.R.D. 451, 464 (D. Md. 2014) ("the risk undertaken by class counsel is evaluated by, among other things, the presence of government action preceding the suit").

C. A Lodestar Cross-Check Demonstrates That The Requested Fee Is Reasonable.

The reasonableness of the fees Designated Counsel request is further confirmed by a lodestar cross-check. *Bowling,* 102 F.3d at 780 (6th Cir. 1996) (affirming district court's methodology which based the fee award on a percentage of the fund and then cross-checked the fee against class counsel's lodestar); *Connectivity Sys. Inc. v. Nat'l City Bank*, 2:08-CV-1119, 2011 WL 292008 at *13 (S.D. Ohio Jan. 26, 2011) ("In this Circuit, the lodestar figure is used to confirm the reasonableness of the percentage of the fund award"). Here, the cumulative lodestar value of Designated Counsel's time spent on the case is more than $52 million (through the end of November 2014), which is more than the amount of fees sought by Designated Counsel.

Neuwirth Decl. ¶ 41. Indeed, the current requested fee award and the fees previously awarded to Designated Counsel following the Vitafoam and Domfoam settlements is over $2 million less than the cumulative lodestar value of Designated Counsel's time on this case. Accordingly, the lodestar cross-check confirms the reasonableness of the requested fee.

D. The Request Is Also Reasonable In Light Of Expenses Incurred.

To date, Designated Counsel have incurred $8,133,855.80 in expenses, excluding expenses that have already been reimbursed. These expenses were reasonable and necessary to the litigation of this case, and included, among other things, costs for experts, document collection and management, electronic hosting for Defendants' document productions, travel, photocopying, overnight mail, process service fees, long distance telephone, electronic research, and contributions to the common expense litigation fund. Neuwirth Decl. ¶¶ 42-43.

"Under the common fund doctrine, 'class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and settlement, including expenses incurred in connection with document production, consulting with experts and consultants, travel and other litigation-related expenses.'" *New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 634-35 (W.D. Ky. 2006), *aff'd sub nom. Fidel v. Farley*, 534 F.3d 508 (6th Cir. 2008) (quoting *In re Cardizem CD Antitrust Litig.,* 218 F.R.D. 508, 535 (E.D. Mich. 2003)); *see also In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 504 (E.D. Mich. 2008) ("Expense awards are customary when litigants have created a common settlement fund for the benefit of a class"). The appropriate analysis to apply in deciding whether expenses are compensable in a common fund case is whether the particular costs are of the type typically billed by attorneys to paying clients in the marketplace. *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722 (7th Cir. 2001)

(expenses paid by private clients in similar cases should be paid to class counsel from common fund); *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee paying client.'") (citation omitted). The categories of expenses for which Designated Counsel seek reimbursement here are the type of expenses routinely charged to hourly-fee paying clients and are described in further detail in the accompanying Neuwirth Declaration. Designated Counsel believe that the expenses were all reasonably incurred, and should be reimbursed in full.

IV. CONCLUSION

For the reasons set forth herein, it is respectfully submitted that this Court should award 30 percent of each of the L&P Settlement Fund and Carpenter Settlement Fund to Designated Counsel, plus expenses of $8,113,855.80.

DATED: December 23, 2014

Respectfully Submitted,

/s/ William A. Isaacson
William A. Isaacson
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue, NW
Washington, DC 20015
Phone: 202-237-2727
Fax: 202-237-6131

/s/ Stephen R. Neuwirth
Stephen R. Neuwirth
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Phone: 212-849-7000
Fax: 212-849-7100

Co-Lead Counsel for the Direct Purchaser Class Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2014, I served via the Court's Electronic Case Filing system, MEMORANDUM OF LAW IN SUPPORT OF DIRECT PURCHASER CLASS PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES AND FOR REIMBURSEMENT OF EXPENSES, on all counsel of record.

/s/ Adam Wolfson

TAB 14A

KeyCite Red Flag
Vacated and Remanded by In re Broiler Chicken Antitrust Litigation, 7th Cir.(Ill.), August 30, 2023

2022 WL 6124787
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.

IN RE BROILER CHICKEN ANTITRUST LITIGATION

No. 16 C 8637
|
Signed October 7, 2022

MEMORANDUM OPINION AND ORDER

Thomas M. Durkin, United States District Judge

***1** In this lawsuit alleging a price-fixing conspiracy in the chicken industry against more than 20 defendants, the Court appointed the law firm Hagens Berman Sobol Shapiro LLP as interim counsel to represent a putative class of end-user consumer plaintiffs (the "End Users"). *See* R. 248. On December 20, 2021, the Court approved settlements for the End Users that interim counsel negotiated with six defendant corporate families, totaling $181 million, *see* R. 5304, while the case continues to proceed against the remaining defendants. [1] In approving the settlements, the Court appointed Hagens Berman and the law firm Cohen Milstein Sellers & Toll PLLC as co-lead counsel for the settlement class ("Appointed Counsel"). Following that order, the Court certified the End User Class on May 27, 2022. *See* R. 5644.

Appointed Counsel seek an interim award of attorney's fees and costs and incentive awards for the 26 named class representatives. R. 5160. Two objections were filed, and one of the objectors sought discovery on issues related to counsel's fees. After briefing on the objections and whether discovery was proper, the Court ordered Appointed Counsel to disclose certain information about their prior fee requests and awards in other antitrust cases, and their agreements with the named plaintiffs in this case. R. 5798; R. 5818; R. 5835. Appointed Counsel's motion for fees and costs and incentive awards is granted in accordance with this order. [2]

Background

Without the benefit of a prior government investigation to guide them, Appointed Counsel sought to represent a class of consumers in this case shortly after it was filed in September 2016. Since then, the Court has appointed counsel for three classes and more than 100 entities have opted out of the classes to file their own direct actions. The more than 20 defendants are represented by some of the most prominent law firms in the country.

Appointed Counsel successfully defended the case against a significant motion to dismiss and achieved class certification. They have shepherded the case through extensive discovery, as is recounted in the declaration supporting their motion, *see* R. 5161-1, and is reflected in the more than 5,800 docket entries that make up the case, including 18 scheduling orders. Appointed Counsel have briefed numerous motions in addition to the motions to dismiss and for class certification.

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***2** Appointed Counsel have been assisted by four other firms. Appointed Counsel and the assisting firms have submitted their hours for the Court's review on a quarterly basis. Their collective lodestar is 67,522.2 hours representing $32,853,802.00 in fees. *See* R. 5161-1 ¶ 17.

Appointed Counsel seek a fee award of 33% of the settlement total of $181 million, or $59,730,000.00. They also seek payment of $8.75 million of the more than $9 million in litigation expenses they have incurred. And they seek a $2,000 incentive award for each of the named class representatives. [3] As of December 6, 2021, 1.2 million class members filed claims, with only seven opt-outs and three objections. *See* R. 5248 at 15.

Analysis

It is customary for class counsel in large and complex cases to seek an interim fee award. *See*, *e.g.*, *Kleen Prod. LLC v. Int'l Paper Co.*, 2017 WL 5247928, at *4 (N.D. Ill. Oct. 17, 2017); *see also In re Endotronics, Inc.*, 1989 WL 6746, at *1 (D. Minn. Jan. 30, 1989) ("Untoward delay could discourage [class counsel] from engaging in matters such as these. The Court, therefore, must have discretion to award interim fees and costs."). The "starting point" for determining such an award is the "market rate" for such services. *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 719 (7th Cir. 2001); *see also Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 957 (7th Cir. 2013) ("[A]ttorneys' fees in class actions should approximate the market rate that prevails between willing buyers and willing sellers of legal services."); *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 635 (7th Cir. 2011) ("[T]he district court must try to assign fees that mimic a hypothetical *ex ante* bargain between the class and its attorneys."). Estimation of the market rate "is inherently conjectural," *In re Trans Union Corp. Priv. Litig.*, 629 F.3d 741, 744 (7th Cir. 2011), because "there is no market in class cases." Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 Fordham L. Rev. 1151, 1155 (2021). [4] But the Seventh Circuit has explained that the goal of approximating the market rate can be "informed by a number of factors, including: (1) the actual agreements between the parties as well as fee agreements reached by sophisticated entities in the market for legal services; (2) the risk of non-payment at the outset of the case; (3) the caliber of Class Counsel's performance; and [4] information from other cases, including fees awarded in comparable cases." *Hale v. State Farm Mut. Auto. Ins. Co.*, 2018 WL 6606079, at *8 (S.D. Ill. Dec. 16, 2018) (citing *Synthroid*, 264 F.3d at 719).

A. Actual Agreements

***3** Appointed Counsel's agreements with the named plaintiffs simply provide that they will take a percentage of any recovery as determined by the Court. *See* R. 5835. No other actual agreements have been presented to the Court.

There is, however, case law describing court-ordered auctions in which potential class counsel bid for appointment. *See In re Cap. One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 800 (N.D. Ill. 2015) (collecting cases, including *In re Amino Acid Lysine Antitrust Litig.*, 918 F. Supp. 1190 (N.D. Ill. 1996)). The courts in *In re Amino Acid* and the other cases collected by *In re Capital One* sought fee award structure bids from attorneys hoping to represent the classes in those cases. The courts in those cases chose counsel who submitted declining fee scale award structures. (In other words, counsel proposed that their fee percentage decrease as the settlement amount increased.) These cases are relatively outdated, none being less than 20 years old. *See* R. 5048-1 ¶ 8, Fitzpatrick Decl. (court "experimentation with auctions has all but ceased"). However, Appointed Counsel have bid a declining fee scale in at least three other cases within the last ten years. *See* R. 5818-3 (*In re Optical Disk Drive Prods. Antitrust Litig.*, Case No. 10-MD-2134-VRW (N.D. Cal.)); R. 5818-4 (*In re Lithium Ion Batteries Antitrust Litig.*, Case No. 13-MD-2420-YGR (N.D. Cal.)); R. 5821 (*Microsystems Devel. Tech., Inc. v. Panasonic Corp.*, No. 15-cv-03820-RMW (N.D. Cal.)).

The Court does not put much stock in these bids. First, the most recent is more than seven years old. Furthermore, the Seventh Circuit has explained that declining fee scale award structures do not reflect market realities and impose a perverse incentive "ensuring that at some point attorneys' opportunity cost will exceed the benefits of pushing for a larger recovery, even though extra work could benefit the client." *Synthroid*, 264 F.3d at 721; *see also Silverman*, 739 F.3d at 957 ("[S]olvent litigants do

not select their own lawyers by holding auctions, because auctions do not work well unless a standard unit of quality can be defined and its delivery verified. There is no 'standard quantity' of legal services, and verification is difficult if not impossible."). "Subsequent cases within the Seventh Circuit have similarly recognized that the auction concept is flawed[.]" R. 5050-1 at 17 n.15, Klonoff Decl. Of course, when confronted with a court ordered competitive auction that permits declining scale bids, some attorneys will likely make such a bid in order to win the auction. But for the reasons expressed by the Seventh Circuit, the Court questions whether it is appropriate to permit declining scale bids in an auction. Thus, cases with auctions that permitted such bids carry little weight in the Court's consideration here.

B. Risk of Non-Payment & Caliber of Class Counsel's Performance

A declining scale fee award structure might be appropriate in cases in which settlement is a more likely outcome and in which the "marginal costs" of increasing the settlement recovery amount are low. *See Silverman*, 739 F.3d at 959. As Professor Fitzpatrick surmised, this "may explain the use of [declining scale fee award structures] in the two [Telephone Consumer Protection Act] cases" noted above. *See* R. 5048-1 at 17 n.6, Fitzpatrick Decl.; *see*, *e.g.*, *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 236 (N.D. Ill. 2016), and *In re Cap. One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 805 (N.D. Ill. 2015). Unlike TCPA cases in which "settlement was likely," *Gehrich*, 316 F.R.D. at 230, settlement in a complex antitrust case like this is far from a foregone conclusion. *See* R. 5050-1 ¶ 37, Klonoff Decl. ("In terms of risk and complexity, TCPA cases are the polar opposite of the present case, a complicated multi-party antitrust conspiracy case."). [5] Appointed Counsel invested massive resources of time and money when few other counsel expressed interest, with little assurance of success. *See Silverman*, 739 F.3d at 958 ("When this suit got under way, no other law firm was willing to serve as lead counsel. Lack of competition not only implies a higher fee but also suggests that most members of the securities bar saw this litigation as too risky for their practices."). As noted, no government investigation preceded the complaint in this case for Appointed Counsel to piggy-back. And Plaintiffs have been opposed by many defendants, including a number of very large and well-funded corporations, which have retained some of the most prominent and sophisticated law firms in the United States. The Court's 92-page decision denying the motions to dismiss was a relatively close call. Discovery proceeded while the motions to dismiss were briefed and decided, so Appointed Counsel was immediately incurring costs of time and money without any assurance of an award. Furthermore, issues raised in the motions to dismiss show that success on summary judgment, let alone trial, is no guarantee.

***4** Appointed Counsel have devoted thousands of hours to this case. Their performance to date has been exemplary. The road to some of the settlements was eventually smoothed by later criminal indictments and corporate plea agreements. But Appointed Counsel's work appears to have prompted the government investigations that led to those indictments, rather than the reverse. A substantial award is warranted here as a proper incentive for high quality counsel to take on complex cases, requiring a massive investment of time and money, with such a high risk of non-payment.

C. Fee Awards in Comparable Cases

The Seventh Circuit has recognized that academic studies of attorney fees awards in common fund class settlement cases reveal a declining percentage with the size of the settlement. *See Silverman*, 739 F.3d at 959. But as Professor Fitzpatrick noted, "these findings are based on fee awards from other Circuits ... that are not even trying to capture how clients pay lawyers in the market like the Seventh Circuit does." R. 5048-1 at 20 n.7, Fitzpatrick Decl. These decisions are infected by default rules recommending smaller attorney fee award percentages for "megafunds." *See*, *e.g.*, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (affirming a 6.5 percent fee award from a common fund over $3 billion, reasoning that "the sheer size of the instant fund makes a smaller percentage appropriate"); *Dial Corp. v. News Corp.*, 317 F.R.D. 426 (S.D.N.Y. 2016) ("[I]n class actions where the recovered settlement fund runs into the multi-millions, courts typically decrease the percentage of the fees amount as the size of the fund increases."). The Seventh Circuit has expressly rejected a megafund rule because, as already noted, it is a perverse incentive. *See Synthroid*, 264 F.3d at 718 (reversing district court's fee award in part because it imposed a lower fee percentage because the settlement fund was more than $100 million, holding that "[m]arkets would not tolerate that effect"). Clients generally want to incentivize their counsel to pursue every last settlement dollar, and a declining percentage award operates to the contrary. Thus, to the extent that courts in other circuits have awarded percentages smaller than what Appointed Counsel seek here, the Court finds those awards and their reasoning relatively unpersuasive.

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Most persuasive are the large number of antitrust cases in this circuit that have awarded one-third of the common fund as attorney's fees. *See* R. 5050-1 at 45-46 (table citing cases), Klonoff Decl. The fact that fee awards in antitrust cases in this circuit are almost always one-third is a strong indication that this should be considered the "market rate." *See* R. 5048-1 ¶ 14, Fitzpatrick Decl. (in "a series of antitrust class actions.... recover[ing] more than $2 billion.... *not a single class member ever objected* to the fee request in any of these cases" showing that "sophisticated corporations are happy to play flat fees of 33.33% and they are happy to do so even in the largest cases.").

Additionally, Appointed Counsel's requested fee award is in line with awards they have received in cases of similar magnitude. In response to an Objector's motion for discovery on this motion, *see* R. 5182, the Court ordered Appointed Counsel to submit data regarding fees they have been awarded in antitrust cases since the inception of this case, *see* R. 5798. Appointed Counsel submitted two charts containing this information. *See* R. 5820; R. 5823. In reviewing this information, the Court discounted awards from the Ninth Circuit due to its megafund rule, and cases in which the settlement amount was less than $50 million, which are not of the scale of this case. Of the 18 remaining awards, all but one were either for at least 30% of the settlement fund or were greater in absolute amount than what Appointed Counsel seek here. The Objector sought this discovery insisting that Appointed Counsel's fee request was "exorbitant" and "substantially above-market," and demanding that "there must be consequences" for such "selfish" conduct. *See* R. 5182 at 6, 15. But in large cases like this, the only available evidence of the "market rate" is past awards. And Appointed Counsel's fee request here is well within the range of awards they have received since 2016. The Court has no reason to characterize the request as "exorbitant" or "selfish."

***5** There is simply little to no precedent recommending anything other than an award of 30-33 percent. With this being the only real evidence of the "market rate," the Court will grant Appointed Counsel's motion for 33% of the relevant fund amount.

D. Expenses

Appointed Counsel seek $8.75 million out of more than $9 million in expenses. Appointed Counsel informed the class that they would not seek to recover the full amount of their expenses at this time. *See* R. 5161 at 18. The request for $8.75 million in expenses is granted.

Expenses, however, should be deducted from the common fund before the fee award percentage is applied. The "ratio that is relevant to assessing the reasonableness of the attorneys' fee that the parties agreed to is the ratio of (1) the fee to (2) the fee plus what the class members received." *Redman v. RadioShack*, 768 F.3d 622, 630 (7th Cir. 2014). Out-of-pocket costs, although paid through the settlement fund, are not benefits to the class and thus not part of "what the class members received." *Id.*; *see also In re Wells Fargo Secs. Litig.*, 157 F.R.D. 467, 471 (N.D. Cal. 1994) ("If an attorney risks losing some portion of his fee award for each additional dollar in expenses he incurs, the attorney is sure to minimize expenses."). Therefore, Appointed Counsel will be paid fees of 33% of the settlement fund minus $8.75 million in expenses.

E. Named Plaintiff Incentive Awards

"Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). "To determine if an incentive award is warranted, a district court evaluates the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825, 834 (7th Cir. 2018) (citing *Cook*, 142 F.3d at 1016). Incentive awards based on a percentage of the settlement fund "are disfavored, if not altogether forbidden." *See* William B. Rubenstein, 5 Newberg on Class Actions § 17:16 (5th ed. 2018); *see also In Re EpiPen Mktg., Sales Pracs. & Antitrust Litig.*, 2021 WL 5369798, at *7 (D. Kan. Nov. 17, 2021).

According to Appointed Counsel, each named plaintiff has spent at least 40 hours on the case. *See* R. 5161 at 20. Each named plaintiff was required to comply with discovery including a deposition. *Id.* This is not an insignificant burden for individual

people to bear. Furthermore, an award of $2,000 for each named plaintiff is less than is customary. *See* William B. Rubenstein, 5 Newberg on Class Actions § 17:1 (5th ed. 2018) ("Empirical evidence shows that incentive awards are now paid in most class suits and average between $10-$15,000 per class representative."); *see also In re Potash Antitrust Litig.*, No. 1:08-cv-06910 (ECF No. 589) (N.D. Ill. June 12, 2013) ($15,000 awarded to named plaintiffs from a $90 million settlement). The Court finds that $2,000 per named plaintiff is a reasonable award.

Conclusion

Therefore, Appointed Counsel's motion [5160] is granted as follows: (1) expenses are awarded in the amount of $8.75 million; (2) incentive awards in the amount of $2,000 are awarded to each of the 24 class representatives, with a twenty-fifth $2,000 award being shared by class representatives David and Leslie Weidner; and (3) attorney's fees are awarded in the amount of $57,400,000.00, which is 33 percent of the settlement fund after deducting the expenses and incentive awards. Lastly, while the Court appreciates the spirit of the objections, including the most recent filing of October 6, 2022, *see* R. 5836, they were not material to a case of this size, alleging antitrust violations, subject to Seventh Circuit precedent, so no objector "incentive award" is appropriate.

All Citations

Not Reported in Fed. Supp., 2022 WL 6124787

Footnotes

1 This Court granted final approval to settlements with: Fieldale Farms Corporation ("Fieldale"); George's Inc. and George's Farms, Inc. ("George's"); Mar-Jac Poultry, Inc., Mar-Jac AL/MS, Inc., Mar-Hac Holdings, Inc.; Mar-Jac Poultry AL, LLC, Mar-Jac Poultry MS, LLC, and Mar-Jac Poultry, LLC ("Mar-Jac"); Peco Foods, Inc. ("Peco"); Pilgrim's Pride Corporation ("Pilgrim's"); and Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Breeders, Inc., and Tyson Poultry, Inc. ("Tyson"). R. 5304.

2 The Court entered an opinion and order on November 30, 2021 awarding fees and costs to counsel for the Direct Purchaser Class resulting from a group of settlements. *See* R. 5225. Because the relevant legal issues are the same here, and the Court's analysis of those issues has not changed, the Court could simply incorporate by reference the prior opinion. Instead, this opinion largely tracks that opinion to provide a self-contained record of the Court's decision on this motion.

3 The named plaintiffs are: Ian Adams; Angela Ashby; Linda Cheslow; Kenneth Cote; Kristin Davis; Abraham Drucker; James D. Flasch; Cristina Hall; Matthew Hayward; Richard Heftel; Stephen Holt; Joshua Madsen; William David Marino; Dorothy Monahan; Dina Morris; Alison Pauk; Daniel Percy; Michael Perry; Catherine Senkle; Diane Spell; Margo Stack; Marilyn Stangel; Eric Thomas; David Weidner; Leslie Weidner; and Natalie Wilbur. *See* R. 4921-1. Two of the class representatives are a married couple, and counsel has stated that they will share one incentive award. *See* 5835. Thus, the total amount of incentive award money is $2,000 multiplied by 25, or $50,000.

4 Professor Fitzpatrick also filed a declaration in support of the Direct Purchaser Plaintiffs' class counsel's motion for fees. *See* R. 5048-1. At the Court's invitation, the Commercial and Institutional Indirect Purchaser Plaintiffs also submitted an expert declaration on the previous motion by Professor Robert Klonoff. *See* R. 5050-1. The Court has referenced and cited these declarations in deciding this motion as well.

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5 Moreover, research by both Professors Fitzpatrick and Klonoff shows that the use of declining sliding scale fee awards in the Seventh Circuit is rare. *See* R. 5048-1 at 13 n.5, Fitzpatrick Decl.; R. 5050-1 at 26-31, Klonoff Decl.

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142 F.4th 568
United States Court of Appeals, Seventh Circuit.

IN RE: BROILER CHICKEN ANTITRUST LITIGATION
End User Consumer Plaintiff Class, Plaintiff-Appellee,
v.
Tyson Foods, Inc., et al., Defendants.
Appeal of: John Andren, Objector.

No. 24-2387
|
Argued May 14, 2025
|
Decided July 2, 2025

Synopsis

Background: Purchasers of broiler chickens, including end-user consumers, filed antitrust class action claiming price fixing in broiler chicken market. After $181 million settlement of portion of action against subset of defendants, the United States District Court for the Northern District of Illinois, Thomas M. Durkin, J., 2022 WL 6124787, awarded $57.4 million in attorney fees to settling plaintiffs and declined to order additional discovery from experts. Objector appealed. The United States Court of Appeals for the Seventh Circuit, Brennan, Circuit Judge, 80 F.4th 797, vacated and remanded with directions. On remand, the District Court, Durkin, J., 2024 WL 3292794, awarded class counsel 30% of net common fund resulting in fee award of $51.66 million, which was decrease of $5.74 million from initial 33.3% award. Objector appealed.

Holdings: The Court of Appeals, Brennan, Circuit Judge, held that:

[1] reliance on ex post fee awards to reconstruct ex ante market was not abuse of discretion;

[2] weighing of evidence to determine ex ante comparators was not abuse of discretion;

[3] class counsel were entitled to reduced award of 26.6% of net common fund;

[4] any error in excluding two outliers from award calculation was harmless; and

[5] award accounted for stage of litigation at which class action settled.

Affirmed, as modified, and remanded.

Procedural Posture(s): On Appeal; Motion for Attorney's Fees.

West Headnotes (17)

[1] Costs, Fees, and Sanctions Customary or Usual Charges for Similar Services

A class often does not agree on a fee with its attorneys before class action litigation; therefore, when awarding fees after the case concludes, district courts must do so according to a hypothetical ex ante bargain, giving counsel the

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market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the litigation's outset.

[2] **Federal Courts** Costs and attorney fees

Court of Appeals reviews de novo whether the district court followed the correct methodology in awarding attorney's fees.

[3] **Federal Courts** Costs and attorney fees

So long as the district court understood its obligation to award attorney's fees according to the hypothetical ex ante bargain, in a class action in which the class did not agree on a fee with its attorneys before litigation, Court of Appeals reviews how district court arrived at its fee only for abuse of discretion.

[4] **Federal Courts** Costs and attorney fees

The district court has substantial latitude in calculating attorney's fees because it is closer to the case than the Court of Appeals, and reasonable fees often fall within a broad range.

[5] **Costs, Fees, and Sanctions** Customary or Usual Charges for Similar Services

Ex ante agreements for attorney's fees are particularly useful guideposts for determining the market rate, in a class action in which the class did not agree on a fee with its attorneys before litigation so the district court awards fees after the case concludes according to a hypothetical ex ante bargain, giving counsel the market price for legal services; those agreements most accurately shed light on the compensation attorneys are willing to accept in the shadow of the litigation's uncertainty, when there is still a risk of loss and when counsel has the highest incentive to offer competitive fees.

[6] **Costs, Fees, and Sanctions** Customary or Usual Charges for Similar Services

Though a district court must treat any prior bids that counsel made as potentially relevant evidence to recreate the ex ante market, in awarding attorney's fees according to a hypothetical ex ante bargain to give class counsel the market price for legal services, those bids do not necessarily set a cap for later cases; instead, because the district court is closer to the case than the Court of Appeals, district court is permitted to distinguish what it believes are inapposite cases.

[7] **Antitrust and Trade Regulation** Amount of fees

District court's reliance on ex post fee awards to reconstruct ex ante market price was not abuse of discretion, in awarding attorney's fees according to hypothetical ex ante bargain, after settlement of antitrust class action claiming price fixing in broiler chicken market, even though court disregarded three ex ante bids that class counsel made in other litigation, which objector asserted were more relevant than ex post awards, since court explained that three bids had little bearing on award, as they were all for civil antitrust suits following governmental criminal investigations, which greatly reduced work required of class counsel.

More cases on this issue

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[8] **Antitrust and Trade Regulation** Amount of fees

District court's weighing of evidence to determine ex ante comparators was not abuse of discretion, in awarding attorney's fees according to hypothetical ex ante bargain, after settlement of antitrust class action claiming price fixing in broiler chicken market; court reasonably concluded that one case in which fee agreement was negotiated with sophisticated pension fund was not "perfect" comparator due to its high anticipated settlement value which meant counsel was willing to accept correspondingly lower percentage of higher recovery, but court then reasonably gave fee award in that case ten times the weight of any other case, for total of 49 awards upon finding case to be "good" comparator, even though that case was in effect diluted by volume of 39 ex post awards in calculation.

More cases on this issue

[9] **Costs, Fees, and Sanctions** Customary or Usual Charges for Similar Services

In awarding attorney's fees according to a hypothetical ex ante bargain, giving counsel the market price for legal services after the class action concludes, the ex post recovery amount of comparator cases does not change the district court's reasoning for why class counsel may have accepted a lower percentage fee award ex ante.

[10] **Costs, Fees, and Sanctions** Evidence

District courts should consider all evidence bearing on an ex ante award of attorney's fees in a class action, according to a hypothetical ex ante bargain, giving counsel the market price for legal services.

[11] **Attorneys and Legal Services** Antitrust

District court's fees award to class counsel in amount of 30% of net common fund required minor adjustment resulting in award of 26.6%, according to calculation based on hypothetical ex ante bargain, after settlement of antitrust class action claiming price fixing in broiler chicken market, since court had relied on expert's declaration containing skewed sample of cases limited only to awards of 33% or greater, so those non-representative cases were required to be excluded from calculation of award.

More cases on this issue

[12] **Costs, Fees, and Sanctions** Customary or Usual Charges for Similar Services

To the extent a district court relies on a sampling of ex post awards of attorney's fees to recreate the hypothetical ex ante market in awarding fees for a class action, the court must ensure that sample is representative.

[13] **Costs, Fees, and Sanctions** Customary or Usual Charges for Similar Services

In awarding attorney's fees according to a hypothetical ex ante bargain, giving counsel the market price for legal services, after the class action concludes, district court may not include data improperly skewing, either high or low, the resulting award.

[14] **Federal Courts** Costs and attorney fees

When reviewing attorney's fee awards, Court of Appeals does not focus solely on the percentage; rather, what matters most is the process the district court used to calculate the award.

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[15] **Federal Courts** Costs and attorney fees

Any error in district court excluding two Ninth Circuit outliers from its fees calculation was harmless, in awarding attorney's fees according to hypothetical ex ante bargain, after settlement of antitrust class action claiming price fixing in broiler chicken market, since adding those cases back into calculation changed average somewhat, but median remained 26.6% of net common fund, which was same award whether those outlier cases were included or excluded.

More cases on this issue

[16] **Costs, Fees, and Sanctions** Amount involved in litigation; relation to amount of award

A large award of attorney's fees is unwarranted if it is disproportionate to the amount of work expended by class counsel.

[17] **Antitrust and Trade Regulation** Amount of fees

District court soundly considered amount of work expended by class counsel, in awarding attorney's fees according to hypothetical ex ante bargain, after settlement of antitrust class action claiming price fixing in broiler chicken market, even though case settled before ruling on class certification, since class counsel had fully briefed certification issue and put forth significant effort, including investing massive resources of time and money, over 67,500 attorney hours, in guiding litigation through extensive discovery, and surviving relatively close motion to dismiss with assistance of in-depth briefing that resulted in 92-page court order denying dismissal, so case was not one in which no litigation occurred, and court examined in detail work that counsel devoted to case.

More cases on this issue

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:16-cv-08637 — **Thomas M. Durkin**, *Judge.*

Attorneys and Law Firms

Steve W. Berman, Attorney, Hagens Berman Sobol Shapiro LLP, Seattle, WA, Benjamin D. Brown, Attorney, Brent W. Johnson, Attorney, Cohen Milstein Sellers & Toll PLLC, Washington, DC, for Plaintiff-Appellee.

Michael Frank Bednarz, Attorney, Hamilton Lincoln Law Institute, Chicago, IL, Theodore H. Frank, Attorney, Anna St. John, Attorney, Hamilton Lincoln Law Institute, Washington, DC, for Appellant.

Bradley D. Justus, Attorney, Axinn, Washington, DC, for Defendant Tyson Foods, Inc.

Boris Bershteyn, Attorney, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY, for Defendant Peco Foods, Inc.

Edward C. Konieczny, Attorney, Edward C. Konieczny LLC, Atlanta, GA, for Defendant Mar-Jac Poultry, Inc.

Emily M. Asp, Attorney, Stinson LLP, Minneapolis, MN, for Defendant George's Inc.

Stephen Novack, Attorney, Armstrong Teasdale LLP, Chicago, IL, for Defendant Koch Foods, Inc.

Before Sykes, Chief Judge, and Brennan and Pryor, Circuit Judges.

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Opinion

Brennan, Circuit Judge.

***571** In this successive appeal, one class member again objects to the district court's award of attorney's fees. The court's analysis was thorough, and we commend the detailed steps it took to calculate the award. Its sole slip was to include a handful of skewed fee awards when recreating the *ex ante* market for legal services. Those awards can be easily removed from the calculation, so we affirm the award as modified.

I

[1] Because this appeal is successive, we need not recount much of the procedural history. *See In re Broiler Chicken Antitrust Litig.* (*Broiler I*), 80 F.4th 797 (7th Cir. 2023). As a brief refresher, a class often does not agree before litigation on a fee with its attorneys. When awarding fees after the case concludes, then, district courts must do so according to a "hypothetical *ex ante* bargain"—giving "counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market" at the litigation's outset. *Id.* at 801–02 (italicization added) (first quoting *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011); and then quoting *In re Synthroid Mktg. Litig.* (*Synthroid I*), 264 F.3d 712, 718 (7th Cir. 2001)).

We previously agreed with objector John Andren and held that, when reconstructing the *ex ante* market for attorney's fees, the district court erred in two ways. First, the court improperly discounted auction bids made by class counsel in other litigation because the bids incorporated a "declining fee scale" format. *Id.* at 803. Regardless of the fee structure, auction bids made at the outset of litigation are typically probative of the rate counsel is willing to accept while the risk of loss still exists—the goal of this circuit's *ex ante* calculus. *Id.* at 801–02. We caveated our discussion, though, by saying it was an error only for the district court to "categorically" discount these bids. *Id.* at 803–04. The court retained discretion to "accord" them "appropriate weight," as "[o]ther aspects of the cases in which the bids were made may show the bids to be poor indicators of what bargain would have been struck *ex ante*." *Id.*

Second, the district court abused its discretion in excluding fee awards from the Ninth Circuit. *Id.* at 804. The court had done so because that circuit, unlike ours, imposes a megafund rule, which caps fees once a recovery reaches a certain amount. *Synthroid I*, 264 F.3d at 717–18. We said that although fees in this circuit are not similarly limited, class counsel, "as rational actors," "assess the risk of being awarded fees below the market rate of their legal services when they seek to represent plaintiffs in the Ninth Circuit." *Broiler I*, 80 F.4th at 804. The district court should have accordingly "assigned appropriate weight" to fees awarded in the Ninth Circuit. *Id.*

On remand, after thoroughly analyzing the parties' arguments, the district court awarded a new fee. A few aspects of its award are relevant here. The court first disregarded three bids class counsel had made to represent plaintiffs in different ***572** antitrust suits in the six years before filing this suit. All those bids entitled class counsel to between 13.5% and 20% of the recovery amount. The district court, though, thought these three bids were poor indicators of the *ex ante* market, as each case was preceded by a government antitrust investigation. Given that the government already laid the groundwork for later private litigation, class counsel had a lighter workload and higher chance of success compared to suits beginning from scratch. As a result, the court did not consider these bids when recreating the *ex ante* market.

Class counsel also agreed to represent a pension fund in an antitrust action against large financial institutions, in a case called *In re Interest Rate Swaps Antitrust Litigation* (*IRS*). That agreement used a declining fee approach taken from another antitrust case. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 445 (E.D.N.Y. 2014). Nobody disputes that if the *Payment Card* schedule were adopted in this case, class counsel would be entitled to a $47.2 million award, representing 26.6% of the net common fund.

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The district court thought *IRS* and this case were "good comparators." Yet it did not award 26.6% here due to a material difference: Because the defendants in *IRS* were large financial institutions with significant assets, the court concluded that the cases' potential settlement values were not comparable. Even though the court did not incorporate the 26.6% award here wholesale, it still gave *IRS* an outsized weight in its final calculation, as discussed below.

Next up for the district court's consideration were awards from the Ninth Circuit. It said fees capped under that circuit's megafund rule are not evidence of the market rate, else there would be no need for an artificial limit. So, although counsel make the informed decision to continue litigating there, all other circuits maintain a higher "market" rate for class-action awards.

To arrive at the fee award, the district court created a detailed spreadsheet, compiling data from three sources. *See In re Broiler Chicken Antitrust Litig.*, No. 16-C-8637, 2024 WL 3292794, at *6 (N.D. Ill. July 3, 2024). The first source included all court-awarded fees to counsel in cases without an *ex ante* agreement—in other words, *ex post* awards—within a set timeframe before this litigation. The second consisted of awards listed in one of class counsels' expert declarations filed by Professor Robert Klonoff. His data was titled "examples of antitrust cases" both within and outside of the Seventh Circuit "with [fee] percentages of 33 percent or greater." The third was the 26.6% award from the *IRS* case. Because the court found that case to be a good comparator, it counted the award ten times in its spreadsheet, thereby giving it an outsized weight. [1]

In its spreadsheet, the district court narrowed the cases it considered to only those with recovery amounts of $100 million to $1 billion—what it viewed as most representative of the $181 million settlement recovery here. This left 52 awards. The district court further excluded three Ninth Circuit "outliers" of 9% and 11%, which—as discussed above—it did not find to be representative of this circuit's *ex ante* market rate. [2] The remaining 49 awards yielded ***573** a median of 31% and mean of 29%. Splitting the difference, the court awarded class counsel 30% of the net common fund. This resulted in a fee of $51.66 million, a decrease of $5.74 million from the initial 33.3% award. Andren timely appeals.

II

Andren challenges the district court's new fee award in four ways. He first argues that the court erred in relying on any *ex post* awards to reconstruct the *ex ante* market. The court improperly disregarded the three *ex ante* bids class counsel made in other litigation, he asserts, which are more relevant than *ex post* awards. Second, Andren contends that the court erroneously relied on the cases in Klonoff's declaration, which listed only fee awards of 33% and above. Third, he posits that the court should not have excluded the Ninth Circuit "outliers" from its calculation. Last, he argues that the court was required to consider the stage at which this case settled and reduce the fee accordingly.

[2] **[3]** **[4]** We review de novo whether the district court followed the correct methodology in awarding a fee. *Broiler I*, 80 F.4th at 801. So long as the district court understood its obligation to award fees according to the hypothetical *ex ante* bargain, as it did here, we review how it arrived at its fee only for abuse of discretion. *Id.* at 802. The district court has substantial latitude here, as it "is closer to the case than we are," and reasonable fees "often fall within a broad range." *Id.* (quoting *In re Stericycle Sec. Litig.*, 35 F.4th 555, 559 (7th Cir. 2022)).

A

[5] We first address Andren's challenge that the district court erred by relying on *ex post* awards to reconstruct the *ex ante* market. True, this court has said that *ex ante* agreements are "particularly useful guidepost[s] for determining the market rate." *Stericycle*, 35 F.4th at 560. Those agreements most accurately shed light on the compensation attorneys are willing to accept

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"in the shadow of the litigation's uncertainty," when there is still a risk of loss and when counsel has the highest incentive to offer competitive fees. *Synthroid I*, 264 F.3d at 719.

Yet this court has already "endorsed" looking to fee awards from other cases to recreate the *ex ante* market. *Williams*, 658 F.3d at 636; *Taubenfeld v. AON Corp.*, 415 F.3d 597, 600 (7th Cir. 2005).[3] Even if this is so, Andren counters, the district court improperly disregarded more relevant evidence: the three bids class counsel made in other cases. These all allowed for a maximum fee recovery between 13.5% and 20%, which Andren asserts is a more accurate representation of the *ex ante* market.

[6] Though a district court must treat any prior bids as potentially relevant evidence, those bids do not necessarily set a cap for later cases. *See Birchmeier*, 896 F.3d at 797 (explaining that courts may award higher fees than in other cases when the present suit was "a riskier undertaking," ***574** making prior cases poor comparators). Instead, because the district court is "closer to the case than we are," *Stericycle*, 35 F.4th at 559, it is permitted to distinguish what it believes are inapposite cases.

[7] The district court here persuasively explained why the three bids had little bearing on this award. It noted that all were for civil antitrust suits following governmental criminal investigations of the defendants, which greatly reduced the work required of class counsel. *See id.* at 564 (Prior litigation can "substantially reduce[ ] lead counsel's risk of nonpayment."). Under our deferential standard of review, we cannot ask more. There was no abuse of discretion when discounting class counsels' bids entirely.

[8] Even if the district court did not err in differentiating the three bids, Andren argues, it underweighted other *ex ante* evidence: the *IRS* fee agreement, negotiated with a sophisticated pension fund. The court viewed *IRS* and this case as "good comparators," but it did not import the *IRS* fee structure here wholesale. Rather, it believed the potential settlement value of *IRS* was greater than in this case, so counsel was willing to accept a correspondingly lower percentage of the higher recovery. Related litigation against the financial-institution defendants in *IRS* had settled just before class counsel filed a similar suit, with the defendants paying about $2 billion in each case. By contrast, the district court noted that the largest antitrust settlement in history against a food-industry defendant was only one-sixth of that amount. It was eminently reasonable, then, for the court to conclude that *IRS*, with its high anticipated settlement value, was not a perfect comparator for this case.

[9] Andren fails to show why the district court's thorough reasoning was an abuse of discretion. He points out that the two cases had similar total damages—both between $3.9 and $4.5 billion. But the district court recognized this. It instead focused on the potential settlement value, which is the more relevant metric to counsels' fee award. Nor is it dispositive that the *IRS* plaintiffs ultimately recovered $71 million, less than half the settlement here. The *ex post* recovery amount does not change the district court's reasoning for why class counsel may have accepted a lower percentage fee award *ex ante.*

The district court also did not exceed the bounds of reason when it gave the *IRS* award ten times the weight of any other case in its calculation. The court's spreadsheet contained 39 *ex post* awards in the $100 million to $1 billion recovery amount range relevant here. The court then counted the *IRS* percentage ten times, for a total of 49 awards. Although the *IRS* award was, in a sense, "diluted" by the volume of *ex post* figures, it was not an abuse of discretion for the district court to structure its calculation this way when presented only with imperfect *ex ante* comparators.

In sum, the district court did not "categorically" give "little weight" to class counsels' bids and negotiated fee structures because they used declining fee agreements. *Broiler I*, 80 F.4th at 803. The court instead soundly exercised its discretion in determining whether those cases served as good "indicators of what bargain would have been struck *ex ante*." *Id.*

B

Andren more persuasively argues that the district court relied on a skewed sample of *ex post* awards. Recall that the court's calculation incorporated data from three sources. First, as just discussed, was ***575** the 26.6% award from *IRS.* Second was a

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representative summary of *ex post* awards class counsel received in other cases around the country. Third, the court cited awards contained in Klonoff's declaration—cases that were limited only to awards around the country of "33 percent or greater."

[10] **[11]** **[12]** District courts should consider all evidence bearing on an *ex ante* award. Indeed, this court has said that when awarding fees, district courts "need[ ] data rather than cherry-picked examples." *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 959 (7th Cir. 2013). It is difficult to see how the cases in Klonoff's declaration provide a representative sample from which to derive an average award. The district court stated that "the sheer volume of *ex post* awards, relative to the minimal number of *ex ante* agreements, has a substantial impact on the expectations of class counsel" when deciding whether to represent a class. We do not disagree with this principle in theory. But when analyzing *ex post* awards, counsel are aware of all relevant awards—not solely those of 33% or more. So, to the extent a district court relies on a sampling of *ex post* awards to recreate the hypothetical market, it must ensure that sample is representative.

[13] Class counsels' brief does not engage with this issue. Instead, it "[p]ut[s] aside whether the cited awards were 'representative,' " asserting only that the district court was permitted to rely on public information, such as *ex post* fee awards. Nobody disputes that courts may rely on public information when fashioning awards. Yet this misses the methodological point: Although we decline to limit the various sources a district court may consult, it may not include data improperly skewing—high or low—the resulting award.

[14] At oral argument before us, class counsel argued that a difference of only 3%—between the district court's revised 30% award and the *IRS* award of nearly 27%—cannot be an abuse of discretion. Oral Arg. at 18:50–22:00. This is incorrect for two reasons. When reviewing awards, this court does not focus solely on the percentage. Rather, what matters most is the process the district court used to calculate the award. Further, this argument is self-defeating. In *Broiler I*, we held that a 33% award was an abuse of discretion. Yet class counsel in this second appeal defend the district court's revised 30% award, tacitly admitting that a 3% difference may be reversible in some contexts.

Because the district court went through the effort of creating a detailed spreadsheet, we can "stick as close as possible to [its] approach" and adjust the fee on appeal. *In re Synthroid Mktg. Litig.* (*Synthroid II*), 325 F.3d 974, 980 (7th Cir. 2003); *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 748 (7th Cir. 2011). The sole adjustment we make is to remove the fee awards listed only in Klonoff's skewed declaration. We do not change either the spreadsheet's inclusion of awards from class counsels' other cases, or the district court's decision to weight the *IRS* fee agreement ten times. We also limit the relevant awards, like the district court did, to those with recoveries between $100 million and $1 billion. After making this single change, we calculate that the average award is 27.1%, with a median of 26.6%. Andren requested a wide range of revised awards, with 26.6% at the top end. We therefore adjust the award to that amount.

C

[15] Andren attempts to poke two more holes in the district court's award, but neither persuades us. First is that the ***576** court improperly excluded two Ninth Circuit "outliers" from its calculation. Even if these cases were erroneously left out, though, any error was harmless. Adding these cases back into the calculation changes the average somewhat, yet the median remains 26.6%. Because our adjusted fee award remains the same whether these cases are included or excluded, we need not address the merits of Andren's argument.

[16] Andren also asserts that the district court failed to account for the stage of litigation at which this case settled. True enough, we have reversed a fee award when "the district court did not give sufficient weight to the early stage" of settlement. *Stericycle*, 35 F.4th at 566. A large award is unwarranted if it is "disproportionate to the amount of work expended by class counsel." *Id.* (quoting *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825, 833 (7th Cir. 2018)). But this circuit has also explained that courts should avoid "a second major litigation strictly over attorneys' fees." *Siddiqui v. Nat'l Ass'n of Broad.*

Emps. & Technicians – Commc'ns Workers, 132 F.4th 530, 533 (7th Cir. 2025) (quoting *Vega v. Chi. Park Dist.*, 12 F.4th 696, 702 (7th Cir. 2021)).

[17] In its initial fee order, the district court soundly considered the amount of work expended by class counsel. It noted the lack of prior government investigation here, requiring counsel to "invest[ ] massive resources of time and money"—over 67,500 attorney hours—in guiding the litigation through extensive discovery. The court further discussed counsels' "exemplary" performance, noting how the plaintiffs survived a "relatively close" motion to dismiss with the assistance of in-depth briefing. Indeed, the court's order denying dismissal tallied 92 pages. And although the case settled before a ruling on class certification, class counsel fully briefed the certification issue. This was not a case where "no real litigation" occurred; counsel put forth significant effort, which the district court properly considered. *Camp Drug Store*, 897 F.3d at 833.

The district court examined in detail the work counsel devoted to this case. To ask for anything further would be to demand a "second major litigation" over fees. *Siddiqui*, 132 F.4th at 533 (quoting *Vega*, 12 F.4th at 702).

* * *

We compliment the district court for creating a detailed fee calculation, spreadsheet and all. After removing the few non-representative data points from its analysis, class counsel are entitled to 26.6% of the net common fund. We AFFIRM the district court's fee award AS MODIFIED and REMAND the case for further proceedings.

All Citations

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Footnotes

1 Although the district court also considered a fourth source of awards, those were outside of the relevant range, as noted in the following paragraph. We therefore do not discuss them here.

2 These were three data points on the spreadsheet, but two cases were duplicates.

3 Andren argues that this court's *Taubenfeld* decision approved of *ex post* fee awards only because the objector there forfeited her market-mimicking argument. *See* 415 F.3d at 599. But this court also addressed this point in *Williams*, expressly approving looking to other cases' fee awards when reconstructing the *ex ante* market. 658 F.3d at 636, *aff'g*, 2010 WL 4723725, at *2 (S.D. Ind., Nov. 12, 2010) (awarding a fee after considering affidavits from class counsel listing, among other things, awards from other cases); *see also Birchmeier v. Caribbean Cruise Line, Inc.*, 896 F.3d 792, 796–97 (7th Cir. 2018), *aff'g, Aranda v. Caribbean Cruise Line, Inc.*, 2017 WL 1369741, at *6 (N.D. Ill. Apr. 10, 2017) (looking to fee awards from other cases).

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TAB 14B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE BROILER CHICKEN ANTITRUST LITIGATION	No. 1:16-cv-08637
This Document Relates To: *All End-User Consumer Plaintiff Actions*	Honorable Thomas M. Durkin

MEMORANDUM IN SUPPORT OF END-USER CONSUMER PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, EXPENSES, AND CLASS REPRESENTATIVE AWARDS

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I. INTRODUCTION

For five years, Hagens Berman and Cohen Milstein[1] (Class Counsel) have worked diligently to represent millions of United States consumers in this complex antitrust case – bearing the risks and costs of litigation, without any compensation to date. Now Class Counsel has secured settlements totaling $181 million. These settlements with six defendant families represent a significant substantial benefit for the class of End User Consumer Plaintiffs ("EUCPs"). The news that these settlements will compensate consumers for their damages has been shared and spread widely – even reaching national audiences via duet on *The Tonight Show*.[2]

The Court is well-aware of the hard work and dedication that has been required to see this complex litigation through; to date, there are more than 5,000 entries on the docket. Unlike many antitrust cases, this case began without having the benefit of a prior Department of Justice criminal case to use as a template. Rather, counsel for the civil plaintiffs were willing to take a risk, dig in, and follow leads to develop the evidence. Over the past five years, Class Counsel invested more than 67,522 hours representing Plaintiffs and pursuing their claims. Defendants in this litigation are large, sophisticated national and multi-national corporations and have hired some of the most well-known and aggressive attorneys in the country.[3] They are also numerous.

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[1] "Hagens Berman" refers to the law firm Hagens Berman Sobol Shapiro LLP, whom the Court appointed as Interim Lead Counsel on December 14, 2016. *See* Order, ECF No. 248. "Cohen Milstein" refers to the law firm Cohen Milstein Sellers & Toll, PLLC. Cohen Milstein and Hagens Berman have requested appointment as Co-Lead Class Counsel for the End User Class.

[2] *See* The Tonight Show Starring Jimmy Fallon, YouTube (Sept. 15, 2021) (https://www.youtube.com/watch?v=zbcNjYT1VCs&t=3m45s) (accessed Oct. 27, 2021).

[3] *Arenson, et al. v. Bd. of Trade of City of Chicago*, 372 F. Supp. 1349, 1354 (N.D. Ill. 1974) (noting that the quality, vigor, and prior success of opposing counsel is an important factor when assessing the quality of work performed by plaintiffs' counsel).

Class Counsel conducted discovery on dozens of defendants and third parties, and to state the obvious, the amount of necessary work multiplies with their number. Overall, it is extraordinary even when compared to other complex antitrust litigations. In addition, Class Counsel has risked nearly $9 million without any guarantee of reimbursement to put forth the best and thoroughly supported case, legal and economic, for consumers of chicken.

Plaintiffs respectfully request: (1) an award of $59,730,000 in attorney's fees – equal to 33 percent of the common fund; (2) reimbursement of $8,750,000 to cover a portion of the out-of-pocket litigation expenses incurred in connection with this litigation; and (3) service awards of $2,000 for each of the class representatives.

II. THE WORK UNDERTAKEN ON BEHALF OF THE CONSUMER CLASS

A. Class Counsel fiercely advocated for consumers' interests before being appointed.

From the outset of this case, Hagens Berman and Cohen Milstein have zealously represented the consumer class's interests. In September 2016, Hagens Berman and Cohen Milstein filed one of the first complaints on behalf of the consumer class and moved to represent the consumer class as interim co-lead counsel.[4] Hagens Berman and Cohen Milstein were the first to raise the issue that having the commercial indirect class (referred to as the "CIIPPs" in this litigation) also represent consumers' interests would lead to a conflict of interest.[5] This issue was vigorously contested by the commercial class, but Class Counsel provided real examples (such as *In re Capacitors Antitrust Litigation*) where lead counsel for a dual

[4] *See* Application for Appointment of Steve W. Berman of Hagens Berman Sobol Shapiro, LLP and Kit A. Pierson of Cohen Milstein Sellers & Toll PLLC as Co-Lead Counsel for the Indirect Purchaser Consumer Class, ECF No. 117 (Oct. 7, 2016).

[5] *Id.*

consumer/commercial indirect class voluntarily dismissed the consumer claims and pursued litigation only on behalf of commercial entities – leaving consumers unable to recover anything.[6]

In raising this issue, Hagens Berman and Cohen Milstein conducted an independent investigation into the consumer channel, retained expert economists to evaluate and explain the different channels, and provided the Court with a legal ethicist's expert opinion – even though there was no certainty they would be appointed as lead counsel. Scarlett Decl. at ¶ 2. After careful consideration, the Court commended counsel's "aggressive and independent advocacy relating to the conflict," and appointed counsel for an independent consumer class.[7]

B. Class Counsel engaged in substantial motion practice and discovery efforts.

1. EUCPs overcame multiple rounds of motions to dismiss.

EUCPs overcame multiple joint and individual motions to dismiss and one motion to reconsider the Court's denial of the motions to dismiss. Scarlett Decl. at ¶ 5. The first round of motions occurred in 2017, shortly after the complaint was filed.[8] After the Court denied these motions one defendant brought a second motion to reconsider.[9] EUCPs were the first to add Agri Stats as a defendant, and the only class to add a rule of reason claim. This initiated a second round of motions to dismiss, which was resolved in favor of EUCPs.[10] Scarlett Decl. at ¶ 5.

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[6] *See* Reply in Support of Application for Appointment of Steve W. Berman of Hagens Berman Sobol Shapiro, LLP and Kit A. Pierson of Cohen Milstein Sellers & Toll PLLC As Co-Lead Counsel for the Indirect Purchaser Consumer Class, ECF No. 121 (Oct. 11, 2016).

[7] *See* Order, ECF No. 248 (Dec. 14, 2016).

[8] *See, e.g.*, Joint Mot. to Dismiss, ECF No. 292 (Jan. 27, 2017); *also* Mots. Mountaire (ECF No. 274); Sanderson, (ECF No. 276); Wayne (ECF No. 282); George's (ECF No. 284); Foster (ECF No. 287); Pilgrim's (ECF No. 294); Peco, (ECF No. 296) (all filed Jan. 27, 2017).

[9] *See* Mot. for Recon. Re Order on Mot. to Dismiss, ECF No. 572 (Dec. 15, 2017).

[10] *See, e.g.,* Mot. to Dismiss by Defendant Agri Stats, ECF No. 804 (Mar. 23, 2018).

2. Class Counsel led depositions of more than forty defendant witnesses.

From the outset of discovery, Class Counsel sought to avoid duplication by coordinating discovery assignments with the other classes. For example, the classes jointly negotiated the discovery protocols for this case and conducted a coordinated review of the millions of documents that were produced in the litigation. Scarlett Decl. at ¶ 6. During this negotiation process, Class Counsel drafted and filed many of the status reports before the Court.[11] Several of Class Counsel's staff attorneys participated in this review full time. Scarlett Decl. at ¶ 6. Counsel also worked together with the other classes to negotiate search terms, ensure the completeness of discovery, and to schedule more than 180 depositions – up to three depositions a day. Scarlett Decl. at ¶ 7.

EUCPs have taken lead in questioning more than 40 of the defendant-employees in this case, including *every* Agri Stats employee and many employees for Pilgrim's, Perdue, and Tyson. Scarlett Decl. at ¶ 9. Preparing for these depositions takes significant time and effort. To help the classes prepare for these difficult depositions, staff attorneys at Hagens Berman and Cohen Milstein devoted their full time to the joint effort among the classes to search and review Defendants' 13 million documents. *Id.* The staff attorneys, with their decades of collective experience, helped identify critical documents and prepare for depositions. Finally, Class Counsel also led questioning at several third-party depositions, including depositions of USDA witnesses. *Id.*

3. Discovery required significant motion practice.

Plaintiffs conducted significant written discovery, including serving document requests, interrogatories, and requests for admission. Scarlett Decl. at ¶ 10. In addition, EUCPs served

[11] *See, e.g.,* Joint Status Report, ECF No. 863 (Apr. 12, 2018).

subpoenas on dozens of third parties in the distribution chain to seek documents and structured data that would be used to show to pass-through. *Id.* This document discovery was contentious at times, requiring multiple motions to compel and responses to motions for protective orders from defendants and third parties.[12] These motions required additional time for meet-and-confers, briefing, and hearing preparation. *See* Scarlett Decl. at ¶ 10. The briefs argued and won by EUCPs have impacted all three classes: for example, when Agri Stats sought a protective order to limit its document production to a two-year period,[13] Class Counsel drafted the brief in opposition.[14] Magistrate Judge Gilbert adopted EUCP's reasoning and denied the request for the protective order.[15] As a result, Agri Stats produced a full set of documents and all three classes used these Agri Stats documents in support of their motions for class certification. Scarlett Decl. at ¶ 11.

4. Two years into the case, the Department of Justice intervened and sought a stay.

Often, civil plaintiffs bring antitrust claims only after the Department of Justice has announced a criminal investigation or criminal charges. As these cases are usually brought against national and multinational corporate leviathans who hold significant market power and can afford the best legal services, "all would agree that antitrust litigation presents a trying task

[12] *See*, *e.g.*, Order, ECF No. 1254 (Sept. 26, 2018) (granting class plaintiffs' motion to serve interrogatories); Order, ECF No. 864 (Apr. 13, 2018) (denying Tyson's motion for protective order); Order, ECF No. 1090 (July 26, 2018) (denying Agri Stats's motion for protective order); Order, ECF No. 1832 (Feb. 14, 2019) (ordering third-party Porky Products to produce downstream data); Order, ECF No. 2010 (Apr. 8, 2019) (granting class plaintiffs' motion to compel documents claimed to be privileged); Order, ECF No. 3622 (May 19, 2020) (granting in part class plaintiffs' motion for production of structured data).

[13] *See* Memorandum by Agri Stats, Inc. in Support of Motion for Protective Order, ECF No. 895 (May 18, 2018).

[14] *See* Memorandum in Opposition to Motion for Protective Order, ECF No. 940 (June 1, 2018).

[15] *See* Memorandum Opinion and Order, ECF No. 1090 (July 26, 2018).

for even the most accomplished trial attorney."[16] To reduce some of the enormous risks, many civil lawyers will only bring an antitrust suit if the government has already paid for an investigation and found enough evidence to bring its own case; in such cases, courts recognize that the civil plaintiffs will be "undoubtedly helped considerably by some of the evidence developed by the government."[17]

This case was different: here, the civil plaintiffs, including Class Counsel, invested their own resources to develop the evidence and bring forth claims before the government became involved and without the benefit of their work. Scarlett Decl. at ¶ 12. Before the Department of Justice announced its investigation, the civil plaintiffs had spent over two years litigating their claims. Scarlett Decl. at ¶ 12. They negotiated and received significant document productions from Defendants and deposed more than 80 defendant witnesses. *Id.*

Seeking time to conduct its investigation, the Department of Justice sought a stay on the civil cases – just as Plaintiffs began scheduling the last round of defendant-depositions. EUCPs were the only class to oppose the stay – resulting, in part, in the Court entering a much narrower stay than originally requested.[18] The narrow stay was granted, which halted Plaintiffs' progress (and exposed Plaintiffs to significantly more risk). As part of its investigation, the government subpoenaed the class plaintiffs and requested Defendants' document productions. Scarlett Decl. at ¶ 13. Here, the government – not civil plaintiffs – were "undoubtedly helped considerably" by some of the evidence developed by Class Counsel.

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[16] *In re Chicken Antitrust Litig.*, 560 F. Supp. 957, 960 (N.D. Ga. 1980).

[17] *In re Folding Carton Antitrust Litig.*, 84 F.R.D. 245, 251 (N.D. Ill. 1979).

[18] End-User Consumer Plaintiffs' Opposition to the United States' Motion to Stay Discovery, ECF No. 2287 (June 26, 2019).

5. Class Counsel conducted discovery on pass-through issues unique to their class.

To prove that the overcharge caused by Defendants' misconduct passed through to the consumer class, Class Counsel negotiated discovery with dozens of distributors and grocery stores. Scarlett Decl. at ¶ 14. As a result of these subpoenas, Class Counsel received troves of data reflecting actual purchases and sales through the distribution chain, which EUCP's expert, Dr. Sunding, was able to use to prove systemic, class-wide pass through of the overcharge. In addition, Class Counsel participated in more than 100 depositions of opt-out distributors and retailers, using these defendant-noticed depositions as an opportunity to solidify the pass-through evidence for the consumer class. *Id.*

6. Class Counsel worked with experts, who undertook critical work.

Class Counsel has also extensively worked with EUCP's two economic experts, Dr. David Sunding and Dr. Luis Cabral, to explain the economic mechanisms in this market and empirically demonstrate the overcharge. In support of the EUCP motion for class certification, Drs. Sunding and Cabral each submitted expert reports, totaling over 200 pages. Scarlett Decl. at ¶ 15. Cameron Azari submitted a report regarding the identification of class members. Defendants had an opportunity to depose each expert, and Class Counsel defended these depositions. *Id.* Plaintiffs' experts also submitted reply reports addressing the errors and criticisms made by Defendants' economic expert in his opposition to class certification. Defendants responded by noticing a second deposition of Dr. Sunding, which Class Counsel again defended. *Id.* In addition to these reports, Plaintiffs also served Defendants with their experts' merits reports, totaling 329 pages, in accordance with the Court's Scheduling Order at the end of August 2021. Scarlett Decl. at ¶ 15.

7. Class Counsel reviewed class representatives' documents and helped prepare for and defend their depositions.

Finally, Class Counsel helped the class representatives respond to Defendants' intense discovery requests and prepare for their depositions. To respond to Defendants' interrogatories and requests for production, some class representatives' personal email accounts were searched. Defendants used these documents to ask questions tangentially related to the claims, including questions on what cooked food products a class representative bought at his church's fundraiser. Scarlett Decl. at ¶ 16. Class representatives sat through more 97 hours of depositions, which lasted an average of four hours – with some going up to seven hours. *Id.* All of these depositions were attended by multiple defense counsel, and at some depositions, named partners – some of whom have more than 30 years of litigation experience – led the questioning. *Id.*

III. LEGAL STANDARD

Rule 23 permits the Court to award reasonable attorneys' fees and expenses in class actions, as authorized by law of by the parties' agreement. *See* Fed. R. Civ. P. Rule 23(h). The Seventh Circuit instructs courts to "do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time."[19] Under Seventh Circuit law, the district court has discretion to award fees using either the lodestar approach or a percentage of fund approach.[20] Another approach, sometimes referred to as the marginal percentage fee structure, has also been applied to common funds,[21] though this

[19] *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("*Synthroid I*").

[20] *See Americana Art China Co. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243, 247 (7th Cir. 2014), *citing Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 566 (7th Cir.1994).

[21] *See, e.g.*, *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 978 (7th Cir. 2003) ("*Synthroid II*"); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 236 (N.D. Ill. 2016).

fee schedule appears to be less commonly applied to antitrust cases.[22] This may be because it "create[s] declining marginal returns to legal work, ensuring that at some point attorneys' opportunity cost will exceed the benefits of pushing for a larger recovery, even though extra work could benefit the client."[23] In applying any of these approaches, the Court's goal should be to "to give the lawyer what he would have gotten in the way of a fee in an arms' length negotiation, had one been feasible."[24]

IV. ARGUMENT

From the inception of this case through June 2021, Class Counsel has invested more than 67,522 hours litigating their claims. Counsel for the Consumer Indirect Class requests: (1) an award of attorneys' fees in the amount of 33 percent of the $181 million settlement fund; (2) reimbursement of expenses Class Counsel has advanced to date on behalf of the class; and (3) service awards of $2,000 for each named plaintiff. As demonstrated below, Class Counsel's request for $59,730,000 in fees is a reasonable rate negotiated by the market and in line with the fees awarded in similar cases. Applying a lodestar cross-check, Class Counsel's request represents a modest 1.8 multiplier, well in line with other cases. Although the Court previously indicated its inclination to apply the marginal percentage fee structure, EUCPs respectfully submit that this structure is not the best approach for this particular case.[25]

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[22] *See, e.g., In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, 80 F. Supp. 3d 838, 845 (N.D. Ill. 2015) (awarding 33% and noting that the *Synthroid* fee structure "is not a one-size-fits-all recovery scheme").

[23] *See Synthroid I*, 264 F.3d at 721; *see also Young v. Cty. of Cook*, 2017 WL 4164238, at *9 (N.D. Ill. Sept. 20, 2017).

[24] *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992).

[25] Class Counsel will address the marginal fee structure in these papers and has also provided a fuller explanation in response to the Court's August 4, 2021 Order. *See* End-User Consumer Plaintiffs' Response Regarding Application of Sliding Scale to Attorneys' Fees, ECF No. 5049 (Sept. 15, 2021).

A. The percent of funds approach is the better approach to apply in this case in order to reflect the market price for legal services.

1. In large, complex antitrust cases, sophisticated entities often negotiate a flat 33% fee, according to empirical data.

For cases with consumer plaintiffs, courts do not usually give weight to fee agreements with named plaintiffs.[26] Instead, the Seventh Circuit encourages courts to review "actual fee contracts that were privately negotiated for similar litigation[.]"[27] The most recent 2021 study examining actual fee contracts found that a flat, fixed percentage fee request of one third is *ex ante* market rate negotiated by sophisticated plaintiffs (such as Fortune 500 companies) who bring antitrust cases.[28] This study examined *seventeen years* of antitrust cases litigated on contingency where large corporations were named plaintiffs. Even though "the potential damages in many of these cases were enormous," the fixed percentage fee request "of one-third *heavily* dominated."[29] This market price dominated "even in the most enormous cases, where we would expect the lawyers to benefit from economies of scale."[30] Studies of other large, complex cases taken on contingency by sophisticated entities – such as patent cases – use similar fee structures.[31] Courts in this District have likewise recognized that "a 33% contingent fee of the

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[26] *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 744 (7th Cir. 2011).

[27] *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 635 (7th Cir. 2011); *see also Hale v. State Farm Mut. Auto. Ins. Co.*, 2018 WL 6606079, at *8 (S.D. Ill. Dec. 16, 2018) (noting that the empirical evidence shows "sophisticated clients and sophisticated class representatives regularly agree to pay 33.33% or more in risky, complex litigation, even when potential rewards are very large.").

[28] Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 Fordham L. Rev. 1151 at 1161 (2021) (emphasis in original), available at https://ir.lawnet.fordham.edu/flr/vol89/iss4/4.

[29] *Id.* (emphasis in original).

[30] *Id*.

[31] *See* David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335, 356–57 (2012) (finding that almost all sophisticated plaintiffs in patent cases

total recovery is on the low end of what is typically negotiated *ex ante* by plaintiffs' firms taking on large, complex cases[.]"[32] Because antitrust cases require the investment of significant time and resources, awards of one third the settlement fund are common.[33]

Guessing at the *ex ante* prices, it is true that district courts have sometimes reduced the percent awarded in class action cases that recover more than $100 million or some other so-called "megafund."[34] But empirical data from private market negotiations do not support these decisions. Conversely, there are many class action antitrust cases where district courts have applied the empirical private market data and awarded approximately one-third of the common fund. For example, in 2017, the district court in *Kleen Products* awarded attorneys' fees totaling 30% of the $354 million settlement, equaling about $104 million.[35]

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negotiated a flat percentage contingency fee. The mean was 38.6 percent, even when damages were in the hundreds of millions. The second most common fee structure was one where the fees *escalate* as the litigation moves closer to trial and appeal).

[32] *Young*, 2017 WL 4164238, at *6.

[33] *See, e.g., Kleen Prod. LLC v. Int'l Paper Co.*, 2017 WL 5247928 (N.D. Ill. Oct. 17, 2017) (awarding class counsel 30% of $354 million common fund); *Dairy*, 80 F. Supp. 3d at 842 (awarding class counsel 33% of $46 million common fund); *Standard Iron Works v. ArcelorMittal,* 2014 WL 7781572, at *1 (N.D. Ill. Oct. 22, 2014) (awarding class counsel 33% of $163.9 million common fund); *In re Potash Antitrust Litig.*, 2013 WL 12470850, at *1 (N.D. Ill. June 12, 2013) (awarding class counsel 33% of $90 million common fund). Other complex cases in this Circuit involving large common funds have taken this approach. *See, e.g., Hale,* 2018 WL 6606079, at *12 (awarding class counsel 33% of $250 million settlement of RICO claims and declining to apply sliding scale); *City of Greenville v. Syngenta Crop Prot., Inc.*, 904 F. Supp. 2d 902, 908-909 (S.D. Ill. 2012) (awarding 33% of $105 million settlement of public nuisance class claims); *Heekin v. Anthem, Inc.*, 2012 WL 5878032, at *1 (S.D. Ind. Nov. 20, 2012) (awarding class counsel 33.3% of $90 million settlement of claims involving insurance demutualization and declining to apply sliding scale).

[34] *See In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 524 (E.D.N.Y. 2003) (awarding more than $200 million in fees, which was approximately 6% of the fund); *but see In re Auto. Parts Antitrust Litig.*, 2017 WL 3525415, at *2 (E.D. Mich. July 10, 2017) (noting there is no requirement to reduce the fee award simply because the common fund increases).

[35] *See Kleen*, 2017 WL 5247928, at *4 ("the requested 30 percent recovery is well-within the range of acceptable fees"); *See also Silverman v. Motorola, Inc.,* 2012 WL 1597388, at *3 (N.D.

Class Counsel opposes the use of the marginal percentage fee structure rather than a flat rate because using the flat rate keeps Class Counsel's interests and the classes' interests aligned, especially as the case moves toward trial.[36] As the Seventh Circuit recognized in *Synthroid I,* sliding scales may not always be best because they "create declining marginal returns to legal work, ensuring that at some point attorneys' opportunity cost will exceed the benefits of pushing for a larger recovery, even though extra work could benefit the client."[37] Some courts have suggested applying the marginal percentage fee structure because "it is almost as expensive to conduct discovery in a $100 million case as in a $200 million case."[38] But this structure only accounts for discovery costs, not the time investment of pre-trial and trial. Routine discovery tasks can be completed by attorneys with relatively less experience (such as drafting discovery letters or reviewing documents). But as a case moves towards trial, senior lawyers with trial experience must invest more time to hone the facts and prepare witnesses and draft trial briefs. Thus, the time investment for senior attorneys – those who have the most experience and forgo the most lucrative opportunities when working full time on one case – increases as a case moves closer to trial. Introducing declining marginal returns as a high-risk, complex case moves closer to trial does not align with the private market. This may explain why the one-third contingency rate dominates, even when sophisticated market participants negotiate the fee structure.[39]

Ill. May 7, 2012), *aff'd sub nom. Silverman v. Motorola Sols., Inc*., 739 F.3d 956 (7th Cir. 2013) (awarding 27.5% of the $200 million common fund in securities case).

[36] *See Synthroid II*, 325 F.3d at 979 (noting that one problem with the auction structure, where support for declining fees are found is that "Lawyers will earn a competitive return even at the lower level of compensation, but the class may be worse off.").

[37] *Synthroid I*, 264 F.3d at 722.

[38] *Gehrich*, 316 F.R.D. at 235.

[39] *See* Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 Fordham L. Rev. 1151 at 1161 (2021).

2. The complexity, length and cost of this litigation – as well as the risks assumed by counsel – cut in favor of awarding a flat 33% fee.

Another factor that courts use to evaluate fee requests is the complexity, length, and cost bringing the litigation.[40] Here, antitrust cases stand out; as one court observed, "[a]n antitrust class action is arguably the most complex action to prosecute."[41] Antitrust cases are universally acknowledged for being "complicated, lengthy and bitterly fought."[42] This case is no exception; the parties are five years into litigation and trial will likely not occur until 2023.

Although all antitrust cases are complex, in many instances, civil antitrust plaintiffs have benefit of governmental investigation or prosecution.[43] "On the facts, it is important to note that unlike many cases where attorneys seek a substantial fee, Class Counsel here were not assisted by any governmental investigations or prosecution, for example, as is often the case large class actions."[44] Instead, the civil plaintiffs alone bore the risk of building the evidence.

This case has required lawyers to devote a significant amount of time and effort into building the evidence; there are many defendants and the alleged misconduct spanned more than a decade. Through June 2021, Class Counsel invested more than 67,522 hours litigating this case. Scarlett Decl. at ¶ 17. More than 13 million documents were collected and reviewed; over 180 depositions of defendants' employees and third parties have been taken. Scarlett Decl. at ¶ 6. In addition, EUCPs have attended many opt-out depositions and questioned opt-outs to develop

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[40] *Dairy*, 80 F. Supp. 3d at 847.

[41] *In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000).

[42] *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005).

[43] *See, e.g., Dairy*, 80 F. Supp. 3d at 848 ("Class Counsel benefitted from a large volume of documents and multiple deposition transcripts collected via a price-manipulation investigation by the Commodity Futures Trading Commission ("CFTC").").

[44] *Hale*, 2018 WL 6606079, at *9.

evidence of pass-through to the consumer class. Scarlett Decl. at ¶¶ 7-8. In similar cases where civil plaintiffs have borne the risk of building the case – without the benefit of a governmental investigation – courts have routinely awarded roughly one-third of the common fund as fees. This rate has been applied by courts in this district[45] as well in other districts around the country.[46]

But this case has an additional wrinkle that amplified the complexity, length, cost, and risk: the United States intervened two years into the litigation and sought a stay.[47] At the time, Defendants argued that the stay should prevent all "depositions and non-evidentiary written discovery . . .of the defendants and their current and former employees."[48] While the stay was granted, Defendants were allowed to continue pursuing discovery on Plaintiffs, including by deposing the named plaintiffs. Scarlett Decl. at ¶ 12. Because defendants were able to continue their discovery while the civil plaintiffs were sidelined, Plaintiffs faced the risk of losing, without having power to hold Defendants' feet to the fire. Meanwhile, the United States benefited from

[45] *See Kleen*, 2017 WL 5247928, at *5 (N.D. Ill. Oct. 17, 2017) (awarding 30% of the $354 million common fund).

[46] *See Hale*, 2018 WL 6606079, at *16 (awarding 33% of $250 million common fund); *In re Vitamins Antitrust Litig*., 2001 WL 34312839, at *10 (D.D.C. July 16, 2001) (awarding about 34% of about a $360 million dollar fund); *In re Se. Milk Antitrust Litig*., 2013 WL 2155387, at *1 (E.D. Tenn. May 17, 2013) (noting that "the court previously awarded attorneys' fees in the amount of $48,333,333.00 (one-third of the recovery)" and awarding an additional $52,866,667 (one-third of the second recovery)); *In re Syngenta AG MIR 162 Corn Litig*., 357 F. Supp. 3d 1094, 1103 (D. Kan. 2018) (awarding one-third of the $151 billion settlement fund as attorneys' fees); *In re: Urethane Antitrust Litig.*, 2016 WL 4060156, at *8 (D. Kan. July 29, 2016) (awarding one-third of the $835 million settlement); *In re Loestrin 24 Fe Antitrust Litig*., 2020 WL 4035125, at *1 (D.R.I. July 17, 2020) (awarding 1/3 of $120 million).

[47] *See* Motion by Intervenor United States of America to Intervene and Stay Discovery, ECF No. 2268 (June 21, 2019).

[48] *See* Defendants' Response to the United States' Motion to Intervene and Stay Discovery, ECF No. 2285 (June 26, 2019).

work and risks borne by the civil plaintiffs, as indicated by the fact that the government intends to introduce documents at its trial that it received from the civil plaintiffs. Scarlett Decl. at ¶ 13.

Other risks, both legal and factual, have abounded since the beginning of the case and continue to do so. If it were not for the presence of the remaining defendants, Class Counsel would more specifically detail them. But suffice to say, the remaining stages in this case, including class certification, summary judgment, trial and any possible appeals, are no slam dunk for the EUCPs or Plaintiffs in general.

3. The reaction of the class supports the percent-of-fund fee award.

Another important consideration is the reaction of the class to the proposed settlement and fee request.[49] Through published notice – on the settlement website and in the notice forms – class members have been advised that Class Counsel may seek a fee award of up to 33.3 percent, or $60,273,000 as attorneys' fees and $8.75 million in costs. Scarlett Decl. at ¶ 27. Nobody has filed notice yet that they intend to object to the settlement. However, the opt-out deadline has not passed; Class Counsel is filing this Motion ahead of the opt-out deadline and will make these briefs available on the settlement website (www.overchargedforchicken.com) so that interested class members will have an opportunity to review and comment. Scarlett Decl. at ¶ 28. Class Counsel will update the Court if this factor changes.

4. A lodestar crosscheck confirms that the percent of funds fee award is reasonable.

Although the district court is under no obligation to perform a cross-check on the requested fees against the lodestar,[50] courts sometimes find cross-checks as informative for

[49] *Dairy*, 80 F. Supp. 3d at 851.

[50] *See Williams*, 658 F.3d at 636 ("[C]onsideration of a lodestar check is not an issue of required methodology.").

appraising fee requests.[51] Class Counsel spent more than 67,522 hours litigating this case. "In risky litigation such as this, lodestar multipliers can be reasonable in a range between 2 and 5."[52] Here, Class Counsel's fee request results in a multiplier of 1.8 when compared to their lodestar.[53]

Class Counsel has kept the team litigating this case relatively lean and nimble; more than 99 percent of the hours billed in this case were incurred by Hagens Berman and Cohen Milstein. Scarlett Decl. at ¶ 17. This staffing strategy means that fewer attorneys spent a larger proportion of their time litigating this case. As a result, they have deeper institutional knowledge of the facts, law and theory, produce better work product and litigate more efficiently. They also produce less lodestar and therefore a higher multiplier when they achieve tremendous results, such as the settlements here, for the class.[54]

At times, keeping the case staffed efficiently resulted in schedules that were exceptionally grueling for the few attorneys who worked full-time on this case. During the discovery process, there were many weeks where multiple depositions were scheduled on the same day and back-to-back each week. Scarlett Decl. at ¶ 7. As a result, there were months where attorneys were required to prepare for and attend several depositions each week, every week. During this phase, several attorneys worked full-time on this case, forgoing other work, at a demanding pace. Scarlett Decl. at ¶¶ 8, 22. Due to time differences, some of these attorneys

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[51] *But see Beesley v. Int'l Paper Co.*, 2014 WL 375432, at *3 (S.D. Ill. Jan. 31, 2014) ("The use of a lodestar cross-check has fallen into disfavor.").

[52] *Spano v. Boeing Co.*, 2016 WL 3791123, at *3 (S.D. Ill. Mar. 31, 2016).

[53] A summary of Class Counsel's time records is included in counsel's declarations that accompany this memorandum. *See Hale*, 2018 WL 6606079, at *13 ("it is well established that courts may rely on summaries and need not review actual billing records.") (citations and quotations omitted).

[54] *See Synthroid I,* 325 F.3d at 979-980 (class counsel's efficiency should not be used "to reduce class counsel's percentage of the fund that their work produced.").

regularly began their day with 6:00 A.M. depositions, and then worked through the late afternoon and evening to prepare for the next deposition. Scarlett Decl. at ¶ 8. This remained true even through the height of the pandemic.

Using counsel's current hourly rates to calculate the lodestar (as described more fully in Class Counsel's declarations, *see, e.g.,* Scarlett Decl. at ¶¶ 17-22) results in a 1.8 multiplier. The hourly rates used to calculate this lodestar are reasonable, accepted rates.[55] *See* Scarlett Decl. at ¶ 21 (providing a summary of the mean hourly rates billed by counsel). The 1.8 multiplier does not exceed the bounds of reasonableness, particularly in light of the work performed by Class Counsel prior to this settlement. Indeed, a multiplier of less than two is below the range of multipliers commonly accepted in similar litigation.[56]

B. Class Counsel should be partially reimbursed for their out-of-pocket expenses.

Under the common fund doctrine, class counsel customarily are entitled to reimbursement of reasonable expenses incurred in the litigation.[57] Thus far, expenses in this litigation have exceeded $9 million. *See* Scarlett Decl. at ¶ 24. Here, Class Counsel seeks reimbursement for $8.75 million to partially reimburse a portion of the costs advanced to support

[55] *See In re Auto Parts Antitrust Litig*., 2018 WL 7108072, at *3 (E.D. Mich. Nov. 5, 2018) ("In national markets, "partners routinely charge between $1,200 and $1,300 an hour, with top rates at several large law firms exceeding $1,400." In specialties such as "antitrust and high-stakes litigation and appeals … [f]or lawyers at the very top of those fields, hourly rates can hit $1,800 or even $1,950."); *see also Spano*, 2016 WL 3791123, at *3 (using similar rates).

[56] *See Standard Iron Works*, 2014 WL 7781572, at *2 (awarding 33 percent of a $163.9 million common fund, and noting that the lodestar multiplier was approximately 1.97, "well within the range of reasonable multipliers awarded in similar contingent cases."); *In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig*., 733 F. Supp. 2d 997, 1015 (E.D. Wis. 2000) (awarding a fee that represented a multiplier of 2.07 on a lodestar cross-check and recognizing that "the mean risk multiplier in cases involving class settlements comparable in size to the present settlement is 2.70.").

[57] *See Synthroid I,* 264 F.3d at 722; Fed. R. Civ. P. 23(h).

this litigation.[58] As with the request for fess, Class Counsel informed class members that they would seek reimbursement of up to $8.75 million as reimbursement for of pocket expenses to advance this litigation. Scarlett Decl. at ¶ 24. A significant portion of Class Counsel's expenses ($7,064,226) relate to the work Plaintiffs' economic experts performed on behalf of the class. The benefits to the class from this expert work are real and substantial. Scarlett Decl. at ¶ 27.

First, Plaintiffs' experts conducted in-depth analyses to prove the existence of the overcharge and to show that it passed through the distribution channel. Plaintiffs have submitted the most detailed overcharge analysis among the classes. Plaintiffs' damages expert – Dr. David Sunding – was the only economist who included an annual overcharge model to confirm that class members incurred an overcharge during every year of Plaintiffs' class period.[59] Dr. Sunding also used this model to analyze chicken products by part and demonstrated that the overcharge impacted each of the product types contained in Plaintiffs' class – whole birds and breast meat. This model demonstrates an overcharge to all or nearly all class members through the entire class period.[60]

In addition to breaking out the overcharge model with this incredible level of detail, Dr. Sunding also performed a price-movement analysis and proved that the misconduct resulted in higher prices on a market-wide basis. This analysis showed that movements in the aggregate price for broilers were shared by all products, including the whole birds and breast meat.[61] In

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[58] In the event of future recoveries, Class Counsel will petition the Court for reimbursement of additional expenses incurred, as well as the remaining $257,062.95 not sought in this motion. Scarlett Decl. at ¶ 24.

[59] *See* Decl. of Dr. David Sunding in Support of End-User Consumer Plaintiffs' Motion for Class Certification, ECF No. 3971-4 (Oct. 30, 2020) at ¶ 8(e).

[60] *Id.* at ¶ 8(e).

[61] *Id*.

addition to these detailed analyses, Dr. Sunding also measured pass-through throughout the consumer distribution chain. To evaluate pass through, EUCPs collected, and Dr. Sunding ran regression models on data reflecting $25 billion in actual purchases and sales in the distribution channel to consumers. This data covered more than 88% of club store commerce and more than half of the retail grocery stores. In every case, Dr. Sunding found positive and statistically significant pass-through rates.[62] Class Counsel believes Dr. Sunding's careful, detailed analysis gave EUCPs leverage in their negotiations with Settling Defendants.

Second, Plaintiffs were the only class who decided to bring a rule of reason claim based on Defendants' exchange of detailed pricing and production information through Agri Stats. There is overwhelming documentary evidence in this case that every Defendant submitted detailed pricing and production information to Agri Stats and Defendants used the information they received to raise prices. Plaintiffs believe that this claim increases the likelihood of recovery not least because of the strength of the documentary evidence in support of it. Plaintiffs are the only class who has offered an expert – Dr. Luis Cabral, an economist specializing in competition – who can explain the significance of these voluminous reports to the trier of fact.[63]

Class Counsel paid for the experts to conduct these detailed analyses in anticipation of common arguments raised by defendants in opposition to class certification and at summary judgment. Plaintiffs submitted some of the most robust reports in support of class certification. Undertaking this work added value to the class – by increasing the likelihood of success on the merits, and by creating leverage during settlement negotiations.

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[62] *Id*. at ¶ 8(f).

[63] *See* Decl. of Dr. Luis Cabral in Support of End-User Consumer Plaintiffs' Motion for Class Certification, ECF No. 3971-3 (Oct. 30, 2020) at ¶¶ 10-11.

Class Counsel's other expenses are common expenses in litigation of this size. Before the COVID-19 pandemic Class Counsel traveled to hearings and depositions, resulting in expenses of $109,958.98. Another large expense ($952,113.64) for Class Counsel was hosting Defendants documents (a significant cost, even after being split among the classes) and hosting Plaintiffs' discovery documents. Scarlett Decl. at ¶ 27. Class Counsel's expenses are described in detail in the declarations and exhibits accompanying this motion. These expenses are in line with other cases of this size and complexity.[64]

C. The named plaintiffs have expended significant time on this litigation and should be awarded $2,000.

Finally, Plaintiffs request that each named plaintiff receive a $2,000. Each named plaintiff has spent significant time (40 or more hours) in connection with this case, as their prior declarations detail.[65] As described above (*see* Section II(B)(7)), being a class representative has been no walk in the park for these individuals: discovery has been borderline invasive and depositions – some of which were conducted by named partners appearing on behalf of Defendants – have been grueling. The $2,000 incentive payment compensates class representatives for their time and the intrusion on their privacy. Courts in this district routinely grant incentive payments in similar or larger amounts.[66]

[64] *See Silverman*, 739 F.3d at 958 (noting more than $5 million in out-of-pocket expenses were expended over four years, prior to summary judgment).

[65] *See* Exhibit E to Scarlett Declaration, ECF No. 4377-6 (Mar. 1, 2021).

[66] *See Cont'l Ill.*, 962 F.2d at 571 ("Since without a named plaintiff there can be no class action, such compensation as may be necessary[...]"); *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig.*, 332 F.R.D. 202, 228 (N.D. Ill. 2019) (awarding $5,000).

V. CONCLUSION

For the forgoing reasons, Plaintiffs respectfully request the Court grant their request for fees, costs, and incentive awards to each named plaintiff.

DATED: October 27, 2021

By /s/ Steve W. Berman
Steve W. Berman

Breanna Van Engelen
HAGENS BERMAN SOBOL SHAPIRO LLP
1301 Second Avenue, Suite 2000
Seattle, WA 98101
Telephone: (206) 623-7292
steve@hbsslaw.com
breannav@hbsslaw.com

Shana E. Scarlett
Rio R. Pierce
HAGENS BERMAN SOBOL SHAPIRO LLP
715 Hearst Avenue, Suite 202
Berkeley, CA 94710
Telephone: (510) 725-3000
shanas@hbsslaw.com
riop@hbsslaw.com

Brent W. Johnson
Benjamin D. Brown
Daniel H. Silverman
Alison Deich
COHEN MILSTEIN SELLERS & TOLL, PLLC
1100 New York Ave. NW
Suite 500, West Tower
Washington, DC 20005
Telephone (202) 408-4600
bjohnson@cohenmilstein.com
bbrown@cohenmilstein.com
dsilverman@cohenmilstein.com
adeich@cohenmilstein.com

Interim Co- Lead Counsel for End-User Consumer Plaintiff Class

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on October 27, 2021, a true and correct copy of the foregoing was electronically filed via CM/ECF, which caused notice to be sent to all counsel of record.

By /s/ Steve W. Berman
Steve W. Berman

TAB 15A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

IN RE: OPANA ER ANTITRUST LITIGATION **THIS DOCUMENT RELATES TO:** **All Direct Purchaser Class Actions**	**MDL DOCKET NO. 2580** **Case No. 1:14-cv-10150 (HDL)**

ORDER GRANTING FINAL JUDGMENT AND ORDER OF DISMISSAL APPROVING DIRECT PURCHASER CLASS SETTLEMENT AND DISMISSING DIRECT PURCHASER CLASS CLAIMS AGAINST IMPAX LABORATORIES, INC.

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, and in accordance with the terms of the Settlement Agreement dated July 15, 2022 between plaintiffs Value Drug Company ("Value Drug") and Meijer, Inc. and Meijer Distribution, Inc. ("Meijer") (collectively, the "Class Representatives"), on behalf of the Class defined below (together with the Class Representatives, the "Plaintiffs"), and Defendant Impax Laboratories, Inc. ("Impax"), it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. This Final Judgment and Order of Dismissal hereby incorporates by reference the definitions in the Settlement Agreement among Plaintiffs and Impax, and all capitalized terms used and not otherwise defined herein shall have the meanings set forth in the Settlement Agreement.

2. The following class (the "Class" or "Direct Purchaser Class") has been certified under Fed. R. Civ. P. 23(b)(3):

> All persons or entities in the United States and its territories, including Puerto Rico, who purchased brand or generic Opana ER 5, 10, 20, 30, and/or 40mg tablets directly from Defendants[1] at any time during the period from April 1, 2011 until August 31, 2017 (the "Class").

[1] "Defendants" are Endo Health Solutions Inc., Endo Pharmaceuticals Inc., Penwest Pharmaceuticals Co. (collectively, "Endo"), and Impax Laboratories, Inc.

> Excluded from the Class are Defendants and their officers, directors, management, employees, subsidiaries, or affiliates, and all federal governmental entities. Also excluded from the Class are: all Retailer Plaintiffs that have opted out of the Class, including CVS Pharmacy, Inc., Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Walgreen Co., The Kroger Co., Albertsons LLC, Safeway Inc. and H-E-B L.P.

3. The Court previously appointed the Class Representatives. The Court previously appointed Bruce E. Gerstein of Garwin Gerstein & Fisher, LLP and David F. Sorensen of Berger Montague PC as Co-Lead Counsel for the Class ("Class Counsel"). The Class Representatives and Class Counsel have fairly and adequately represented the interests of the Class and satisfied the requirements of Fed. R. Civ. P. 23(g).

4. The Court has jurisdiction over these actions, each of the parties, and all members of the Class for all manifestations of this case, including this Settlement.

5. The notice of settlement (substantially in the form presented to this Court as Exhibit B to the Settlement Agreement) (the "Notice") directed to the members of the Class via First Class Mail, constituted the best notice practicable under the circumstances. In making this determination, the Court finds that the Notice provided for individual notice to all members of the Class who were identified through reasonable efforts. Pursuant to, and in accordance with, Rule 23 of the Federal Rules of Civil Procedure, the Court hereby finds that the Notice provided Class members due and adequate notice of the Settlement, the Settlement Agreement, these proceedings, and the rights of Class members to object to the Settlement.

6. Due and adequate notice of the proceedings having been given to the Class and a full opportunity having been offered to the Class to participate in the November 3, 2022 Fairness Hearing, it is hereby determined that all Class members are bound by this Order and Final Judgment.

7. The Settlement of this Class Action was not the product of collusion between the Class Representatives and Impax or their respective counsel, but rather was the result of *bona fide*

and extensive arm's-length negotiations conducted in good faith between Class Counsel and counsel for Impax, with the assistance of a mediator, Jonathan B. Marks.

8. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court hereby approves the Settlement and finds that the Settlement is, in all respects, fair, reasonable and adequate to Class members and in their best interests. Accordingly, the Settlement shall be consummated in accordance with the terms and provisions of the Settlement Agreement.

9. The Court hereby approves the Plan of Allocation of the Settlement Fund as proposed by Class Counsel (the "Plan of Allocation"), which was summarized in the Notice of Proposed Settlement and filed with Plaintiffs' Motion for Preliminary Approval of Settlement (ECF No. 1043-2), and directs RG/2 Claims Administration, the firm retained by Class Counsel and previously appointed by the Court as the Claims Administrator, to distribute the Net Settlement Fund as provided in the Plan of Allocation. RG/2 shall distribute 80% of each Claimant's share of the Net Settlement Fund after Impax's second installment payment (to be paid no later than January 17, 2023). RG/2 shall distribute the remainder of each Claimant's share of the Net Settlement Fund after Impax's third installment payment (to be paid no later than January 17, 2024).

10. All claims against Impax in *In re: Opana ER Antitrust Litigation*, MDL No. 2580, No. 14-cv-10150 (HDL) (the "Class Action") are hereby dismissed with prejudice, and without costs (other than as provided herein).

11. Upon the Settlement Agreement becoming final in accordance with Paragraph 7 of the Settlement Agreement, Impax and its past, present, and future parents, subsidiaries, divisions, affiliates, joint ventures, stockholders, officers, directors, management, supervisory boards, insurers, general or limited partners, employees, agents, attorneys, servants, representatives (and the parents', subsidiaries', and affiliates' past, present, and future officers, directors, employees,

agents, attorneys, servants, and representatives), and the predecessors, successors, heirs, executors, administrators and representatives of each of the foregoing (collectively, the "Releasees") are and shall be unconditionally, fully, and finally released and forever discharged from all manner of claims, debts, obligations, demands, actions, suits, causes of action, damages whenever incurred, liabilities of any nature whatsoever, including costs, expenses, penalties and attorneys' fees, under federal or state laws, whether known or unknown, foreseen or unforeseen, suspected or unsuspected, contingent or non-contingent, in law or equity, that Plaintiffs and all Class members, whether or not they make a claim upon or participate in the Settlement Fund, on behalf of themselves and their respective past, present, and future parents, subsidiaries, associates, affiliates, officers, directors, employees, insurers, general or limited partners, divisions, agents, attorneys, servants, trustees, joint ventures, heirs, executors, administrators, representatives (and the parents' subsidiaries' and affiliates' past and present officers, directors, employees, agents, attorneys, servants, and representatives), and their predecessors, successors, heirs, executors, administrators, and representatives (collectively, the "Releasors"), ever had, now has, or hereafter can, shall or may have, directly, representatively, derivatively or in any other capacity, arising out of or relating in any way to:

> (a) all claims related to the Direct Purchaser Class Action that accrued prior to the date of the Settlement Agreement, (collectively, this entire paragraph represents the "Released Claims").

The Settlement Agreement is not intended to release anyone other than the Releasees and is not on behalf of anyone other than the Releasors. For the avoidance of doubt, the Settlement Agreement shall not be construed to affect a release of any kind of any claim against Endo. Furthermore, Impax represents and warrants that it has assumed no contractual obligation that would, in fact or at law, in the event Plaintiffs prevail against Endo in the Direct Purchaser Class

Action, obligate Impax to indemnify, pay contribution to, be liable to, or share in a judgment entered in favor of Plaintiffs against Endo in the Direct Purchaser Class Action, and agrees that Plaintiffs justifiably rely on this representation and warranty and that it is material to Plaintiffs' decision to enter into the Settlement Agreement.

12. In addition, Plaintiffs and each Class member, on behalf of themselves and all other Releasors, hereby expressly waive, release and forever discharge, upon the Settlement becoming final, any and all provisions, rights and/or benefits conferred by § 1542 of the California Civil Code, which reads:

> Section 1542. General Release; extent. A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor;

or by any law of any state or territory of the United States, or principle of common law, which is similar, comparable or equivalent to § 1542 of the California Civil Code. Each Releasor may hereafter discover facts other than or different from those which he, she or it knows or believes to be true with respect to the claims which are the subject matter of Paragraph 14 of the Settlement Agreement, but each Releasor hereby expressly waives and fully, finally and forever settles, releases, and discharges, upon this Settlement becoming final, any known or unknown, foreseen or unforeseen, suspected or unsuspected, asserted or unasserted, contingent or non-contingent claim that would otherwise fall within the definition of Released Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts. Each Plaintiff and member of the Class also hereby expressly waives and fully, finally and forever settles, releases, and discharges any and all claims that are the subject matter of Paragraph 14 of the Settlement Agreement that it may have against any Releasees under § 17200, et seq., of the California Business and Professions Code or any similar comparable or equivalent provision of the

law of any other state or territory of the United States or other jurisdiction.

13. As set forth in Paragraph 16 of the Settlement Agreement (with subheading "Reservation of Claims"), the release set forth in Paragraphs 14 and 15 of the Settlement Agreement (and in Paragraphs 11 and 12 of this Order) shall not release any claims between Plaintiffs, members of the Class, and the Releasors, on the one hand, and Impax and the Releasees, on the other (a) arising in the ordinary course of business between Releasors and Releasees under Article 2 of the Uniform Commercial Code (pertaining to Sales), the laws of negligence or product liability or implied warranty, breach of contract, breach of express warranty, or personal injury; (b) arising out of or in any way relating to any alleged price-fixing agreement between or among manufacturers of generic pharmaceutical products, including but not limited to Impax, including claims alleged in *In re: Generic Pharmaceuticals Pricing Antitrust Litig.*, MDL No. 2724, Case No. 16-MD-2724 (E.D. Pa.); and/or (c) of any sort that do not relate specifically to brand or generic Opana ER.

14. Class Counsel have moved for an award of attorneys' fees, reimbursement of expenses and service awards for the Class Representatives. Class Counsel request an award of attorneys' fees of 36% of the Settlement amount (including the interest accrued thereon), reimbursement of the reasonable costs and expenses incurred in the prosecution of this action in the amount of $4,343,137.06, and service awards of $150,000 for each to the two Class Representatives, and such motion has been on the docket and otherwise publicly available since September 19, 2022.

15. Upon consideration of Class Counsel's petition for fees, costs and expenses, Class Counsel are hereby awarded attorneys' fees totaling $50,528,470.66 (representing 36% of the Settlement Fund, net of reimbursed costs and expenses and service awards) and costs and expenses totaling $4,343,137.06, together with a proportionate share of the interest thereon from the date the

funds are deposited in the Settlement Escrow Account until payment of such attorneys' fees, costs and expenses, at the rate earned by the Settlement Fund, to be paid solely from the Settlement Fund. The attorneys' fees, costs and expenses authorized and approved by this Final Judgment and Order shall be paid to Berger Montague PC and Garwin Gerstein & Fisher LLP as follows: Class counsel shall be entitled to reimbursement of expenses within five (5) business days after this Settlement becomes final pursuant to Paragraph 7 of the Settlement Agreement or as soon thereafter as is practical and in accordance with the terms of the Settlement Agreement and the Escrow Agreement and shall receive 80% of the total attorneys' fees awarded after Impax's second installment payment and the remaining 20% of attorneys' fees awarded after Impax's final settlement payment.

16. Upon consideration of Class Counsel's petition for service awards for Class Representatives, Value Drug and Meijer are each hereby awarded $150,000, to be paid solely from the Settlement Fund immediately after the Settlement becomes final in accordance with Paragraph 7 of the Settlement Agreement. Class Counsel David F. Sorensen and Bruce E. Gerstein shall allocate and distribute such attorneys' fees, costs and expenses among the various Class Counsel which have participated in this litigation. The Releasees shall have no responsibility for, and no liability whatsoever with respect to any payment or disbursement of attorneys' fees, expenses, costs or service awards among Class Counsel and/or Class Representatives, nor with respect to any allocation of attorneys' fees, expenses, costs or service awards to any other person or entity who may assert any claim thereto. The attorneys' fees, costs and expenses, and service awards authorized and approved by this Final Judgment and Order shall constitute full and final satisfaction of any and all claims that Plaintiffs and any Class member, and their respective counsel, may have or assert for reimbursement of fees, costs, and expenses, and service awards, and Plaintiffs and members of the Class, and their respective counsel, shall not seek or demand payment

of any fees and/or costs and/or expenses and/or service awards from Impax other than from the Settlement Fund.

17. The Court retains exclusive jurisdiction over the Settlement and the Settlement Agreement as described therein, including the administration and consummation of the Settlement, and over this Final Judgment and Order.

18. The Court finds that this Final Judgment and Order adjudicates all of the claims, rights and liabilities of the parties to the Settlement Agreement (including the members of the Class) and is final and shall be immediately appealable. Neither this Order nor the Settlement Agreement nor any other Settlement-related document shall constitute any evidence, admission, or concession by Impax or any other Releasee, in this or any other matter or proceeding of any kind whatsoever, civil, criminal or otherwise, before any court, administrative agency, regulatory body, or any other body or authority, present or future, nor shall either the Settlement Agreement, this Order, or any other Settlement-related document be offered in evidence or used for any other purpose in this or any other matter or proceeding except as may be necessary to consummate or enforce the Settlement Agreement, the terms of this Order, or if offered by any Releasee in responding to any action purporting to assert Released Claims, or if offered by any Releasor in asserting that a claim is not a Released Claim, including because such claim is covered by Paragraph 16 of the Settlement Agreement ("Reservation of Claims").

SO ORDERED this 3rd day of November 2022

The Honorable Harry D. Leinenweber
United States District Judge

TAB 15B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE OPANA ER ANTITRUST LITIGATION	MDL No. 2580 Lead Case No. 14-cv-10150
THIS DOCUMENT RELATES TO: All Actions	Hon. Harry D. Leinenweber

DIRECT PURCHASER CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND SERVICE AWARDS FOR THE CLASS REPRESENTATIVES

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I. INTRODUCTION

Class counsel representing Direct Purchaser Class Plaintiffs Value Drug Company ("Value Drug"), Meijer, Inc., and Meijer Distribution, Inc. (together, "Meijer"), and the certified direct purchaser class (collectively, "Plaintiffs," "Direct Purchaser Plaintiffs," or "DPPs") respectfully submit this memorandum in support of their Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Service Awards for the Class Representatives. The declaration of Bruce E. Gerstein ("Gerstein Decl.") accompanies this memorandum.

For over eight years, Class counsel aggressively prosecuted this complicated and challenging antitrust case against determined Defendants. At the start of what would be a three-week trial, Class counsel reached an agreement in principle with defendant Impax Laboratories, Inc. ("Impax") to settle this matter for $145 million.[1] This is a particularly favorable outcome for the Direct Purchaser Class ("Class")[2] given the jury's ultimate verdict in favor of the remaining defendants, Endo Health Solutions Inc., Endo Pharmaceuticals Inc., and Penwest Pharmaceuticals Co. (collectively, "Endo").[3] This Court described the settlement with Impax as

[1] Under the terms of the Settlement Agreement, Impax will pay Plaintiffs $145,000,000 plus interest in three installments as follows: $58,000,000 was paid on June 22, 2022; $58,000,000 plus interest paid no later than January 17, 2023; and $29,000,000 plus interest paid no later than January 17, 2024. Settlement Agreement, ¶ 8 (ECF No. 1043-1).

[2] The Court previously certified the following Direct Purchaser Class:

> All persons or entities in the U.S. and its territories, including Puerto Rico, who purchased brand or generic Opana ER 5, 10, 20, 30, and/or 40 mg tablets directly from Defendants at any time during the period from April 1, 2011 until August 31, 2017 (the "Class"). Excluded from the Class are the Defendants and their officers, directors, management, employees, subsidiaries, or affiliates, and all federal governmental entities.

ECF No. 751 at 1 ("Defendants" are Endo and Impax). Also excluded from the Class are the following entities who have independently filed actions and previously opted out of the Class: CVS Pharmacy, Inc., Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Walgreen Co., The Kroger Co., Albertsons LLC, Safeway Inc. and H-E-B L.P (collectively, the "Retailer Plaintiffs"). *See* ECF No. 768 at ¶ 9.

[3] The trial verdict is subject to a pending Post-Trial Motion for Judgment as a Matter of Law or for a New Trial. ECF No. 1048, which is stayed due to Endo's bankruptcy filing. ECF No. 1064.

"excellent" and "great." *See* Transcript of Preliminary Approval Hearing, dated July 28, 2022 ("Preliminary Approval Transcript") at 2, 6-7.[4]

Hatch-Waxman antitrust cases brought pursuant to the standard articulated in *Actavis*[5] are complicated, requiring: (a) an understanding of intricate FDA regulations and the drug application approval process; (b) expertise in patent law and patent litigation, including substantive analyses of patents and patent infringement allegations; (c) economic expertise to evaluate the contours of monopoly power, which can include analysis of the relevant market; (d) the development of factual evidence and an economic model to demonstrate a "but-for world" devoid of the alleged anticompetitive behavior; and (e) the calculation of damages to the Class caused by the alleged misconduct. These cases, including this one, also require substantial attorney (and support staff) hours and the incurrence of substantial expenses and costs.

This particular case added several layers of complexity on top of the typical framework described above. Because the payment at issue in the contested "reverse payment" agreement was associated with a Development and Co-Promotion Agreement ("DCA") for a yet-to-be developed drug, the case required an understanding of the due diligence typically involved in drug investment partnerships and an investigation into the due diligence analysis (or lack thereof) conducted by the Defendants for the DCA. Further, because the settlement agreement included a so-called "broad license," Defendants argued that this provision made their agreement on balance procompetitive notwithstanding the challenged reverse payments because it granted a license to later-issued patents Endo had not yet acquired at the time of the reverse payment agreement, and other generic companies later lost patent infringement lawsuits brought by Endo

[4] A copy of the Preliminary Approval Transcript is attached as Exhibit B to the Gerstein Decl.

[5] *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013).

concerning those later-issued patents. Additionally, unlike other cases, the complicated structure of the reverse payment—specifically the existence of the Endo Credit—made the establishment of any payment from Endo to Impax more difficult and challenging for Plaintiffs here than in other reverse payment cases. Indeed, Class counsel here needed to convince the Court and the jury that the Endo Credit was designed to guarantee Impax a significant payment at the time of the agreement no matter what happened to the market for Opana ER. Further compounding these unique and challenging complexities, since Opana ER is a controlled substance, the case required an understanding of FDA regulations related to controlled substances, the safety and dangers associated with different formulations of Opana ER for purported abuse deterrence, and analyses of Endo's claims of safety associated with its reformulated Opana ER, its petitions to the FDA to remove original Opana ER from the market, and its ultimate withdrawal of reformulated Opana ER from the market at the FDA's request.

The challenges and risks associated with this case were significant and were further intensified by the additional challenges imposed by Covid protocols. Those risks were ultimately realized following an almost three-week jury trial when the jury returned a verdict for Endo. Even the verdict underscored the complexities of this case. While the jury found that Class counsel successfully proved monopoly power and a reverse payment, they found that Endo's arguments concerning the "broad license" provided sufficient procompetitive justification for the conduct. The loss at trial underscores just how valuable the $145 million settlement is for the Class. Absent this settlement, secured by Class counsel as the trial commenced, the Class would currently be empty-handed, without *any* compensation for their injuries.

Class counsel investigated this case independently, without the aid of a preceding government action or indictment, and filed this case on an entirely contingent basis, knowing it

could take years to prosecute, millions of dollars and tens of thousands of attorney hours to properly resource, and assuming the very real risk of nonpayment. Class counsel began investigating this "pay for delay" case in early 2014, ultimately filing the first complaint on behalf of plaintiff Rochester Drug Cooperative, Inc. ("RDC") on June 4, 2014.[6] Gerstein Decl. Decl. ¶ 2. Soon thereafter, Class counsel filed complaints on behalf of plaintiffs Value Drug[7] and Meijer[8] and the cases were centralized by the U.S. Judicial Panel on Multidistrict Litigation in the Northern District of Illinois, along with cases filed on behalf other plaintiffs. ECF No. 1 (Dec. 12, 2014). Gerstein Decl. ¶¶ 2-4. The DPPs' complaints alleged that Defendants Endo and Impax violated Sections 1 and 2 of the Sherman Act under the standards set forth in *Actavis* by entering into an unlawful reverse payment agreement to settle patent infringement litigation. The litigation has since focused on the large, unlawful reverse payments Endo made to Impax, which induced Impax to delay its launch of generic Opana ER and suppressed competition, causing Class members to pay supracompetitive prices for brand and generic Opana ER sold by Defendants. Prior to the DPPs' complaint being filed, no other direct purchaser pursued the pay-for-delay theory that Class counsel and the Class Representatives here did, and the FTC did not file its case until 2016, almost two years after the first DPP complaint was filed.[9] Gerstein Decl. ¶¶ 8-9.

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[6] *Rochester Drug Co-Operative, Inc. v. Endo Health Solutions Inc. et al.*, No. 14-cv-3185 (E.D. Pa.) (complaint filed on June 4, 2014) (now No. 14-cv-10151 (N.D. Ill.)). RDC voluntarily dismissed its claims with prejudice in June 2018 (ECF No. 375).

[7] *Value Drug Company v. Endo Health Solutions Inc. et al.*, No. 14-cv-5416 (N.D. Ill.) (complaint filed on July 16, 2014).

[8] *Meijer, Inc., et al. v. Endo Health Solutions Inc. et al.*, No. 14-cv-7320 (N.D. Ill.) (complaint filed on Sept. 19, 2014).

[9] *Compare Rochester Drug Co-Operative, Inc. v. Endo Health Solutions Inc. et al.*, No. 14-cv-3185 (E.D. Pa.) (complaint filed on June 4, 2014) (now No. 14-cv-10151 (N.D. Ill.)), to *FTC v. Endo, et. al*, No. 16-cv-01440 (E.D. Pa.) (complaint filed on Mar. 30, 2016).

Class counsel pursued this case on a wholly contingent basis without any guarantee of success or compensation. Gerstein Decl. ¶ 9. The favorable settlement with Impax reached at the late stage in this case is the result of their unique skill and experience gained from 20-plus years of handling similar cases and their perseverance in this case in the face of vigorous defenses advanced by some of the best defense firms in the country.

From case investigation through preliminary approval of the settlement, over the course of eight years, Class counsel expended almost 66,000 hours of uncompensated professional time, equating to a lodestar of over $41.7 million based on 2022 rates, and incurred over $4.3 million in unreimbursed out-of-pocket expenses. Gerstein Decl. ¶¶ 66-69. As compensation for their efforts, Class counsel seek reimbursement of litigation expenses in the amount of $4,343,137.06, *Id*. at ¶ 66, service awards in the amount of $150,000 each for class representatives Value Drug and Meijer, and an award of attorneys' fees in the amount of $50,528,470.66, *i.e.*, 36% of the settlement amount (including an equal percentage of any interest accrued since the settlement amount was escrowed), net of reimbursed expenses and service awards granted by the Court pursuant to this motion. *Id*. at ¶ 71.[10] The requested fee, if awarded, would result in a modest lodestar multiplier of 1.21. *Id.*[11] It is respectfully suggested that these requests are justified for several reasons.

First, the result - $145 million in cash for the Class - is extraordinary as a stand-alone matter, but even more so in light of the loss at trial. The alternative for the Class was no recovery

[10] This is calculated by subtracting $4,343,137.06 in expenses and $300,000 in service awards from the $145 million settlement and multiplying the difference by .36. The notice sent to the Class stated that "Class Counsel intend to seek attorneys' fees of up to forty percent of the Settlement Fund less court-approved expenses and service awards." ECF No. 1055 at 9.

[11] The multiplier of 1.21 is calculated by dividing the requested fee $50,528,470.66 by the Class counsel's lodestar of $41,762,618.41.

at all pending post-trial briefing and a likely appeal (by whichever side loses at the district court), which will not resolve for many months, if not years, and may result in another trial with similar uncertainties.

Second, the requested fee is a reasonable market rate for Class counsel's services had they been negotiated *ex ante*, as the Seventh Circuit directs. The benchmarks employed in the Seventh Circuit to gauge reasonable market rates – existing or prior contracts between the parties, data from similar common fund cases, and class counsel auctions – all support Class counsel's request. Class members in this litigation have previously attested to the reasonableness of a 33% fee in similar class settlements of pharmaceutical antitrust cases and more than the 36% fee sought here if the case advanced to trial, as this one did. A 36% fee is also within the ordinary range of contingency fee arrangements actually negotiated *ex ante* between parties, including in complex securities and antitrust actions. And while there are few comparable, complex antitrust cases that advance all the way to a jury verdict, a 36% fee is not uncommon when they do.

Third, the unusually high risk, length, and complexities of this case, coupled with the caliber of performance and quality of work performed by Class counsel, including during trial, warrant the requested fee. This case was particularly complicated and risky, even among traditionally complicated antitrust cases brought under *Actavis*. Despite the very real risk of nonpayment, Class counsel committed 8 years, almost 66,000 attorney and professional hours, and $4,343,137.06 in unreimbursed expenses to ensure the vigorous prosecution of this case. Class counsel took this case through exhaustive fact and expert discovery, significant motion practice (under Federal Rules of Civil Procedure 12, 23, 56, and 702/*Daubert*, numerous motions to compel, numerous motions *in limine*, and motions regarding admissibility of evidence at trial),

and through a three-week jury trial. The case was hard fought at every stage against very well-resourced Defendants, represented by some of the top defense law firms in the country, who mounted an aggressive and sophisticated defense. A lodestar cross check confirms the reasonableness of the 36% fee request. The requested fee would equate to a 1.21 multiplier of lodestar, which is on the low side of what is routinely granted in this Circuit and others in complex cases.

These factors strongly support the requested fee, the $150,000 service award for each named class representative, and the reimbursement of $4,343,137.06 in costs/expenses.

II. SUMMARY OF CLASS COUNSEL'S LITIGATION EFFORTS

A. Pre-Filing Investigation

Class counsel began investigating this case in earnest in early 2014. Gerstein Decl. ¶ 1. Class counsel gathered information regarding the market availability of generic versions of Opana ER, reviewed and analyzed the Opana ER patent litigation proceedings, and researched and analyzed publicly available information regarding the terms and conditions of Endo's settlements with Impax and the other would-be generic competitors.

On June 4, 2014, Class counsel's client RDC filed the first complaint by any plaintiff alleging a delay in generic Opana ER competition due to Defendants' unlawful reverse payment agreement.[12] Soon thereafter, Value Drug[13] and Meijer[14] filed complaints with substantially

[12] *Rochester Drug Co-Operative, Inc. v. Endo Health Solutions Inc. et al*., No. 14-cv-3185 (E.D. Pa.) (complaint filed on June 4, 2014) (now No. 14-cv-10151 (N.D. Ill.)). RDC dismissed its complaint with prejudice on June 11, 2018, ECF No. 378, but other clients of Class counsel, Class Representatives Value Drug and Meijer, filed complaints making substantially similar allegations, as outlined below.

[13] *Value Drug Company v. Endo Health Solutions Inc. et al*., No. 14-cv-5416 (N.D. Ill.) (complaint filed on July 16, 2014).

[14] *Meijer, Inc., et al. v. Endo Health Solutions Inc. et al*., No. 14-cv-7320 (N.D. Ill.) (complaint filed on Sept. 19, 2014).

similar allegations, and the United States Judicial Panel on Multidistrict Litigation transferred the cases to the Northern District of Illinois for coordination with other actions.[15] Class counsel filed the First Amended Consolidated Class Action Complaint on May 4, 2015, which remained the operative complaint for the duration of litigation.[16] Class counsel investigated these allegations and developed the pleadings without the benefit of a related investigation or complaint brought by a government enforcement agency.

B. Prosecution of the Case

1. The Motion to Dismiss

Defendants filed a motion to dismiss on July 3, 2015, which argued that: (1) the "Endo Credit," no-AG agreement, and Endo's non-refundable upfront $10 million cash payment under the DCA did not constitute large reverse payments under *Actavis*; and (2) because other generic manufacturers were still embroiled in patent infringement litigation on later-issued patents, DPPs could not plausibly allege that Impax would have launched its generic Opana ER earlier absent the reverse payment agreement, which contained a so-called "broad license." ECF No. 118. Class counsel responded in sixty pages of briefing on August 21, 2015, raising, among other things, a newly issued decision in the Third Circuit which directly refuted Defendants' theory that a no-AG promise should not constitute a large reverse payment under *Actavis*. ECF No. 129 at 3, n. 6 (*citing King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp*., 791 F.3d 388, 395 (3d Cir. 2015)). The Court denied Defendants' motion in a 40-page opinion issued on February 10, 2016, acknowledging that, among other things, Plaintiffs' claims about the value of the alleged reverse payments "may be an issue for summary judgment or trial." *In re Opana ER*

[15] *See* Transfer Order, *In re: Opana ER Antitrust Litigation*, MDL No. 2580, ECF No. 54 (Dec. 12, 2014).

[16] ECF No. 101

Antitrust Litig., 162 F. Supp. 3d 704, 719-20 (N.D. Ill. 2016). With these risks and challenges in mind, Class counsel developed and executed a comprehensive discovery plan.

2. Discovery

Discovery in this case began in earnest in the spring of 2016 following the Court's denial of the motion to dismiss. Class counsel, on behalf of DPPs, served each Defendant with over 100 Requests for Production, at least fifteen interrogatories, and several Requests for Admission; took, participated in, and defended more than 20 fact depositions; and pursued non-party discovery, including from Actavis, another generic Opana ER manufacturer. Gerstein Decl. ¶¶ 15-18, 21. Discovery in this litigation was hotly contested, requiring Class counsel to file numerous motions to compel document production, deposition testimony, and interrogatory responses from Defendants and third parties to access the discovery necessary to prove their claims. *See e.g.* ECF Nos. 262, 279, 281, 285, 291, 347, 359, 372; Gerstein Decl. ¶ 19.

As discussed below, Class counsel's diligent pursuit of evidence armed Plaintiffs with documentary evidence and testimony to successfully support their class certification motion, opposition to two motions for summary judgment, and present evidence during an almost three-week trial before this Court.

3. Class Certification

Class counsel's work developing expert discovery and filing a Rule 23 motion resulted in the successful certification of a class of direct purchasers of generic and brand Opana ER from Endo and Impax. *See In re Opana ER Antitrust Litig*., 2021 WL 3627733, at *4 (N.D. Ill. June 4, 2021). Class counsel overcame Defendants' argument that the DPP class, with fewer than 40 distinct class members, was not sufficiently numerous to satisfy Rule 23(a), a hotly disputed issue resulting in split outcomes in district courts across the country. *See id.*

4. Experts

Class counsel retained eleven experts who issued 22 reports and sat for 22 depositions, resulting in expert fees of nearly $3 million. Gerstein Decl. ¶¶ 22-23. Class counsel also deposed or participated in the depositions of Defendants' twelve experts. Gerstein Decl. ¶ 26. These efforts required Class counsel to present and defend against very complex material in a concise and coherent manner. Class counsel also ensured that eight of the Class's experts were fully prepared to provide comprehensible testimony at trial. Gerstein Decl. ¶ 24.

5. Summary Judgment and *Daubert* Motions

After the conclusion of expert discovery, Defendants moved for summary judgment on causation and damages, arguing that Plaintiffs suffered no antitrust injury because Defendants' settlement agreement allegedly promoted competition and hastened generic entry by granting Impax a broad license that purportedly permitted Impax to continue selling generic Opana ER after Endo acquired the later-issued patents. ECF Nos. 539, 540. Endo also moved for partial summary judgment on several complex patent issues related to the prior patent litigation, seeking to prevent Plaintiffs from (a) recovering damages after the issuance of its two later-issued patents; and (b) from presenting certain arguments and defenses related to Impax's purported patent infringement. ECF Nos. 532, 533. Along with its summary judgment motions and replies, Defendants collectively submitted 160 pages of alleged undisputed facts and 138 exhibits. ECF Nos. 562, 581; Gerstein Decl. ¶ 29. Defendants also filed ten *Daubert* motions, totaling another 216 pages of briefing (including replies) and an additional 105 exhibits. ECF Nos. 510 & 512 (Tupman), 513 & 515 (DeLeon), 516 (Molina), 529 (Leitzinger), 537 & 542 (Bruno), 541 & 544 (Belvis), 546 & 549 (Byrn), 550 & 554 (Zettler and Lessem), 556 & 559 (McGuire), 757 & 758 (Leitzinger, renewed); Gerstein Decl. ¶ 30. Class counsel opposed with two summary judgment briefs, submitting their own statements of undisputed facts and replies to Defendants' statements

of facts and exhibits. ECF Nos. 615 & 617-21, 639, 644; Gerstein Decl. ¶ 32. Plaintiffs also filed 10 *Daubert* motions of their own, totaling 222 pages in briefing (including opening and replies) and supported by 98 exhibits, and opposed each of Defendants' ten *Daubert* motions in another 135 pages of briefing and supported by 57 exhibits. ECF Nos. 519 (Patel), 520 (Singer), 521 (Figg), 522 (Lowman), 523 (excluding opinions concerning lawsuits and patents that post-date the reverse payment agreement), 524 (Fassihi), 525 (Gilligan), 526 (Addanki), 527 (Green), 528 (Berneman), 534 (Declaration and Exhibits in support of *Daubert* motions), 565 (Patel reply), 566 (Singer reply), 568 (Figg reply), 569 (Lowman reply), 571 (Post-date reply), 572 (Fassihi reply), 573 (Gilligan reply), 575 (Addanki reply), 576 (Green reply), 577 (Berneman reply), 600 (Tupman opposition), 602 (DeLeon opposition), 603 (Molina opposition), 604 (Bruno opposition), 605 (Belvis opposition), 609 (Leitzinger opposition), 613 (McGuire opposition), 614 (Zettler & Lessem opposition), 616 (Byrn opposition), 762 (Leitzinger renewed opposition); Gerstein Decl. ¶¶ 31, 33.

In a 29-page opinion, the Court denied Defendants' summary judgment motions and denied, at least in part, all but one *Daubert* motion filed by Defendants. *In re Opana ER Antitrust Litig.*, 2021 WL 2291067 (N.D. Ill. June 4, 2021). In denying Defendants' motion for summary judgment on causation and damages, the Court rejected Defendants' argument concerning the broad license:

> Defendants would like to use the Broad License as a counterbalance to the reverse payment, but the Broad License is a concession in the same direction as the reverse payment—from Endo to Impax. As a result, while the Broad License has potentially beneficial effects to consumers, it does not counterbalance the $102 million reverse payment from Endo to Impax. Instead, the Broad License concession serves only to highlight how much Endo valued Impax's delayed start, suggesting monopolistic effects instead of procompetitive ones.

Id., at *25. The Court agreed with Plaintiffs that "there is additional evidence in the record that the Broad License was not a reasonably necessary part of the 2010 Settlement and License Agreement," and this became the defining issue at trial. *Id.*

6. Trial Preparation and Trial

With fact and expert discovery completed, summary judgment and *Daubert* motions resolved, Class counsel prepared for trial, which ultimately began on June 9, 2022. Gerstein Decl. ¶¶ 35, 44. Leading up to trial, Defendants filed 23 motions *in limine*, comprising 174 pages of briefing. ECF Nos. 801-05, 814-15, 817-20, 822, 824-25, 827, 829, 831; Gerstein Decl. ¶ 36. Class counsel filed 91 pages of briefing in opposition and seven motions *in limine* of their own, totaling 82 pages. ECF Nos. 806-12, 839, 842-43, 845-46, 848, 865; Gerstein Decl. ¶ 36. In preparation for trial and via the joint pretrial order filed on May 24, 2022, the parties exchanged witness lists, deposition designations, exhibit lists, proposed jury instructions, and proposed verdict forms. Gerstein Decl. ¶ 37. Class counsel, on behalf of Plaintiffs, named 35 fact witnesses and eight expert witnesses, which Class counsel prepared to examine or present via video depositions at trial. *Id.* at ¶ 38. Endo and Impax named 44 witnesses, which Class counsel prepared to cross-examine or present via counter-designated video depositions at trial. *Id.* Class counsel submitted a 186-page spreadsheet of deposition designations, to which Defendants objected and counter-designated deposition testimony. *Id.* at ¶ 39. Class counsel replied by responding to Defendants' objections, as well as by objecting and providing reply-designations in response to Defendants' counter-designations. *Id.* Endo submitted a 104-page spreadsheet of deposition designations and Impax submitted a 105-page spreadsheet. *Id.* For each, Class counsel responded with objections and counter-designations. *Id.* Class counsel prepared a final exhibit list with 1,664 exhibits, while Endo offered 618 and Impax offered 190, which Class counsel responded to with objections as appropriate. *Id.* at ¶ 40. Class counsel prepared general jury

instructions, Phase I jury instructions, and Phase II jury instructions, as well as a statement for the Court in support of their jury instructions, totaling more than 250 pages. *Id.* at ¶ 41. Class counsel also prepared objections to Endo's and Impax's separate, opposing jury instructions and responses to Endo's and Impax's objections to Plaintiffs' proposed jury instructions. *Id.* Last, Class counsel prepared proposed verdict forms for Phase I and Phase II, along with a supportive statement and objections to Endo's and Impax's separate proposed verdict forms, which collectively totaled 23 pages. *Id.*

Class counsel travelled to Chicago a few days before the final pre-trial conference on June 2, 2022 to submit to court-mandated COVID testing and further coordinate with co-counsel and the other plaintiff groups on trial strategy. *Id.* at ¶ 42. Class counsel telephonically attended the pretrial conference addressing the Court's rulings on motions *in limine* and instructions related to jury selection and trial logistics, among other things. *Id.* In preparation for jury selection, Class counsel reviewed over 200 pages of juror information and questionnaire responses. *Id.* at ¶ 43. The trial began on June 9, 2022 with *voir dire*. *Id.* at ¶ 44. A jury was selected that morning and Class counsel and co-counsel offered opening arguments that afternoon. Class counsel attended trial during the day, examining witnesses, countering any objections raised by Defendants, and proffering objections of their own. *Id.* at ¶ 45. Each evening, for witnesses whose deposition testimony was presented at trial by video, Class counsel exchanged exhibit lists, deposition designations, related objections, counter-designations, and reply-designations with Defendants. *Id.*

Just before opening statements on June 9, 2022, Impax and Class counsel announced a settlement with Impax, who also settled with the Retailer plaintiffs. *Id.* at ¶ 46. Because Impax had not yet settled with the end-payor plaintiffs, however, Impax participated at trial until June

15, 2022, when Impax and the end-payor plaintiffs informed the Court they had settled. *Id.* The trial continued against Endo, and the jury ultimately returned a jury verdict in favor of Endo on July 1, 2022. *Id.*

7. Mediation and Settlement

DPPs and Impax reached an agreement in principle on June 8, 2022 just as the parties prepared for opening statements. Gerstein Decl. ¶ 48. This represented the culmination of mediation efforts that first started in May 2022 with a full day mediation led by Jonathan Marks, one of the preeminent mediators in the nation, and continued with multiple individual virtual sessions in May and early June, laying the groundwork for the parties' ultimate settlement as trial started. *Id.* at ¶ 47. After the jury verdict, Class counsel negotiated the ultimate settlement agreement with Impax, which was executed on July 15, 2022, just two weeks after the jury's verdict in Endo's favor. *Id.* at ¶ 48.

* * *

For nearly eight years, Class counsel zealously prosecuted this action. The very substantial settlement reached with Impax will ensure that the Class receives a significant recovery despite a loss at trial.

III. CLASS COUNSEL SHOULD BE REWARDED REASONABLE ATTORNEYS' FEES

A. The Recovery for the Class is Extraordinary in Light of the Loss at Trial

Class counsel secured an "excellent"[17] $145 million settlement with Impax as trial commenced, which continued to conclusion with a verdict in Endo's favor. The $145 million Class counsel recovered from Impax on behalf of the Class is not only substantial in relation to

[17] Preliminary Approval Transcript at 2, 7.

similarly complex cases,[18] it is extraordinary in light of the known alternative: no recovery whatsoever. The indisputable value and benefit conferred on the Class by this settlement is a testament to Class counsel's determined pursuit of victory at every stage of this litigation.

B. Class Counsel's Fee Request is Reasonable

Under the "equitable fund" doctrine, attorneys for the plaintiffs in a class action may petition the court for compensation from the settlement fund that resulted from their efforts. *Boeing v. Van Gemert*, 444 U.S. 472, 478 (1980); Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees ... that are authorized by law or by the parties' agreement."). Courts in the Seventh Circuit use one of two methods for calculating reasonable attorneys' fees – either the "lodestar" method, which considers "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate," or the percentage method, which "sets the fee award as a percentage of the recovered settlement fund, plus expenses and interest." *In re Dairy Farmers of Am., Inc*., 80 F. Supp. 3d 838, 844 (N.D. Ill. 2015) (citations omitted); *In re Cap. One Tel. Consumer Prot. Act Litig*., 80 F. Supp. 3d 781, 794 (N.D. Ill. 2015) ("It has long been the law in the Seventh Circuit that in common fund cases like this one, district courts have discretion to choose either the lodestar or a percentage approach to calculating fees.") (citing *Florin v. Nationsbank of Ga., N.A*., 34 F.3d 560, 566 (7th Cir.1994)). The trend in common-fund cases like this one is to use the percentage method. *Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998) ("When a class suit produces a fund for the class, it is commonplace to award the lawyers for the class a percentage of the fund in recognition of the

[18] *See 2021 Antitrust Annual Report: Class Actions in Federal Court*, at 15 (April 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4117930 (last accessed Sept. 16, 2022) ("2021 Antitrust Annual Report") (Settlement recoveries in pharmaceutical antitrust cases average $54.2 million).

fact that most suits for damages in this country are handled on the plaintiff's side on a contingent-fee basis") (collecting cases, internal citations omitted); *Dairy Farmers*, 80 F. Supp. 3d at 844 (Applying the percentage method and explaining that it "has emerged as the favored method for calculating fees in common-fund cases in this district"). As Professor Brian Fitzpatrick of Vanderbilt Law School, an expert on fee awards in class action litigation, has observed, where a court can monitor against premature settlement—which clearly is not an issue here—then the percentage of recovery, not lodestar, is the best method for determining appropriate attorneys' fees. Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees In Class Actions*, 89 Fordham Law Review 1151, at 1170 (2021) (hereinafter, "*Guide to Awarding Fees In Class Actions*").

As the Seventh Circuit directs, "[t]o determine the reasonableness of the sought-after fee in a common-fund case, 'courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.'" *Cap. One*, 80 F. Supp. 3d at 788–89 (quoting *In re Synthroid Mktg. Litig*., 264 F.3d 712, 718 (7th Cir. 2001) ("*Synthroid I*") (citations omitted). This is often referred to as the "*ant*e approach," which asks the court to assign fees that "mimic a hypothetical *ex ante* bargain between the class and its attorneys." *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 635 (7th Cir.2011); *Synthroid I,* 264 F.3d at 719 (Directing the district court on remand to "set a fee by approximating the terms that would have been agreed to *ex ante*, had negotiations occurred.").

In *Synthroid I*, the Seventh Circuit provided "guides" or "benchmarks" to approximate the market rate by looking at "similar bargains," such as (1) actual fee contracts between the parties and class counsel in similar cases, (2) data from similar common fund cases, and (3) information from lead counsel auctions in similar cases. *Synthroid I*, 264 F.3d at 719;

Taubenfield v. AON Corp., 415 F.3d 597, 599 (7th Cir. 2005). The market rate should also be adjusted to account for (1) the risk of nonpayment a firm agrees to bear, (2) the quality of its performance, (3) the amount of work necessary to resolve the litigation, and (4) the stakes of the case. *Synthroid I,* 264 F.3d at 721.

Here, Class counsel's request for a fee of 36% of the net settlement fund is supported by these factors, consistent with the law, and commensurate with awards in similar cases.

C. Benchmarks Provided by Similar Cases Support Class Counsel's Fee Request as an Appropriate Market Rate

Attorneys' fees negotiated and arrived at in similar complex cases provide an initial benchmark for a reasonable market rate. *Cap. One*, 80 F. Supp. 3d at 796 ("the Seventh Circuit explained that it is possible to learn about 'similar bargains' and set forth three 'guides' or 'benchmarks' to help district courts estimate the market fee: (1) actual fee contracts between plaintiffs and their attorneys; (2) data from similar common fund cases where fees were privately negotiated; and (3) information from class-counsel auctions.") (citing *Synthroid I*, 264 F.3d at 719); *Dairy Farmers*, 80 F. Supp. 3d at 845 ("As a barometer for assessing the reasonableness of a fee award in common-fund cases, courts look to the going market rate for legal services in similar cases.").

1. Fee Contracts Between Class Counsel and Clients

As is often true in class action litigation, the parties here did not agree upon a contingent fee award in advance, but this Class consists of sophisticated business entities who have served as Class members and recovered settlements from numerous pharmaceutical pay-for-delay antitrust cases like this one. Class counsel are largely the same legal team that have been litigating direct purchaser delayed generic entry antitrust cases since 1998. As a result of Class counsel's historical efforts, the largest members of these classes – the three "national

wholesalers," AmerisourceBergen Corp., Cardinal Health, Inc. and McKesson Corp. – have received substantial recoveries in prior pharmaceutical pay-for-delay cases. These same entities have provided letters and declarations in previous cases affirmatively supporting fee applications, where Class counsel requested a fee of one-third (33.3%) of the settlement. *See* Gerstein Decl., Ex. A (prior letters). The prior support from these Class members, all large corporations with extensive experience in negotiating fair legal fees, for fees of 33% in similar pharmaceutical antitrust cases suggests that this is a fair guide or benchmark. A critical distinction, however, is that none of the cases approving a 33% fee was litigated through trial and none involved a significant settlement with one defendant during a trial that ended with a verdict for the other defendant, as occurred here. In an antitrust case brought on behalf of a class with a similar make up to the Class here, the class representative, Louisiana Wholesale Drug Co., Inc., attested that they "would have retained [Class counsel] based on a 33 1/3% contingency fee in the event of settlement or compromise without trial and/or based on a 40% contingency fee in the event of trial." *In re Neurontin Antitrust Litig*., No. 02-1830, ECF No. 114 at 12 (D.N.J. Aug. 6, 2014).

2. Data from Similar Common Fund Cases

Courts nationwide recognize that a 36% fee is within the ordinary range of *ex ante* rates in privately negotiated contingency-fee arrangements. *Dairy Farmers*, 80 F. Supp. 3d at 845 (in class actions, the "usual range for contingent fees is between 33 and 50 percent"); *In re Corel Corp. Sec. Litig*., 293 F. Supp. 2d 484, 495–98 (E.D. Pa. 2003) ("Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class commercial litigation."); *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, 2001 WL 1568856, at *4 (N.D.Ill. Dec.10,

2001) ("A customary contingency fee would range from 33 1/3% to 40% of the amount recovered.").[19]

When looking to similar class cases and fee awards ultimately granted by courts for a benchmark, the unique posture of this case should be considered. Very few antitrust cases proceed to trial and even fewer reach a jury verdict. *See Allapattah Servs., Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185, 1193 (S.D. Fla. 2006) ("The most apparent feature distinguishing this class action from virtually every other class action in the reported federal decisions is obviously that it did not settle before trial."). This is one of only two reverse payment antitrust cases to go to verdict since the Supreme Court's *Actavis* decision in 2013, and the only case that resulted in both a significant mid-trial settlement for, and a jury verdict against, the same plaintiffs. Where complex class action cases proceed to trial, a fee award of even 40% is not uncommon. *See* Order Granting Mot. for Att'ys Fees, *In re Melridge, Inc. Sec. Litig*., No. 87-cv-01426-FR, ECF No. 2419 (D. Or. Apr. 15, 1996) (awarding 40% fee in eight-year litigation after jury trial and appeal). *See also In Re Mushroom Direct Purchaser Antitrust Litig.,* No. 06-0620, ECF No. 1088

[19] *See also Temp. Servs., Inc. v. Am. Int'l Grp., Inc*., 2012 WL 4061537, *8-*9 (D.S.C. Sept. 14, 2012) ("the market rate for private contingency fees is in the range of 33 1/3 percent to 40 percent"); *Montague v. Dixie Nat. Life Ins. Co*., 2011 WL 3626541, at *2-3 (D.S.C. Aug. 17, 2011) (noting that "[v]ery few class actions are ever litigated to judgment as in this case" and that "[i]n non-class contingency fee litigation, a 30% to 40% contingency fee is typical."); *Flournoy v. Honeywell Int'l, Inc*., 2007 WL 1087279, at *2 (S.D. Ga. Apr. 6, 2007) ("Forty percent fee contracts are common for complex and difficult litigation. . . ."); *In re Remeron Direct Purchaser Antitrust Litig*., 2005 WL 3008808, at *16 (D.N.J. Nov. 9, 2005) ("Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation."); *In re Ikon Off. Sols., Inc., Sec. Litig*., 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("[I]n private contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery."); *In re Orthopedic Bone Screws Products Liability Litig*., 2000 WL 1622741, *7 (E.D.Pa. Oct.23, 2000) ("... the court notes that plaintiffs' counsel in private contingency fee cases regularly negotiate agreements providing for thirty to forty percent of any recovery"); *Cimarron Pipeline Const., Inc. v. Nat'l Council on Comp. Ins*., 1993 WL 355466, at *2 (W.D. Okla. June 8, 1993) ("Fees in the range of 30-40% of any amount recovered are common in complex and other cases taken on a contingent fee basis."); *Durant v. Traditional Investments, Ltd*., 1992 WL 203870, *4 n. 7 (S.D.N.Y. Aug.12, 1992) ("contingent fee agreements up to 40 percent have been held reasonable").

(E.D. Pa Jan. 9, 2020) (awarding 40% after 13 years of litigation, weeks before trial, following summary judgment and several interlocutory appeals).

As Professor Fitzpatrick explained in his recent article, awarding "higher percentages after class trials" is "consistent with models that recommend escalating percentages as the litigation matures," but "because trials are so rare in class actions, there are no published studies" on the topic. *Guide to Awarding Fees In Class Actions*, at 1168. Professor Fitzpatrick ultimately concluded based on his analysis, that "judges should usually choose the percentage method. I also think this percentage should either be fixed or escalate with litigation maturity." *Id*. The observation supporting a higher fee award for cases that go to trial is particularly relevant to the Court's analysis here, as Professor Fitzpatrick studied 33 delayed generic entry cases brought on behalf of basically the same class of wholesalers as the Class here over 17 years (between 2003 and 2020) and found that the typical, *unobjected-to* fee request was around 33% for cases that did not go to trial. *Id.* at 1161-62. Here, of course, Class counsel did go to trial, taking on even more risk than the typical case, which justifies a fee greater than 33% of the settlement. This premise is also supported by the fee negotiated by an opt-out plaintiff in an antitrust case, *In re High Fructose Corn Syrup Antitrust Litig.*, which promised its lawyers 33 percent to 40 percent of the recovery, "depending upon the time of any settlement." Decl. of John C. Coffee, Jr., *In re High Fructose Corn Syrup Antitrust Litig.*, No. 95-cv-01477, ECF No 1421, Ex. A at 2 (C.D. Ill. Oct. 7, 2004).

The 36% fee sought here is also supported by a study published by David L. Schwartz, which surveyed contingent fee arrangements in patent litigation. Patent litigation often involves some of the largest, most sophisticated corporations in the country and therefore serves as a good proxy for this complex pharmaceutical antitrust litigation containing a patent component. The

study found that companies hiring patent litigators on a contingency basis use two types of fee arrangements: flat fee arrangements, with a fixed percentage, and graduated arrangements, setting escalating rates at various case milestones. For flat fee arrangements, fees averaged 38.6% of the recovery. For graduated arrangements, the average fee negotiated was 28% upon filing and 40.2% through appeal. David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335, 360 (2012).[20]

The length of this case further supports Class counsel's fee request. The average antitrust case settles in 5.2 years, well before the case proceeds to trial and significantly earlier than the 8 years required to reach a settlement in this case. *2021 Antitrust Annual Report*, at 8 (Settlements in antitrust cases take an average of 5.2 years from filing to final approval). In antitrust class actions of similar complexity to this one, where recoveries exceed $100 million, but where settlements are reached earlier in the litigation, courts routinely award fees of 33%. *See e.g*. *In re Tricor Direct Purchaser Antitrust Litig*., No. 05-cv-340, ECF No. 543 (D. Del. April 23, 2009) (33% of $250 million settlement, settled after 3 ½ years of litigation at the commencement of trial); *Neurontin,* No. 02-1830, ECF No. 114 (D.N.J. Aug. 6, 2014) (33 1/3% of $191 million settlement, settled after 12 years of litigation, following summary judgment and *Daubert* decisions); *In re Titanium Dioxide Antitrust Litig*., 2013 WL 6577029 (D. Md. Dec. 13, 2013)

[20] Professor Schwartz's findings are consistent with reports found in patent blogs, one of which explained:

> Contingent Fee Arrangements: In a contingent fee arrangement, the client does not pay any legal fees for the representation. Instead, the law firm only gets paid from damages obtained in a verdict or settlement. Typically, the law firm will receive between 33-50% of the recovered damages, depending on several factors. This is strictly a results-based system.

Matt Cutler, *Contingent Fee and Other Alternative Fee Arrangements for Patent Litigation*, available at https://www.harnessip.com/blog/2020/06/08/contingent-fee-and-other-alternative-fee-arrangements-for-patent-litigation/ (June 8, 2020) (last accessed Sept. 16, 2022).

(33% of $163.5 million settlement after 3 years of litigation, settled on the eve of trial); *In re Se. Milk Antitrust Litig*., 2013 WL 2155387, at *8 (E.D. Tenn. May 17, 2013) (33% of $158.6 million settlement after five years of litigation, at the close of discovery, with class certification and summary judgment briefed); *In re Flonase Antitrust Litig*., 951 F. Supp. 2d 739 (E.D. Pa. 2013) (33% of $150 million settlement after five years of litigation, following the close of discovery and decisions on class certification and summary judgment); *In re Plasma-Derivative Protein Therapies Antitrust Litig*., No. 09-cv-07666, ECF Nos. 693, 697, 697-1 and 701 (N.D. Ill. 2014) (33% of $128 million settlement after five years of litigation in the midst of discovery).[21] *See also 2121 Antitrust Annual Report*, at 27 (The median award for attorneys' fees in antitrust cases are around 30% for recoveries up to $249 million). As discussed above, a higher fee is warranted here in light of the unique posture of this case.

3. Class Action Auctions

Auctions for class counsel are not an appropriate benchmark in an antitrust case such as this one. While there are cases from over 20 years ago adopting a competitive approach to negotiate fee structures at the outset of litigation, this is not a method that has been adopted by courts in the current market environment. *Cap. One*, 80 F. Supp. 3d at 800–01 (collecting cases selecting class counsel through an auction process, all dated prior to 2002).[22] For just this reason,

[21] *See also In re Relafen Antitrust Litig*., No. 01-12239, ECF No. 297 (D. Mass. April 9, 2004) (33 1/3% of $175 million settlement after a year and a half of litigation, two weeks before trial, following rulings on class certification and summary judgment); *In re Buspirone Antitrust Litig*., No. 01-cv-07951, ECF No. 22 (S.D.N.Y. April 17, 2003) (33 1/3% of $220 million settlement after two years of litigation, in the midst of fact discovery); *In re: Cardizem CD Antitrust Litig*., 99-md-01278, ECF No. 724 (E.D. Mich. Nov. 26, 2002) (30% of $110 million settlement after four years of litigation, following class certification and summary judgment, with an appeal pending); *In re Vitamins Antitrust Litig*., 2001 WL 34312839, at *14 (D.D.C. July 16, 2001) (34.6% of $365 million settlement, following motions to dismiss and on the heels of guilty pleas by the defendants in parallel DOJ investigations).

[22] *See also Guide to Awarding Fees In Class Actions*, at 1164-66 (explaining that auctions for class counsel are impractical and criticizing their effectiveness, because (a) bids submitted by attorneys are

the Seventh Circuit cast doubt on the use of contingent fees arrived at by auctions in securities class actions as a metric for other lawsuits. *In re Synthroid Mktg. Litig*., 325 F.3d 974, 979 (7th Cir. 2003) ("*Synthroid II*") ("if securities suits present less risk to the plaintiff class than does a fraud suit against a drug manufacturer, it is unsound to use a contingent fee appropriate to the former as the measure in the latter.").

There is one example of an attempted auction in a risky litigation associated with a bankruptcy proceeding that is instructive. In *In re Merry-Go-Round Enterprises, Inc*., 244 B.R. 327 (D. Md. 2000), the bankruptcy trustee wanted to assert claims against Ernst & Young. The trustee looked for counsel willing to accept a declining scale of fee percentages, found no takers, and ultimately agreed to pay a law firm a straight 40% of the recovery. Ernst & Young subsequently settled for $185 million, at which point the law firm applied for $71.2 million in fees,[23] 21 times its lodestar. The bankruptcy judge granted the request, writing: "[v]iewed at the outset of this representation, with special counsel advancing expenses on a contingency basis and facing the uncertainties and risks posed by this representation, the 40% contingent fee was reasonable, necessary, and within a market range." *Id*. at 335.

D. A 36% Fee is Fair and Reasonable Given the Remarkable Recovery for the Class in a Case with Extraordinary Risk, Length, and Difficulty

The $145 million Class counsel recovered from Impax for the Class is remarkable in light of the certain alternative: loss at trial and currently no recovery at all. Using the market rate as a "guide," courts can and should adjust fee rates obtained in similar cases based on factors unique

often complex and not easily comparable to one another, (b) the lowest bidder may not be the best lawyer and it is difficult for judges to subjectively evaluate quality in exchange for price, (c) the lawyers winning the auction with the lowest bid will have the strongest incentive to settle the case too early for too little.).

[23] The 40% contingency request was made after reimbursement of expenses and reduced by $2 million to reflect a settlement with an objecting, major creditor. *Id.* at 333.

to the case at hand, *i.e.*, the (1) risk of nonpayment, (2) quality of lawyering, (3) work required, and (4) the stakes of the case. *Synthroid I,* 264 F.3d at 721 ("The market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case."). Since the certain alternative for the Class was to prosecute this case through to an unfavorable jury verdict (pending post-trial briefing and likely appeal), Class counsel's fee request of 36% is eminently reasonable considering the risk of nonpayment, quality of lawyering required, work invested, and high stakes involved to achieve such an extraordinary outcome.

1. Risk of Nonpayment

The risk assumed by Class counsel in prosecuting this case warrants a 36% fee award. *Cap. One*, 80 F. Supp. 3d at 805 ("The estimated magnitude of the risk necessarily affects the price at which Class Counsel in this case would have been willing to offer their services in an *ex ante* negotiation, had such a negotiation occurred.") (citing *Synthroid I*, 264 F.3d at 721). When Class counsel filed this case over eight years ago, no government agency had taken any action to prosecute a similar case involving Opana ER. Class counsel did not have the advantage of "piggy backing" on pre-existing litigation or the reassurance of liability associated with a coinciding government indictment or guilty plea when it initiated the case entirely on a contingent basis. *Dairy Farmers*, 80 F. Supp. 3d at 848 ("One proxy for assessing risk is whether the litigation followed on the heels of some prior criminal or civil proceeding involving the same parties or subject matter. This inquiry provides insight into whether class counsel benefitted from the work of others.").

If Class counsel had not secured this settlement, neither the Class nor Class counsel would have received anything, despite the eight years, thousands of hours, and millions of dollars expended. The 36% fee request is consistent with the considerable risk assumed by Class

counsel with no guarantee of recovery (and, in hindsight, the certainty of no recovery absent this settlement). *Silverman v. Motorola Sols., Inc*., 739 F.3d 956, 958 (7th Cir. 2013) (citation omitted) ("Contingent fees compensate lawyers for the risk of nonpayment. The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel.") (affirming above-average fee percentage because district court could have found that the "suit was unusually risky."); *Synthroid I*, 264 F.3d at 719 ("The greater the risk of loss, the greater the incentive compensation required."); *Sutton v. Bernard*, 504 F.3d 688, 694 (7th Cir.2007) (holding that class counsel was undercompensated where "the district court failed to provide for the risk of loss"); *Matter of Cont'l Illinois Sec. Litig*., 962 F.2d 566, 569 (7th Cir. 1992) (emphasizing the need to adjust fee awards to account for risk).

2. The Quality of Performance

"Yet another litmus test for assessing reasonableness is quality of Class Counsel's performance in achieving the settlement—that is, whether this is the type of outcome that willing clients would have envisioned from the outset." *Dairy Farmers*, 80 F. Supp. 3d at 849. This litigation was bitterly fought and aggressively litigated by both sides. Defendants were large, sophisticated corporations represented by skilled, nationally respected trial and appellate attorneys with practically unlimited resources at their disposal. Litigating this case against formidable Defendants and their attorneys required extraordinary skill. Class counsel expertly navigated this unusually complicated case, from initial investigation in 2014 through numerous discovery battles, extensive class certification briefing, dozens of expert reports and *Daubert* motions, summary judgment, trial preparation, including dozens of motions *in limine*, more than three weeks of trial, and settlement, with tremendous skill and faithful adherence to the Class's best interests at every stage.

Class counsel have decades of experience pursuing and trying pharmaceutical antitrust cases, which lends the team efficiency and sophisticated litigation judgment. The result speaks for itself: Class counsel obtained class certification and defeated Defendants' summary judgment motions and almost all of Defendants' *Daubert* motions. Class counsel's ability to secure what this Court described as an "excellent" and "great"[24] $145 million settlement for the Class at the outset of the three-week-long trial is a testament to the strength of Class counsel's preparation for trial. Had Class counsel failed to secure this settlement, the Class today would be left empty-handed. It speaks to the quality of representation provided by Class counsel and supports their fee request.

3. Class Counsel Devoted Extensive Time and Work to Successfully Prosecute this Case

Class counsel devoted eight years and almost 66,000 hours to the prosecution of this case, which invoked complex and unique issues of fact and law. *Synthroid I*, 264 F.3d at 721 ("The market rate for legal fees depends in part on …the amount of work necessary to resolve the litigation.").

Antitrust cases are some of the most complex, expensive, and time-consuming actions to prosecute. *See In re Motorsports Merch. Antitrust Litig.,* 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000) ("An antitrust class action is arguably the most complex action to prosecute."); *In re Air Cargo Shipping Servs. Antitrust Litig*., 2015 WL 5918273, at *6 (E.D.N.Y. Oct. 9, 2015) (prosecuting an antitrust conspiracy required "complex expert analysis and review of mountains of documents"); *Flonase*, 951 F. Supp. 2d at 743 ("Antitrust class actions are particularly complex to litigate and therefore quite expensive."). This lawsuit was especially large and

[24] Preliminary Approval Transcript at 2, 6-7.

complicated, as borne out at trial, where a jury returned a verdict for Endo. Class counsel had to grapple with numerous factual obstacles, including: a settlement agreement that contained a "broad license" for later-issued patents; Endo's success litigating patent infringement lawsuits against other generic manufacturers for those later-issued patents; a complicated payment provision called the "Endo Credit" contained in the settlement agreement; the DCA signed in conjunction with the settlement agreement and disputes over its related payments; Endo's efforts to convert the market from original Opana ER to reformulated Opana ER and disputes over each product's safety and abuse deterrence, related petitions filed with and decisions issued by the FDA, and Endo's ultimate decision to remove reformulated Opana ER from the market at the FDA's request. Needless to say, if there is a "standard" reverse payment case, this case deviated from that mold. It is hard to overstate the challenge Class counsel faced in making the complexities of this case comprehensible to a lay jury. The time and labor involved in prosecuting this case, and the novelty and difficulty of the questions presented, support Class counsel's fee request.

The Seventh Circuit does not require a lodestar cross-check. *See Williams*, 658 F.3d at 636 ("[C]onsideration of a lodestar check is not an issue of required methodology.") (citing *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir.1998) ("[W]e have never ordered the district judge to ensure that the lodestar result mimics that of the percentage approach."); *Schulte v. Fifth Third Bank*, 805 F.Supp.2d 560, 598 (N.D.Ill. 2011) (noting that "many courts in this circuit have criticized the use of a lodestar cross-check in common fund cases" when approving fee request with lodestar risk multiplier of 2.5); *Will v. Gen. Dynamics Corp*., 2010 WL 4818174, at *3 (S.D. Ill. Nov. 22, 2010) ("The use of a lodestar cross-check in a common fund case is unnecessary, arbitrary, and potentially counterproductive."). Nonetheless, the lodestar multiplier

in this case supports the appropriateness of Class counsel's fee request. As detailed in the Gerstein Declaration, Class counsel worked almost 66,000 hours on this case thus far, amounting to $41,762,618.41 in lodestar based on 2022 rates. Gerstein Decl. ¶ 67. A 36% fee award equals a lodestar multiplier of 1.21. Such a multiplier falls on the low end of the range routinely awarded by courts in this Circuit. *Harman v. Lyphomed, Inc*., 945 F.2d 969, 976 (7th Cir. 1991) ("[a risk] multiplier is, within the court's discretion, appropriate when counsel assume a risk of non-payment in taking a suit" and "[m]ultipliers anywhere between one and four, *In re Cenco, Inc. Sec. Litigation*, 519 F.Supp. 322, 325 (N.D.Ill.1981) (four, which is quite rare), have been approved."); *accord Schulte*, 805 F. Supp. at 598 (citing *Harman* with approval); *In re TikTok, Inc., Consumer Priv. Litig*., 2022 WL 2982782, at *29 (N.D. Ill. July 28, 2022) ("In practice, most multipliers fall between one and four.") (Approving a multiplier of 2.04 for a $92 million fund); *In Re Broiler Chicken Antitrust Litigation*, 2021 WL 5709250, at *1 (N.D. Ill. Dec. 1, 2021) (approving a multiplier of 1.11 for a $169 million settlement); *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig*., 332 F.R.D. 202, 225 (N.D. Ill. 2019), *aff'd sub nom. Walker v. Nat'l Collegiate Athletic Ass'n*, 2019 WL 8058082 (7th Cir. Oct. 25, 2019) (approving a multiplier of 1.5 for a $70 million settlement). *See also* Newberg on Class Actions § 14.6 (4th ed. 2009) ("multiples ranging from one to four frequently are awarded in common fund cases when the lodestar method is applied"); *In re: Urethane Antitrust Litig*., 2016 WL 4060156, at *7 (D. Kan. July 29, 2016) (approving a fee yielding a multiplier of approximately 3.2, and noting that a multiplier of up to 4 or 5 "would fall within the range of multipliers accepted by a number [of] courts in megafund cases."). Pharmaceutical pay-for-delay antitrust cases commonly result in similar or significantly higher multipliers. *Flonase*, 951 F. Supp. 2d at 750-51 (approving 2.99 multiplier for $150 million fund, explaining that one to four is the

standard multiplier range); *In re Loestrin 24 Fe Antitrust Litig*., 2020 WL 4035125, at *6 (D.R.I. July 17, 2020), *report and recommendation adopted sub nom*. 2020 WL 5203323 (D.R.I. Sept. 1, 2020) (approving 1.31 multiplier for $120 million settlement); *King Drug Co. of Florence, Inc. v. Cephalon, Inc*., 2015 WL 12843830, at *6 (E.D. Pa. Oct. 15, 2015) (approving 4.12 multiplier for $512 million settlement); *In re Prograf Antitrust Litig*., No. 1:11-md-02242-RWZ, 2015 WL 13908415, at *5 (D. Mass. May 20, 2015) & ECF No. 667 (April 9, 2015) (approving 2.35 multiplier for $98 million settlement); *Neurontin,* No. 02-1830, ECF No. 114 (D.N.J. Aug. 6, 2014) (approving 1.99 multiplier on $191 million settlement); Order and Final Judgment Approving Settlement, *Tricor*, No. 05-cv-340, ECF No. 543 (D. Del. April 23, 2009) (approving 3.93 multiplier for $250 million fund); *In re Relafen Antitrust Litig*., 231 F.R.D. 52, 82 (D. Mass. 2005) (approving 2.02 multiplier for $75 million settlement). Given the risk Class counsel assumed and the amount of time, labor, and expense dedicated to litigating this case all the way through trial, the requested fee is reasonable. *See* Newberg on Class Actions §15:87 (5th ed. 2015) (substantial multiplier is appropriate where case was risky, time-consuming, involved wrongdoing uncovered by counsel in the first instance, and delivered exceptional results).

4. <u>The stakes in the case</u>

The high stakes of this litigation likewise support Class counsel's fee request. According to Plaintiffs' damages expert, the Class's total overcharges in this case exceeded $500 million. Ex. 3, Supplemental Report of Dr. Jeffrey Leitzinger, dated July 26, 2021 (ECF No. 758-2). With trebled damages under the Sherman Act, Defendants' joint exposure was over $1.5 billion. Class counsel also had a great deal at stake, taking the case on an entirely contingent basis, expending almost 66,000 hours and over $41.7 million in uncompensated attorney and professional time to litigate the case, and advancing litigation costs over $4.3 million. Gerstein Decl. ¶¶ 66-67; *Heekin v. Anthem, Inc*., 2012 WL 5878032, at *5 (S.D. Ind. Nov. 20, 2012) (noting that Class

counsel "had a great deal at stake, with the risk of non-payment, burden of advancing litigation costs of over $6 million, and the "opportunity costs" of turning down other lucrative clients."); *Schulte*, 805 F. Supp. 2d at 598 (observing that "the stakes in the case are high given the size of the Class, the scale of the challenged activity, the complexity and costs of the legal proceedings, and the amount of money involved.").

The very real risk of non-payment, quality of representation, work required to resolve the litigation, and high stakes of this particularly complex antitrust class action – only the second of its kind to ever reach a jury verdict – all weigh in favor of awarding Class counsel their requested 36% fee. *See Beesley v. Int'l Paper Co*., 2014 WL 375432, at *2 (S.D. Ill. Jan. 31, 2014) ("Class Counsel's fee request is more than justified in this case given the extraordinary risk counsel accepted in agreeing to represent the Class; Class Counsel's demonstrated willingness to pursue this action over more than seven years of intense, adversarial litigation; and the enormous value of … relief included in this settlement.").

IV. CLASS COUNSEL'S COSTS AND EXPENSES ARE REASONABLE AND WERE NECESSARY TO THE RESULT

It is well-settled that counsel who have created a common fund for the benefit of a class are entitled to be reimbursed for out-of-pocket expenses reasonably incurred in creating the fund. *Schulte*, 805 F. Supp. 2d at 600 ("The Federal Rules of Civil Procedure allow the Court, in a certified class action, to 'award reasonable…nontaxable costs that are authorized by law or by the parties' agreement.'") (quoting Fed.R.Civ.P. 23(h)). Here, Class counsel's unreimbursed expenses of $4,343,137.06 were reasonably incurred and necessary to the representation of the Class. These expenses have been itemized by category for the Court's convenience. Gerstein Decl. ¶ 66-69. *See Synthroid I*, 264 F.3d at 722 ("If counsel submit bills with the level of detail that paying clients find satisfactory, a federal court should not require more."). These

unreimbursed expenses include costs for computerized legal research, the creation and maintenance of an electronic document database, expert costs, travel and lodging expenses, copying, court reporters, transcripts, and mediation. Gerstein Decl. ¶ 69. They also include trial expenses, such as a jury consultant and various other trial-related costs, such as a workspace in Chicago for almost two months. *Id.* These are typical expenses, routinely deemed reasonable and necessary, and they are consistent with expenses in similar, complex class cases, particularly in light of the eight years of litigation and the expense of preparing for and conducting a trial. *See* Order Granting Reimbursement of Litig. Expenses, *In re AT & T Corp*., 455 F.3d 160, 163 (3d Cir. 2006) (upholding reimbursement of $5.4 million in expenses in case that settled mid-trial); *King Drug Co. of Florence, Inc. v. Cephalon, Inc*., No. 2:06-cv-01797, ECF No. 870 at 10 (E.D. Pa. Oct. 15, 2015) (approving $3.5 million in costs and expenses); *Tricor*, No. 05-340, ECF No. 543 at 10 (D. Del. Apr. 23, 2009) (approving $3.5 million in costs and expenses in a case that settled after 3 ½ years of litigation at the commencement of trial); *In re Wellbutrin XL Antitrust Litig*., No. 2:08-cv-2431, ECF No. 485 at 8 (E.D. Pa. Nov. 7, 2012) (approving $3.1 million in costs and expenses in a case that settled after the close of fact and expert discovery, following summary judgment rulings). Accordingly, Class counsel respectfully request that the Court approve reimbursement of Class counsel's expenses in full.

V. SERVICE AWARDS FOR THE CLASS REPRESENTATIVES ARE APPROPRIATE AND REASONABLE

"Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Cook*, 142 F.3d at 1016 (citation omitted). Here, Class counsel believes that awards of $150,000 each to Value Drug and Meijer are appropriate in recognition of the long hours they spent participating in this litigation, filing suit, collecting discovery, sitting for depositions, defending their

adequacy in motions, and attending and participating in trial. Gerstein Decl. ¶¶ 72-79. *See Cook*, 142 F.3d at 1016 ("In deciding whether such an award is warranted, relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation."). The named plaintiffs here, Value Drug and Meijer, are regular customers of the Defendants, routinely purchasing products from both Impax and Endo. Gerstein Decl. ¶ 73. There is inherent risk in filing suit as a named plaintiff on behalf of a class against an entity with which all class members transact business, a risk Value Drug and Meijer assumed in order to benefit the Class. *See Dial Corp. v. News Corp*., 317 F.R.D. 426, 439 (S.D.N.Y. 2016) ("[T]he decision to fire the first shot on behalf of the Class was fraught with risks. Notably, the named Plaintiffs in this case assumed a substantial risk in antagonizing a longstanding, powerful business partner[.]").

The amount requested here is in line with awards made to named representatives in other pharmaceutical reverse payment cases, which did not go to trial. *See e.g., In re Lidoderm Antitrust Litig.*, No. 3:14-md-02521-WHO, ECF No. 1054 at ¶ 15 (N.D. Cal. Sept. 20, 2018) ($100,000); *In re K-Dur Antitrust Litig.,* No. 01-1652, ECF No. 1057 at ¶ 12 (D.N.J. Oct. 5, 2017) ($100,000); *In re Modafinil Antitrust Litig.*, No. 2:06-cv-01797 (MSG), ECF No. 870 at ¶ 30 (E.D. Pa. Oct. 15, 2015) ($100,000 to certain representatives); *Neurontin,* No. 02-1830 (FSH), ECF No. 114 at ¶ 31 (D.N.J. Aug. 6, 2014) ($100,000). The amount requested here also reflects that this case was not settled until trial. Both named representatives prepared for trial, with J. Mark Bover, on behalf of Value Drug, traveling to Chicago and testifying at trial on behalf of the Class. Gerstein Decl. ¶ 77. Employees of both Class representatives sat for extensive pretrial depositions, produced thousands of pages of documents and several sets of purchase and

chargeback data, and spent hours consulting with Class counsel and staying apprised of the litigation. *Id*. at ¶¶ 74-78.

VI. CONCLUSION

For the reasons set forth above and in the Declaration of Bruce E. Gerstein, Class counsel respectfully request that this Court enter an Order awarding Class counsel fees in the amount of $50,528,470.66, *i.e.,* 36% of the net settlement amount (including a *pro rata* share of the accrued interest), and reimbursement of expenses in the amount of $4,343,137.06. Class counsel also respectfully request that this Court approve service awards of $150,000 to each of the class representatives for their efforts on behalf of the Class.

Dated: September 19, 2022

Respectfully submitted,

s/ Andrew C. Curley
David F. Sorensen
Andrew C. Curley
Caitlin G. Coslett
Richard D. Schwartz
BERGER MONTAGUE PC
1818 Market Street, Suite 3600
Philadelphia, PA 19103
T: (215) 875-3000
F: (215) 875-4604
dsorensen@bm.net
acurley@bm.net
ccoslett@bm.net
rschwartz@bm.net

s/ Bruce E. Gerstein
Bruce E. Gerstein
Jonathan M. Gerstein
GARWIN GERSTEIN & FISHER, LLP
Wall Street Plaza
88 Pine Street, 10th Floor
New York, NY 10005
T: (212) 398-0055
F: (212) 764-6620
bgerstein@garwingerstein.com
jgerstein@garwingerstein.com

Co-Lead Counsel for the Direct Purchaser Class

Robert N. Kaplan
Matthew P. McCahill
KAPLAN FOX & KILSHEIMER LLP
850 Third Avenue, 14th Floor
New York, NY 10022
T: (212) 687-1980
F: (212) 687-7714
rkaplan@kaplanfox.com

TAB 16A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE FLONASE ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: Direct Purchaser Actions	Case No. 08-cv-3149 (Direct) **Hon. Anita B. Brody**

JUNE 14, 2013 ANITA B. BRODY, J.

MEMORANDUM

Following nearly five years of antitrust class action litigation between the makers of branded Flonase nasal spray, the makers of a generic brand version, indirect purchasers of the drug, and direct purchasers, the parties reached a global settlement in January 2013. Before me now is the Direct Purchaser Plaintiffs' ("DPs") Corrected Motion for Approval of Settlement (Doc. 488) and Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Payment of Incentive Awards to the Representative Plaintiffs (Doc. 486). After holding a fairness hearing on June 3, 203 and reviewing the Plaintiffs' submissions, I now approve the final settlement agreement and allocation plan. I will also grant counsel's request for attorneys' fees, reimbursement of expenses, and incentive awards for class representative, although I will modify the incentive payment awarded.

I. BACKGROUND

Named plaintiffs American Sales Company, Inc., Meijer, Inc., and Meijer Distribution, Inc. brought this suit on behalf of a class of 33 companies that purchase medications directly from the manufacturer—in this case, purchasers of Flonase, the brand-name version of fluticasone propionate ("FP"), a nasal corticosteroid used to treat

nasal inflammation caused by allergies. The suit claimed that Defendant SmithKline Beecham Corporation d/b/a GlaxoSmithKline PLC ("GSK") improperly delayed the entry of generic FP, resulting in overcharges to the direct purchasers. Plaintiffs allege that this allowed GSK to unlawfully maintain monopoly power in the American FP market; maintain the price of Flonase at above-competitive levels; and overcharge the direct purchasers millions of dollars by blocking unrestricted competition and access to less expensive generic versions of FP.

This case has an extensive litigation history. American Sales filed the first complaint against GSK for its anticompetitive behavior in 2008.[1] Extensive discovery began in late 2008 and continued through mid-2010, including 30 depositions of current and former employees of GSK and Roxane Laboratories ("Roxane"), the maker of generic FP. Over a dozen expert reports and rebuttals were submitted. After oral argument, I certified a class of 33 direct purchasers of Flonase on November 12, 2010. *See American Sales Company, Inc. v. Smithkline Beecham Corp.*, 274 F.R.D. 127 (E.D. Pa. 2010).[2] In 2011, I denied two separate GSK motions for summary judgment, one on causation, and one on *Noerr-Pennington* immunity. *See* 798 F.Supp.2d 619 (E.D. Pa. 2011) and 795 F.Supp.2d 300 (E.D. Pa. 2011), respectively. The case was set for trial in early 2013, and both sides submitted over a dozen motions *in limine*. With the court's assistance, the parties reached a settlement agreement in November 2012, whereby GSK agreed to pay $150 million in exchange for the settlement of all direct purchaser claims. I preliminarily approved the settlement on January 14, 2013.

II. FINAL APPROVAL OF SETTLEMENT

[1] Related cases were also filed by indirect purchasers of the drug (No. 08-3301) and Roxane Laboraties ("Roxane") (No. 09-1638), the maker of a generic competitor to Flonase.
[2] After notice went out, there was not a single objector or exclusion from the class certification.

According to Federal Rule of Civil Procedure 23(e), "The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." In other words, "a class action cannot be settled without the approval of the court and a determination that the proposed settlement is 'fair, reasonable and adequate.' " *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 148 F.3d 283, 316 (3d Cir.1998) (quoting *In re G.M. Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir.1995)).

The Third Circuit applies a nine prong test, known as the *Girsh* factors, when determining the fairness, adequacy, and reasonableness of a proposed class action settlement:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir.1975) (internal quotation marks and ellipses omitted). In more recent decisions, the Third Circuit has suggested an expansion of the nine-prong test when appropriate to include what are now referred to as *Prudential* considerations, such as:

> the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other facts that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for *335 individual class or subclass members and the results achieved-or likely to be achieved-for

> other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable.

In re Prudential, 148 F.3d at 323; *see also In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 350 (3d Cir.2010). District courts "must make findings as to each of the Girsh factors, and the *Prudential* factors where appropriate," and "cannot substitute the parties' assurances or conclusory statements for [their] independent analysis of the settlement terms." *In re Pet Food*. 629 F.3d at 350–51.

Here, the Girsh factors and relevant Prudential considerations weigh in favor of settlement approval.

A. The Complexity, Expense, and Likely Duration of the Litigation

This suit involves highly complex antitrust issues, FDA bioequivalence standards for suspension nasal spray products, pharmaceutical manufacturing and supply issues, and pharmaceutical regulatory issues, all of which were investigated and litigated for more than four years. Antitrust class actions are particularly complex to litigate and therefore quite expensive. *See In re Auto. Refinishing Paint Antitrust Litig*., 2008 U.S. Dist. LEXIS 569, at *14 (E.D.Pa. Jan. 3, 2009) ("This litigation, like most antitrust cases, has been exceedingly complex, expensive, and lengthy.") (emphasis added). " 'An antitrust class action is arguably the most complex action to prosecute. . . .' " *In re Linerboard Antitrust Litig.*, 296 F.Supp.2d 568, 577 (E.D.Pa.2003) (quoting *In re Motorsports Merchandise Antitrust Litig.*, 112 F.Supp.2d 1329, 1337 (N.D.Ga.2000)). The DPs and GSK reached this settlement after they had completed significant preparation for trial, including litigating *Daubert* challenges, identifying hundreds of trial exhibits, and briefing over a dozen motions *in limine* between them. The settlement

avoided the need for a difficult and expensive multi-week trial involving complex scientific and regulatory testimony, and the time and expense associated with the appeal that would likely have followed a verdict. This factor strongly supports settlement.

B. The Reaction of the Class to the Settlement

All 33 class members received direct notice, via first-class mail, of the class settlement. There has not been a single objection. Moreover, two of the three largest pharmaceutical distributors in the country—class members whose claims collectively represent the majority of the total recovery—have submitted letters affirmatively supporting the settlement. This factor overwhelmingly supports settlement approval.

C. The Stage of the Proceedings and the Amount of Discovery Completed

These proceedings advanced to a sufficiently late stage prior to settlement that the related *Girsh* and *Prudential* factors also weigh in favor of approval. Explaining the rationale behind the third *Girsh* factor, the Third Circuit wrote in *Prudential*:

> The parties must have an "adequate appreciation of the merits of the case before negotiating." To ensure that a proposed settlement is the product of informed negotiations, there should be an inquiry into the type and amount of discovery the parties have undertaken.

In re Prudential, 148 F.3d at 319 (quoting *In re G.M.*, 55 F.3d at 813). Further, "courts generally recognize that a proposed class action settlement is presumptively valid where . . . the parties engaged in arm's length negotiations after meaningful discovery." *Cullen v. Whitman Med Corp.*, 197 F.R.D. 136, 144-45 (E.D. Pa. 2000).

This factor also weighs strongly in favor of approval of the settlement agreement. This case was very advanced by the time the agreement was reached. Fact discovery concluded in February 2010 and included 45 depositions and millions of pages of documents. Expert discovery concluded in September 2010 and included the exchange of

numerous expert reports. The parties briefed two separate motions for summary judgment. The Court heard *Daubert* motions concerning experts on both sides on two separate occasions. By the time the agreement was reached, the parties had exchanged trial witness lists, conferred on trial exhibits and deposition testimony to be used at trial, and submitted pretrial memoranda. Trial was just two months away when the parties reached their agreement.

D. The Risks of Establishing Liability and Damages.

These two *Girsh* factors are closely related, so I will address them together. This case involved complex scientific, regulatory, and legal issues, and plaintiffs faced many obstacles to success at trial. Among other things the Plaintiff would have to prove were two particularly difficult propositions: First, they would have had to prove that GSK's petitions to the FDA regarding generic FP were objectively baseless and that GSK could not have reasonably expected success on the merits of any of its requests to the FDA. Second, and most crucially, Plaintiffs would have had to prove that GKS's petitions to the FDA were a substantial cause of any delay in the approval of Roxane's generic FP, and that, but for GSK's actions, Roxane would have had the manufacturing capability to get its product to market sooner. These difficulties go both to Plaintiffs' case for liability and their case for damages, as they would have had to show that GSK's actions resulted in improper overcharges to the DPs. Given the complexity of these issues, there is no guarantee that a jury would have found GSK liable, or how the jury would have responded to the complicated economic data necessary to show damages. Therefore, these two factors counsel in favor of settlement.

E. The Risks of Maintaining the Class Action Through Trial

Although I already certified the DP class here, class certification is subject to review and modification at any time during the litigation. *See Zenith Lab., Inc. v. Carter–Wallace, Inc.*, 530 F.2d 508, 512 (3d Cir.1976). However, numerous courts, including the Third Circuit, have certified nearly identical classes of direct purchasers bringing antitrust claims against manufacturers allegedly seeking to delay generic competition in the pharmaceutical industry. *See, e.g., In re K-Dur Antitrust Litig*., 686 F.3d 197 (3d Cir. 2012); *In re Wellbutrin SR Direct Purchaser Antitrust Litig*, C.A. No. 05-5525, 2008 WL 1946848 (E.D. Pa. May 2, 2008); *Teva Pharms. USA, Inc. v. Abbott Labs*, 252 F.R.D. 213 (D. Del. 2008). Because Plaintiffs do not face much risk in maintaining a certified class throughout trial, this factor is neutral.

F. The Ability of the Defendants to Withstand a Greater Judgment

This factor is also neutral. The ability of defendants to withstand a greater judgment generally only comes into play when "a settlement in a given case is less than would ordinarily be awarded but the defendant's financial circumstances do not permit a greater settlement." *Reibstein v. Rite Aid Corp*., 761 F.Supp.2d 241, 254 (E.D.Pa.2011). That does not appear to be the case. I have not been presented with any evidence indicating that GSK is at risk of insolvency. Regardless, I follow my district court colleagues within the Third Circuit who "regularly find a settlement to be fair even though the defendant has the practical ability to pay greater amounts." *Bredbenner v. Liberty Travel, Inc*., 2011 WL 1344745, at *15, 2011 U.S. Dist. LEXIS 38663, at *42 (D.N.J. Apr. 8, 2011) (citing *McCoy v. Health Net. Inc*., 569 F.Supp.2d 448, 462 (D.N.J.2008); *Weber v. Gov't*

Emples. Ins. Co., 262 F.R.D. 431, 446 (D.N.J.2009)). Therefore, this *Girsh* factor neither supports nor undercuts the parties' settlement.

G. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and All the Attendant Risks of Litigation

Taken together, the final two *Girsh* factors "test two sides of the same coin: reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case went to trial." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 538 (3d Cir. 2004). These factors confirm that the settlement here should be approved. A proposed settlement totaling $150 million cash is reasonable both in absolute terms and in light of the circumstances of this litigation, particularly the risks of establishing liability at trial. Under the settlement, each class member can benefit from the $150 million fund immediately, and avoid the uncertainties and delay inherent in continuing to litigate this complex class action.

In *In re G.M. Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig*., the Third Circuit warned "against demanding too large a settlement ... after all, settlement is a compromise, yielding of the highest hopes in exchange for certainty and resolution." 55 F.3d 768, 806 (3d Cir.1995). With that warning in mind, I agree with class counsel and find that the $150,000,000 figure is reasonable. Therefore, this factor weighs in favor of settlement.

H. *Prudential* Factors

In *Prudential*, the Third Circuit noted that, "since *Girsh* was decided in 1975, there has been a sea-change in the nature of class actions," noting that it therefore "may be useful to expand the traditional *Girsh* factors" to add additional topics for the district courts to take into consideration when reviewing a proposed settlement agreement. *In re: Prudential Ins. Co. of Am. Sales Practice Litig*., 148 F.3d 283 (3d Cir.1998). Here, the

relevant *Prudential* factors counsel in favor of approving the settlement. First, as has been explained above, the case was settled only after extensive discovery and trial preparation. The underlying substantive issues were therefore well-developed, supporting approval of the settlement. Second, as to the results achieved for the individual class members compared to those achieved for other claimants, there are no direct purchaser class members who have filed a separate lawsuit against GSK. Therefore, the settlement creates the only award for class members. Third, class members were given the chance to opt out when I originally certified the class in 2010. No class member requested exclusion. While I declined to allow class members an additional opportunity to opt out of the class after receiving notice of the settlement, not a single class member objected to the settlement for any reason, including on the basis that no opt-out right was given. Therefore, the absence of a second opt-out right was of no consequence here. As to attorneys' fees, as I will discuss in the next section, the provisions for attorneys' fees are reasonable. Sixth, the procedure for processing individual claims under the settlement is fair and reasonable. Class members will be provided with information reflecting their qualifying purchases, as reflected in GSK's sales records, and will be advised of their proposed *pro rata* share of the total purchases. They will have the opportunity to review the information based on their own data. Once all claims have been submitted, payments will be distributed based on each class member's pro rata share of the purchases, so that if one direct purchaser made 10 percent of the purchases, it will receive 10 percent of the settlement fund.

The *Girsh* factors and the *Prudential* factors all counsel strongly in favor of approval of the class settlement. I therefore find the settlement to be fair, reasonable, and adequate.

III. ATTORNEYS' FEES AND EXPENSES

Class counsel seeks (i) an award of attorneys' fees in the amount of $50 million, or one-third of the $150 million settlement fund (plus interest); (ii) reimbursement for litigation costs and expenses totaling $2,069,433; and (iii) approval of an incentive award to class representatives American Sales and Meijer in the amount of $85,000 and $75,000, respectively. Doc. No. 486.

Federal Rule of Civil Procedure 23(h) states: "In a certified class action, the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties' agreement." The proposed settlement agreement states class counsel's intention to seek attorneys' fees of up to 33 1/3 percent of the total settlement fund, along with reimbursement of reasonable costs and expenses incurred, all of which will be paid directly from the settlement fund. Settlement Agreement ¶ 9, Mot. for Preliminary Approval of Settlement Ex. A, Doc. No. 480-2. Nonetheless, "a thorough judicial review of fee applications is required in all class action settlements." *In re Prudential*, 148 F.3d at 333 (quoting *In re G.M.*, 55 F.3d at 819).

Courts generally use one of two methods for assessing attorneys' fee requests: the lodestar method or the percentage-of-recovery method. *In re Prudential*, 148 F.3d at 333. The former is "more commonly applied in statutory fee-shifting cases, and is designed to reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that a percentage-of-recovery method would provide inadequate compensation." *Id*. The latter method, on the other hand, is "generally favored in cases involving a common fund . . . ." *Id*. Either way, "it is sensible for a court

to use a second method of fee approval to cross-check its initial fee calculation." *In re Rite Aid Corp. Sec. Litig*, 396 F.3d 294, 300 (3d Cir. 2005).

A. Applying the *Gunter* Factors

The settlement agreement at issue here establishes a common fund of $150 million, from which the class members will receive their allocations and the attorneys will receive any award and expense reimbursement. "[I]n the traditional common fund situation ... the district court ... should attempt to establish a percentage fee arrangement agreeable to the Bench and plaintiff's counsel." *Report of the Third Circuit Task Force on Court Awarded Attorney Fees*, 108 F.R.D. 237, 255 (1985). In order to make that determination, the Third Circuit has identified ten factors for the Bench to consider. These include:

> (1) the size of the fund created and the number of beneficiaries, (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel, (3) the skill and efficiency of the attorneys involved, (4) the complexity and duration of the litigation, (5) the risk of nonpayment, (6) the amount of time devoted to the case by plaintiffs' counsel, (7) the awards in similar cases, (8) the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations, (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained, and (10) any innovative terms of settlement.

In re Diet Drugs Prod. Liab. Litig., 582 F.3d 524, 541 (3d Cir.2009) (citing *Gunter v. Ridgewood Energy Corp*., 223 F.3d 190, 195 (3d Cir.2000); *In re Prudential*, 148 F.3d at 336–40). These *Gunter*/ *Prudential* factors are not exhaustive, and a district court should consider "'any other factors that are useful and relevant with respect to the particular facts of the case.'" *In re Diet Drugs*, 582 F.3d at 541 n. 34 (quoting *In re AT & T Corp. Sec. Litig*., 455 F.3d 160, 166 (3d Cir.2006)).

1. The size of the fund created and the number of beneficiaries

The settlement creates a $150 million settlement fund. Each of the 33 direct purchaser class members will receive a *pro rata* share based on their purchases of Flonase from the net fund, after attorneys' fees, expenses, and incentive awards, plus accrued interest, are removed. This is a sizeable settlement, and provides immediate and certain payment to the class members. Every dollar of the net fund will be distributed to class members. This factor counsels in favor of approval of the requested fee.

2. The presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel

As discussed above, there are no objections by any class members to this settlement. This factor strongly supports approval of the requested fee.

3. The skill and efficiency of the attorneys involved

The Third Circuit has explained that the goal of the percentage fee-award device is to ensure "that competent counsel continue to undertake risky, complex, and novel litigation." Id. at 198. The *Cullen* court explained that "[t]he single clearest factor reflecting the quality of class counsels' services to the class are the results obtained." *Cullen v. Whitman Medical Corp.*, 197 F.R.D. 136, 149 (E.D. Pa. 2000).

Thomas Sobol of Hagens Berman Sobol Shapiro LLC and Joseph Meltzer of Kessler Topaz Meltzer & Check, LLP were co-lead counsel for the direct purchasers in this case. Both firms have extensive experience in plaintiff-side class action, with particular expertise in delayed generic entry cases. Indeed, counsel for both sides were knowledgeable, tenacious, and highly skillful. As discussed above, the $150 million settlement award represents a substantial

amount and clearly demonstrates the value of class counsel's efforts. This factor supports approval of the requested fee.

4. The complexity and duration of the litigation

I have already addressed this matter above in my discussion of the *Girsh* factors. This factor weighs strongly in favor of the proposed fee.

5. The risk of nonpayment

The risk of nonpayment here was not negligible. As explained above in analyzing the risks of establishing liability under the *Girsh* analysis, success in this litigation was by no means guaranteed. *See In re Rite Aid*, 396 F.3d at 304 (finding the "risks of establishing liability" analysis relevant to the assessment of the risk of non-recovery). Even if Plaintiffs had succeeded in proving liability at trial, there is no guarantee they would have recovered damages. *See, e.g., U.S. Football League v. National Football League*, 644 F.Supp. 1040, 1042 (S.D.N.Y. 1986) (noting the jury's award of only $1 in nominal damages to the plaintiffs). Moreover, as a contingent fee case, counsel faced a risk of nonpayment in the event of an unsuccessful trial. This factor supports approval of the requested fee.

6. The amount of time devoted to the case by plaintiffs' counsel

According to their declaration, class counsel spent more than 40,000 hours over the course of more than four years litigating this case. More than 35,000 hours were logged by the two lead counsel firms alone. The record of this litigation also indicates that the time spent by Plaintiffs' counsel was necessary for the successful prosecution of this case, considering both the complexity of the

issues and the robust defense mounted by the defendants. This factor weighs in favor of the requested fee.

7. The awards in similar cases

The fee request here is consistent with other direct purchaser class actions involving allegations of overcharges arising from suppressed generic drug competition. Just last year, for example, this court approved a one-third attorneys' fee from one such case with a $37.5 million settlement fund. Final Order and Judgment Approving Settlement at 8, *In re Wellbutrin XL Antitrust Litigation*, No. 08-2431 (E.D. Pa. Nov. 7, 2012). Indeed, in the last two-and-a-half years, courts in eight direct purchaser antitrust actions approved one-third fees. *In re Wellbutrin, id*.; *Rochester Drug Co-Operative, Inc. v. Braintree Labs., Inc.*, No. 07-142-SLR (D. Del. May 31, 2012) (awarding fees of one-third of $17.5 million settlement fund); *In re Metoprolol Succinate Antiturst Litig.*, No. 06-52-MPT (D. Del. January 12, 2012); *In re DDAVP Direct Purchaser Antitrust Litig.*, No. 05-2237 (S.D.N.Y. Nov. 28, 2011); *In re Wellbutrin SR Antitrust Litig*., No. 04-5525 (E.D. Pa. November 21, 2011); *Meijer, Inc. v. Abbott Labs.*, No. 07-05985-CW (N.D. Cal. Aug. 11, 2011); *In re Nifedipine Antitrust Litig.*, No. 03-mc-223-RJL (D.D.C. Jan. 31, 2011); *In re Oxycontin Antitrust Litig.*, No. 04-md-1603-SHS (S.D.N.Y. Jan. 25, 2011).

It is also important to emphasize that every single class member received direct notice of the settlement agreement, including counsel's intention to request a one-third fee, and not a single class member objected. What is more, two of the three largest pharmaceutical distributors in the country, whose claims collectively

represent more than half of the total recovery, have expressly indicated their support of the settlement.[3] This factor supports approving the requested fee.

8. The value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations

Class counsel was not assisted by a government investigation. In *Prudential*, the Third Circuit singled this factor out for important consideration by district courts. *See In re Prudential*, 148 F.3d at 338. The appeals court remanded the trial court's fee award for wrongly "credit[ing] class counsel with creating the entire value of the settlement" and overlooking the considerable contributions of a multi-state life insurance task force. *Id*. Yet this case is more similar to *In re AT & T*, in which the Third Circuit found that "class counsel was not aided by the efforts of any governmental group, and the entire value of the benefits accruing to class members is properly attributable to the efforts of class counsel." *In re AT & T*, 455 F.3d at 173. Although other plaintiffs pursued claims against GSK, counsel for the direct purchaser plaintiffs launched the first action and led joint litigation efforts, taking the lead in discovery and development of scientific and FDA experts, significant motion practice, and trial preparation. This factor weighs in favor of the proposed fee.

9. The percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained

[3] *See* Corrected Decl. of Co-Lead Counsel Thomas M. Sobol and Joseph H. Meltzer in Support of Direct Purchaser Plaintiffs' Unopposed Motion for Final Approval of Settlement Ex. B. ("CardinalHealth is satisfied that . . . the proposed attorneys' fee award of one-third of the settlement amount is appropriate in this case"); Ex. C ("McKesson . . . supports class counsel's application for attorneys' fees and reimbursement of costs").

It is extremely difficult to determine what fee would have been negotiated at the outset of the litigation. I can only look to my colleagues who have attempted to apply this factor, even though I recognize that the contingent fee can only be "based on the particular facts and circumstances of the specific litigation under consideration." *In re United States Bioscience Sec. Litig*., 155 F.R.D. 116, 119 (E.D.Pa.1994). After appointing a Special Master to study the award of attorneys' fees in a class action securities suit, Judge Dalzell approved of the Special Master's recommendation that a thirty percent fee award was an appropriate estimate of what would have been negotiated. *See id*. (citing Report and Recommendation of Special Master Judge Arlin M. Adams). Judge Katz noted that in private contingency fee cases, "plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery." *In re Ikon*, 194 F.R.D. at 194. Of course, Judge Katz was referring to tort matters in particular. In the end, I do "not give great weight to this hypothetical exercise." *In re Prudential*, 148 F.3d at 340. This factor is neutral and will not be considered to count for or against the proposed fee request.

10. Any innovative terms of settlement.

The terms of this settlement are relatively standard. In the absence of any innovative terms, this factor neither weighs in favor nor against the proposed fee request.

11. Summation

I recognize that the *Gunter*/*Prudential* factors "'need not be applied in a formulaic way' because each case is different, 'and in certain cases, one factor may outweigh the rest.'" *In re AT & T*, 455 F.3d at 166 (citing *In re Rite Aid*. 396 F.3d at 301). In sum, after

"'engag[ing] in a robust assessment [ ] of the fee award reasonableness factors,'" I have determined that eight of the ten *Gunter*/*Prudential* factors count in favor, while the remaining two are neutral. *Id*. (citing *In re Rite Aid*, 396 F.3d at 302). Therefore, there is overwhelming support for the proposed fee. The lodestar cross-check, moreover, militates in favor of approval.

B. Lodestar

"The lodestar award is calculated by multiplying the number of hours reasonably worked on a client's case by a reasonable hourly billing rate for such services based on the given geographical area, the nature of the services provided, and the experience of the attorneys." *In re Rite Aid*, 396 F.3d at 305. Once the lodestar is calculated, "[t]he total lodestar estimate is then divided into the proposed fee calculated under the percentage method. The resulting figure represents the lodestar multiplier to compare to multipliers in other cases." Manual for Complex Litigation (Fourth) § 14.122 (2004).

1. Number of Hours and Hourly Rates

Class counsel reports that they cumulatively spent more than 41,000 hours litigating this case over the last nearly five years. Seven different firms worked on the Plaintiffs' case, though the vast majority of hours were logged by the two lead counsel firms, Hagens Berman Sobol Shapiro LLC and Kessler Topaz Meltzer & Check LLP. At my request, class counsel submitted copies of their time and expense records for in camera review. The nearly five years of work included, among other work, preparing the complaint; conducting extensive discovery including taking 39 depositions of current and former employees of GSK and Roxane; filing for class certification; submitting 13 opening and rebuttal expert reports; opening and defending *Daubert* challengs; defending

two separate motions for summary judgment; and preparing for trial, including filing eight motions *in limine* and defending against eight motions *in limine*. The law firms charged different amounts based on their average billable rates and the individual attorney or staff member working on the assignment, with hourly rates ranging from $120 to $795.

Taking the reported hours at the attorneys' current rate reveals a lodestar of $18,616,424. Counsel explained in their briefing that, after reviewing the reported hours, they revised the lodestar downward to delete unnecessary duplication of effort, mis-reported time, and other errors, and came up with a lodestar that "exceeds $16,750,000." Under the revised figure, the average billable rate is $407 per hour.

2. Lodestar Multiplier

"After a court determines the lodestar amount, it may increase or decrease that amount by applying a lodestar multiplier." *In re Diet Drugs Prod. Liab. Litig*., 582 F.3d 524, 539 (3d Cir.2009) (citing *In re Rite Aid*, 396 F.3d at 305–06). The Third Circuit explained that "multipliers may reflect the risks of non-recovery facing counsel, may serve as an incentive for counsel to undertake socially beneficial litigation, or may reward counsel for extraordinary result. By nature they are discretionary and not susceptible to objective calculation." *In re Prudential*, 148 F.3d at 340. The lodestar multiplier is calculated by dividing the attorneys' fees sought by class counsel ($50,000,000.00) by the total amount of hours class counsel devoted to the litigation times class counsel's hourly rates ($16,750,000). Here, that calculation comes to a multiplier of 2.99, meaning class counsel would receive nearly three times their regular billing rates. The Third Circuit has recognized that "'multiples ranging from one to four are frequently awarded

in common fund cases when the lodestar method is applied.'" *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 150 (2000) Brody, J.) (internal quotation omitted). *See also In re Cendant Corp. PRIDES Litig*., 243 F.3d 722, 742 (3d Cir.2001) (citing *In re Prudential*, 148 F.3d at 341). Indeed, courts in this circuit have accepted multipliers much higher than the one here. *See, e.g., Meijer, Inc. v. 3M*, No. 04-5871, 2006 WL 2382718 at *24 (E.D. Pa. Aug. 14, 2006) (approving a percentage fee award that translated to a 4.77 multiplier); Order and Final Judgment Approving Settlement, Awarding Attorneys' Fees and Expenses, Awarding Representative Plaintiff Incentive Awards, Approving Plan of Allocation, and Ordering Dismissal As to All Defendants, *In re Tricor Direct Purchaser Antit. Litig.*, No. 05-340 at 9 (D. Del. Apr. 23, 2009) (approving a one-third fee where lodestar multiplier was 3.93).

Therefore, a multiple of 2.99 is within the generally acceptable range and provides additional support for approving the attorneys' fees request. Thus I will award counsel thirty-three and a third percent of the common fund, for a total of $50,000,000.00, in attorneys' fees.

C. Costs

Class counsel requests reimbursement of $2,069,433 for expenses incurred litigating the case. Two-thirds of this amount reflects fees paid experts, including to pharmaceutical science experts, FDA regulatory specialists, and economic experts, all of whom were integral to the Plaintiffs' prosecution of the case. The next largest category of expenses, what class counsel calls "document management," represents less than ten percent of the total costs. As class counsel notes, they had a strong incentive to conserve their expenses, given that they were incurred with no guarantee of recovery. I find that

these expenses were reasonable and proper. Therefore, I will award counsel a reimbursement of these expenses from the settlement fund.

IV. Incentive Awards for Class Representatives

Incentive awards are "not uncommon in class action litigation and particularly where, as here, a common fund has been created for the benefit of the entire class." *In re Southern Ohio Correctional Facility*, 175 F.R.D. 270, 272 (S.D.Ohio 1997). As a matter of practice, "courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Id*. (citing numerous cases in which incentive awards were granted). I agree with my colleagues who have held that "[r]easonable payments are permissible to compensate named plaintiffs for the expenses they incur during the course of class action litigation." *First State Orthopaedics v. Concentra. Inc*., 534 F.Supp.2d 500, 524–25 (E.D. Pa.2007) (referencing *Nichols v. SmithKline Beecham Corp*., No. 00-6222, 2005 WL 950616, at *24 (E.D. Pa. April 22, 2005); *Godshall v. Franklin Mint Co.*, No. 01-6539, 2004 WL 2745890 (E.D. Pa. Dec. 1, 2004,)).

Plaintiffs seek an incentive award for the two class representatives, American Sales and Meijer, in the amount of $85,000 and $75,000, respectively. Though incentive awards are appropriate in this case, the requested amounts are too large. I will award American Sales $50,000 and Meijer $40,000.

These class representatives launched this litigation despite the risk of retaliation inherent in suing a supplier. This risk should be recognized. The class representatives "actively assisted in the preparation and prosecution of the case by collecting and producing records, preparing for and giving depositions and agreeing to participate in

what could have been a several-week trial, turning attention away from their daily business." Pls.' Mot. for an Award of Attorneys' Fees, Reimbursement of Expenses, and Payment of Incentive Awards to the Representative Plaintiffs, Sobol and Meltzer Decl., at ¶ 16. The $10,000 difference in the requested award reflects the fact that American Sales filed the first complaint, and maintained the action for nearly a year before Meijer filed its own action.

Finally, an incentive award of $50,000 and $40,000 is within the range of payments awarded by courts within the Third Circuit in other direct purchaser antitrust litigation. *See, e.g.*, *Tricor*, No. 05-340 at 11 (D. Del. Apr. 23, 2009) (awarding $50,000 to each of three class representatives); *Bradburn Parent Teacher Store*, 513 F.Supp.2d 322, 342 (awarding $75,000 to one class representative); *McCoy v. Health Net, Inc.*, 569 F.Supp.2d 448, 480 (awarding $60,000 to each class representative).

V. Plan of Distribution and Proposed Claim Form

When assessing proposed plans of allocation, courts use the same standard for determining whether to approve the settlement itself. Therefore, the proposed plan needs to be fair, reasonable and adequate. *In re Cendant Corp. Litig.*, 264 F.3d 201, 248 (3d Cir.2001). "In general, a plan of allocation that reimburses class members based on the type and extent of their injuries is reasonable." I*n re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 184 (E.D.Pa.2000). The plan of distribution, which was submitted with the Plaintiffs' memorandum in support of its motion for preliminary approval of the settlement (Doc. No. 480-1, at Ex. B), meets this standard. Under the plan proposed by Plaintiffs, as revised in their current motion, the claims administrator will mail claim forms to every class member within five days of final approval of the settlement. This

form will include calculations made by the settlement administrator of each class member's qualifying Flonase purchases during the class period, based on GKS's sales data. Class members have thirty-five days after final approval to submit their executed claim forms, in which they either accept the administrator's calculations or provide their own Flonase purchase data to support a revised purchase amount. By sixty-five days after final approval, class counsel will submit to the court a motion for distribution of the net settlement fund supported by a declaration of the settlement administrator. Under this plan, each class member receives their *pro rata* share of the net settlement fund, based on their share of qualifying Flonase purchases.

I find that the proposed plan is fair, reasonable, and adequate, especially as claimants are expected to receive the maximum amount they would have received if they had opted for trial and won. I also find that the proposed claim form is clear, fair, and reasonable.

VI. Conclusion

For the reasons explained above, I will grant Plaintiff's Motion for Final Approval of Settlement and their Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Payment of Incentive Awards to the Representative Plaintiffs.

s/Anita B. Brody

Dated: ____6/14/2013____ _____
ANITA B. BRODY, J.

TAB 16B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE FLONASE ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: Direct Purchaser Actions	Case No. 08-cv-3149 (Direct) **Hon. Anita B. Brody**

DIRECT PURCHASER PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND PAYMENT OF INCENTIVE AWARDS TO THE REPRESENTATIVE PLAINTIFFS

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I. INTRODUCTION

Counsel[1] for the direct purchasers[2] file this memorandum to support the request of an order (i) awarding attorneys' fees in the amount of one-third of the settlement fund of $150 million (plus accrued interest), (ii) reimbursing direct purchaser counsel for litigation costs and expenses incurred through January 2013 in the amount of $2,069,433, and (iii) approving an incentive award to American Sales in the amount of $85,000 and to Meijer in the amount of $75,000. The fee request falls well within the legal standards for an award based on the percentage of fund and is warranted by the efforts and results achieved.

Direct purchaser counsel led this complex action. Direct purchaser counsel reviewed millions of pages of documents, took more than 45 depositions (including three in the United Kingdom), filed over a dozen motions, submitted hundreds of pages of briefing, made many oral arguments, conducted multiple evidentiary hearings, and prepared and designated thousands of trial exhibits. In short, this case was hard fought from the outset and did not settle until after more than four years of litigation and the submission of extensive pretrial memoranda.

Direct purchaser counsel also committed human and financial resources with considerable risk of non-recovery. Direct purchaser counsel expended in excess of 40,000 hours prosecuting the claims. The co-lead firms spent almost $1 million *each* in out of pocket expenses, and other class counsel contributed other out of pocket payments. Direct purchaser counsel achieved a significant cash settlement of $150 million in the face of litigation that was often hotly contested and always imposed the daunting level of proof demanded by the high hurdle of substantive law set forth in *Professional Real Estate.*

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[1] Class counsel includes Hagens Berman Sobol Shapiro LLP and Kessler Topaz Meltzer & Check, LLP, appointed on November 12, 2010 as co-lead counsel for the class,[1] as well as The Radice Law Firm, P.C., Grant & Eisenhofer P.A., Kaplan Fox & Kilsheimer LLP, Nussbaum LLP, and Vanek, Vickers & Masini, P.C. All firms made contributions to the prosecution of the case.

[2] American Sales Company, Inc. ("American Sales"); Meijer, Inc., and Meijer Distribution, Inc. ("Meijer")

The effort and results achieved by direct purchaser counsel over the four and one half years of this litigation warrants the one-third fee.

II. BACKGROUND

This is an antitrust class action brought on behalf of direct purchasers of the prescription drug Flonase.

A. Direct purchasers' claims

Direct purchasers allege that GSK, as part of an overarching scheme to delay the introduction of less expensive generic versions of Flonase, unlawfully abused the citizen petition process contained in Section 505(j) of the Federal Food, Drug, and Cosmetic Act. As a result of its anticompetitive conduct, direct purchasers claim that GSK: (a) unlawfully maintained monopoly power in the market for fluticasone propionate in the United States; (b) maintained the price of Flonase at supra-competitive levels; and (c) overcharged the direct purchasers and members of the direct purchaser class millions of dollars by depriving them of the benefits of unrestricted competition and access to less expensive generic versions of fluticasone propionate.

B. Procedural background

The first complaint filed against GSK for its anticompetitive scheme was in July 2008 by direct purchaser American Sales. The Court held its first of many hearings in the case in September 2008 and issued its first scheduling order in October 2008.

Fact Discovery: Discovery in this case was extensive, including production of millions of documents by GSK, the FDA, Roxane, and three other generic manufacturers of fluticasone propionate. Document discovery began in late 2008 and continued until GSK completed its production in February 2010. Although always cordial, the extent of production of documents and data was a source of considerable negotiation among the parties as well as a source of motion practice. For example, direct purchasers challenged GSK's withholding of hundreds of documents under a claim of

attorney-client privilege. That dispute resulted in multiple rounds of briefing with the Court and, ultimately, the appointment of a special master, Edward Mullinix, to sift through GSK's privilege log and withheld documents while conferring with GSK and direct purchase counsel. While document production substantially concluded in February 2010, the direct purchasers review, re-review, and re-re-review of those documents continued through depositions, expert reports, rebuttal expert reports and complete trial preparation. Direct purchaser counsel spent thousands of hours understanding this complex documentary record.

Deposition discovery began in September 2009 and was equally extensive. Fact witness depositions occurred over many months, concluding the end of March, 2010. Deposition of fact witnesses in the case did not conclude until March 31, 2010. In all, direct purchasers took 30 depositions of current and former employees of GSK and Roxane, three of which required travel to the United Kingdom.

Class Certification: Direct purchasers first filed a motion for class certification, and a supporting expert report from their economist, in December 2008. That motion was essentially mooted by the Third Circuit's decision in *In Re Hydrogen Peroxide*, 552 F.3d 305 (3d Cir. 2008), requiring that direct purchasers re-file their class motion, along with reports from two separate economic experts, in January 2010. GSK conducted depositions of direct purchaser's class experts in March 2010 and shortly thereafter the parties entered into negotiation of a stipulation on certification of a class of direct purchasers. As a result of those negotiations, on May 17, 2010 the parties entered into a stipulation regarding certification of a litigation class of direct purchasers of Flonase.

Although the parties had stipulated to class, the Court – needing to independently determine that the requirements of Rule 23 were satisfied – held extensive oral argument on the issue of class certification, in October 2010. On November 10, 2010, as modified by a February 9, 2011 Order, the

Court certified a class of direct purchasers of Flonase: [3]

> All persons or entities in the United States and its territories who purchased Flonase nasal spray directly from Defendant (or any of its predecessors or affiliates) at any time from May 19, 2004 until March 6, 2006, excluding defendant, its predecessors, officers, directors, management, employees, subsidiaries, parent or affiliates, and government entities or persons.[4]

Expert Discovery: Beginning with initial expert reports filed in May 2010, direct purchasers submitted a total of 13 opening and rebuttal expert reports on the issues of causation, the science of bioequivalence related to nasal sprays, biostatistics, market power and damages. GSK filed a total of 11 opening and rebuttal expert reports in the direct purchaser case. Expert depositions took place in summer and fall of 2010 with direct purchasers taking a total of 7 depositions of GSK's experts while defending their experts in 7 depositions.

Daubert Challenges: The parties submitted an initial round of *Daubert* motions and briefing in October 2010. At that time direct purchasers challenged the opinions of all four of GSK's experts. GSK filed a *Daubert* challenge to the direct purchaser's economists' opinion on market power. At the urging of the Court, the parties engaged in significant negotiations over the scope of the challenged opinions and were able to reach agreement on all but one – GSK's FDA expert Mary Pendergast. On April 18, 2012 the Court held an evidentiary hearing on direct purchaser's challenge to Ms. Pendergast's opinion.

In July 2012, GSK sought permission to file a late expert report from former FDA reviewer Kenneth Furnkranz. The direct purchasers objected to the proposed Furnkranz report. The matter was exhaustively briefed both before GSK filed the report and again after it was filed in July 2012. In the meantime, in response to the Court's order allowing Ms. Pendergast's testimony, direct purchasers

[3] In exchange for stipulating to the certification of a direct purchaser class, the direct purchasers agreed not to seek so called "brand to brand" damages, a small portion of overall direct purchaser damages, and to seek only "brand to generic" damages and "generic to generic" damages.

[4] 11/10/2010 Order [Dkt. No. 161] as modified by 2/9/2011 Order [Dkt. No. 215].

sought to introduce the opinion of the former head of the FDA, Dr. David Kessler. GSK filed a *Daubert* challenge to Dr. Kessler's opinion in July 2012 and, in October 2012, the Court held an evidentiary hearing on GSK's motion. The Court ultimately admitted the opinions of both Mr. Furnkranz and Dr. Kessler. The direct purchasers defended GSK's challenge to Dr. Kessler in an evidentiary hearing in October 2012.

Summary Judgment: In October 2010, GSK filed two separate motions for summary judgment, one on the basis of *Noerr-Pennington* immunity and one on the issue of causation. The briefing on summary judgment was extensive. Together direct purchasers filed a total of 178 pages of briefing in opposition to GSK's summary judgment motions, including a total of 226 exhibits. GSK filed a total of 210 pages of briefing and submitted a total of 125 exhibits. Co-lead counsel for direct purchasers led the opposition in a full day hearing on the *Noerr-Pennington* summary judgment motion in April 2011. The Court considered the causation motion based on the party's submissions. The Court denied both motions in their entirety.

Trial Preparation: Given the complexity of the various issues involved in proving direct purchaser's case against GSK, the sheer volume of document and deposition discovery and the expert intensive nature of the evidence to be presented at trial, preparations for trial were extensive.

In June 2012, both sides filed eight separate *motions in limine*, each covering several related but separate evidentiary issues. The briefing was understandably extensive.

From the millions of pages produced, the direct purchasers considered a combined total of 2192 potential exhibits culled from the millions of pages of discovery, ultimately identifying 834 for trial. GSK identified more than 650 trial exhibits. The parties then conducted multiple all day meet and confer sessions, both in person and by telephone, in an attempt to agree upon a set of trial exhibits and identify and narrow their objections.

Similarly, the task of reviewing and identifying potential trial deposition testimony to be presented to the jury was monumental. It required teams of counsel reviewing the testimony of more than 28 GSK and Roxane employees and review and counter designation of testimony in response to GSK's deposition designations. For several weeks the parties conducted daily phone calls, most lasting 4-5 hours each, to confer on designation objections in an attempt to reach agreement.

In November 2012, the direct purchasers submitted a comprehensive pretrial memorandum, including identification of trial exhibits and deposition designations and provision of a proposed trial plan and jury instructions.

Settlement Negotiations: The settlement negotiations between the direct purchasers and counsel for GSK were professional, arm's-length and unfolded in phases. First, early discussions were unproductive, but counsel for both sides revisited the issue from time to time. Second, at the Court's suggestion, the parties agreed to private mediation before Eric Green, a highly accomplished national mediator. After a full day with a private mediator the parties found themselves at an impasse. Finally, with the Court's assistance, the parties again engaged in negotiations in October 2012 and again in November 2012. On November 7, 2012, (again with the Court's assistance), the parties reached a settlement of all direct purchaser claims in exchange for the payment of $150 million cash by GSK.

III. ARGUMENT

The United States Supreme Court has "recognized consistently that a lawyer who recovers a common fund for the benefit of persons other than his client is entitled to a reasonable attorney's fee from the fund as a whole." [5] A Court determining the reasonableness of an attorney's fee is guided by the factors set forth in *Gunter v. Ridgewood Energy Corp.,* 223 F.3d 190, 195 n.1 (3d Cir. 2000) – the length and complexity of the case, the benefit conferred on the class, the skill and efficiency of counsel;

[5] *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

the risk of non-recovery, the amount of time devoted to the litigation, and the fees paid in comparable cases. The Third Circuit urges district courts to perform a lodestar cross-check to ensure that application of the percentage method results in a "sensible" recovery.[6]

The direct purchasers' request for a fee of one-third of the $150 million settlement fund is reasonable under these standards. This is a long and complex case. The direct purchaser counsel spent over 40,000 hours of professional time through January 2013. If awarded, the requested fee of one-third of the settlement fund would amount to a multiplier of less than three times the total loadstar, well within the range frequently approved for antitrust litigation.

The direct purchasers' request for reimbursement of expenses, totaling $2,069,433, is also reasonable. These funds were spent out-of-pocket by counsel for the benefit of the class, and are in an amount that is reasonable for a complex, expert-intensive case such as this.

The direct purchasers' request for an incentive award for class representatives American Sales in the amount of $85,000, and for Meijer in the amount of $75,000, is reasonable and consistent. These entities took the risk of serving as class representatives against one of their suppliers and participated actively in the litigation, providing documents and testimony, communicating with and overseeing direct purchaser counsel concerning the progress of the litigation, and consulting on settlement negotiations.

A. The legal standard governing awards of attorneys' fees in class actions

The Third Circuit favors the percentage-of-recovery method of calculating fee awards in common fund cases. It allows courts to reward litigation success and penalize failure.[7] For

[6] *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305-06 (3d Cir. 2005).

[7] *See In re AT&T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005) (citing *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 333 (3d Cir. 1998) (distinguishing the alternative lodestar method of determining attorneys' fees, which is more commonly applied in statutory fee-shifting cases).

many years courts in the Third Circuit and elsewhere have employed the percentage-of-the-fund method in pharmaceutical antitrust class actions.[8]

B. The fee requested by direct purchaser counsel is fair and reasonable

Third Circuit courts historically consider the following seven factors when evaluating the reasonableness of a fee request under the percentage-of-recovery method:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.[9]

More recently, the Third Circuit has suggested additional factors for consideration:

> (1) the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such as government agencies conducting investigations; (2) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained; and (3) any "innovative" terms of settlement.[10]

[8] *See, e.g., In re Remeron Direct Purchaser Antitrust Litig.*, Civ. 2005 U.S. Dist. LEXIS 27013, at *32 (D.N.J. Nov. 9, 2005) ("the percentage of fund method is the proper method for compensating Plaintiffs' Counsel in this common fund case"); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 79 (D. Mass. 2005) ("[T]his Court rules that the percentage of fund method is appropriate in these circumstances"); *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 261 (D. Del. 2002) ("In determining the fee award in a common-fund class action, the Third Circuit follows the percentage-of-the-recovery method."); s*ee also section III.B.1.g. infra* (identifying 15 direct purchaser antitrust pharmaceutical cases in which courts have awarded attorneys' fees based on percentage-of-the-fund method).

[9] *Gunter v. Ridgewood Energy Corp.,* 223 F.3d at 195 n.1.

[10] *In re Prudential Ins. Co. of American Sales Practices Litig.*, 148 F.3d 283, 340 (3d Cir. 1998)*; See In re AT & T Corp.*, 455 F.3d 160, 165-66 (3d Cir. 2006) ("In reviewing an attorneys' fees award in a class action settlement, a district court should consider the *Gunter* factors, the *Prudential* factors, and any other factors that are useful and relevant") (citations omitted).

1. Application of the *Gunter* factors

- **The complexity and duration of the litigation**

Complexity and duration of the litigation is "the first factor that a district court can and should consider in awarding fees."[11] This action involved complex antitrust issues, FDA bioequivalence tests and standards for suspension nasal spray products, pharmaceutical manufacturing and supply issues, and pharmaceutical regulatory issues that were investigated and litigated intensely over more than four years. "Antitrust class actions are perhaps the most complex cases to litigate."[12] This is particularly so when the case also demands proof of objective baselessness under the rigorous *Noerr-Pennington* qualified immunity standard.[13] Direct purchaser counsel:

- Conducted extensive investigation of class claims of antitrust violation and injury;
- Performed detailed analyses of facts and law concerning antitrust, bioequivalence standards, FDA regulatory law, including the Hatch-Waxman Act, and FDA ANDA review policies and procedures;
- Conducted extensive legal research and analysis concerning *Noerr-Pennington* and *P.R.E.* standards as they relate to citizen petitions;
- Successfully obtained class certification;
- Negotiated and resolved with GSK's counsel an extensive production of documents and data;
- Litigated discovery motions and negotiated discovery-related stipulations with defendant;
- Pursued discovery from third-parties, such as the FDA and generic fluticasone manufacturers, which necessarily required substantial negotiations regarding the scope of such discovery;

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[11] *Gunter*, 223 F.3d at 197.

[12] *Bradburn Parent Teacher Store v. 3M*, 513 F. Supp. 2d 322, 338-39 (E.D. Pa. 2007). *Accord In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003).

[13] *See E.R.R. Presidents Conference v. Noerr Motor Freights, Inc*., 365 U.S. 127 (1961) ("*Noerr"*); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)) ("*Pennington*"); *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus. Inc.,* 508 U.S. 49 (1993) ("*PRE*").

- Reviewed and analyzed millions of pages of documents and data produced by GSK, Roxane, and third-parties;
- Conducted depositions of current and former employees of the defendants and third-parties in the United States and the United Kingdom regarding complex regulatory, pharmaceutical manufacturing, corporate decision-making and financial matters;
- Retained experts in pharmaceutical sciences, FDA law, regulation, and practice biostatistics, and economics, and conducted and defended many expert depositions;
- Submitted 13 expert reports and reply reports.
- Opposed GSK's summary judgment motions, which included hundreds of pages of briefing and factual statements and submission of 226 exhibits;
- Successfully defended experts challenged by GSK under *Daubert* including extensive briefing and multiple evidentiary hearings;
- Prepared for trial by identifying of over 800 trial exhibits, submitting and briefing 8 motions *in limine*, opposing GSK's 8 *motions in limine*,
- Led an extensive meet and confer process concerning trial exhibits and designation and counter designation of 28 trial depositions;
- Prepared and filed an extensive pre-trial memorandum and trial plan;
- Conducted complex and successful settlement discussions that yielded a $150 million cash settlement for the class; and
- Developed and drafted the settlement and class notice documents and will assist in overseeing the notice and claims process to ensure swift and accurate distribution of settlement proceeds to the class.

Co-lead Counsel Decl. ¶6. Direct purchaser counsel will continue to devote time to settlement approval (preparation for the final approval hearing and responding to class member inquiries) and to settlement administration. *Id.* ¶7. The first, critical factor is soundly met by direct purchaser class counsel.[14]

[14] *Tricor,* No. 05-340-SLR (D. Del. Apr. 23, 2009) (awarding one-third fee where class counsel "effectively and efficiently prosecuted this difficult and complex action on behalf of members of the Class for over three and one-half years"); *In re Am. Investors Life Ins. Co. Marketing and Sales Practices Litig.*, 263 F.R.D. 226, 243 (E.D. Pa. 2009) (fee request supported where case involved complex RICO allegations, had been pending for more than five years, and class counsel had conducted extensive

- **The skill and efficiency of counsel**

Direct purchaser counsel are skilled in prosecuting complex actions. They have particular expertise in delayed generic entry cases with many having been involved in similar actions for over a decade. They used their knowledge and experience in this specific kind of litigation to obtain a positive result for the class.

The high "quality of opposing counsel" further supports the fee request.[15] GSK presented formidable opposition from its skilled and tenacious counsel, one of the premier law firms in the nation.

- **The risk of non-payment**

The risk of non-payment in this matter was considerable.[16] In the most closely analogous pharmaceutical antitrust case to proceed to trial to date, one involving allegations of sham citizen petitioning to the FDA, a jury returned a verdict for the defense after a two week trial.[17] "A determination of a fair fee must include consideration of the sometimes undesirable characteristics of a contingent antitrust action[], including the uncertain nature of the fee, the wholly contingent outlay of large out-of-pocket sums by plaintiffs, and the fact that the risk of failure and nonpayment in an antitrust case are extremely high."[18] As Judge Pratter explained, attorneys who undertake the representation of a class are "unable to mitigate any of the risk of nonpayment; instead, they [a]re

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discovery, retained experts, and filed and defended several complex motions); *Bradburn*, 513 F. Supp. 2d at 339 (four-year antitrust case involving litigation over class certification and collateral estoppel, expert testimony on both class certification and on the merits, and numerous depositions supported fee request).

[15] *Am. Investors*, 263 F.R.D. at 244 (where class counsel were skilled in litigating class actions against insurance companies, defendants were represented by a leading law firm, and the case was vigorously litigated by both sides, class counsel's fee request was supported).

[16] The history of antitrust litigation is replete with cases in which plaintiffs succeeded at trial on liability but recovered no or very small damages at trial or after appeal. *See, e.g.*, *U.S. Football League v. National Football League,* 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) ("the jury chose to award plaintiffs only nominal damages, concluding that the USFL had suffered only $1.00 in damages"); *MCI Comme'ns Corp. v. Am. Tel. & Tel. Co.,* 708 F.2d 1081, 116-67 (7th Cir. 1983) (antitrust judgment remanded for new trial and damages); *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973) (after two trips to the Second Circuit and one to the Supreme Court, plaintiffs and the proposed class recovered nothing in an antitrust class case).

[17] *See Louisiana Wholesale Drug Co., Inc. v. Sanofi-Aventis*, 2009 U.S. Dist. LEXIS 77206, *9 (S.D.N.Y. 2009).

[18] *Remeron*, Civ. 2005 U.S. Dist. LEXIS 27013, at *39.

required to spend or incur obligations to effectively litigate th[e] case."[19] And as Judge Stengel explained in support of awarding class counsel a one-third fee in *In re Wellbutrin SR Antitrust Litig.*, 04-5525 (E.D. Pa., Nov 21, 2011):

> Class Counsel faced numerous risks in preparing and litigating this case, including the risks associated with the motion to dismiss, class certification, summary judgment, and – had the case continued – ultimately proving liability and damages at trial and potentially surviving any appeals. Underlying all of these risks was the enormous one of handling this case for its entire duration on a contingent basis, doing everything necessary to honor Class Counsel's commitment and obligations to the class. . . . The substantial risk of nonpayment that Class Counsel faced throughout this litigation strongly supports their fee request. [20]

And so it is here. Having now recovered a significant settlement for the class in the face of these multiple risks, direct purchaser counsel should be rewarded for their efforts, and their success, on behalf of the class.[21]

- **The amount of time devoted to the litigation**

Direct purchaser counsel expended over 40,000 hours over the course of almost four and one-half years preparing, litigating, and negotiating the settlement of this case. Their commitment continues, and their lodestar calculation does not account for any future work ensuring the distribution of proceeds.[22]

- **The size of the fund and the number of people that benefit**

The settlement provides the class with immediate and certain payment. All direct purchaser class members will receive their *pro rata* share of the net settlement fund, *i.e.,* the

[19] *Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402, 423 (E.D. Pa. 2010).

[20] *In re Wellbutrin SR Antitrust Litig.*, 04-5525 (E.D. Pa., Nov 21, 2011) at 11-12 (citations omitted).

[21] *See Blum v. Stenson*, 465 U.S. 886, 902 (1984) (Brennan, J., concurring) ("the risk of not prevailing, and therefore, the risk of not recovering any attorney's fees, is a proper basis on which a district court may award an upward adjustment to an otherwise compensatory fee").

[22] *See Remeron*, 2005 U.S. Dist. LEXIS 27013, at *42, (observing that class counsel would "likely incur hundreds of additional hours in connection with administering the settlement, without the prospect for further fees").

settlement fund net of attorneys' fees, expenses, and incentive payments awarded by the Court, plus accrued interest, based on their purchases of Flonase during the class period. This is a good result.

- **The reaction of the class**

The settlement notice was mailed on February 14, 2013. The deadline to object is not until March 15, 2015. While it is premature to evaluate the class's reaction to the settlement, direct purchaser counsel conferred with both the class representatives and the three largest class members -- AmerisourceBergen Corp., Cardinal Health, Inc., and McKesson Corp. (who together account for the vast majority of the purchases subject to the settlement). Each fully supports the settlement and the requested fee.

- **Consistency with fee awards in comparable cases**

The requested fee request is consistent with prior practice in other direct purchaser class actions involving allegations of overcharges arising from suppressed generic drug competition. The following table summarizes fifteen cases that support a one-third fee in such matters.

Direct Purchaser Generic Suppression Antitrust Class Action Settlements One-Third Attorneys' Fees Awarded		
Date	**Case Name**	**Settlement Amount**
11-07-12	*In re Wellbutrin XL Antitrust Litigation,* E.D. Pa. 08-2431	$37.5M
05-31-12	*Rochester Drug Co-Operative, Inc., v. Braintree Laboratories, Inc.*, D. Del. 07-142-SLR	$17.5M
01-12-12	*In re Metoprolol Succinate Antitrust Litig.*, D. Del. 06-52-MPT	$20M
11-28-11	*In re DDAVP Direct Purchaser Antitrust Litig.*, S.D.N.Y. 05-2237	$20.25M
11-21-11	*In re Wellbutrin SR Antitrust Litig.*, E.D. Pa. 04-5525	$49M
08-11-11	*Meijer, Inc. v. Abbott Labs.*, N.D. Cal. 07-05985-CW	$52M
01-31-11	*In re Nifedipine Antitrust Litig.*, D.D.C. 03-mc-223-RJL	$35M
01-25-11	*In re Oxycontin Antitrust Litig.*, S.D.N.Y. 04-md-1603-SHS	$16M
04-23-09	*In re Tricor Direct Purchaser Litig.*, D. Del. 05-340-SLR	$250M
04-20-09	*Meijer, Inc. v. Barr Pharms., Inc.*, D.D.C. 05-2195	$22M
11-09-05	*In re Remeron Direct Purchaser Antitrust Litig.*, D.N.J. 03-0085	$75M
04-19-05	*In re Terazosin Hydrochloride Antitrust Litig.*, S.D. Fla. 99-MDL-1317	$74M
09-28-04	*North Shore Hematology-Oncology Assoc., P.C. v. Bristol-Myers Squibb Co.*, D.D.C. 04-248-EGS	$50M
04-09-04	*In re Relafen Antitrust Litig.*, D. Mass. 01-12239-WHY	$175M
04-11-03	*La. Wholesale Drug Co. v. Bristol-Myers Squibb Co.*, S.D.N.Y. 01-MD-1410-JGK	$220M

In the past two years, courts in eight direct purchaser antitrust actions approved one-third fees.

2. Application of the *Prudential* factors

- **The value of benefits accruing to class members attributable to the efforts of direct purchaser counsel, as opposed to the efforts of others**

Unlike in some antitrust cases, the commencement of this action did not follow a government lawsuit or investigation. Rather, the development of this case depended entirely on the investigation and efforts of direct purchaser counsel. This factor further supports the fee request.[23] Although other plaintiffs pursued claims against GSK, counsel for direct purchasers commenced the first case and led joint litigation efforts, taking the lead in discovery and development of scientific and FDA experts, significant motion practice and trial preparation.

- **The percentage fee that would have been privately negotiated**

A one-third contingency is standard in individual litigation, and could be more in an antitrust case, given the complexities and risks.[24]

- **Innovative terms**

The terms of the settlement, while providing a benefit to the class, are otherwise relatively standard. Therefore, this factor neither supports nor detracts from the fee request.

C. A lodestar cross-check confirms the reasonableness of the fee request

A lodestar cross-check ensures that application of the percentage method results in a recovery that is "sensible."[25] Once the lodestar is calculated, "[t]he total lodestar estimate is then

[23] *AT&T Corp.*, 455 F.3d 160, 173 (3d Cir. 2006) (that "class counsel was not aided by the efforts of any governmental group, and the entire value of the benefits accruing to class members is properly attributable to the efforts of class counsel . . . strengthens the District Court's conclusion that the fee award was fair and reasonable.")

[24] *See Bradburn*, 513 F. Supp. 2d at 340 (a 35% fee award was comparable to the percentage counsel would have negotiated had the case been subject to a private contingency fee agreement); *Remeron,* 2005 U.S. Dist. LEXIS 27013, at *46, ("[a]ttorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation," and in a direct purchaser pharmaceutical antitrust class action, the "requested 33⅓% fee reflects the market rate in other litigation of this type").

[25] *Rite Aid,* 396 F.3d at 305-06; *see also Warfarin*, 212 F.R.D. 231 at 263 ("The Third Circuit suggests that the district court cross-check the percentage award against the 'lodestar' award to help ensure the reasonableness of the fee.").

divided into the proposed fee calculated under the percentage method. The resulting figure represents the lodestar multiplier to compare to multipliers in other cases."[26]

When attorneys' fees are awarded, the current market rate, not the rate at the time the services were performed, is to be used.[27] In comparable cases, Third Circuit courts have often been presented with, and approved, lodestar multipliers in the 2-4 range, but accepted multipliers have been much higher.[28]

Direct purchaser counsel's lodestar is in excess of $16,750,000. Based on a one-third fee ($50 million), the requested fee is 2.98 times the lodestar. The lodestar cross-check confirms the reasonableness of the fee request.

D. The Court should approve the request for reimbursement of expenses

Direct purchaser counsel advanced necessary litigation expenses with no assurance of repayment. Attorneys who create a common fund for the benefit of a class are entitled to reimbursement of their reasonable litigation expenses from the fund.[29]

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[26] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14.122.

[27] *Lanni v. State of New Jersey*, 259 F.3d 146 (3d Cir. 2001) ("The current rate in 2008, rather than the historic rates of 2005, 2006 and 2007, must be used in the Third Circuit to reflect the delay in payment for services rendered in past years, measured by current market rates."). *Accord Phillips v. Phila. Hous. Auth*., 2005 U.S. Dist. LEXIS 34606, at *18-20 (E.D. Pa. Dec. 20, 2005). *See also Rode v. Dellarciprete*, 892 F.2d 1177, 1184 (3d Cir. 1990) ("the district court can make 'an appropriate adjustment for delay in payment – whether by application of current rather than historic hourly rates or otherwise.'") (quoting *Missouri v. Jenkins*, 491 U.S. 274, 109 S. Ct. 2463, 2469, 105 L. Ed. 2d 229 (1989)).

[28] *See, e.g., Meijer, Inc. v. 3M*, No. 04-5871, 2006 WL 2382718 (E.D. Pa Aug. 14, 2006), at *24 (approving a percentage fee award that translated to a 4.77 multiplier in case that settled after one year); *Tricor*, No. 05-340 at 9 (D. Del. Apr. 23, 2009) (approving one-third fee where lodestar multiplier was 3.93); *Warfarin*, 212 F.R.D. at 263 (approving lodestar cross-check finding a 1.33 multiplier calculated at counsel's then-current rates); *In re Children's Ibuprofen Oral Suspension Antitrust Litig.*, 04-mc-00535-ESH; (D.D.C. Apr. 24, 2006) (multiplier of 2.33); *Remeron*, Civ. 2005 U.S. Dist. LEXIS 27013, at *47-48, (multiplier of 1.86 is on the "low end of the spectrum"). *See also Segen v. OptionsXpress Holdings Inc.*, 631 F. Supp. 2d 645 (D. Del. 2009) (approving a fee award resulting in a lodestar multiplier of 2.06 in securities class action).

[29] *See Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 732 n.12 (3d Cir. 2001) (quoting the 1985 Task Force Report for the conclusion that the "common-fund doctrine . . . allows a person who maintains a lawsuit that results in the creation, preservation, or increase of a fund in which others have a common interest, to be reimbursed from that fund for litigation expenses incurred."); *see also AT&T Corp.*, 455 F.3d at 172 n.8 (litigation "[e]xpenses are generally considered and reimbursed separately from attorneys' fees").

Class counsel requests reimbursement of $2,069,433 for expenses incurred litigating the case. The largest component of this amount consists of fees paid to pharmaceutical sciences experts, FDA regulatory specialists, and economic experts who were essential to the prosecution of this case. These expenses, as well as others routinely charged to hourly-fee-paying clients (such as costs for deposition transcripts, computerized research, the creation of an electronic document database, copying, and travel) were reasonable.[30] Given that the expenses here were incurred with no guarantee of recovery, direct purchaser counsel had a strong incentive to conserve, and did so. The expenses were necessarily incurred in obtaining this positive result for the class and should be reimbursed.

E. A modest award to the class representatives is appropriate

Incentive awards may be provided to class representatives as a reward for efforts that benefit the class.[31] In evaluating the appropriateness of an award, courts consider (i) the financial, reputational and personal risks to the plaintiff; (ii) the degree of plaintiffs' litigation responsibilities; (iii) the length of litigation; and (iv) the degree to which the plaintiffs benefitted as class members.[32]

Direct purchaser counsel request that class representative American Sales be granted an incentive award of $85,000 and that Meijer be granted an award of $75,000. These awards are well deserved.

First, the class representatives stepped in despite the risk of retaliation inherent in suing a supplier. Without them, the class would have recovered nothing.

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[30] A breakdown of the litigation expenses incurred, by category is provided. *See* Declaration of Co-Lead Counsel Thomas M. Sobol and Joseph H. Meltzer, ¶13.

[31] *See Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 220 (E.D. Pa. 2011); *Bradburn*, 513 F. Supp. 2d at 342 ("It is particularly appropriate to compensate named representative plaintiffs with incentive awards when they have actively assisted plaintiffs' counsel in their prosecution of the litigation for the benefit of the class.").

[32] *Id.*

Second, the class representatives actively assisted in the preparation and prosecution of the case by collecting and producing records, preparing for and giving depositions, and agreeing to participate in what could have been a several-week trial, turning their attention away from their daily business.

Third, the amounts requested are within the acceptable range of payments awarded by courts within the Third Circuit in other direct purchaser antitrust litigation.[33]

The $10,000 differential requested between the award to American Sales and Meijer is meant in recognition of the fact that American Sales filed its complaint, and began prosecuting its claims, almost a full year before Meijer.[34]

IV. CONCLUSION

Direct purchasers respectfully request that the Court approve the attorneys' fee and expense application and enter an order awarding counsel fees of $50,000,000 (plus a proportionate share of the interest thereon through the date of the award) and reimbursement of expenses in the amount of $2,069,433. Co-lead counsel also request that American Sales receive an incentive award of $85,000 and that Meijer receive an incentive award of $75,000 for their efforts on behalf of the class in the prosecution of this action.

[33] *See, e.g.*, *Rochester Drug Co-Operative, Inc., v. Braintree Laboratories, Inc.*, 07-142-SLR (D. Del. May 31, 2012) (awarding $60,000 incentive awards to each class representative); *In re Metoprolol Succinate Antitrust Litig.*, D. Del. 06-52-MPT (D. Del. Jan 12, 2012) (awarding $50,000 incentive awards to each class representative); *In re Wellbutrin SR Antitrust Litig.*, 04-5525 (E.D. Pa. Nov. 23, 2011) (awarding a total of $50,000 to two representatives); (awarding $50,000 per representative); *In re Tricor Direct Purchaser Antitrust Litigation,* C.A. No. 05-340-SLR (D. Del. April 23, 2009) (awarding $50,000 incentive awards to each class representative).

[34] American Sales filed its complaint on July 8, 2008. Meijer filed its complaint on June 3, 2009.

TAB 17A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
GREENEVILLE DIVISION

IN RE: SOUTHEASTERN MILK ANTITRUST LITIGATION	)	
	)	**Master File No. 2:08-MD-1000**
THIS DOCUMENT RELATES TO: ***Sweetwater Valley Farm, Inc., et al. v. Dean Foods Co., et al., No. 2:07-CV 208.***	)	**Judge J. Ronnie Greer**

MEMORANDUM OPINION AND ORDER

This matter is currently before the Court on the plaintiffs' Motion For Award Of Attorneys' Fees, Reimbursement Of Expenses, And Incentive Awards For Class Representatives. [Doc. 1808]. No party has filed a response to the motion and no class member has objected to the requested fees, expenses, and incentive awards. The Court held a fairness hearing on May 15, 2012, and heard brief argument on the motion. The matter is now ripe for disposition. For the reasons set forth herein, the motion will be GRANTED.

I. Background

This is a multi-district antitrust case involving allegations by the plaintiffs that defendants violated §§ 1 and 2 of the Sherman Act. After nearly five years of contentious litigation, the plaintiffs have entered into settlement agreements with certain of the defendants, [*See* Doc. 1856]. In short, plaintiffs have negotiated a cash settlement in the amount of $140 million with defendant Dean Foods and a $5 million cash settlement and substantial structural changes with defendants SMA and Baird (collectively referred to as "Settling Defendants"). The Court has now given final

approval to the settlements, [Docs. 1889, 1890] and the trial of the matter against the non-settling defendants is currently scheduled to commence in November, 2012. Plaintiffs request an award of $48,333,333.00 in attorney's fees (one-third of the recovery from Settling Defendants), $7,408,920.00 as reimbursement for class counsel's out of pocket expenses and incentive awards for the 15 class representatives in the amount of $10,000.00 each, or $150,000.00 total.

II. Analysis

A. Applicable Law

"In a certified class action, the court may award reasonable attorney's fees . . . that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). The Court must ensure "that counsel is fairly compensated for the amount of work done as well as for the results achieved." *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). Courts have broad discretion in determining an award of attorney's fees in class actions. *See Bowling v. Pfizer, Inc.*, 102 F.3d 777, 779 (6th Cir. 1996); *Rawlings*, 9 F.3d at 516.

One of two methods for calculation of attorney's fees is generally employed in the Sixth Circuit: The lodestar [1] and the percentage-of-the-fund. [2] The district court may "select the more appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them." *Van Horn v. Nationwide Prop. and Cas. Ins. Co.*, 436 Fed. App'x 496, 2011 WL 3792362, at *1 (6th Cir. Aug. 26, 2011) (quoting *Rawlings*, 9 F.3d at 516). The district court, however, generally must explain

[1] With the lodestar method, the Court multiplies the number of hours reasonably expended on the litigation by a reasonable hourly rate. *Reed v. Rhodes*, 179 F.3d 453, 471 (6th Cir. 1999).

[2] When using the percentage-of-the-fund method, the Court simply determines a percentage of the settlement to award to class counsel. *Rawlings*, 9 F.3d at 516.

its "reasons for adopting a particular methodology and the factors considered in arriving at the fee." *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009) (internal quotation marks omitted).

This is a common fund case and plaintiffs urge the Court to apply the percentage of the fund method. As a general matter, "[t]he lodestar method better accounts for the amount of work done, while the percentageof the fund method more accurately reflects the results achieved." *Rawlings*, 9 F.3d at 516. It appears that the trend in the Sixth Circuit is "toward adoption of a percentage of the fund method" in common fund cases. *Stanley v. United States Steel Company*, 2009 WL 4646647 (E.D. Mich. Dec. 8, 2009) (quoting *Rawlings*, 9 F.3d at 515). "[T]he vast majority of courts of appeal now permit or direct district courts to use the percentage-fee in common-fund cases." *Manual For Complex Litigation Fourth* ("MCL") § 14.121. "In practice, the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation" and "creates inherent incentive to prolong the litigation." *Id.* At least one circuit court of appeals has recognized that the percentage method "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005).

1. Selecting the Method

In the Sixth Circuit, it is within the discretion of the district court to decide which method to use in a given case. *Bowling*, 102 F.3d at 779; *Rawlings*, 9 F.3d at 516. The percentage-of-the-fund method, however, clearly appears to have become the preferred method in common fund cases. *Stanley, supra*; *see* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7; J. Empirical Legal Stud. 811, 832 (December, 2010).

As noted above, plaintiffs urge the Court to award a percentage of the common fund

in this case. Although the Court acknowledges its discretion to use the lodestar method, the Court finds that the percentage-of-the-fund method is the more appropriate method in this case, especially when employed with a lodestar cross-check. Here, a substantial common fund has been established for the benefit of class members through the efforts of class counsel. Given the commitment of time and resources committed by class counsel and the complexity of this litigation, it simply would not have been practicable for individual members of this class to pursue litigation challenging the alleged illegal conduct in this case. Given the clear trend in the Sixth Circuit and the Court's belief that the percentage-of-the-fund method, when employed in connection with a lodestar cross-check, accounts for both the amount of the work done and reflects the results achieved by class counsel, this Court will use the percentage-of-the funds method and a lodestar cross-check. [3] In addition, given the number of hours expended by counsel in this case (approximately 113,000) use of a percentage-of-the-fund method here is much more efficient and less time consuming for the Court to administer.

2. The Reasonableness of the Requested Fee

As noted above, the attorneys' fees requested represent 33.33 percent of the settlement fund. Although the total fee requested is a very large amount, the percentage requested is certainly within the range of fees often awarded in common fund cases, both nationwide and in the Sixth Circuit. *Bessey v. Packerland Plainwell, Inc.*, 2007 WL 3173972, at *4 (W.D. Mich. Oct.

[3] Counsel have provided to the Court summary schedules indicating the number of hours spent by the attorneys involved in this litigation and the lodestar calculation based on historical billing rates. Those schedules were prepared from contemporaneous time records not produced by counsel. Unlike the situation when the Court employs the lodestar method in full, "the hours documented by counsel need not be exhaustively scrutinized by the district court" where a lodestar cross-check is used. *In re WorldCom Sec. Litig.*, 388 F. Supp.2d 319, 355 (S.D.N.Y. 2005) (citing *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000)).

26, 2007) (approving an award of 33 percent and noting that "[e]mpirical studies show that . . . fee awards in class actions average around one-third of recovery") (quoting *Shaw v. Toshiba America Inf. Sys., Inc*. 91 F.Supp.2d 942, 972 (E.D. Tex. 2000)); *Worthington v. CDW Corp*. 2006 U.S. Dist. LEXIS 23100, at *22 (S.D. Ohio May 22, 2006); MCL § 14.121 ("[a]ttorney fees awarded under the percentage method are often between 25% and 30% of the fund."); *see also* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?* 158 U. Pa. L. Rev. 2043, 2063 (2010) ("although the mean and median fee awards in federal court are 25%, there are many awards at the 33% level, ...").

In the Sixth Circuit, several factors have been identified for consideration in determining the reasonableness of the requested fee. These include:

> (1) the value of the benefit rendered to the plaintiff class . . . ; (2) the value of services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides."

Bowling, 102 F.3d at 780. *See also Smillie v. Park Chemical Co.*, 710 F.2d 271, 275 (6th Cir. 1983).

All of the relevant factors here support the requested fee. First, the result obtained by counsel for the plaintiff class is extraordinary and will result in an average cash payment to each class member of approximately $13,000.00. The total settlement fund is approximately one-third of the total damages calculated by plaintiffs' damages expert.[4] In addition, the settlement with Baird and SMA will result in significant structural changes in the way milk is marketed in the future in the Southeast. One part of that relief alone has been estimated by SMA to generate value of

[4] Plaintiffs claim the settlement is likely the largest settlement of any antitrust case litigated in this district. Although the Court has not attempted to confirm the accuracy of that claim, the Court is not aware of any settlement for a larger amount.

approximately $0.10 to $0.12/cwt to Southeast dairy farmers, totaling millions of dollars over the next several years. The value of the settlement to the class is further illustrated by the lack of objection from any class member to the requested fees. Of the roughly 7000 members of the class, only one objected to the settlement, and that objector voiced no objection to the requested fees.

Second, there is absolutely no question that counsel has spent a remarkable amount of time preparing and litigating this case–over 113,000 hours of legal work. Counsel spent a year investigating the antitrust allegations, consulting experts and mapping strategy before filing suit. The case has been extensively and vigorously litigated for four years and the settling defendants have aggressively defended the suit. Counsel has reviewed and organized over 5,000,000 pages of documents and multiple motions to compel discovery have been litigated. Over 100 depositions have been conducted, including those of numerous plaintiff and defense experts. The Court's docket entries for the case are approaching 2,000, fully illustrating the extensive nature of the legal work done, from the initial motions to dismiss through the summary judgment stage and extensive litigation of a host of other pretrial motions. Counsel have participated in extensive and lengthy court ordered mediation sessions, as well as settlement discussions with defendants. The quality of the work done by class counsel has been exceptional, not only with respect to the pleadings filed but also the oral advocacy during oral argument on various motions.

Using the lodestar method as a cross-check on the reasonableness of the requested fee likewise supports the award of fees requested. As noted above, counsel spent over 113,000 hours on this case, which, when multiplied by a reasonable hourly rate, results in a lodestar of $46,702,830. The requested fee-- $48,333,333-- represents a lodestar multiplier of only 1.03, minimal when compared to typical lodestar multipliers. *See In re Cardinal Health, Inc. Sec. Litig.*,

528 F. Supp.2d 752, 767 (S.D. Ohio 2007) (typical lodestar in large securities class actions ranges from 1.3 to 4.5); *Newberg on Class Action* § 14.6 (4th ed. 2009) ("Multiples ranging from one to four frequently are awarded in common fund cases when the lodestar method is applied.").

The complexity of the litigation also supports the requested fees. This Court has observed several times the complexity of the case. Almost every aspect of this case has been hotly contested and litigated extensively and the case presents several somewhat novel issues. The complexity of the case is further illustrated by the number of pages of documents produced, as noted above, a list of potential trial exhibits that numbers in the thousands and literally hundreds of potential witnesses who have been interviewed and/or deposed in preparation for trial. Class counsel, who have extensive experience in complex class action litigation, have efficiently and competently managed their enormous task and have vigorously and effectively prosecuted the case on behalf of the class. They have also been opposed by equally experienced and highly competent counsel for defendants and have achieved an excellent result for their clients.

Furthermore, counsel undertook this case on a contingency-fee basis and accepted a substantial risk of non-payment for legal work and reimbursement of out-of-pocket expenses advanced. This Court finds that the fee awarded should fully reflect the risk taken by these lawyers and is a very substantial factor in this case which weighs in favor of the requested fee. Not only did counsel risk not being paid for more than $46 million in legal work, they also ran the risk of losing nearly $7.5 million in out-of-pocket expenses. If counsel are not rewarded for this risk, few attorneys will undertake "the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing." *Behrens v. Wometco Enter., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988).

Finally, failing to fully compensate class counsel for the excellent work done and the various substantial risks taken would undermine society's interest in the private litigation of antitrust cases. Society's interests are clearly furthered by the private prosecution of civil cases which further important public policy goals, such as vigorous competition by marketplace competitors. *See Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983) ("This court has emphasized the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws.").

Simply put, anti-competitive conduct such as that alleged in this case would likely go unchallenged absent the willingness of attorneys to undertake the risks associated with such expensive and complex litigation. No single class member could have undertaken the litigation prosecuted here on his own. The sheer size of the outlay for out-of-pocket expenses by class counsel illustrates the reason why. Awards of substantial attorney's fees in cases like this are necessary to incentivize attorneys to shoulder the risk of nonpayment to expose violations of the law and to achieve compensation for injured parties.

One final issue should be addressed. Some studies have identified the size of the underlying class action settlement as the factor with the most influence on the fee and have found an inverse relationship between fee percentage and size of the settlement fund. *See* Fitzpatrick, *Do Class Action Lawyers Make too Little?*, at 2055 (citing Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees In Class Action Settlements: An Empirical Study*, *1* J. Empirical Legal Stud. 27, 35-36 (2004)). Indeed, it is fairly widely recognized that lower percentages are appropriate in cases in which large settlements serve as the basis for calculating a percentage. MCL, § 14.121 (citing *In re Prudential Ins. Co. of Amer. Sales Practices Litig.* 148 F.3d 283, 339-40 (3d Cir. 1998)

(remanding award of 6.7% of common fund for further consideration "in light of the magnitude of the recovery")). In cases involving settlements exceeding 100,000,000, fee percentages have ranged from 4.1% to 17.92%. *Id.*

This Court finds, however, that such an inverse approach would not be appropriate in this case for several reasons. First, the Court has not found any Sixth Circuit case endorsing such an approach. Second, a declining percentage-of-the fund based on the size of the settlement "can create an incentive to settle quickly and cheaply when the returns to effort are highest" and discourage counsel from "investing additional time and maximizing plaintiffs' recovery." *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71, 80 (S.D. N.Y. 2000). In addition, the Court sees no good reason why class action lawyers who represent clients on a contingency-fee basis in a case such as this should receive lower fees on a percentage basis than due contingency-fee lawyers in litigation representing individual clients, which typically amount to 33% or more of the recovery. Lastly, such an approach would penalize these class action attorneys given the actual number of hours spent on the case, rather than compensate them fairly. In other words, the requested fees do not result in a windfall for class counsel.

After consideration of all these factors and the entire and lengthy record of this complex litigation, the Court concludes that, although the requested fee is a very, very substantial amount, it is fair and reasonable under the circumstances. Accordingly, the Court will approve the requested fees in the amount of thirty-three and one-third percent (33 1/3%) of the common fund, i.e. $48,333,333.00[5] and will authorize lead counsel to allocate fees to specific firms.[6]

[5] The Dean settlement is to be paid over four years. Plaintiffs do not propose to take all of their fees up front but rather the fees will be paid proportionally as Dean's payments are made to the settlement fund.

[6] The Court, of course, retains jurisdiction to resolve any fee disputes which may arise.

B. Reimbursement of Expenses

In addition to their petition for attorney's fees, class counsel seek reimbursement of out-of-pocket expenses incurred during the representation of the class in the amount of $7,408,920.39. "Expense awards are customary when litigants have created a common settlement fund for the benefit of a class." *See In re F & M Distributors, Inc.*, 19 U.S. Dist. LEXIS 11090, at *19 (E.D. Mich. June 29, 1999). Based upon the Court's review of the various affidavits submitted by class counsel, it appears that the requested expenses are the type typically billed by attorneys to paying clients in similar cases, *see In re Synthroid Marketing Litig*., 264 F.3d 712, 722 (7th Cir. 2001), and are fair and reasonable under the circumstances of this case. A large percentage of the expenses consist of fees paid to experts who were crucial to the prosecution of the case, travel to depositions, hearings, and meetings with witnesses, experts and class representatives, and payments to court reporters for depositions, computerized research, copying costs, and delivery charges. Although the affidavits submitted by class counsel are not itemizations of all of the expenses incurred but rather an aggregate listing of the expenses for each category, the Court finds the affidavits submitted sufficiently detailed and the Court is persuaded that the expenses are legitimate and are reasonable in the case and will approve payment to class counsel from the common settlement fund in the amount of $7,408,920.39 as reimbursement for their out-of-pocket expenses.

C. Incentive Awards to Class Representatives

Plaintiffs request that the Court approve incentive awards for the fifteen (15) class representatives in the amount of $10,000 each. "Such awards are discretionary and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness

to act as a private attorney general." *Rodriguez v. West Publ'g. Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009) (citations omitted). Based on this Court's knowledge of these lengthy proceedings, it appears that the class representatives have had extensive involvement in this litigation and deserve compensation above and beyond the amounts they will be entitled to by virtue of class membership alone.[7] They have been crucial in the preparation of the case and the requested incentive awards are reasonable in light of other incentive awards approved by courts in this circuit. *See Hainey v. Parrott*, 2007 WL 3308027 at * 5 (S.D. Ohio Nov. 6, 2007) (approving $50,000 incentive awards); *Worthington*, 2006 U.S. Dist. LEXIS 32100, at *24 (approving $10,000 incentive awards); *In re F&M Distributors*, 1999 U.S. Dist. LEXIS 11090, at * 20-21 (approving $2,500 incentive awards).

III. Conclusion

For all the foregoing reasons, plaintiffs' motion for award of attorneys' fees, reimbursement of expenses, and incentive awards for class representatives, [Doc. 1808], will be GRANTED and the Court will award $48,333,333 in attorneys' fees, reimbursement for out-of-pocket expenses in the amount of $7,408,920.39, and$10,000.00 as an incentive award to each of the class representatives.

So ordered.

ENTER:

s/J. RONNIE GREER
UNITED STATES DISTRICT JUDGE

[7] No affidavits or other documentation have been submitted in support of the incentive award request. Class representatives, however, have clearly been extensively involved in the litigation, settlement discussions and court proceedings and have committed substantial time to the case as confirmed by the Court's own observations. *See also* Declaration of Robert G. Abrams, [Doc. 1809]. ("Class representatives have communicated with class counsel regarding case issues, produced documents and information, been deposed, and prepared for trial.")

TAB 17B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
GREENEVILLE DIVISION

IN RE SOUTHEASTERN MILK ANTITRUST LITIGATION	)	**Master File No. 2:08-MD-1000**
	)	**Judge J. Ronnie Greer**
THIS DOCUMENT RELATES TO:	)	
***Sweetwater Valley Farm, Inc., et al. v. Dean Foods, et al.*, No. 2:07-CV-208**	)	

PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND INCENTIVE AWARDS FOR CLASS REPRESENTATIVES

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Following four years of intense litigation and over one year of pre-filing investigation, Plaintiffs' counsel, on behalf of the class of Southeast Dairy Farmers, successfully negotiated settlements in the amount of $140,000,000 with Defendant Dean Foods and $5,000,000 and substantial structural changes with Defendants SMA and Baird (collectively, "Settling Defendants"). Plaintiffs believe this is the largest and most substantial antitrust settlement obtained in this District. In accordance with Sixth Circuit guidance, Plaintiffs respectfully request an award of $48,333,333 in attorneys' fees (one-third of the recovery from Settling Defendants) and $7,408,920 as reimbursement for Class Counsel's out-of-pocket expenses.

The requested fee award is consistent with the percentage awards approved by courts in the Sixth Circuit in similar antitrust and complex class action cases, is supported by Class Counsel's actual lodestar (out of pocket costs and fees absent any multiplier), and is strongly supported by the factors considered by the Sixth Circuit for determining the reasonableness of a fee award. Of particular significance are the following considerations:

- Numerous decisions in the Sixth Circuit and other jurisdictions establish that the percentage award requested here, 33.3% of the settlements, plus reimbursement of out-of pocket expenses, is well within the range of awards approved as reasonable in large contingency cases.
- Class Counsel's lodestar in this matter is over $46,000,000, and out-of-pocket expenses of more than $7,000,000 have been incurred. Thus, although courts within the Sixth Circuit support calculation of a reasonable fee using a multiplier of lodestar of over 2 to compensate for risk borne by plaintiffs and other factors, here the requested award is 1.03 of the total lodestar.
- The requested award is particularly appropriate in an antitrust matter such as this

because of the complexity of the matter and the critical public policies advanced by private actions to enforce the antitrust laws.

- The requested fee award also is appropriate because of the degree of risk entailed in this litigation. Class Counsel represented the class on a contingency basis, and received no revenue from outside sources. As the Court is well aware, every claim and issue in this case has been vigorously contested by Defendants who are represented by premier law firms – Williams & Connolly (DC), Dechert (DC), Winston & Strawn (Chicago), Andrews Kurth (Dallas), Stinson Morrison Hecker (Kansas City), and Patton Tidwell Schroeder (Texas). There is no doubt that Plaintiffs and their counsel have invested significant time and resources in the prosecution of this litigation.
- Finally, Plaintiffs believe the quality of the representation in this case strongly supports such an award. Plaintiffs achieved settlements with the Settling Defendants, while litigating against able defense counsel represented by major law firms that devoted enormous resources to the defense.

The factual predicate for this fee and expense request are set forth in the accompanying declarations by Class Counsel. *See* Declaration of Robert G. Abrams, Lead Class Counsel Baker & Hostetler ("Abrams Decl."), and attached supporting Declarations from individual Plaintiffs' firms.[1]

[1] The Petition is supported with the lodestar and expense information for nine firms: Baker & Hostetler LLP/Howrey LLP; Boies Schiller & Flexner LLP; Brewer & Terry P.C.; Cohen Milstein Sellers & Toll, PLLC; Fine, Kaplan, & Black R.P.C.; Freed Kanner London & Millen, LLC; Hausfeld LLP; Jessee & Jessee; and Whitfield Bryson & Mason LLP.

I. THE REQUESTED AWARD OF FEES IS FAIR AND REASONABLE

A. An Award of Fees Based on a Percentage of the Common Fund Created by the Settlement Is Appropriate

Class Counsel created a benefit for the Settlement Class and are entitled to recover reasonable attorneys' fees. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."); *Stanley v. U.S. Steel Co.*, 2009 U.S. Dist. LEXIS 114065, at *4 (E.D. Mich. Dec. 8, 2009) ("[W]here counsel's efforts create a substantial common fund for the benefit of [ ] a class, they are entitled to payment from the fund based on a percentage of that fund.").

This award is particularly appropriate here, where Defendants' conduct could not practicably have been challenged without the commitment of significant time and resources by Plaintiffs and Class Counsel. (*See* 9/7/10 Order, Dkt No. 934 (As this Court recognized: "This litigation is complex, its prosecution costly, and the [class] members with smaller damages claims likely have fewer resources with which to fund individual litigation.")) Defendants vigorously defended – and non-settling Defendants continue to defend – the case and had great resources at their disposal, requiring Class Counsel to devote immense amounts of time and resources on a contingency basis and at a significant risk.

In awarding fees paid out of a common fund, the Sixth Circuit "trend[s] towards adoption of a percentage of the fund method in cases," *Stanley*, 2009 U.S. Dist. LEXIS 114065, at *4 (quoting *Rawlings v. Prudential-Bach Props. Inc.*, 9 F.3d 513, 515 (6th Cir. 1993)),[2] although

[2] The percentage of the fund method prevents "inequity by assessing attorneys' fees against the entire fund," and "decreases the burden imposed on the [c]ourt by eliminating a full-blown, detailed and time consuming lodestar analysis." *Stanley*, 2009 U.S. Dist. LEXIS 114065, at *4-5; *In re Cardinal Health Sec. Litig.*, 528 F. Supp. 2d 752, 762 (S.D. Ohio 2007) ("[T]he [c]ourt [is] spared from the costly task of scrutinizing counsel's billable hours"). The percentage of the

the Court has the discretion to apply either the percentage of the fund or lodestar method[s] in determining the appropriate amount of the award, *Stanley*, 2009 U.S. Dist. LEXIS 114065, at *3-4; *In re Sulzer Ortho. Inc.*, 398 F.3d 778, 780 (6th Cir. 2005) ("[I]t is within the district court's discretion to determine the appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before it") (quoting *Rawlings*, 9 F.3d at 516-17). When courts employ the percentage of the fund method, the lodestar may still be useful to cross-check the reasonableness of the percentage. *Stanley*, 2009 U.S. Dist. LEXIS 114065, at *9-10 (citing Manual for Complex Litig. (Third) § 14.121, n.504 (1995)); *Cardinal Health*, 528 F. Supp. 2d at 767 (performing a lodestar cross-check). Under either method, the fees requested here are appropriate. Plaintiffs accordingly seek fees based on a percentage of the common fund, with a lodestar cross-check.

B. Application of the Sixth Circuit's Test for Reasonableness Strongly Supports the Requested Award

Plaintiffs' requested fee of 33.3% of the settlement fund falls well within the 20-50% range of fees awarded in the Sixth Circuit on a percentage basis in complex common fund cases. *See Worthington v. CDW Corp.*, 2006 U.S. Dist. LEXIS 32100, at *22 (S.D. Ohio May 22, 2006) ("[C]ounsel's requested percentage of 38 and one-third of the total gross settlement is solidly within the typical 20 to 50 percent range."); *Rotuna*, 2010 U.S. Dist. LEXIS 58912, at *23 ("one-third of the total award[] is . . . reasonable"); *Bessey v. Packerland Plainwell, Inc.*, 2007 WL 3173972, at *4 (W.D. Mich. Oct. 26, 2007) (approving award of approximately 33% and noting that "[e]mpirical studies show that . . . fee awards in class actions average around one-third of the

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fund method is also advantageous because it "establish[es] reasonable expectations on the part of class counsel as to their expected recovery and encourag[es] early settlement before substantial fees and expenses have accumulated." *Rotuna v. West Customer Mgm't Group, LLC*, 2010 U.S. Dist. LEXIS 58912, at *20 (N.D. Ohio June 15, 2010). In addition, the percentage of the fund approach "more accurately reflects the results achieved." *Rawlings*, 9 F.3d at 516.

recovery") (internal quotations omitted); *In re Sulzer Ortho., Inc*., 398 F.3d at 779, 782 (affirming award of "thirty-two per cent of the settlement fund"); *Kogan v. AIMCO Fox Chase, L.P*., 193 F.R.D. 496, 505 (E.D. Mich. 2000) (awarding approximately 31%); *In re Cardizem CD Antitrust Litig*., Case No. 99-md-1278 (E.D. Mich. Nov. 26, 2002) (unreported, Edmunds, J.) (awarding 30% of settlement to counsel for "Sherman Act Plaintiffs")[3]; *In re F&M Distrib., Inc. Sec. Litig*., 1999 U.S. Dist. LEXIS 11090, at *10 (E.D. Mich. June 29, 1999) ("the excellent performance of the attorneys merits an award of thirty percent of the settlement fund"); *In re Foundry Resins Antitrust Litig*., Case No. 2:04-md-1638 (S.D. Ohio Mar. 31, 2008) (unreported, Frost, J.) (awarding approximately 30%).[4]

Plaintiffs' requested fee is fair and reasonable compensation for Class Counsel's efforts in light of the following factors considered by the Sixth Circuit: (1) "the value of the benefit rendered to the plaintiff class"; (2) "the value of the services on an hourly basis"; (3) "the complexity of the litigation"; (4) "whether the services were undertaken on a contingent fee basis"; (5) "the professional skill and standing of counsel involved on both sides"; and (6) "society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others." *Bowling v. Pfizer, Inc*., 102 F.3d 777, 780 (6th Cir. 1996); *see also Kogan*, 193 F.R.D. at 503 (laying out factors).

1. Class Counsel Secured a Valuable Benefit for the Class

A recovery of $145,000,000 from three Defendants is a significant success and of substantial benefit to the class. This settlement is likely the largest settlement of any antitrust case litigated in this District. Each class member will be eligible to receive proportional shares

[3] This unreported decision (hereafter "*Cardizem* (unreported)") is attached hereto as Exhibit A.

[4] This unreported decision is attached hereto as Exhibit B.

of the settlement based on the volume of milk within the class, estimated to be, on average, $13,000 per class member. (2/14/12 Order, at Ex. A ¶ 15, Dkt No. 1782-1.) In addition, $145,000,000 is approximately one-third of the total damages calculated by Plaintiffs' expert as of August 2011. (*See, e.g.*, Supp. Rpt. of Rausser, 9.) It is unquestionable that this monetary recovery is of substantial benefit to the class. *See Lazy Oil Co. v. Witco Corp.*, 95 F. Supp. 2d 290, 339 (W.D. Pa. 1997) ("[C]ourts have determined that a settlement can be approved even if the benefits amount to a small percentage of the recovery sought . . . . '[T]here is no reason . . . why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.'") (quoting *Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 n.2 (2d Cir. 1974)).

In addition, the settlement with SMA and Baird includes valuable and significant structural changes to the manner in which SMA is operated and managed, the way in which milk is marketed in the Southeast, and how SMA interacts with Southeast dairy farmers. (SMA/Baird Settlement Agmt, Dkt No. 1678-1.) First, SMA will undergo a broad annual audit of its activities conducted by an independent auditor, the results of which shall be made available to SMA's Board of Directors and the managers of SMA's member cooperatives. (*Id.*, ¶ 7.3.) Second, SMA will use its best efforts to increase Class I utilization percentages in Federal Orders 5 and 7 by reducing milk supply commitments to certain manufacturing plants within those Orders. SMA estimates that this change alone may generate value to Southeast dairy farmers of approximately $0.10 to $0.12/cwt of milk – which could amount to millions of dollars per year of benefits to members of the class. (*Id.*, ¶ 7.4.) Third, SMA and Baird also will maintain, for at least three years, a production incentive program for the dairy farmer members of SMA's cooperatives in Orders 5 and 7 designed to increase prices paid to these farmers for the purpose

of increasing their local production of milk. (*Id*., ¶ 7.5.) Fourth, SMA will change the procedures for the election of its board of directors, implement term limits for most directors, and disclose potential and actual conflicts of interest. (*Id*., ¶ 7.6.) Fifth, SMA will no longer handle, pool or otherwise be involved with milk marketed by DMS for independent farmers. (*Id*., ¶ 7.8.) Sixth, SMA and Baird will terminate without cause the management agreement between SMA's member cooperatives and VFC Management, LLC (Baird's management company), and a competitive bidding process will be implemented for the selection of SMA's General Manager. (*Id*., ¶ 7.6.) Seventh, SMA and Baird will establish a Dispute Resolution Committee consisting of three independent parties authorized to hear and resolve complaints and disputes over SMA and Baird's compliance with certain provisions of the Settlement Agreement. (*Id*., ¶ 7.7.) This important structural relief, which would not have been undertaken absent this litigation, will provide significant long-term economic benefits to all Southeast dairy farmers in addition to the $145,000,000 cash payments. Achieving this substantial benefit for thousands of dairy farmers similarly supports Class Counsel's fee request here. *See In re Visa Check/ Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 524 (E.D.N.Y. 2003) (considering the injunctive relief awarded in determining an appropriate fee award).

2. Class Counsel Expended Significant Time and Labor

Final approval of the settlements with Dean, SMA, and Baird will represent a benefit obtained from over 113,000 hours of legal work. (Abrams Decl., ¶ 3.) This matter involves very complex issues, which where vigorously litigated by all nine Defendants. Unquestionably, Class Counsel's efforts in this case have been extensive. Class Counsel began prosecuting this case over four years ago, after a one-year investigation of the dairy industry in the Southeast. The formidable defense began shortly after the complaints were filed, when Class Counsel (and

separate counsel prior to consolidation) responded to numerous motions to dismiss. (Abrams Decl., ¶ 4.)

During discovery, Class Counsel reviewed, analyzed, and organized for use over 5,000,000 pages of documents produced by Defendants, in addition to the over 95,000 pages produced by third parties. (Abrams Decl., ¶ 5.) Obtaining these documents from Defendants and third parties required hundreds of hours of Class Counsel's time participating in meet and confer sessions and exchanging dozens of letters, in an effort to resolve discovery issues without Court intervention. (Abrams Decl., ¶ 5.) While disputes were sometimes resolved informally, the parties were often unable to reach agreement, forcing Plaintiffs to file seventeen motions to compel and other discovery motions. (Abrams Decl., ¶ 6.) Many of these motions were subject to another round of briefing after both sides moved to reconsider or appeal Magistrate Judge Inman's decisions, and sometimes decisions of this Court. (Abrams Decl., ¶ 6.) In addition, Named Plaintiffs produced over ten thousand pages of documents, (Abrams Decl., ¶ 5), and opposed several discovery motions filed by Defendants. (Abrams Decl., ¶ 6.) Class Counsel and Plaintiffs also produced hundreds of pages of interrogatory responses. (Abrams Decl., ¶ 5.)

During discovery, Class Counsel took 80 depositions of fact witnesses, and defended or otherwise attended 30 depositions taken by Defendants. (Abrams Decl., ¶ 5.) Plaintiffs also conducted extensive expert discovery. In the class certification phase of the case, Class Counsel consulted extensively with John Beyer, Plaintiffs' expert, and deposed Defendant's class expert, Catherine Morrison-Paul. (Abrams Decl., ¶ 7.) Towards the end of discovery and throughout trial preparation, Class Counsel frequently consulted with its two experts, Frank Scott and Gordon Rausser. (Abrams Decl., ¶ 7.) In addition, Class Counsel deposed Defendants' five experts (Kalt, Elzinga, Peterson, Ortego, and Herbein). (Abrams Decl., ¶ 7.) Class Counsel also

filed three *Daubert* motions to exclude Defendants' experts, and opposed Defendants' five motions to exclude Professors Scott and Rausser. (Abrams Decl., ¶ 7.)

Class Counsel filed extensive briefs and evidence in support of class certification and responded to Defendants' six motions for summary judgment and voluminous statements of fact.[5] (Abrams Decl., ¶ 7.) Class Counsel also performed significant work in oppositions to Defendants' Rule 23(f) Petition for Leave to Appeal as well as several motions to decertify the class. (Abrams Decl., ¶ 7.)

Class Counsel's ability to prosecute this case was further complicated by the robust protection afforded by the Protective Order. (Abrams Decl., ¶ 8.) Defendants designated significant parts of their document productions and almost all deposition transcripts as "Confidential" or "Highly Confidential." (Abrams Decl., ¶ 8.) These designations prohibited Class Counsel from filing many of its briefs and supporting evidence on the public record. (Abrams Decl., ¶ 8.) Plaintiffs filed multiple motions requesting the Court modify the Protective Order, and were also required to follow the sealing procedures put in place by the Court. (Abrams Decl., ¶ 8.) Accordingly, for many of Plaintiffs' filings, Class Counsel would: (1) file a brief and exhibits under seal, which required multiple hard copies and a CD hand delivered to the Court; (2) confer with Defendants and third parties about the materials contained in the briefs to determine whether information must remain sealed; (3) file a redacted version of the brief and exhibits, redacting all purported "Confidential" and "Highly Confidential" information; and (4) draft responses to Defendants' objections to unsealing the information.

[5]Although the Court granted in part summary judgment on Counts 2-4, it should be noted that Defendants understood that Plaintiffs' claims remained essentially unaltered as the case proceeded to trial. (Exhibit C, 7/18/11 NE Milk Hearing Tr., 61 ("MR. FRIEDMAN: [In the Southeast case], [m]otions for Summary Judgment briefed, argued, decided. Three counts were dismissed . . . but two counts survived. And those two counts . . . frankly, are sufficiently large enough to encompass everything that the plaintiffs in Tennessee were complaining about."))

(Abrams Decl., ¶ 8.) Complying with this procedure required a significant amount of time and resources by Class Counsel. (Abrams Decl., ¶ 8.)

As trial approached, Class Counsel prepared pretrial submissions including over 1,000 exhibits and hundreds of deposition designations, and identified dozens of potential witnesses. (Abrams Decl., ¶ 9.) Class Counsel filed 18 motions in limine, and opposed Defendants' 57 motions in limine. (Abrams Decl., ¶ 9.) Plaintiffs and Class Counsel were prepared to commence the 6-7 week trial when the trial was postponed in August 2011. (Abrams Decl., ¶ 9.) In a very real sense, settlements with Dean, SMA, and Baird did not occur until the parties were on the Courthouse steps.

Finally, Class Counsel participated in many mediation sessions over the past four years. (Abrams Decl., ¶ 10.) Each of these sessions required preparation of materials for the mediator's consideration and took the time of Class Counsel's most senior lawyers. (Abrams Decl., ¶ 10.) Class Counsel also participated in countless settlement meetings and discussions with Dean, SMA, and Baird to secure the settlements.

In total, Class Counsel spent over 113,000 hours prosecuting this case.

Courts in the Sixth Circuit recognize the lodestar method as a check of the reasonableness of the fee calculated as a percentage of the fund. *Stanley*, 2009 U.S. Dist. LEXIS 114065, at *9-10. The great amount of time spent by Class Counsel to achieve these settlements makes clear that the fee requested is supported by the amount of work contributed to the recovery. A lodestar calculation requires the court to multiply the number of hours counsel reasonably expended on the case by their reasonable hourly rate. *See Isabel v. City of Memphis*, 404 F.3d 404, 415 (6th Cir. 2005). The Sixth Circuit also typically adds on to that number to account for the risk in handling the case on a contingency basis. *Id.; see also Stanley*, 2009 U.S. Dist. LEXIS 114065,

at *9. Here, Class Counsel expended over 113,000 hours over the course of the litigation. (Abrams Decl., ¶ 3.) Simply multiplying historical rates charged by counsel (with no multiplier) results in a lodestar of $46,702,830. (Abrams Decl., ¶ 3.)

Class Counsel seeks one-third of the settlement amount recovered, ensuring that most of the settlement goes to the dairy farmer class members for whom the benefit was recovered. This amount - $48,333,333 – is equal to a minimal lodestar multiplier of only 1.03, well within the range permitted in this Circuit. *See In re Cardinal Health*, 528 F. Supp. 2d at 767 (noting that "[m]ost courts agree that the typical lodestar multiplier in a large . . . class action[] ranges from is 1.3 to 4.5"); *Worthington*, at *19 (range of 1.5 to 5 is appropriate lodestar multiplier); *Cardizem* (unreported) (approving 30% fee award that equates to lodestar multiplier of 3.7). Notably, in *Cardinal Health*, counsel and their staff worked 51,970 hours at a "reasonable average hourly billing rate of approximately $353.63" for a total lodestar of $18,378,122.75. 528 F. Supp. 2d at 767. The court approved a $108,000,000 fee award – 18% of the settlement, but almost *six times* the counsel's lodestar. *Id.* at 768. The court reasoned that it was "not uncomfortable with deviating from the normal range of lodestar multipliers . . . . [g]iven the outstanding settlement in this case and the noticeable skill of counsel." *Id.*

3. The Complexity of the Litigation Supports the Requested Award

Antitrust class actions are "arguably the most complex action[s] to prosecute. The legal and factual issues involved are always numerous and uncertain in outcome." *In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003) (quoting *In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000)); *see also In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 533 (E.D. Mich. 2003) (observing that "[a]ntitrust class actions are inherently complex"); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96,

122 (2d Cir. 2005) (affirming district court's [fee award] because, *inter alia*, "antitrust cases, by their nature, are highly complex"); *In re Shopping Carts Antitrust Litig.*, 1983 WL 1950, at *7 (S.D.N.Y. Nov. 18, 1983) ("antitrust price fixing actions are generally complex, expensive and lengthy").

In addition to antitrust issues, this case required Class Counsel to become well-versed in the "inner workings of the dairy industry [which] are complicated in the extreme." (12/8/10 Order, Dkt No. 1186.) Class Counsel consulted extensively with Named Plaintiffs, industry and economic experts, and other witnesses to master the complex concepts at issue in this case. The Court repeatedly acknowledged the complexity of this case: "This is an incredibly complex case, involving arcane issues far beyond the understanding of the average juror." (12/8/10 Order, Dkt No. 1193; *see also* 1/6/09 Tr., at 13, Dkt No. 214 ("THE COURT: I don't think in the years I practiced law I was ever involved in a case that is quite this complicated"); 8/17/10 Order, at 23, Dkt No. 934 ("This litigation is complex."))

The litigation began with six different dockets, all of which were consolidated into one MDL. (Abrams Decl., ¶ 4.) Defendants were located in several different states, requiring substantial coordination and negotiation with defense counsel on scheduling matters – including the dates and locations of over 100 depositions. (Abrams Decl., ¶ 5.) As described in part I.B.2, *supra*, millions of pages of documents were reviewed, over 100 depositions taken or defended, scores of briefs filed – including multiple motions to dismiss, class certification, summary judgment, and *Daubert* motions – and nine different expert opinions provided. (Abrams Decl., ¶¶ 4-7.)

The *Cardizem* court's reasoning for awarding a 30% fee to the Sherman Act plaintiffs is instructive. In that case, the court explained:

> The complexity of this case cannot be overstated. Antitrust class actions are inherently complex. The complexity of this antitrust case was enhanced by additional, highly technical, causation-related issues; i.e., regulatory issues . . . . Despite its complexity, Class Counsel was able to efficiently and effectively prosecute and settle this matter.

Cardizem (unreported), at 20-21. The extensive amount of work and coordination by Class Counsel supports the award here. *F&M*, 1999 U.S. Dist. LEXIS 11090, at *12 (approving fee award because attorneys had to "survive numerous motions to dismiss," "face[] vigorous opposition to their efforts to obtain class certification," and "manage complex discovery").

4. The Contingent Nature of the Fee and the Financial Risk Carried by Class Counsel

Courts in this Circuit recognize that the risk of the litigation is an important factor to consider when awarding fees. *Stanley*, 2009 U.S. Dist. LEXIS, at *8 ("Numerous cases recognize that the contingent fee risk is an important factor in determining the fee award."). Class Counsel undertook this case on a contingency basis with the expectation that a successful result would be rewarded with a fee to reflect the risk of non-payment. "Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of the result." *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981), *overruled on other grounds by Int'l Woodworkers of Am. v. Champion Int'l Corp.*, 790 F.2d 1174 (5th Cir. 1986). "If this 'bonus' methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing." *Behrens v. Wometco Enter., Inc*., 118 F.R.D. 534, 548 (S.D. Fla. 1988).

An antitrust case of this complexity and magnitude, in which the defendants have significant resources, experienced counsel, and a track record of litigating rather than settling, posed very significant risks for Plaintiffs. Even though Plaintiffs successfully navigated

Defendants' pretrial challenges over the course of four years (including motions to dismiss, class certification, and summary judgment), and if they succeed in establishing liability at trial, they risk recovering minimal – or no – damages. *See, e.g., United States Football League v. Nat'l Football League*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) (finding liability, but awarding nominal damages). Even if Plaintiffs establish liability and damages at trial, they are still at risk of having the judgment overturned after years of appeal.

This case is no exception to the rule. Here, Class Counsel have invested tens of thousands of hours and advanced many millions of dollars, despite the very real risk of recovering nothing for their efforts. Class Counsel alone have borne the risk of the case being dismissed or of not prevailing at trial. Class Counsel have received no compensation over the course of five years, but have spent over 113,000 hours prosecuting this case, and incurred over $7,000,000 in out-of-pocket-expenses. (Abrams Decl., ¶ 3.) This risk carried by Class Counsel supports the requested fee award. *Kogan*, 193 F.R.D. at 504 (factor weighed in favor of fee where "[p]laintiffs' counsel undertook this action on a contingency fee basis and made significant cash outlays to finance it"); *Stanley*, 2009 U.S. Dist. LEXIS 114065, at *8 (awarding fees because, *inter alia*, "class counsel worked for over four years without payment, risking recovery of nothing in the event they were to generate no benefit for the class").

5. Skill and Experience of Class Counsel

Class Counsel – and defense counsel – have extensive experience in complex litigation, antitrust litigation, and class actions. (Abrams Decl., ¶ 3.) The Settlements were reached only after vigorous prosecution of the case and significant arms-length negotiations with highly-competent and experienced opposing counsel. A recovery of $145,000,000 plus substantial and valuable structural relief is a significant success and of enormous benefit to class members, and speaks volumes to Class Counsel's competence, experience, and diligence in obtaining the

Settlements. As the Court previously observed, "Class Counsel in this case are experienced in antitrust and class action litigation . . . and they have to date aggressively and vigorously prosecuted this case." (9/7/10 Order, Dkt No. 934.) Class Counsel have been confronted with highly skilled attorneys and have achieved an excellent result for the class in the face of such challenges. *F&M*, 1999 U.S. Dist. LEXIS 11090, at *19 ("The skill and competence of the attorneys for the plaintiffs was evident, especially when viewed on the basis of the results that they obtained in this case, while the excellent advocacy skills of the defense counsel . . . were equally evident").

6. Society Has an Important Stake in this Lawsuit

It is well-established that there is a "need in making fee awards to encourage attorneys to bring class actions to vindicate public policy (e.g., the antitrust laws) as well as the specific rights of private individuals." *In re Folding Carton Antitrust Litig*., 84 F.R.D. 245, 260 (N.D. Ill. 1979). Courts in the Sixth Circuit weigh "society's stake in rewarding attorneys who [win favorable outcomes] in order to maintain an incentive to others . . . . Society's stake in rewarding attorneys who can produce such benefits in complex litigation such as in the case at bar counsels in favor of a generous fee . . . . Society also benefits from the prosecution and settlement of private antitrust litigation." *In re Cardizem*, 218 F.R.D. at 534 (quoting *F&M*, 1999 U.S. Dist. LEXIS 11090, at *18).

Further, the Supreme Court has recognized the need for private litigation to enforce the antitrust laws. *Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983) ("This Court has emphasized the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws."). Here, the significant recovery Class Counsel achieved makes clear to the dairy industry, and to other businesses, that

collusion will not be tolerated. Society as a whole stands to benefit from the work of Class Counsel.

Fee awards in cases like this incentivize attorneys to act as private attorneys' general to enforce compliance with the antitrust laws and secure relief for injured parties (particularly injured parties challenging anticompetitive conduct by defendants with far greater resources). Awards of attorneys' fees allow and ensure the zealous enforcement of class members' legal rights. *Kogan*, at 504 (approving 31% fee because "the amount . . . is substantial and therefore, would create an incentive for other attorneys to take on similar cases").

C. The Court Should Authorize Lead Counsel to Determine Allocations to Specific Firms

Class Counsel have collaborated on this litigation under the supervision of Lead Counsel appointed by the Court in this case in accordance with the Court's Case Management Order. (Abrams Decl., ¶ 3.) Courts generally approve joint fee applications which request a single aggregate fee award with allocations to specific firms determined by lead counsel. *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *17-18 (E.D. Pa. June 2, 2004) (approving joint fee petition with specific allocations to be determined by liaison counsel); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 357 (N.D. Ga. 1993) ("Ideally, allocation is a private matter to be handled among class counsel."). Class Counsel has directed this case from its inception and are "better able to describe the weight and merit of each [counsel's] contribution." *Linerboard*, 2004 WL 1221350, at *18. Allowing lead counsel to allocate the fee award "relieves the Court of the difficult task of assessing counsels' relative contributions." *Id.* (internal quotations omitted).

Plaintiffs request the Court approve the aggregate amount of the fee award, and allow Lead Counsel to allocate the fee among the firms representing Plaintiffs, in Lead Counsel's good

faith judgment, and consistent with the authority delegated to Lead Counsel by the Case Management Order. The Court would, of course, retain jurisdiction for any disputes that cannot be resolved by counsel over the allocation of the award. *See In re Automotive Refinishing Paint Antitrust Litigation*, 2008 WL 63269, at *8 (E.D. Pa. Jan. 3, 2008) (holding lead counsel shall allocate the fees, but the court will retain jurisdiction to address any disputes).

II. THE EXPENSES REQUESTED ARE REASONABLE

Plaintiffs request reimbursement of costs incurred in litigating this case and obtaining the settlements through February 29, 2011, in the amount of $7,408,920.39. (Abrams Decl., ¶ 3.) It is well-settled that plaintiffs who have created a common fund for the benefit of a class are entitled to be reimbursed for their out-of-pocket expenses reasonably incurred in creating the fund. *F&M*, 1999 U.S. Dist. LEXIS 11090, at *20 ("Expense awards are customary when litigants have created a common settlement fund for the benefit of a class."). The touchstone for reimbursing expenses is whether they are of the type typically billed to paying clients in the similar cases. *Cardizem* (unreported), at 22.

Here, a large percentage of Class Counsel's out-of-pocket expenses consist of fees paid to experts who were pivotal in helping Plaintiffs to certify the class, defend against summary judgment, prepare for trial, and obtain these settlements. (Abrams Decl., ¶¶ 13-14.) In addition, Class Counsel have had to travel across the country for depositions, hearings, and meetings with witnesses, experts and class representatives. (Abrams Decl., ¶¶ 13-14.) Other expenses include the cost of payments to court reporters for depositions, computerized research, copying costs, and delivery. (*Id*., ¶¶ 13-14.) These are the types of expenses customarily charged to paying clients. Class Counsel's expenses, detailed in the attached declarations, are reasonable and should be reimbursed in full. *Cardizem* (unreported) at 22 ("The Court finds that the categories of expenses for which Class Counsel seek reimbursement are the type routinely charged to their

hourly fee-paying clients and thus should be reimbursed out of the Settlement Fund.").

III. THE COURT SHOULD APPROVE THE REQUESTED INCENTIVE AWARD TO CLASS REPRESENTATIVES

Plaintiffs request that the Court approve incentive awards for the fifteen class representatives, in the amount of $10,000 each, or $150,000 total.[6] The Notice to the Settlement Class advised class members that Class Counsel would apply for incentive awards for the class representatives. (*See* 2/14/11 Order, Ex. A, ¶ 20, Dkt No. 1782-1.)

"Incentive awards are fairly typical in class action cases. Such awards are discretionary and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009) (citations omitted). The common fund theory allows courts to award additional compensation to the class representatives for their efforts including investigation, document production, and deposition appearances. *Hainey v. Parrott*, 2007 WL 3308027, at *5-6 (S.D. Ohio Nov. 6, 2007) (approving incentive awards of $50,000 each for class representatives out of a settlement fund of $6 million); *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 787 (N.D. Ohio 2010) ("Courts within the Sixth Circuit . . . recognize that, in common fund cases and where the settlement agreement provides for incentive awards, class representatives who have had extensive involvement in a class action litigation deserve compensation above and beyond amounts to which they are entitled to by virtue of class membership alone.").

Throughout this litigation, the class representatives have communicated closely with

[6] The class representatives are: Sweetwater Valley Farm, Inc., Barbara & Victor Arwood, Jeffrey Bender, Randel Davis, Farrar & Farrar Dairy, Inc., Fred Jaques, John Moore, D.L. Robey Farms, Robert Stoots, Virgil Willie, Thomas Watson, James & Eva Baisley, Stephen Cornett, William Frazier & Branson McCain, and Jerry Holmes.

Class Counsel, provided documents and information essential to the litigation of this case, submitted to depositions, and assisted with the preparation of this case for settlement and trial. (Abrams Decl., ¶ 15.) The amounts requested by Plaintiffs are reasonable in light of other incentive awards approved by courts in this Circuit. *See Hainey*, 2007 WL 3308027, at *5 (approving $50,000 incentive awards); *Cardizem* (unreported) at 23 (approving $20,000 incentive awards); *Worthington*, 2006 U.S. Dist. LEXIS 32100, at *24 (approving $10,000 incentive awards); *F&M*, 1999 U.S. Dist. LEXIS 11090, at *20-21 (approving $7500 incentive awards).

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court grants its motion and award $48,333,333 in attorneys' fees, reimburse $7,408,920.39 in expenses, and award $150,000 in incentive awards for the class representatives.

Dated: April 2, 2012

Respectfully submitted,

/s/ Robert G. Abrams

Robert G. Abrams, Esq.
Gregory J. Commins, Jr., Esq.
Terry L. Sullivan, Esq.
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
abramsr@bakerlaw.com
comminsg@bakerlaw.com
sullivant@bakerlaw.com
Lead Counsel for Dairy Farmer Plaintiffs

Thomas C. Jessee, Esq.
412 East Unaka Ave.
Johnson City, TN 37601
jjlaw@jesseeandjessee.com
Liaison Counsel for Dairy Farmer Plaintiffs

/s/ Gary Brewer

Gary E. Brewer, Esq. (BPR #000942)
BREWER & TERRY, P.C.
1702 W. Andrew Johnson Hwy.
Morristown, TN 37816-2046
robin@brewerandterry.com
Counsel for DFA Subclass

CERTIFICATE OF SERVICE

I certify that on the 2nd day of April, 2012, a true and correct copy of ***Plaintiffs'Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Incentive Awards for Class Representatives*** was served by operation of the electronic filing system of the U.S. District Court for the Eastern District of Tennessee upon all counsel who have consented to receive notice of filings in the matters styled *In re Southeastern Milk Antitrust Litigation*, MDL No. 1899.

/s/ Robert G. Abrams
Robert G. Abrams

Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: CARDIZEM CD ANTITRUST LITIGATION,

Master File No. 99-md-1278
MDL No. 1278

THIS DOCUMENT RELATES TO:

Honorable Nancy G. Edmunds

Louisiana Wholesale, 99-73259

Duane Reade, 99-73870

FILED
NOV 26 2002
CLERKS OFFICE
U.S. DISTRICT COURT
EASTERN MICHIGAN

ORDER NO. 49

MEMORANDUM OPINION GRANTING SHERMAN ACT CLASS PLAINTIFFS' MOTIONS FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION, AND SHERMAN ACT CLASS COUNSEL'S JOINT PETITION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND INCENTIVE AWARDS FOR NAMED PLAINTIFFS

This matter came before the Court on November 20, 2002 on Sherman Act Class Plaintiffs' motions for (1) final approval of settlement; (2) approval of plan of allocation; and (3) Class Counsel's joint petition for attorneys' fees, reimbursement of expenses and incentive awards for named Plaintiffs. The Court preliminarily approved the Settlement on September 24, 2002. On November 20, 2002, a fairness hearing was conducted. For the reasons stated below, this Court GRANTS Sherman Act Class Plaintiffs' motions.

I. Background

Class Counsel filed class action suits on behalf of Plaintiffs and the Class on November 18, 1998 and February 22, 1999. These suits were consolidated in this Court by the Judicial Panel on Multidistrict Litigation on June 11, 1999. The Plaintiffs'

consolidated actions (the "Class Actions") arise out of Defendants' September 1997 Agreement, pursuant to which Aventis agreed to pay Andrx, *inter alia*, $10 million per quarter in return for Andrx's agreement not to manufacture and sell its generic version of Cardizem CD. Plaintiffs have alleged that this Agreement kept less expensive generic versions of Cardizem CD off the market, thereby forcing direct purchasers to pay artificially inflated prices for Cardizem CD and its AB-rated generic equivalents.

On December 10, 1999, Class Counsel moved for certification of the Sherman Act Class. After a period of class-related discovery, including expert depositions (and motion practice relating thereto), and briefing on Plaintiffs' motion, the Court conducted an evidentiary hearing and oral argument on class certification. On March 14, 2001, the Court granted Class Counsel's motion allowing the litigation to proceed on a classwide basis and certified a class consisting of:

> all persons (or assignees of such persons) who at any time during the period July 9, 1998 through June 23, 1999 ("Class Period") directly purchased Cardizem CD from HMRI [now Aventis]; and who also, after the first generic version of Cardizem CD entered the market on June 23, 1999, either: (1) purchased one or more generic versions of Cardizem CD; or (2) obtained increased discounts for their direct purchases of Cardizem CD [the "Sherman Act Class" or "Class"].

See Order No. 24 at 3, 59. Excluded from the Class are all Defendants in this lawsuit, and their officers, directors, management and employees, subsidiaries or affiliates. *See id.* Also excluded are those direct purchasers who have already opted out of the Class on or before the opt-out deadline of January 25, 2002 ordered by the Court, including those who brought their own separate actions against Defendants, which are currently being coordinated with the Class's case before this Court. Notice of the class certification decision was sent to Class members on or about December 11, 2001, pursuant to a notice

program approved by the Court. On March 28, 2001, Defendants filed a petition with the Sixth Circuit Court of Appeals for permission to appeal the Court's class certification ruling pursuant to Fed. R. Civ. P. 23(f). On June 18, 2001, the Court of Appeals denied Defendants' petition.

On December 10, 1999, Class Counsel also filed a motion for partial summary judgment asking the Court to rule that the Defendants' September 1997 Agreement was a *per se* violation of the antitrust laws. On February 8, 2000, Class Counsel argued the merits of the motion, and on June 6, 2000, the Court granted it, holding that the Defendants' agreement "constitutes a restraint of trade that has long been held illegal *per se* under established Supreme Court precedent." Order No. 13 at 1. On June 20, 2000, Defendants asked for permission to immediately appeal this decision to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(b). Defendants' request was granted, and on December 12, 2000, the Sixth Circuit agreed to hear Defendants' appeal. The appeal has been fully briefed and argued, and the parties are currently awaiting decision by the Sixth Circuit.

In December 1999, Defendants also moved to dismiss the consolidated complaint filed by the Plaintiffs. After substantial briefing and oral argument on these motions, the Court denied Defendants' motions to dismiss on May 11, 2000. *See* Order No. 12 at 4.

In addition to this significant motion practice, Class Counsel also conducted a coordinated and efficient discovery effort that included the filing of numerous motions to compel, the review of over a million pages of documents and conducting over 25 depositions of witnesses.

After lengthy negotiations, including a protracted mediation with Professor Eric Green, a highly experienced mediator approved by the Court, and following substantial discovery, investigation and substantive briefing on the legal issues, Class Counsel entered into a final settlement agreement and side letter with Defendants on August 13, 2002 (the "Settlement Agreement").

II. Analysis

A. Final Approval of Settlement

Sherman Act Class Plaintiffs come before this Court seeking final approval, pursuant to Fed. R. Civ. P. 23(e) of the proposed settlement of this antitrust class action as embodied in the Settlement Agreement dated August 13, 2002 ("Settlement"). The Settlement provides for a cash payment of $110 million, plus interest (the "Settlement Fund") to the class certified by this Court on November 26, 2001. The Settlement comes after almost four years of vigorous litigation, including months of mediation under the aegis of the nationally recognized mediator, Professor Eric D. Green, in an extraordinarily complex case raising a multitude of difficult issues in the areas of antitrust law, patent law, and laws governing pharmaceutical drugs.

This Court preliminarily approved the proposed Settlement on September 24, 2002. It also approved the form and manner of notice for dissemination to the Class. Pursuant to the approved notice, all entities identified as potential Class members from Defendants' sales database were advised of their rights under the Settlement, including their right to exclude themselves from the Class, to object to any or all terms of the Settlement, the Plan of Allocation, the award of attorneys' fees and costs, and incentive awards to the named

Plaintiffs. Copies of the Notice of Proposed Class Settlement and Hearing Regarding Settlement (the "Notice") were disseminated by first class mail to Class members, and a Summary Notice was published in two trade publications well known to entities within the pharmaceutical industry: the Pink Sheet and the Chain Drug Review. The Summary Notice notified potential Class members of, *inter alia*, the proposed settlement and instructed them where to obtain a more detailed Class Notice. The deadline for submitting objections was November 13, 2002. No Class members objected in writing or at the fairness hearing held on November 20, 2002.

1. Standards for Court Approval of Settlement

Fed. R. Civ. P. 23(e) provides that "[a] class action shall not be dismissed or compromised without approval of the court . . . ." In deciding whether to approve a proposed class action settlement, the Court must determine, after the fairness hearing, whether the settlement is "fair, adequate, and reasonable, as well as consistent with the public interest." *Bailey v. Great Lakes Canning, Inc.*, 908 F.2d 38, 42 (6th Cir. 1990). The Court's determination requires consideration of "whether the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued." Manual for Complex Litigation (Third) § 30.42 (1995).

Other relevant factors considered by the Court include: (1) the likelihood of success on the merits weighed against the amount and form of the relief offered in the settlement; (2) the risks, expense, and delay of further litigation; (3) the judgment of experienced counsel who have competently evaluated the strength of their proofs; (4) the amount of discovery completed and the character of the evidence uncovered; (5) whether the

settlement is fair to the unnamed class members; (6) whether the settlement is consistent with the public interest; (7) objections raised by class members; and (8) whether the settlement is the product of arm's length negotiations as opposed to collusive bargaining. *See Granada Investments, Inc. v. DWG* Corp., 962 F.2d 1203, 1205 (6th Cir. 1992); Williams *v. Vukovich*, 720 F.2d 909, 922-23 (6th Cir. 1983); *Kogan v. AIMCO Fox Chase*, L.P., 193 F.R.D. 496, 501-02 (E.D. Mich. 2000); *Steiner v. Fruehauf Corp.*, 121 F.R.D. 304, 305-06 (E.D. Mich. 1988).

2. Evaluation of the Settlement Under Applicable Standards

Considering the above, this Court finds that the proposed Settlement is fair, adequate, and reasonable. Accordingly, Plaintiffs' motion is GRANTED, and the Settlement is APPROVED for the following reasons.

a. The Benefits of the Settlement Weigh in Favor of Approval

Pursuant to the proposed Settlement, the Class will obtain an immediate and certain benefit of $110 million in cash, plus interest ($539,116.96 as of October 31, 2002). The Sherman Act Class Plaintiffs' expert economist has estimated that this amount represents more than 200% of the total amount the Class was overcharged during the period the Defendants' September 1997 Agreement was in effect (September 24, 1997 through June 9, 1999), and more than 95% of overcharge damages accrued through August 13, 2002, the date the Sherman Act Class Plaintiffs and Defendants signed the proposed Settlement Agreement.[1] The recovery to the Class under the negotiated Settlement is well beyond the

[1]The Settlement Agreement also provides "most favored nation" protection against a settlement with any other direct private purchaser on better monetary terms for a comparable release than the Settlement with the Class. If Defendants were to enter into such a settlement, additional payments on behalf of the Class would be required to make

percentage of claimed damages found by other courts to be satisfactory. *See In re Warfarin Sodium Antitrust Litig.*, ___ F. Supp.2d ___, ___, 2002 WL 2007850, *26 (D. Del. Aug. 30, 2002) (observing that "[t]he settlement amount of $44.5 million represents more than 33% of the maximum possible recovery," and finding that this is "a very reasonable settlement when compared with recovery percentages in other class actions."). In light of the above, this Court finds that the benefits the Settlement confers on the Class weigh in favor of approval.

b. The Risks, Expenses, and Delay of Continued Litigation Favor Approval

As part of the approval process, the Court also evaluates the proposed Settlement's fairness and adequacy "by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement." *Williams*, 720 F.2d at 922. Settlements should represent "a compromise which has been reached after the risks, expense and delay of further litigation have been assessed." *Id.* Accordingly, this Court examines the risks, expense, and delay Plaintiffs would face if they continued to prosecute this complex litigation through trial and appeal and weighs those factors against the amount of recovery provided to the Class in the proposed Settlement.

The prospect of a trial necessarily involves the risk that Plaintiffs would obtain little or no recovery. Experience proves that, no matter how confident trial counsel may be, they cannot predict with 100% accuracy a jury's favorable verdict. Moreover, Plaintiffs', while

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up the difference. *See* Settlement Agreement ¶ 7. The mediator, Eric Green, has already determined that the Individual Sherman Act Plaintiffs' settlement with Defendant Aventis does not trigger Aventis' obligation to make additional payments to the Class under this "most favored nation" clause.

emphasizing the strengths of their case, candidly admit there were hurdles that would have to be overcome for successful prosecution at trial and on appeal.

First, there is the risk that the Sixth Circuit might reverse this Court's ruling that Defendants' September 1997 Agreement was a *per se* violation of the Sherman Act. This issue is pending on appeal, and, if reversed, would add significantly to the risks Plaintiffs would face at trial. For example, Plaintiffs would have to prove their case under a more difficult "quick look" or "rule of reason" analysis. They would also have to rebut Defendants' pro-competitive justifications for the Agreement and define a relevant market.

Second, Plaintiffs faced risks regarding the causation element of their claims. The FTC, in its "Analysis to Aid Public Comment" accompanying the announcement of its settlement with Defendants, stated that, based on its investigation, it did not believe that the Defendants' September 1997 Agreement delayed the entry of Andrx's generic Cardizem CD product onto the market. Sherman Act Class counsel disagree with this statement and observe that it has no precedential value. Nonetheless, they acknowledge that it highlights one of the primary risks Plaintiffs would face absent the Settlement. During the course of this litigation, Defendants have vigorously challenged Plaintiffs' claims with multi-faceted and complex causation arguments; i.e., that, regardless of the September 1997 Agreement, Andrx had no intention of coming to market while its patent litigation with Aventis (formerly HMRI) was pending, and furthermore, Andrx could not have come to market any earlier due to various financial and technical reasons. Class Counsel contend that they developed persuasive evidence to refute these defenses (and thus obtained a favorable settlement) but cannot dismiss the fact that there is no way to assure that they would have succeeded on their claims if they had proceeded to trial.

If the jury came to the conclusion that the Defendants' September 1997 Agreement did not delay Andrx (or any other generic company) from entering the market, then the Class would recover nothing – even if the Court's ruling that the Agreement was a *per se* violation of Section 1 of the Sherman Act is upheld on appeal. To recover monetary damages under Section 4 of the Clayton Act, the Class must not only establish that Defendants' September 1997 Agreement was illegal but also that it caused the Class economic harm. Here, the economic harm claimed by the Class is overcharges incurred because of the alleged delay in generic entry caused by the Defendants' September 1997 Agreement. Accordingly, a jury's determination that the Agreement did not delay generic entry would result in no recovery for the Class. Plaintiffs would also likely face additional defenses at trial; i.e., that Class members, especially wholesalers, did not suffer any economic injury as a result of the Agreement ("bypass" argument raised by Defendants in the class certification context). The possibility that a jury could agree with Defendants at trial on any of these issues presents a risk to be weighed against the amount and form of relief offered in the settlement.

Continued prosecution through trial and appeal would also create substantial additional expense and delay. Although significant discovery has already taken place (Class counsel contends that it has already reviewed approximately one million documents and taken numerous depositions), substantial additional effort and expense would be required to prepare this matter for trial. This would include: (1) completion of fact and expert discovery; (2) preparing witnesses, experts and exhibits; and (3) completing pre-trial motion practice, including possible motions for summary judgment.

In light of the above, this Court finds that the certain and immediate benefits to the Class represented by the Settlement outweigh the possibility of obtaining a better result at trial, particularly when factoring in the additional expense and long delay inherent in prosecuting this complex litigation through trial and appeal.

c. The Judgment of Experienced Counsel and the Amount and Character of Discovery Weigh in Favor of Approval

In approving a proposed Settlement, the Court also considers the opinion of experienced counsel as to the merits of the settlement. As the Sixth Circuit observed, "[t]he court should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs. Significantly, however, the deference afforded counsel should correspond to the amount of discovery completed and the character of the evidence uncovered." *Williams*, 720 F.2d at 922-23 (internal citations omitted).

This Court finds that counsel for the Sherman Act Class, who have extensive experience in antitrust and other complex class action litigation, negotiated the proposed settlement at arm's length, after extensive discovery and independent analysis of all relevant matters, and thus it defers to Class Counsel's conclusion that the proposed Settlement is fair, adequate, and reasonable. At the time the parties entered into the Settlement Agreement, fact discovery relevant to the Sherman Act Class Plaintiffs' action had almost been completed. Class Counsel's Affidavits reveal that they had (1) thoroughly investigated the claims against Defendants; (2) retained and worked with expert witnesses in evaluating aggregate damages to the Class and Defendants' highly technical production-related causation defenses; and (3) sufficiently developed the facts concerning

Defendants' liability and damages to make a highly informed decision regarding the proposed Settlement. All of this weighs in favor of the Court's approval of the Settlement.

d. The Fact that the Settlement Is the Product of Arm's Length Negotiations as Opposed to Collusive Bargaining and Consideration of the Fairness of the Settlement to the Unnamed Members of the Class Also Favor Approval

This Settlement comes after almost four years of vigorous litigation and is the product of arm's length settlement negotiations between Class Counsel and Defendants that lasted several months. These negotiations and the ultimate Settlement Agreement were closely monitored by Professor Eric D. Green, an experienced and respected mediator. He opines in his Mediation Report to the Court that "this settlement was the result of hard-fought and difficult negotiations. All counsel did an excellent job in the litigation and the mediation, and in my opinion the process was such as would lead to a fair and reasonable settlement." Eric Green 11/18/02 Mediation Report at 4.

As to the Settlement's fairness to unnamed members of the Class, Plaintiffs' expert economist estimates that the $110 million Settlement (plus interest) is more than enough to cover all of the Class's overcharge damages. Moreover, pursuant to the proposed Plan of Allocation, the Settlement Fund is to be distributed *pro rata* to all Class members based on their proportion of the Class's aggregate damages. The fact that the two named Plaintiffs are to receive an incentive award in the amount of $20,000 does not render the Settlement unfair to unnamed members of the Class. In light of the above, this Court finds that the Settlement was negotiated at arm's length and would be fair to the unnamed Class members. Accordingly, these factors also weigh in favor of approval.

e. The Settlement's Consistency with Public Interest Favors Approval

There is a strong public interest in private antitrust litigation. *See e.g., Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983). Likewise, there is a strong public interest in encouraging settlement of complex litigation and class action suits because they are "notoriously difficult and unpredictable" and settlement conserves judicial resources. *See Granda*, 962 F.2d at 1205 (internal quotes and citation omitted). *Accord, In re Warfarin Sodium Antitrust Litig.*, ___ F.Supp.2d at ___, 2002 WL 2007850 at *21; *Steiner*, 121 F.R.D. at 305. Settlement of this antitrust action serves the public interest by ensuring effective enforcement of the antitrust laws and deterrence of anti-competitive conduct in the marketplace. *See Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965). This is particularly important in the pharmaceutical industry where the potential harm to society caused by agreements to prevent or delay entry of cheaper generic products has recently received considerable attention.

f. The Lack of Class Member Objections Weighs Heavily in Favor of Approval

Notice of the Settlement included a description of the Class, the procedural status of the litigation, description of the Class members' rights under Fed. R. Civ. P. 23(b)(3), the significant terms of the Settlement, a general description of the proposed plan of allocation of the settlement proceeds, and a description of the process of court approval. Notice was mailed to each Class member at its last known address (for whom such address was known). The Summary Notice was also published in two industry publications, and the Settlement Agreement and Notices were posted on the websites of Co-Lead Counsel. No Class member objected to the terms of the Settlement in writing or at the fairness hearing

held on November 20, 2002. The Court finds that the positive Class response to the proposed Settlement weighs heavily in support of its approval. *See Kogan*, 193 F.R.D. at 502.

3. Conclusion

Having considered the above factors, this Court finds that the proposed Settlement merits FINAL APPROVAL. For the reasons stated on the record at the November 20, 2002 fairness hearing, this Court's approval is without prejudice to the Individual Sherman Act Plaintiffs' right to assert arguments against application of the release language contained in the Settlement Agreement to the claims asserted in their separate, on-going litigation.[2] Defendant Andrx's arguments regarding the legal effect of that release language present affirmative defenses that are properly considered in the context of that separate, on-going litigation. *See Abbott Labs. v. CVS Pharmacy, Inc.*, 290 F.3d 854 (7th Cir. 2002).

B. Approval of Allocation Plan

Sherman Act Class Plaintiffs also seek approval of their Plan of Allocation which allocates the settlement funds, net of Court-approved attorneys' fees, incentive awards, and expenses ("Net Settlement Fund"), in proportion to the overcharge damages incurred by each Class member due to Defendants' alleged anti-competitive conduct. For the following reasons, this Court GRANTS Plaintiffs' motion and APPROVES Plaintiffs' Plan of Allocation.

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[2]As clarified at the November 20, 2002 fairness hearing, Individual Sherman Act Plaintiffs have no objection to this Court's approval of the proposed Settlement in this action.

First, no Class member has objected to the Plan. Second, it provides a fair and reasonable method of calculating Class member overcharge damages based on each Class member's actual purchases of generic Cardizem CD and/or any increased discounts on Cardizem CD that the Class members actually received, in conformance with Plaintiffs' experts' damage calculation methodology; and also provides a fair and reasonable method for determining each Class member's *pro rata* share of the Net Settlement Fund.

Third, the Plan adequately describes: (1) the method of calculating each Class member's overcharge damages and *pro rata* share of the Net Settlement Fund; (2) the contents and method of disseminating a Claims Notice form; (3) the manner in which claims will be initially reviewed and processed; (4) the method of notifying Class members of the amount that each Class member will receive from the Net Settlement Fund ("Notice of Class Member Distribution Amount"); and (5) the process for handling and resolving challenged claims. It also includes deadlines for completing tasks related to distributing each Class member's *pro rata* share of the Net Settlement Fund: (1) preparation and dissemination of the Claims Notice form; (2) receipt by the Settlement Administrator of completed Claims Notice forms and supporting documentation; (3) curing deficiencies in any Claims Notice form or supporting documentation submitted by Class members; (4) disseminating the Notice of Class Member Distribution Amount; and (5) challenging and resolving disputes over the Settlement Administrator's determination of each Class member's distribution amount.

Accordingly, Plaintiffs' Plan of Allocation is approved with one minor amendment. Consistent with Paragraph 23 of the parties' Settlement Agreement, the term "alleged" (or, where appropriate, "allegedly") shall be inserted in the Plan at page 2 (before references

to "the illegal Agreement," "the illegal behavior" and "the collusive period"), page 3 (before reference to "the anti-competitive Agreement"), page 4 (before reference to "delay[ed] generic entry [and] delayed competition"), and page 9 n.5 (before reference to "the collusive conduct").

C. Approval of Requested Attorneys' Fees, Expenses and Incentive Awards

Class Counsel also filed a Joint Petition for Attorneys' Fees, Reimbursement of Expenses and Incentive Awards for Named Plaintiffs. Specifically, Class Counsel request a fee in the amount of 30% of the Settlement Fund plus interest, for a total of $33,161,734.80 through October 31, 2002, plus 30% of additional interest as accrued. Counsel for the Sherman Act Class also request reimbursement of $1,089,371.73 in out-of-pocket expenses incurred in the representation of the Sherman Act Class. Finally, Class Counsel request an incentive award of $20,000 each to the named Plaintiffs, Louisiana Wholesale Drug Company, Inc. and Duane Reade, Inc., for their participation as representatives of the Sherman Act Class. For the reasons set forth below, this Court GRANTS Class Counsel's requests.

1. Attorneys' Fees

The Class members' claims against Defendants in this consolidated action have been settled for $110 million in cash, plus interest since July 1, 2002 (as of October 31, 2002, $539,116.96 of interest has accrued). As discussed above, this represents an excellent settlement for the Class and reflects the outstanding effort on the part of highly experienced, skilled, and hard working Class Counsel. As Class Counsel's affidavits show, their efforts were not only successful, but were highly organized and efficient in addressing

numerous complex issues raised in this litigation, including highly technical Federal Drug Administration ("FDA") regulatory issues, patent, manufacturing, financial and related causation issues. To date, Class Counsel have been without compensation of any kind. They have expended more than 27,000 hours over a four-year period, with compensation wholly contingent on the result achieved.

This Court finds that the percentage-of-the-fund method is the proper method for compensating Class Counsel, and that an attorneys' fee award of 30% of the Settlement Fund is reasonable under the circumstances presented here. Courts in the Sixth Circuit have approved similar percentage awards, and consideration of factors identified by the Sixth Circuit justify such an award.

The Settlement Fund is a "common fund", and the courts have long recognized that a lawyer who recovers such a fund is entitled to a reasonable attorneys' fee from the fund as a whole. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). "In a common fund case, the 'fees are not assessed against the unsuccessful litigant (fee shifting), but rather are taken from the fund or damage recovery (fee spreading), thereby avoiding the unjust enrichment of those who otherwise would be benefited by the fund without sharing in the expenses incurred by the successful litigant.'" *Fournier v. PFS Investments, Inc.*, 997 F. Supp. 828, 830 (E.D. Mich. 1998) (quoting *Court Awarded Attorneys Fees*, Report of the Third Circuit Task Force, 108 F.R.D. 237, 250 (1985)). "The common fund exception to the American Rule is grounded in the equitable powers of the courts under the doctrines of *quantum meruit* and unjust enrichment. It applies where a common fund has been created by the efforts of plaintiffs' attorney and rests on the principle that persons who

obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." Manual for Complex Litigation (Third) § 24.121 (1995) (internal quotes and footnotes omitted).

The Sixth Circuit leaves it to the Court's discretion as to whether it will apply the lodestar or percentage-of-the-fund method to awards of attorneys fees, requiring "only that awards of attorney's fees by federal courts in common fund cases be reasonable under the circumstances." *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). It noted, however, that the recent trend has been towards application of a percentage-of-the-fund method in common fund cases. *See id.* Courts within the Sixth Circuit have likewise indicated their preference for the percentage-of-the-fund method. *See, e.g., In re F & M Distributors, Inc. Sec. Litig.*, Case No. 95-CV-71778-DT, 1999 U.S. Dist. LEXIS 11090, [1999 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 90,621 (E.D. Mich. June 29, 1999) (choosing percentage-of-the-fund as the better method for determining attorneys' fees in a securities class action); *In re Rio Hair Naturalizer Products Liability Litig.*, MDL No. 1055, 1996 U.S. Dist. LEXIS 20440 (E.D. Mich. Dec. 20, 1996) (observing that "more commonly, fee awards in common fund cases are calculated as a percentage of the fund created, typically ranging from 20 to 50 percent of the fund"); *Fournier*, 997 F. Supp. at 832-33 (choosing percentage-of-the-fund method in class action securities litigation). This Court agrees with Judge Cook's observations in *F & M Distributors* that (1) "the lodestar method is too cumbersome and time-consuming of the resources of the Court"; and (2) "more importantly, the 'percentage of the fund' approach more accurately reflects the result achieved." 1999 U.S. Dist. LEXIS 11090 at *8 (internal quotes and

citations omitted). This Court's decision to apply the percentage-of-the-fund method is consistent with the majority trend, and, more importantly, is reasonable under the circumstances presented here.

As the Third Circuit Task Force recently concluded, "[m]ost courts use the percentage of the fund method." *Third Circuit Task Force on the Selection of Class Counsel*, Final Report of the Third Circuit Task Force at 103 (January 2002). The Task Force concluded that "[a] percentage fee, tailored to the realities of the particular case, remains superior to any other means of determining a reasonable fee for class counsel." *Id.* at 19. It explained why the lodestar method is inferior to the percentage fee approach:

> The lodestar remains difficult and burdensome to apply, and it positively encourages counsel to run up the bill, expending hours that are of no benefit to the class. Moreover, use of the lodestar may result in undercompensation of talented attorneys. Experienced practitioners know that a highly qualified and dedicated attorney may do more for a class in an hour than another attorney could do in ten. The lodestar can end up prejudicing lawyers who are more efficient with a less expenditure of time.

Id. at 104. These observations apply here. The percentage fee method is preferred so as not to undercompensate extremely talented and efficient Class Counsel.

This Court also finds that the requested 30% fee is fair and reasonable and is justified by the excellent performance of Class Counsel in obtaining an extraordinary result for the Class in this complex litigation. This is within the ordinary range of between 20-30% typically awarded in common fund cases. *See F & M Distributors*, 1999 U.S. Dist. LEXIS 11090 at *8-10 (awarding 30% of the gross settlement fund after reviewing other awards in the Sixth Circuit and finding 30% award consistent with the trend). It is also within the range of fee awards in settlements with common funds of comparable size to the $110

million Settlement Fund at issue here. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 n.4 (9th Cir.) (upholding a 28% fee award of a $96.885 million settlement fund, and observing that its survey of percentage fee awards "from 34 common fund settlements of $50-200 million from 1996-2001," show a majority clustered in the 20-30% range), *cert. denied*, ___ S. Ct. ___, 2002 WL 1968819, 71 U.S.L.W. 3154 (U.S. Nov. 12, 2002).

A lower percentage is not required simply because the Settlement obtained on behalf of the Class is large. As recently observed by the District Court for the Southern District of New York, blind adherence to a declining percentage-of-fund method under these circumstances "can create an incentive to settle quickly and cheaply when the returns to effort are highest," and can create an undesirable situation where counsel is inadequately rewarded for "investing additional time and maximizing plaintiffs' recovery." *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71, 80 (S.D. N.Y. 2000).

This Court determines the reasonableness of the percentage requested by Class Counsel by examining factors identified by the Sixth Circuit. These include: "(1) the value of the benefit rendered to the plaintiff class . . .; (2) the value of services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides." *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996) (internal quotes and citations omitted). *Accord, Smillie v. Park Chem. Co.*, 710 F.2d 271, 275 (6th Cir. 1983).

Considering the above factors, this Court finds that Class Counsel's requested fee award is reasonable under the circumstances. First, as discussed above, the result Class Counsel obtained on behalf of the Class is extraordinary. Second, there is no question that Class Counsel spent thousands of hours litigating this complex case over the past four years. Their work at all times has been of the highest quality. The Court is also mindful that the significant amount of time spent on this action precluded Class Counsel from working on other matters. Moreover, the fact that the 30% fee recovery in this case would equate to a lodestar multiplier of approximately 3.7 does not render it unreasonable. Similar multipliers have been accepted as fair and reasonable in complex matters with large settlement funds such as this. *See Vizcaino*, 290 F.3d at 1051 (examining cases and determining that a 3.65 multiplier on a $96.885 million settlement was appropriate and within the range applied in large common fund cases).

The third through sixth factors also support the requested attorneys' fee. Class Counsel undertook representation of the Class on a contingent fee basis and thus bore the risk of recovery (detailed above) and the outlay of large out-of-pocket expenses for almost four years. The complexity of this case cannot be overstated. Antitrust class actions are inherently complex. The complexity of this antitrust case was enhanced by additional, highly technical, causation-related issues; i.e., regulatory issues arising out of the Hatch-Waxman Act; patent law issues relevant to the Aventis/Andrx patent litigation underlying the Defendants' September 1997 Agreement; the intricacies of the pharmaceutical industry from a sales and marketing perspective; the scientific and production processes involved with inventing and commercializing branded and generic pharmaceutical products; and the FDA regulations applicable to reviewing and approving pharmaceutical products and new

manufacturing facilities/processes. Despite its complexity, Class Counsel was able to efficiently and effectively prosecute and settle this matter. A review of Class Counsel's affidavits, submitted in support of the petition, reveals that they were able to streamline and focus their discovery and litigation efforts through standing weekly conference calls in which tasks were assigned and reviewed and through discovery agendas where the internal discovery committee was required to justify the need for each piece of discovery before pursuing it.

Furthermore, this Court would be remiss if it failed to acknowledge the experience, hard work, and skill demonstrated by Class Counsel in this matter. Their excellent performance on behalf of the Class in this hotly contested case justifies the award they seek. The Court is appreciative of the professionalism, skill, and competency displayed by counsel for both sides throughout this litigation. Professor Eric Green, the mediator in this matter, likewise observed that the skill and professionalism of counsel for the Defendants and the Plaintiff Class during the mediation was of the highest caliber.

Finally, this Court considers society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others. As already noted, Class Counsel obtained an excellent settlement for the Class in a complex and hard-fought case. "Society's stake in rewarding attorneys who can produce such benefits in complex litigation such as in the case at bar counsels in favor of a generous fee. . . ." *F & M Distributors*, 1999 U.S. Dist. LEXIS 11090 at *18. Society also benefits from the prosecution and settlement of private antitrust litigation. *See e.g., Pillsbury Co.*, 459 U.S. at 262-63; *Minnesota Mining & Mfg. Co.*, 381 U.S. at 318. Class Counsel brought this private antitrust action seeking to enforce the antitrust laws and alleging that a brand-name drug

manufacturer had colluded with a generic competitor to block cheaper generic versions of the brand-name drug from coming to market. This case has helped put prescription drug pricing and marketing tactics at the forefront of media, Congressional scrutiny, and judicial scrutiny. Encouraging qualified counsel to bring inherently difficult and risky but beneficial class actions like this case benefits society.

Taking into consideration the above factors and also observing that there are no objections to the requested fee, this Court awards counsel for the Sherman Act Class 30% of the Settlement Fund plus interest, for a total of $33,161,734.80 through October 31, 2002, plus 30% of additional interest as accrued.

2. Reimbursement of Expenses

In addition to their petition for attorneys' fees, Class Counsel seek reimbursement of $1,089,371.73 in out-of-pocket expenses incurred in the representation of the Sherman Act Class. Upon review of the numerous affidavits submitted by Class Counsel in support of this request, the Court finds this amount to be fair and reasonable. "Expense awards are customary when litigants have created a common settlement fund for the benefit of a class." *F & M Distributors*, 1999 U.S. Dist. LEXIS 11090 at *19. In determining whether the requested expenses are compensable in this common fund, the Court has considered whether the particular costs are of the type typically billed by attorneys to paying clients in similar cases. *See In re Synthroid Marketing Litig.*, 264 F.3d 712, 722 (7th Cir. 2001). The Court finds that the categories of expenses for which Class Counsel seek reimbursement are the type routinely charged to their hourly fee-paying clients and thus should be reimbursed out of the Settlement Fund. Likewise, considering the detailed affidavits

submitted in support of the request for reimbursement, this Court is persuaded the these expenses are reasonable.

3. Incentive Awards to Named Plaintiffs

Finally, Class Counsel request the Court to approve incentive awards in the amount of $20,000 each for the two named Plaintiffs, Louisiana Wholesale Drug Company, Inc. and Duane Reade, Inc. The Court GRANTS Class Counsel's request. Such awards are also common in class actions such as this. *See F & M Distributors*, 1999 U.S. Dist. LEXIS 11090 at *20. The Notice to the Class advised that Class Counsel would apply for these incentive awards, and no objections were received. Moreover, the Court finds these incentive awards to be reasonable and justified in light of the discovery, mediation, settlement, and other litigation burdens placed on Louisiana Wholesale and Duane Reade, Inc.

III. Conclusion

For the foregoing reasons, this Court GRANTS Sherman Act Class Plaintiffs' motions for (1) final approval of settlement; (2) approval of plan of allocation; and (3) Class Counsel's joint petition for attorneys' fees, reimbursement of expenses and incentive awards for named Plaintiffs.

Nancy G. Edmunds
U.S. District Judge

Dated: 26 NOV 2002

CERTIFICATE OF SERVICE

Pursuant to Rule 77(d), Federal Rules of Civil Procedure, copies have been mailed to:

Elwood S. Simon, Esq.
ELWOOD S. SIMON & ASSOCIATES
355 South Old Woodward Avenue
Suite 250
Birmingham, MI 48009

Stephen Lowey, Esq.
LOWEY, DANNENBERG, BEMPORAD & SELINGER PC
The Gateway, 11th Floor
One North Lexington Avenue
White Plains, New York 10601-1714

Joseph J. Tabacco, Jr., Esq.
BERMAN, DEVALERIO, PEASE & TABACCO
425 California Street, Suite 2025
San Francisco, CA 94104

Richard Drubel, Esq.
BOIES & SCHILLER
26 South Main Street
Hanover, NH 03755

Bruce E. Gerstein, Esq.
GARWIN BRONZAFT GERSTEIN & FISHER, LLP
1501 Broadway
New York, NY 10036

Scott E. Perwin, Esq.
KENNY NACHWALTER SEYMOUR ARNOLD CRITCHLOW & SPECTOR, PA
1100 Miami Center
201 South Biscayne Boulevard
Miami, FL 33131-4327

Joseph Rebein, Esq.
SHOOK, HARDY & BACON LLP
One Kansas City Place
1200 Main Street
Kansas City, MO 64105

Craig L. John, Esq.
DYKEMA GOSSETT PLLC
39577 Woodward Avenue, Suite 300
Bloomfield Hills, MI 48304-5086

Louis M. Solomon, Esq.
SOLOMON ZAUDERER ELLENHORN FRISCHER & SHARP
45 Rockefeller Plaza
New York, NY 10111

Norman C. Ankers, Esq.
HONIGMAN MILLER SCHWARTZ & COHEN
32270 Telegraph Road, Suite 225
Bingham Farms, MI 48025-2457

Steve D. Shadowen
SCHNADER HARRISON SEGAL & LEWIS, L.L.P.
Suite 700, 30 North Third Street
Harrisburg, PA 17101-1713

Paul F. Novak
Assistant Attorney General
CONSUMER PROTECTION DIVISION
670 G Mennen Williams Building
Lansing, MI 48913

Robert Hubbard
OFFICE OF THE NEW YORK ATTORNEY GENERAL
120 Broadway
New York, NY 10271-0332

David L. Douglas
PORTER WRIGHT MORRIS & ARTHUR
1919 Pennsylvania Avenue N.W.
Washington, DC 20006-3434

JUDICIAL PANEL MULTIDISTRICT LITIGATION
Thurgood Marshall Federal Judiciary Building
Room G-255 North
One Columbus Circle, N.E.
Washington, D.C. 20002-8004

Deputy Court Clerk

26 NOV 2002

Date

Exhibit B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: FOUNDRY RESINS ANTITRUST LITIGATION	Case No. 2:04-md-1638 Master Docket No. 2:04-cv-415 **CLASS ACTION**
This Document Relates To: **ALL CASES EXCEPT Caterpillar Inc. v. Ashland Inc., et al., Court File No. 2:04-cv-01165-GLF-MRA**	Judge Gregory L. Frost Magistrate Judge Mark R. Abel

ORDER

This matter is before the Court for consideration of the February 15, 2008 Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses and Payment of Incentive Awards to Class Representatives (Doc. # 242) and the March 25, 2008 Plaintiffs' Notice of Filing Supplemental Time and Expense Information in Support of Motion for an Award of Attorneys' Fees, Reimbursement of Expenses and Payment of Incentive Awards to Class Representatives (Doc. # 244). Upon consideration, the Court **GRANTS** the motion as supplemented.

It is therefore hereby ORDERED, ADJUDGED, and DECREED as follows:

(1) The Court awards Plaintiffs' Counsel attorneys' fees in the amount of 33⅓% of the Ashland Settlement Fund ($7,900,000.00) and 33⅓% of the HAI Settlement Fund ($6,256,421.00 after reduction pursuant to the applicable "most favored nation" provision), for a total fee of $4,718,807.00, plus accrued interest.

(2) The Court authorizes Co-Lead Counsel to distribute such fees to Plaintiffs' Counsel in a manner which, in the opinion of Co-Lead Counsel, fairly compensates each Plaintiffs'

Counsel firm in view of its contribution to the prosecution of Plaintiffs' claims. The Court retains jurisdiction over any disputes among Plaintiffs' Counsel concerning the allocation of such awarded attorneys' fees.

(3) In addition to the attorneys' fees awarded by the Court, the Court approves a payment of unreimbursed litigation expenses in the amount of $891,185.20 from the Ashland and HAI Settlement Funds to Plaintiffs' Counsel.

(4) The Court approves incentive awards of $5,000 each to Plaintiffs State Line Foundries, Kore Mart, Lancaster Foundry Supply, Kulp Foundry, AmeriCast Technologies, and Tri-Cast Limited from the Ashland and HAI Settlement Funds for their service as Class Representatives.

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE

Exhibit C

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

ALICE H. ALLEN, ET AL)

VS) CASE NO: 5:09-CV-230

DAIRY FARMERS OF AMERICA, INC,)
DAIRY MARKETING SERVICES,
LLC, DEAN FOODS COMPANY AND)
HP HOOD,LLC
_____) FINAL FAIRNESS HEARING

BEFORE: HONORABLE CHRISTINA REISS
CHIEF JUDGE

APPEARANCES: KIT A. PIERSON, ESQUIRE
Cohen Milstein
1100 New York Avenue, NW
Suite 500, West Tower
Washington, DC 20005
Representing The Plaintiffs

ANDREW D. MANITSKY, ESQUIRE
Gravel & Shea
76 St. Paul Street
P.O. Box 369
Burlington, Vermont 05402
Representing The Plaintiffs

(APPEARANCES CONTINUED:)

DATE: July 18, 2011

TRANSCRIBED BY: Anne Marie Henry, RPR
P.O. Box 1932
Brattleboro, Vermont 05302

posture of the case because clearly it makes, it makes a big difference. And I will preface what I'm about to say, I'll say it once so I don't have to keep repeating it. Judge Grear in Tennessee has made a substantial number of rulings and moved the case forward. And we disagree with many of his rulings, but they are the rulings of the Court. And they put us in the posture we found ourselves last week.

So the hurdles that the plaintiffs in Tennessee passed, that have not been even crossed yet by the plaintiffs here, include class certification. And in Tennessee we petitioned for interlocutory appeal. The Sixth Circuit turned it down so they survived that. There are two pending motions to decertify the class. The Court hasn't ruled on those yet. [Motions for Summary Judgment briefed, argued, decided. Three counts were dismissed, from my perspective that was great, but two counts survived. And those two counts, conspiracy in restraint of trade under Section 1 and conspiracy to monopolize in violation of Section 2, frankly, are sufficiently large to encompass everything that the plaintiffs in Tennessee were complaining about.]

There were 70, don't blanch, but 70 motions in limine that were filed. The Court held argument on those over the course of two days and delivered oral rulings on many of them. So we knew -- the, the written rulings were

TAB 18A

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

IN RE: PACKAGED SEAFOOD PRODUCTS ANTITRUST LITIGATION	Case No. 3:15-md-02670-DMS-MSB
This document relates to: All End Payer Plaintiff Actions	**ORDER GRANTING END PAYER PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS**

Pending before the Court is the End Payer Plaintiffs' ("EPPs") motion for an award of attorneys' fees and reimbursement of litigation expenses made in connection with their class action settlement with Defendants StarKist Co. and Dongwon Industries Co., Ltd. (collectively, "StarKist and DWI") and Defendants Lion Capital (Americas), Inc., Lion Capital LLP, and Big Catch Cayman LP[1] (collectively, the "Lion Companies"). The EPPs also seek incentive awards from the settlement fund in varying amounts ranging from $3,000, $6,000 and $9,000 for consumers who acted as Class Representatives for their service in this case.

Having considered the EPPs' motion, the record in this case, and the supporting papers, the Court finds EPPs' request for attorneys' fees, reimbursement of litigation expenses, and incentive awards for each of the Class Representatives for their service in this case is fair and reasonable considering the outstanding settlements obtained, the substantial efforts Class Counsel have taken, the considerable litigation risks faced by Class Counsel, and the extent of time and work that the Class Representatives have put into this case over the last nine years. Accordingly, the Court **GRANTS** the EPPs' motion and **ORDERS** the following:

(1) The Class Representatives shall each receive an incentive award as follows:

a. $3,000 each to Louise Adams, Nay Alidad, Jessica Bartling, Barbara Blumstein, Barbara Buenning, Scott Caldwell, Jade Canterbury, Casey Christensen, Jody Cooper, Sundé Daniels, Brian Depperschmidt, Vivek Dravid, Rob Etten, Ana Gabriela Felix Garcia, John Frick, Kathleen Garner, Stephanie Gipson, Tina Grant, Tya Hughes, Amy Jackson, Marissa Jacobus, Danielle Johnson, Zenda Johnston, Michael Juetten, Steven Kratky, Kathy Lingnofski, Katherine McMahon, Diana Mey, Liza Milliner, Laura Montoya, Kirsten Peck, Elizabeth Perron, Valerie Peters, John Peychal, Audra Rickman, Erica Rodriguez, Joelyna A San Agustin, Amber Sartori, Rebecca Lee Simoens, Nancy Stiller, Christopher Todd, John Trent, Nigel Warren, Thomas E. Willoughby III, and Dan Zwirlein.

[1] Big Catch Cayman LP was previously dismissed from the Action by the Court with prejudice. ECF No. 3103.

b. $6,000 each to Melissa Bowman, Michael Buff, Kathy Durand (f/k/a Gore), Kim Eason (f/k/a Craig), Gloria Emery, Edgardo Gutierrez, Carla Lown, Rick Musgrave, Corey Norris, John Pels, Rob Skaff, Greg Stearns, Bonnie Vander Laan, and Julie Wiese.

c. $9,000 each to Gay Birnbaum, Laura Childs, Andrew Gorman, Lisa Hall, Mary Hudson, Jennifer Nelson, Barbara Olson, and Elizabeth Twitchell.

(2) Class Counsel is awarded a total of $1,618,489.24 in past litigation expenses since May of 2021 and fees of $48,320,739.40.

(3) The fees and expenses shall be allocated among Class Counsel by the EPPs' Lead Counsel (Wolf Haldenstein Adler Freeman & Herz LLP) in a manner that, in the Lead Counsel's good-faith judgment, reflects each firm's contribution to the institution, prosecution, and resolution of the litigation.

(4) This order shall be entered of this date pursuant to Rule 54(b) and (d) of the Federal Rules of Civil Procedure, the Court finding that there is no just reason for delay.

IT IS SO ORDERED.

Dated: November 22, 2024

Hon. Dana M. Sabraw, Chief Judge
United States District Court

TAB 18B

BETSY C. MANIFOLD (182450)
manifold@whafh.com
RACHELE R. BYRD (190634)
byrd@whafh.com
ALEX J. TRAMONTANO (276666)
tramontano@whafh.com
WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
750 B Street, Suite 1820
San Diego, CA 92101
Telephone: 619/239-4599
Facsimile: 619/234-4599

Class Counsel for the End Payer Plaintiffs

[Additional counsel appear on signature page]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE: PACKAGED SEAFOOD PRODUCTS ANTITRUST LITIGATION	Case No.: 15-MD-2670 DMS (MSB)
	END PAYER PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR ATTORNEYS' FEES AND COSTS
This Document Relates to: End Payer Plaintiffs Class Track	DATE: November 22, 2024 TIME: 1:30 p.m. JUDGE: Hon. Dana M. Sabraw COURT: 13A (13th Floor)

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I. INTRODUCTION

Class Counsel for the End Payer Plaintiffs ("EPPs"), Wolf Haldenstein Adler Freeman & Herz LLP, respectfully submits this brief in support of the EPPs' motion for an award of reasonable attorneys' fees, reimbursement of litigation expenses, and modest incentive awards for each Class Representative (tiered in relation to their time and service in this case).

To bring more than nine years of hard-fought litigation to a close, Class Counsel have presented the Court with two final settlements, which the Court preliminarily approved on August 23, 2024. ECF No. 3302. Subject to the Court's final approval, these proposed settlements, with a combined cash value of $136,000,000 and in addition to the previously approved COSI Partial Settlement, will provide total settlement cash benefits of $152,200,000 to the EPP consumers.[1] As the Court is well aware, Class Counsel and their co-counsel devoted significant time and substantial resources to this lengthy, complex, and highly successful antitrust litigation, and the settlements provide a substantial benefit to the EPPs. This exceptional recovery arose only from Class Counsel's skillful and dedicated litigation of this complex case.

The Court previously approved a partial settlement with COSI that ultimately yielded $16.2 million in settlement benefits to the EPPs. ECF No. 2871. As part of the partial settlement with COSI, the Court previously approved an Expense Award of $4,155,027.67 to reimburse Class litigation costs incurred as of May 2021. ECF No. 2872 at 4:17-19. Class Counsel did not request a Fee Award in connection with the COSI partial settlement, continuing to prosecute the case vigorously with their fees entirely at risk. *Id*. at 2:19-22; ECF 2827, Ex. F (Class Notice) at 48, 52. Class Counsel reserved their right to seek an award of attorneys' fees from any monies recovered from the Non-Settling Defendants (*i.e.*, StarKist and the Lion Companies)

[1] *See* EPPs' Motion for Preliminary Approval of Class Action Settlements [ECF No. 3286] at 7 ("MPA") (all abbreviated and capitalized terms are as defined in the MPA).

and to include the monies received from the COSI partial settlement in any subsequent fee request. *Id*.; 2845-1 at 4 n.6.

For the excellent result they have achieved, EPPs' counsel seek reimbursement of their additional out-of-pocket expenses in the amount of $1,618,489.24 and an award of attorneys' fees in the amount of $48,320,739.40, which is 33% of the net cash settlement amount after deducting ***all*** expenses awarded by the Court. While a slight upward departure from the 9th Circuit's 25% fee benchmark, an award of 33% of the net recovery for the Consumer Class is amply supported by the time and effort expended by counsel for the EPPs and by the tremendous settlements achieved, and represents a ***negative*** multiplier of 0.82 on their time expended over nine years in this hard-fought litigation.[2] Class Counsel propose to withdraw the payment of any Fee Award over time in proportion to the receipt of settlement monies from the Defendants. *See* § IV.D below.

In addition, counsel for the EPPs seek reimbursement of $1,618,489.24 in additional expenses incurred since May 2021 to prosecute this case to its successful conclusion. *Id*. EPPs request that $206,379.11 of that amount be returned to COSI to reimburse it for administration costs that will be common to the proposed new settlements and the prior COSI partial settlement. ECF No. 3286-2 at 4, ¶7.

The proposed fee and expense request is consistent with other fee and expense awards in this District and the Ninth Circuit generally. Furthermore, the request is fair and reasonable considering the outstanding settlement obtained, the substantial efforts by Class Counsel, and the considerable litigation risks faced by Class Counsel at every stage of this nine-year old complex antitrust litigation.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

[2] Counsel for the EPPs have excluded all time spent seeking appointment of lead counsel and all time spent seeking an award of fees and expenses from their time submitted in support of the fee application. *See* Declaration of Mark C. Rifkin in Support of the End Payer Plaintiffs' Motion for Fees and Costs ("Rifkin Decl."), ¶¶ 9-10.

Having presided over this complex litigation for many years, the Court is well familiar with the factual background and procedural history of the case. A summary of relevant events is included in the accompanying Declaration of Betsy C. Manifold ("Manifold Decl.") in Support of the EPPs' Motion for Preliminary. Only key events are highlighted here.

A. Lead Counsel Coordinated and Conducted Substantial Discovery

Wolf Haldenstein was appointed by the Court as the EPPs' Interim Lead Counsel on March 24, 2016, and was tasked with several important responsibilities, including the duty to conduct and oversee the prosecution of all aspects of the Action for the EPP Classes, to retain and work with experts and consultants, and to coordinate and supervise the conduct of other counsel for the EPPs to ensure that the litigation was conducted effectively and efficiently. *See* ECF No. 119. As Class Counsel, Wolf Haldenstein also was given the duty to collect and review lodestar and expense information from all counsel for the EPPs and to allocate fees and expenses among all counsel for the EPPs in the event of a successful outcome. *Id.*

B. Class Certification Was Hard-Fought and the Decision Widely Cited

Notably, class certification of the EPP Consumer Classes was especially hard-fought, involving three highly respected economists retained by Plaintiffs, Dr. Russel Mangum (DPPs), Dr. Michael Williams (CFPs); and Dr. David Sunding (EPPs), and countered by two equally respected economists hired by Defendants, Dr. John Johnson and Dr. Laila Haider. Manifold Decl., ¶31; ECF No. 2846-2 at ¶12. EPP Class Counsel prepped and defended 16 individual EPP Class Representative depositions. Manifold Decl., ¶31. On January 14-16, 2019, the Court conducted a three-day evidentiary hearing on class certification. *Id.*, ¶32. The Court ultimately certified a Cartwright Act Class consisting of all persons and entities who resided in one of the states identified in the EPPs' operative complaint and indirectly purchased Packaged Tuna in consumer-sized cans or pouches produced by any Defendant during the period June 1, 2011 through July 1, 2015 (the "Class Period"). ECF No. 1931 at

46. The Court also certified a statewide damages class for each State identified in the operative complaint. *Id*. The Court appointed Wolf Haldenstein as Class Counsel. *Id.* at 58-59.

The Court's class certification decision withstood extensive appeals in the Ninth Circuit, resulting in a comprehensive decision that has become the nation's leading antitrust class certification order, having been cited no fewer than 994 times by district courts throughout the United States. Manifold Decl., ¶33. The Supreme Court denied a petition for *certiorari* from the Ninth Circuit's decision. *Id*.

C. Expert Discovery and Successful Dispositive Motions

In preparation for trial, EPPs engaged two experts: Dr. Sunding (economist) and Adoria Lim (forensic accountant). Manifold Decl., ¶34. The Defendants hired seven experts: Dr. Randal Heeb (economist), Dr. Michael Moore (economist), Gary Kleinrichert (accountant), Andres Lerner (economist), Janusz Ordover (economist), Robert Daines (law professor), and Ilya A. Strebulaev (private equity professor). *Id*. Extensive expert discovery concluded on February 23, 2023. ECF No. 2980.

After the close of discovery, in September 2019, the seven Defendants, three Plaintiff Classes, and 53 Direct Action Plaintiffs who remained in the case filed various dispositive motions and engaged in substantial briefing. Wolf Haldenstein played a substantial and leading role in organizing, coordinating, drafting, and filing the documents associated with over twenty (20) dispositive motions. Manifold Decl., ¶35. Plaintiffs filed four motions for partial summary judgment [ECF Nos. 1976, 1993, 2009, 2035] and three narrow *Daubert* motions [ECF Nos. 1970, 1987, 2034], including a motion for summary judgment motion filed by the EPPs against StarKist, which the Court granted on liability. Defendants filed thirteen dispositive motions: ten joint motions for summary judgment [ECF No. 1973, 1992, 1998, 1999, 2001, 2007, 2010, 2015, 2023, 2025] and three *Daubert* motions [1967, 1981, 1984].

Plaintiffs largely prevailed on the *Daubert* and summary judgment motions. Manifold Decl., ¶37.

D. Preparations for Trial Were Substantially Complete

Preparations for the trial scheduled to begin on July 16, 2024, were substantially complete when the proposed settlements were reached. The extensive trial preparation included numerous motions *in limine* filed by all parties, the Local Rule 16.1(f) meeting held on June 3, 2024, the preparation of joint jury instructions, which Plaintiffs presented to the Court along with their respective supplemental instructions and objections on May 31, 2024, and preparation of the proposed Pre-Trial Order, which Class Counsel lodged with the Court on June 14, 2024, in anticipation of a final Pretrial Conference on June 21, 2024. Virtually all pre-trial proceedings were completed before these settlements were reached.

In sum, as amply reflected in more than 3,300 docket entries filed by the parties and entered by the Court over the last nine years, this MDL has been vigorously, efficiently, and successfully litigated by Class Counsel at every stage of the proceedings. The EPP Class has been extremely well represented by Class Counsel and the other counsel for the Consumer Class throughout these proceedings.

III. THE SETTLEMENTS

A. Partial COSI Settlement Was Previously Approved by the Court

The COSI "icebreaker" settlement was the first settlement between the EPPs and any Defendant. It adds $16,200,000 to the Total Settlement Benefits of $152,200,000.[3] In granting final approval to the COSI partial settlement, the Court

[3] Under the COSI Settlement Agreement, the Maximum Settlement Amount was $20 million. ECF No. 2552-3 at 8. Under Paragraph 11(b) and 18, up to $5 million could be used to cover the reasonable costs of the Settlement Notice and administration of the $15 million Settlement Fund. Since the reasonable costs of the Settlement Notice were less than $5 million, the difference will be refunded to COSI. *Id*. at 14 and 15. The COSI settlement required COSI to pay certain notice and administration, from which COSI has requested reimbursement for $206,379.11 in administrative costs incurred in 2024 that are being shared with the proposed StarKist and Lion settlements. ECF 3286 at 7 n.2. Thus, the actual amount of the COSI settlement is $16.2 million.

noted "that significantly, Settlement Class Counsel have not requested any attorney fees, just reimbursement of actual litigation costs and expenses." ECF No. 2871 at 14. At that time, counsel for the EPPs reserved their rights to request attorneys from future settlements with the Non-Settling Defendants (StarKist and the Lion Companies) and to base their request upon the *total* settlement amounts obtained from *all* settling parties. *Id*.

B. StarKist and the Lion Companies Settled Just Weeks Before Trial

The parties made notable attempts to settle the matter throughout the litigation. Since mid-2019, Class Counsel engaged in several informal settlement discussions and many more formal settlement negotiations (most presided over with extreme care and exceptional skill by Magistrate Judge Michael S. Berg) with counsel for the Settling Defendants. ECF No. 3286-2 at 7-9 ¶¶ 17, 18, 22 (including Bumble Bee). In particular, the EPPs and StarKist participated in multiple settlement conferences with Judge Berg on October 4, 2023, April 25, 2024, May 22, May 23, 2024, and June 3, 2024. *Id.* at ¶¶ 20, 21. With the oversight and guidance of Judge Berg, and with most pre-trial proceedings complete and the July 16, 2024, trial looming, the EPPs and StarKist finally reached a settlement-in-principle in the amount of $130 million on June 3, 2024.

The EPPs and the Lion Companies also attended a joint settlement conference before Judge Berg on August 7, 2023. ECF No. 3286-2 at ¶ 23. Counsel for the EPPs and for the Lion Companies continued to conduct informal and formal settlement negotiations, including a lengthy but unsuccessful formal mediation with Judge Michael Weinstein (retired). On June 17, 2024, nearly a year after beginning the settlement process and with the trial imminent, the EPPs again met with the Lion Companies (and their principals and insurers) in a day-long settlement conference with Judge Berg. The settlement conference resulted in the parties reaching a $6,000,000 settlement-in-principle, but only after the Lion Companies' and its

founders' financial condition were carefully and thoroughly evaluated by Class Counsel and by Judge Berg. *Id.*, ¶ 24.

C. Preliminary Approval of the Proposed Settlements

Based on this ample record, the Court found that the proposed settlements were the result of arms'-length negotiations. ECF No. 3302 at 4. After carefully reviewing the monetary terms, the Settlement Class definitions, and the releases provided for in both settlement agreements, the Court granted preliminary approval "as each is likely to be finally approved after the Fairness Hearing." *Id.* at 7.

D. Settlement Terms and Payment Schedule

Complete copies of both the StarKist Settlement Agreement and the Lion Settlement Agreement are attached to the Manifold Decl. as Exhibits 1 and 2, respectively. *See* ECF No. 3286-2 at 19-46 ("StarKist Settlement Agreement") and 47-72 ("Lion Settlement Agreement"). The Preliminary Approval Motion provided a detailed summary of the key terms in both settlements and is available (along with all the exhibits) on the Settlement Website. *See* ECF No. 3286-1 at 13-15.[4]

StarKist. The StarKist Settlement provides that StarKist will pay $130 million in cash over a period of time ranging from 30 days after preliminary approval (September 19, 2024) to 500 days after preliminary approval (January 6, 2026). ECF No. 3286-2 at 26, ¶ 1.24, App'x A; Manifold Decl., ¶14. The first payment of $32 million was paid on September 19, 2024, within 30 days after preliminary approval on August 21, 2024. *Id*. The second payment of $18 million from StarKist is due prior to the Fairness Hearing on November 22, 2024. ECF No. 3286-2 at 26, ¶ 1.24. The remaining settlement payments by StarKist are fixed on certain dates following preliminary approval. *Id*. For the Court's convenience, the payment schedule is set forth in Appendix A at the end of this Memorandum.

[4] Once the final approval motion is filed on or before November 15, 2024, the motion and all supporting papers also will be posted on the settlement website, concurrently with the filing. ECF No. 3302 at 19.

Lion Companies. Under the terms of the Lion Settlement Agreement, the Lion Companies have deposited $3 million in the Settlement Fund Escrow. ECF No. 3286-2 (Lion SA) at 54, ¶ 1.22; Manifold Decl., ¶15. The final $3 million will be deposited within 45 days after final approval of the settlement. *Id*., App'x A attached hereto.

The payment terms for the settlement monies and their timing is relevant here because, to share the burden of the delayed payment and the small risk of non-payment with the EPP Class, Class Counsel propose (*see* §IV.D. below) that the attorneys' fees awarded to them by the Court will be paid out to them over time in proportion to the monies actually received from the Settling Defendants.

IV. CLASS COUNSEL ARE ENTITLED TO A FEE AWARD

Counsel for the EPPs seek attorneys' fees in the amount of $48,320,739.40, which is 33% of the net settlement fund of $146,426,833.09 (after deducting expenses of $5,773,516.91). The requested fee is $10,338,011 ***less*** than the total lodestar of EPPs' counsel in the amount of $58,658,750.84 expended in diligent service of the Consumer Class over nine years and represents a ***negative multiplier*** of 0.82 on their professional time.

A. Applicable Legal Standard Governing the Award of Attorney Fees in Common Fund Cases

District courts may award reasonable attorney's fees and expenses from the settlement of a class action upon motion under Federal Rules of Civil Procedure 23(h) and 54(d)(2). Counsel who successfully represent a class and produce a benefit for the class members are entitled to be compensated for their services. As the Supreme Court has held, "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorneys' fee from a fund as a whole." *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980); *see also Mills v. Elec. Auto-Lite Co.,* 396 U.S. 375, 393 (1970). In *Blum v. Stenson,* 465 U.S. 886, 900 n.16 (1984), the Supreme Court recognized that under the common fund doctrine, a reasonable fee may be based "on a percentage of the fund bestowed on the

class." The purpose of the common fund doctrine is that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Washington Pub. Power Supply Sys. Sec. Litig.,* 19 F.3d 1291, 1300 (9th Cir. 1994). *See also Boeing*, 444 U.S. at 478 ("persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigants' expense.")

The common fund doctrine is fully consistent with the strong public policy favoring vigorous enforcement of unfair competition laws. Courts have recognized the importance of private litigation as an effective enforcement of antitrust laws. *See Pillsbury v. Conboy,* 459 U.S. 248, 262-63 (1983). Antitrust laws are best served by ensuring that private action "will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968).

In the Ninth Circuit, there are two primary methods used to calculate attorneys' fees: the lodestar method and the percentage-of-recovery method. "Whether to use one method over the other is in the court's discretion; however, the use of the percentage method in common fund cases appears to be dominant." *Ahlman v. Barnes*, No. SA-CV-20-835 (JGB), 2022 WL 16957837, at *4 (C.D. Cal. Sept. 12, 2022). *See also Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (courts regularly award fees as a percent-of-the recovery in common fund cases). The percentage-of-the-fund method is generally recognized as the superior method of calculating attorneys' fees in common fund settlements like this one because it "aligns the interests of class counsel and the class, rather than rewarding attorneys for hours spent on cases, as the lodestar method does." *In re Brooktree Secs. Litig.*, 915 F. Supp. 193, 196 (S.D. Cal. 1996).

Under the percentage-of-the-fund approach, the district court awards a percentage of the fund created by the attorneys' efforts as their attorneys' fee. *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 738 (9th Cir. 2016) ("*Stanger*"). The

percentage-of-recovery for fee computation purposes is based on the total amount of that fund made available. *Boeing,* 444 U.S. at 479-80. Cases in the Ninth Circuit often treat 25% as the benchmark percentage. *See*, *e.g*, *In re Google Inc. Street View Elec. Commc'ns Litig.,* 21 F.4th 1102, 1120 (9th Cir. 2021); *Asner v. SAG-AFTRA Health Fund,* No. 2:20-cv-10914, 2023 WL 6984582, at *12 (C.D. Cal Oct. 19, 2023), *reconsideration denied,* 2023 WL 8529996 (Dec.7, 2023).

However, courts in this Circuit and elsewhere often permit an upward departure from the benchmark due to the results achieved, the inherent complexities of the legal issues involved, and the risks assumed by attorneys involved. *See In re Lidoderm Antitrust Litig.,* MDL No. 2521, 2018 WL 4620695, at *4 (N.D. Cal. Sept. 20, 2018) ("As to the fifth factor, a fee award of one-third is within the range of awards in this Circuit."); *see also Larsen v. Trader Joe's Co.,* No. 11-cv-05188, 2014 WL 3404531, at *9 (N.D. Cal. July 11, 2014) (citing multiple cases awarding fees of 32% or greater); *In re Pac. Enters. Sec. Litig.,* 47 F.3d 373, 379 (9th Cir. 1995) (affirming award of one-third); *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1023 (E.D. Cal. 2019) (finding an attorney's fees award of one-third reasonable because of the case complexity, lengthy procedural history, and class wide results) (collecting cases awarding 33% in attorneys' fees).[5]

B. The Requested 33% Fee Award is Reasonable Under the Percentage-of-Recovery Method

In common fund cases, "[s]election of benchmark or any other rate must be supported by the findings that take into account all of the circumstances of the case." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002); *Ziegler v. GW*

[5] For cases outside of this Circuit, *see*, *e.g.*, *In re Pork Antitrust Litig.,* No. 18-1976, 2022 WL 4238416, at *7 (D. Minn. Sept. 14, 2022) (awarding 33% of the settlement as attorney fees in consumer indirect purchaser action); *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.,* No. 14-md-02542, 2021 WL 2328431, at *1 (S.D.N.Y. June 7, 2021) (awarding one-third of a $31 million settlement fund as attorneys' fee in indirect purchaser action); *In re Aggrenox Antitrust Litig.*, No. 3:14-MD-2516, 2018 WL 10705542, at *5 (D. Conn. July 19, 2018) (same).

Pharm, PLC., No. 21-cv-1019, 2024 U.S. Dist. LEXIS 52979, at *19 (S.D. Cal. Mar. 25, 2024)(awarding one-third).[6] Counsel for the EPPs seek a fee of 33% of the net settlement fund. While slightly higher than the 25% "benchmark," the $48,320,739.40 requested fee is $10,338,011.44 ***less*** than the total lodestar of EPP's counsel and represents a ***negative multiplier*** of 0.82 on their professional time expended over nine years.

In setting an appropriate percentage fee, courts typically analyze the following non-exhaustive factors: the results achieved for the class; the risks of litigation; the skill, experience, and performance of counsel (both sides); and the contingent nature of the fee. *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917, 2016 WL 4126533, at *4 n.8 (N.D. Cal. Aug. 3, 2016) ("*CRT*") (providing discussion on why these factors apply in the percentage of recovery context, in addition to lodestar analysis), *dismissed sub nom. In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 16-16368, 2017 WL 3468376 (9th Cir. Mar. 2, 2017); *see also Stanger,* 812 F. 3d at 740. All four factors support the 33% fee request here.

1. Class Counsel Achieved Excellent Results

Results are the primary factor in determining the reasonableness of an attorney's fee request. *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008). The total settlement benefit achieved for the Consumer Class is $152,200,000. By any measure, the indirect purchaser settlement achieved here represents an excellent result.

Regression modeling by the EPPs' expert, Dr. David Sunding, showed single damages of approximately $224 million for the entire EPP Class.[7] When trebled (which is not automatic in all state law indirect purchaser cases), this is approximately

[6] In considering whether a fee request is appropriate, courts typically consider similar fees in comparable cases. *Vizcaino*, 290 F.3d at 1048 (comparable fees is a factor to be considered). "[A] one-third fee is standard in complex antitrust cases" such as this one. *In re Flonase Antitrust Litig.,* 291 F.R.D. 93, 104 (E.D. Pa. 2013).

[7] *See* Expert Report of David Sunding, dated February 16, 2019, p. 17, Table 2.

$672 million. Based on the maximum single damages of $224 million for the entire conspiracy period, a total recovery of $152.2 million is ***nearly 68% of the maximum single damages*** and over 20% of the maximum treble damages. It is larger than the penalty amount recovered by the government in the criminal case and substantially higher (in absolute dollars) than the recovery by the DPPs in their direct action against StarKist. *See* DPP Fee Brief at 14:1-6 (ECF No. 3312-1). The EPPs' recovery also is comparable to the DPPs' percentage recovery as well. *See id.*

Here, a 68% recovery of single damages is meaningful and exceeds the usual range of recovery of 30-40% which is typical. *See Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 954 (9th Cir. 2009) (finding a settlement that was approximately 30% of the estimated damages before trebling fair, adequate, and reasonable); *accord Edwards v. Nat'l Milk Producers Fed'n*, No. 11-cv-04766-JSW, 2017 WL 3616638, at *3 (N.D. Cal. June 26, 2017) (finding a settlement representing approximately 30% of the total estimated single damages fair and reasonable). Obtaining nearly 68% of single damages, particularly in a case where single damages are as high as they were in this case, is an excellent result and warrants the approval of the requested 33% attorneys' fee award.

2. The Risks of Complex Litigation Were High

Class Counsel endured significant risk in pursuing this litigation. *See Vizcaino*, 290 F.3d at 1048 (degree of risk assumed and complexity relevant to reasonableness of fee request); *Stanger*, 812 F. 3d at 740 (including risk of litigation as a factor in determining whether requested fees are reasonable). Antitrust class actions are particularly complex matters and inherently risky. *See In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.*, No. 4:14-cv-02758-CW, 2017 WL 6040065, at *4 (N.D. Cal. Dec. 6, 2017) (noting that "antitrust class action is arguably the most complex action to prosecute. The legal and factual issues involved are always numerous and uncertain in outcome." (internal quotation omitted)).

With over 3,300 entries, the Court's docket reflects the complexities and risk of this nine-year old antitrust litigation, which survived multiple appeals, motions for reconsideration, *Daubert* challenges, evidentiary hearings, and disputes as to jury instructions, admissible evidence, and witnesses at trial. Although Class Counsel believe that the EPP Class claims had substantial merit, the risk and expense necessary to prosecute their claims through trial, and subsequent appeal were significant, and the inherent difficulties and delay in any final resolution for a multistate antitrust litigation like this case are substantial and well-known. *See*, *e.g.*, *Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1376 (9th Cir. 1993) (approving settlement based in part on "inherent risks of litigation").

Given the criminal convictions and guilty pleas by COSI, StarKist, and Bumble Bee, liability as to the plea period (November 2011 to December 2013) was strong. However, Bumble Bee was bankrupt and the claims against the parent companies were vigorously disputed and not part of the criminal investigation by the DOJ. StarKist and the Lion Companies vigorously disputed the scope, duration, and effect of the conspiracy. Manifold Decl., ¶41. The EPPs faced added complexities and risks at trial because, as consumers, they needed to prove liability for a multistate Cartwright Act Class claim and multiple individual state law claims as well as proving a pass-through of the overcharge to consumers. Those risks rise the longer litigation progresses. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M:07-cv-01827, 2012 WL 13209696, at *4 (N.D. Cal. Nov. 9, 2012) (finding counsel entitled to a fee award above the 25% benchmark because counsel had litigated for more than six years, which compounded the litigation risk).[8]

Another substantial risk was proving damages at trial through an expert economist, an inherently uncertain process fraught with conflicting expert testimony.

[8] The timing of the settlement and reduction of trial expense is also a relevant factor. *See Koenig v. Lime Crime, Inc.*, No. CV 16-503 PSG (JEMX), 2018 WL 11358228, at *6 (C.D. Cal. Apr. 2, 2018) (finding that settlement minimized litigation cost and that going to trial would significantly increase cost and attorney's fees sought).

Achieving maximum damages was based on two key assumptions: the jury would believe the EPPs' expert (not the Defendants' expert) and would award full damages for the entire Class Period and for all the repealer act states. The reaction of a jury, or even a judge, to such complex and disputed expert testimony is highly unpredictable, and in a battle of the experts a jury could find either no damages or just a fraction of the damages sought. *Dexter's LLC v. Gruma Corp.*, No. 23-cv-212, 2023 WL 8790268, at *4 (S.D. Cal. Dec. 19, 2023) ("'The court shall consider the vagaries of litigation and compare the significance of immediately recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation.'") (quoting *Nat'l Rural Telecomms Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004)).

Even a jury verdict is no assurance of success. Antitrust cases with complex expert econometric modeling and treble damages face the very real risks of reversal at trial, after verdict and on appeal, and this case was no exception. *In re National Football League's Sunday Ticket Antitrust Litig.*, 2:15-md-02668-PSG, Judgment (C.D. Cal. Aug. 20, 2024) (ECF No. 1542), is a cautionary tale. From June 5 through June 26, 2024, the Court presided over a jury trial of antitrust claims against the NFL by a commercial class and a residential class of DirecTV subscribers to the NFL Sunday Ticket. *Id*. at 2. The NFL defendants moved for judgment under Rule 50(a) at the close of the plaintiffs' case, which the Court denied. *Id*. On June 27, 2024, the jury returned a verdict in Plaintiffs' favor, finding that NFL Defendants had violated the Sherman Act and awarded the commercial class nearly $100 million and the residential class over $4.6 billion in damages. Thereafter, based on the Court's own view of the plaintiffs' experts, the Court granted judgment for the defendants as a matter of law and vacated both verdicts. *Id*.

Even if successful at trial, the EPPs were concerned that post-trial events would threaten any verdict they obtained. In addition to post-trial motions, the EPPs faced a significant risk that they would be unable to collect or enforce their judgment against

either Dongwon Industries Co., Ltd. or the Lion Companies, all foreign defendants who might not have sufficient assets in the United States to satisfy the judgment, and that StarKist might not have sufficient assets itself to satisfy the judgment. *See Stanger,* 812 F.3d at 740 (assessing reasonableness can include weighing "the risk of nonpayment" and "the difficulty and risks inherent in litigating against defendants in a [foreign nation]"). The litigation risks at trial, on appeal, and after a judgment were all very real here.

3. The Skill Required and the Quality of the Work Justify the Request

The experience, skill, and reputation of counsel also is relevant to the reasonableness of an attorney's fee request. *See In re Animation Workers Antitrust Litig.*, No. 3:14-CV-4062 LHK, 2016 WL 6663005, at *7 (N.D. Cal. Nov. 11, 2016) (finding relevance in the plaintiff's nationally recognized antitrust and class action litigation in assessing counsel's fee petition); *CRT*, 2016 WL 4126533, at *4 (finding relevance in counsel's 30 years of experience in antitrust cases and the experience of the other participating law firms); *LCD*, 2012 WL 13209696, at *4 (finding that counsel's skills and experience in antitrust warranted an upward adjustment from the 25% benchmark).

This multistate antitrust litigation involved significant factual investigations, research, complex econometric modeling, representation of over 65 Class Representatives, coordination among multiple plaintiff groups, tens of millions of documents, 200 depositions and related criminal and bankruptcy proceedings. As a result of Counsel's skill and expertise, this case has become a model for econometric regression modeling in complex antitrust matters, particularly when it comes to what an expert has shown related to antitrust injury at class certification.[9]

The proposed settlements were hard-fought, negotiated at arm's-length against

[9] *See* Mac Newton, *Fishy Class Certification: A Packaged Tuna Antitrust Case and a Shift in Class Certification Standards*, 88 MO. L. REV. (2023), https://scholarship.law.missouri.edu/mlr/vol88/iss2/14.

highly experienced opposing counsel and only achieved after extensive face-to-face settlement meetings and on the very eve of trial. ECF No. 3286-2, ¶¶ 17-24. The difficulty of achieving such a settlement against such experienced and motivated opposing counsel (Latham & Watkins and Sullivan Cromwell) is substantial. *See, e.g. Fernandez v. Corelogic Credco, LLC,* No. 20-cv-1262, 2024 WL 3209391, at * 16 (S.D. Cal. June 24, 2024) (analyzing whether defense counsel was "experienced and quality"); *In re Heritage Bond Litig.*, No. 02-ML1475 DT, 2005 WL 1594403, at *20 (C.D. Cal. June 10, 2005) ("The Court also notes that the quality of opposing counsel is important in evaluating the quality of Plaintiff's counsel's work.")

Class Counsel is a nationally recognized antitrust and class action law firm with considerable expertise representing indirect purchaser plaintiff classes in antirust matters. Manifold Decl., ¶45. Such qualifications also should be taken into account when evaluating an appropriate fee award. *See Fernandez,* 2024 WL 3209391, at *16 (approving a fee award based in part on the experience of counsel); *see also Vitamins Antitrust Litig.*, No. 99-197, MDL 1285, 2001 WL 34312839, at *11 (D.D.C. July 16, 2001) ("[T]he attorneys involved are among some of the most highly skilled in the country with extensive experience in similar class action litigation . . . The experience, skill and professionalism of counsel and the performance and quality of opposing counsel all weigh in favor of the requested fee."). Therefore, the skill required and quality of work in the present case weigh in favor of the requested fee award. Manifold Decl., Ex. 2 at 4, 5 (Judge Berg stating, "[I[t is my recommendation that the District Court consider an upward departure from the presumptively reasonable benchmark fee of 25% in common fund cases" and finding that "an award at [one-third] is warranted.")

4. The Contingent Fee Nature and Financial Burden Carried by Class Counsel Also Supports the Fee Request

The contingent nature of Class Counsel's representation further supports the fee request. *See In re Lithium Ion Batteries Antitrust Litig.*, No. 13-md-02420-YGR, 2018 WL 3064391, at *1 (N.D. Cal. May 16, 2018) ("attorneys' fees requested were

reasonable and entirely contingent upon success – Plaintiffs' Counsel risked time and effort and advanced costs with no ultimate guarantee of compensation"). Similarly, Class Counsel litigated this case on a wholly contingent basis with no guarantee of payment and recovery only if they were successful. Courts recognize the need to reward plaintiffs' counsel because of the risk of non-payment they face.

Here, the Court should not overlook the real risks faced by Class Counsel in accepting a large scale complicated and time-consuming antitrust action. Antitrust cases inevitably require a tremendous investment of time, energy, and resources. Class Counsel were ready to make, and did make an investment of over $5.7 million, with the very real possibility of an unsuccessful outcome. The demands and risks involved can readily deter participation by traditional class action firms. The fact that significant financial burden was carried for such an extended period supports the reasonableness of the requested fee percentage. *See Vizcaino,* 290 F.3d at 1050 ("These burdens [years of litigation, significant financial expenses, foregoing other work] are relevant circumstances.") (citations omitted).

C. Lodestar Cross-Check Confirms that the Requested Fee Is Reasonable

Although not required, courts often apply a lodestar "cross-check" on the reasonableness of the fee calculated as a percentage of the fund. *In re Online DVD-Rental Antitrust Litig.,* 779 F.3d 934, 949 (9th Cir. 2015); *Johnson v. MGM Holdings, Inc.*, 943 F.3d 1239, 1242 (9th Cir. 2019) (encouraging the use of the cross-check method). Lodestar is generally the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). To calculate lodestar, courts "multiply[] the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer." *Online DVD*, 779 F.3d at 949 (internal quotation omitted). "A lodestar cross-check does not require 'mathematical precision' or 'bean-counting,' and the court 'may rely on summaries submitted by the attorneys and need not review actual

billing records." *In re Optical Disk Drive Prods. Antitrust Litig.*, No. 10-md-02143-RS, 2021 WL 4124159, at *2 (N.D. Cal. Sept. 9, 2021) (citing *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 307 (3rd Cir. 2005)). Courts may "use a rough calculation of the lodestar as a cross-check to assess the reasonableness of the percentage award." *Fernandez v. Victoria Secret Stores, LLC*, No. CV 06-04149 MMM SHX, 2008 WL 8150856, at *9 (C.D. Cal. July 21, 2008).

The lodestar for the services performed by Class Counsel in this case results in a negative multiplier.[10] Class Counsel expended a total of 74,280.59 hours litigating this case following the appointment of lead counsel on March 24, 2016 for a total lodestar of $58,658,750.84. Rifkin Decl., ¶15. The total lodestar is greater than the percentage fee award that Class Counsel requests. The requested fee of 33% of $146,426,483 is $48,320,739.40, which is just 82% of their reduced lodestar. The ***negative*** multiplier of 0.82 supports the reasonableness of the percentage fee request. *Schiller v. David's Bridal, Inc.,* No. 1:10-cv-00616, 2012 WL 2117001, at *23 (E. D. Cal. June 11, 2012) (acknowledging reasonableness when "[n]otwithstanding [a] reduction in hourly rates . . . the resulting lodestar . . . is still greater than the percentage fee award counsel requests.")

There is no question that the requested fee award of 33% is reasonable based on a lodestar cross-check.

D. Class Counsel Propose the Fee Award Be Net of Expenses and Paid Over Time In Proportion to Settlement Monies Received

Class Counsel propose that any fees be awarded net of expenses and be paid

[10] Wolf Haldenstein provides summary hour and lodestar information in the accompanying Declaration of Mark C. Rifkin. Firm-by-firm breakdown of hours and lodestar by timekeeper are included in the additional declarations filed concurrently herewith and submitted for each firm that completed work on this case. At the request of Class Counsel, two of the firms representing EPPs, Kralowec Law Group and Oliver Bell Law Group, that performed specific limited tasks in the Action agreed to submit their lodestars at hourly rates below their regularly hourly rates. The total lodestar for EPPs' counsel includes their time at those reduced hourly rates.

over time at the same rate as settlement monies are received from StarKist and the Lion Companies. *See* App'x B (attached hereto).

First, Class Counsel propose to "net out" and pay reasonable costs and expenses in the amount of $5,773,516.91, which consists of $4,155,027.67 in expenses previously awarded in the COSI partial settlement plus $1,618,489.24 in additional expenses now being sought (if they are approved by the Court) from the total value of the cash settlement of $152.2 million. Assuming the Court grants the additional expense request in full, the total amount of $5,773,516.91 in expenses will be deducted from the total EPP Class settlement amount of $152,200,000, leaving a net settlement fund of $146,426,483 (the "Net Settlement Amount"). EPPs' counsel seek an attorneys' fee award equal to 33% of the Net Settlement Amount, in the amount of $48,320,739.40.[11]

Second, subject to the Court's approval, Class Counsel will pay the attorneys' fee award over time to coincide with the receipt of settlement monies from StarKist and the Lion Companies in proportion to the settlement funds as they are actually received from Defendants. Rifkin Decl., ¶ 16. *See* App'x B. While not required, and while Class Counsel would be reasonably justified in taking their ***entire*** attorneys' fee from the cash on hand at the time of the fee award, Class Counsel are prepared to share the burden of the delayed payment with the EPP Class and believe the short delay and the small risk of non-payment is warranted here.

To date, Class Counsel have received $32,000,000 from StarKist and $3,000,000 from the Lion Companies, which they are holding together with the $12,000,000 already received from COSI[12] in escrow as a qualified settlement fund.

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[11] If the Court awards less than $1,618,489.24 in additional expenses, Class Counsel will adjust the net calculation to reflect the expenses actually awarded by the Court and will calculate the 33% accordingly. Rifkin Decl., ¶20.

[12] The COSI Partial Settlement was for up to a maximum of $20 million. Of that amount, COSI unconditionally agreed to pay $15 million to the EPP Classes. To date, COSI has paid $10 million of that amount plus $2,042,830 for notice and (continued…)

Manifold Decl., ¶¶14-15. StarKist must pay another $18,000,000 into the Net Settlement Fund on the date of the Final Hearing. *See* App'x A. The remaining $70 million will be paid between November 23, 2024, and January 5, 2026. *See id.*

The StarKist Settlement Agreement and the Lion Settlement Agreement both permit Class Counsel to be paid attorneys' fees awarded by the Court five days following entry of the Court's award of fees and costs. *See* ECF No. 3286-2 at 40, ¶14.1; at 68, ¶14.1. At that time, assuming the Court promptly approves the settlement and grants the additional expense request in full, the total amount of settlement proceeds on hand will be approximately $65,042,830 (including interest earned on the settlement proceeds already paid to Class Counsel). Rifkin Decl., ¶ 21. After deducting $5,773,516.91 for allowed expenses, the resulting 33% attorneys' fee on that amount ($59,269,313.09) will be $19,558,873.30, which Class Counsel will be permitted to take five days following the Court's award of fees and costs as permitted by the Settlement Agreements.[13] ECF No. 3286-2 at 40, ¶14.1; at 68, ¶14.1. Thereafter, Class Counsel will withdraw a proportionate 33% share as their Court-awarded attorneys' fees from each subsequent payment from StarKist and the Lion Companies as they are received. *Id.*

V. EXPENSES ARE REASONABLE AND SHOULD BE REIMBURSED

Class Counsel respectfully request reimbursement for their additional litigation costs and expenses in the amount of $1,618,489.24 incurred to prosecute this case since May 2021. Rifkin Decl., ¶ 17. They also respectfully request that $206,379.11

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administration costs. Manifold Decl., ¶ 8. The balance of the settlement payment from COSI is due to be paid on or before 30 days prior to distribution of the Net Settlement Fund to EPP Class members. *Id.* In addition, COSI has paid $206,379.11 in administration costs incurred in 2024, which will be returned to it. That sum will be credited against the settlement payment balance still owed to the EPP Classes under the payment terms of the settlement. *Id.*, ¶¶9-10.

[13] That calculation will be changed proportionately if the Court reduces either the amount of expenses to reimburse or the amount of attorneys' fees to award to EPPs' counsel. Rifkin Decl., ¶ 20.

of that amount be returned to COSI in the form of a credit against its remaining payment obligation as reimbursement for administration costs that were common to both the COSI Partial Settlement and the proposed StarKist and Lion Companies settlements. *Id;* ECF 2386-2 at 2-4 (¶¶ 5-8). After approving the COSI Partial Settlement, the Court separately approved an Expense Award of $4,155,027.67. ECF No. 2872 at 2. Since that date, Class Counsel have advanced $1,618,489.24 in additional reasonable expenses for which they now seek reimbursement. Rifkin Decl., ¶17. Under the common fund doctrine, Class Counsel are entitled to be reimbursed for all reasonable out-of-pocket expenses and costs incurred to prosecute the claims and obtain a settlement. *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 785-86 (9th Cir. 2022) (fundamental purpose is to spread a party's burden of litigation expenses among those who benefitted); *Fernandez,* 2024 WL 3209391, at *21.

These expenses are in line with those approved by courts in this Circuit and are all the type of expenses routinely charged to hourly paying clients. *See, e.g.*, *In re LendingClub Sec. Litig.*, No. C 16-02627 WHA, 2018 WL 4586669, at *3 (N.D. Cal. Sept. 24, 2018) (expenses such as expert and consultant fees, court fees, travel and lodging costs, legal research fees, and copying expenses were reasonable and recoverable); *Carlin,* 380 F. Supp. 3d at 1023-24; *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (approving expenses normally charged to paying client). Details concerning the expenses incurred are listed in the accompanying declarations. Accordingly, Class Counsel respectfully requests that litigation costs and expenses incurred since May 2021 in the amount of $1,618,489.24 be reimbursed.

VI. SERVICE AWARDS SHOULD BE APPROVED

Throughout nine years of litigation, the individual Class Representatives remained devoted to their duties and actively participated in the litigation. EPPs request a total Service Award in the amount of $294,000. The monies will be distributed to the sixty-seven (67) Class Representatives and three Illinois plaintiffs based on a tier system reflecting the extent of time and work that each put into the

case. *See* ECF No. 3286-2, ¶¶ 25-29. A chart of the Tier Breakdown by Class Representative is attached hereto as App'x C for the convenience of the Court and Settlement Class Members. The requested Service Award amount is insignificant (0.19%) in light of the Total Benefit Amount ($152.2 million).

The requested tiered Service Awards reflect the Class Representatives' specific contributions to this case. All of the forty-five (45) Class Representatives who participated in discovery and provided multiple Class standing declarations will receive a service award of $3,000 (Tier 1) for a total of $135,000. *Id*. For the fourteen (14) Class Representatives who sat for a deposition as part of the class certification process, the higher award of $6,000 is requested for a total of $84,000. *Id*. For the eight (8) Class Representatives who were deposed more than once (EPP Drew Gorman), functioned as a plaintiff representative in the Bumble Bee bankruptcy proceedings or were previously deposed and then prepped and prepared to appear at trial, the highest award of $9,000 is appropriate for a total of $72,000. *Id*.

Courts routinely grant service awards for class representatives. *Rodriguez*, 563 F.3d at 958-59. Incentive awards are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and to recognize their willingness to function as private attorneys general. *Id.* There is no bright line minimum or maximum for service awards, they "typically range from $2,000 to $10,000." *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 267 (N.D. Cal. 2015) (collecting cases discussing award amounts); *Online DVD*, 779 F.3d at 943 (affirming approval of "incentive awards of $5,000 each for nine class representatives" as "well within the usual norms of 'modest compensation' paid to class representatives." (citations omitted)). The Service Awards requested are well within the usual norms and should be approved.

VII. THE COURT SHOULD APPROVE THE REASONABLE SETLEMENT ADMINISTRATION AND NOTICE COSTS

Courts allow for reimbursement of reasonable settlement administration fees

and costs and any costs associated with providing class notice. *See Online DVD*, 779 F.3d at 953. The Settlement Notice Plan, approved by the Court, was robust and provided notice (in various forms) to Settlement Class Members via email, U.S. Mail, posting on the Settlement Website and by digital and print publication. ECF No. 3313-1, ¶¶4-20; ECF No. 3302 at 12-19. The digital and print efforts alone reached more than 70% of potential Settlement Class Members. *Id*., ¶26.

The costs of a robust notice program to a large consumer class is substantial. For this reason, StarKist advanced $1 million and Lion Companies agreed to pay up to $200,000 to cover the costs of notice administration. Manifold Decl., ¶59. ECF No. 3302 at 15 ("an interim distribution of $1.2 million for notice costs prior to the Fairness Hearing is appropriate and is approved under the terms provided in the Settlement Agreements"). As of October 18, 2024, JND has incurred reasonable expenses in the amount of $726,702.30, slightly below the estimates provided to the Court. Manifold Decl., ¶59. As permitted by the terms of settlements agreements, Class Counsel has paid JND for these reasonable costs of notice administration. *Id.* ECF No. 3302 at 15; ECF No. 3286-2 at 29, ¶5.3 and at 58, ¶5.3 (advanced Notice Costs not recoverable by the Settling Defendants).

JND has provided an estimate for the costs of processing claims, running fraud analysis, and dispersing the Distribution Funds of $2.1 million to $5.8 million. ECF No. 3302 at 19; ECF No. 3286-2 at 15-16, ¶41. The range is dependent on the number of claims received. *Id*. For example, the estimated range of processing from 500,000 to 2,000,000 claims could range from $1.3 million or over $5 million. *Id*. Settlement Class Counsel request permission to pay the periodic costs and expenses of claims processing out of the Settlement Fund and, due to the delayed distribution of the Settlement Funds to authorized claimants, will file periodic reports as directed by the Court to update the Court as to the status and estimated costs for the Distribution Plan.

VIII. CONCLUSION

For the foregoing reasons, the EPPs respectfully request that, in conjunction with Final Approval of the proposed settlements, the Court grant their request for attorneys' fees in the amount of $48,320,739.40, award reimbursement of their additional litigation expenses in the amount of $1,618,489.24, and approve service awards to the named Class Representatives in the total amount of $294,000.

Dated: October 25, 2024

By: *s/ Betsy C. Manifold*
BETSY C. MANIFOLD

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
BETSY C. MANIFOLD
RACHELE R. BYRD
ALEX J. TRAMONTANO
750 B Street, Suite 1820
San Diego, CA 92101
Telephone: 619/239-4599
Facsimile: 619/234-4599
manifold@whafh.com
byrd@whafh.com
tramontano@whafh.com

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
MARK C. RIFKIN
THOMAS H. BURT
270 Madison Avenue
New York, New York 10016
Telephone: 212/545-4600
Facsimile: 212/545-4653
rifkin@whafh.com
burt@whafh.com

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLC
CARL MALMSTROM
111 West Jackson, Suite 1700

Chicago, IL 60604
Telephone: 312/984-0000
Facsimile: 312/212-4401
malmstrom@whafh.com

Class Counsel for the End Payer Plaintiffs

4878-0242-7890v1

APPENDIX A

In Re: Packaged Seafood Products Antitrust Litigation,
Case No. 15-MD-2670 DMS (MSB) (S.D. Cal.)

StarKist Payment Schedule:

Date	Event/Deadline	Additional Amount Due	Total Amount
8/23/2024 (Friday)	Preliminary Approval	N/A	N/A
9/22/2024 (Sunday)	30 days after Preliminary Approval	$32,000,000.00	$32,000,000.00
11/22/2024 (Friday)	Anticipated Final Approval Date	$18,000,000.00	$50,000,000.00
2/19/2025 (Wednesday)	180 days after Preliminary Approval	$15,000,000.00	$65,000,000.00
4/20/2025 (Sunday)	240 days after Preliminary Approval	$12,000,000.00	$77,000,000.00
6/19/2025 (Thursday)	300 days after Preliminary Approval	$11,000,000.00	$88,000,000.00
8/18/2025 (Monday)	360 days after Preliminary Approval	$11,000,000.00	$99,000,000.00
10/17/2025 (Friday)	420 days after Preliminary Approval	$11,000,000.00	$10,000,000.00
12/16/2025 (Tuesday)	480 days after Preliminary Approval	$10,000,000.00	$120,000,000.00
1/05/2026 (Monday)	500 days after Preliminary Approval	$10,000,000.00	$130,000,000.00

See ECF No. 3285-2 (StarKist Settlement Agreement) at 26, Paragraph 1.24.

Lion Payment Schedule:

Date	Event/Deadline	Additional Amount Due	Total Amount
8/23/2024 (Friday)	Preliminary Approval	N/A	N/A
9/22/2024 (Sunday)	30 days after Preliminary Approval	$3,000,000.00	$ 3,000,000.00
11/22/2024 (Friday)	Anticipated Final Approval date	N/A	N/A
1/6/2025 (Monday)	45 days after Final Approval	$3,000,000.00	$6,000,000.00

See ECF No. 3285-2 (Lion Companies Settlement Agreement) at 54, Paragraph 1.22

COSI Payment Schedule:

Date	Event/Deadline	Additional Amount Due	Total Amount
Sunday, March 27, 2022	60 days after Preliminary Approval	$ 5,000,000.00	$ 5,000,000.00
Sunday, August 14, 2022	30 days after Final Approval	$5,000,000.00	$10,000,000.00
Sunday, August 14, 2022	30 days after Final Approval	$ 5,000,000.00	$15,000,000.00
Monday, January 5, 2026	30 days prior to Distribution	$5,000,000.00	$20,000,000.00

See ECF No. 2846-2 (Partial (COSI) Settlement) at 23, Paragraph 11(d).

APPENDIX B

Calculations: Fee Award Be Paid Over Time Proportional to Settlement Monies

Total Money Received at or before Final Approval $65,042,830.00 **total**

- $50,000,000 from StarKist
- $3,000,000 from Lion
- $12,042,830.00 from COSI

Total Costs to be Presently Netted Out or Already Paid from COSI , , . total

- -$4,155,027.67 for Approved Expenses (per ECF 2872)
- -$1,618,489.24 for Costs/Expenses since 4/2022 (Net Expenses from Mot. for Preliminary Approval)

$65,042,830.00	**Total Money at Final Approval**
– $5,773,516.91	**Total Costs Expenses**
$59,269,313.09	**Total Fund at Final Approval after netting out costs**

Fees received at final approval , , .

- 33% of $59,269,313.09 (Total Fund at Final Approval after netting out costs) = $19,558,873.30

Fees received post final approval , , .

- $26,400,000.00 (33% of all remaining payments from StarKist)
- $1,650,000.00 (33% of all remaining payments from COSI)
- $990,000.00 (33% of all remaining payments from Lion)

Combined Attys Fees Total , , .

- $19,558,873.30 (at final approval) + $29,040,000.00 (post-final approval) = $48,320,739.40 (Total Fees Award)

Est. Remaining Balance of Funds at the time of Distribution , , .

- The costs of administering the settlement fund, processing claims will be paid out of this figure. (Est. at $1,300,000.00 to $5,000,000.00.)
- Any Service Awards to award to Class Representatives will be paid out of this amount ($294,000.00 requested).

APPENDIX C

CLASS REPRESENTATION SERVICE AWARDS TIER CHART

	Tier 1	Tier 2	Tier 3
# of Plfs	46	14	8
Individual Award	$3,000	$6,000	$9,000
Total Award	$138,000	$84,000	$72,000
List of Plaintiffs in Each Tier	Adams, Louise Alidad, Nay Bartling, Jessica Blumstein, Barbara Buenning, Barbara Caldwell, Scott Canterbury, Jade Christensen, Casey Cooper, Jody Daniels, Sundé Depperschmidt, Brian Dravid, Vivek Etten, Rob Felix Garcia, Ana Gabriela Frick, John Garner, Kathleen Gipson, Stephanie Grant, Tina Hughes, Tya Jackson, Amy Jacobus, Marissa Johnson, Danielle Johnston, Zenda Juetten, Michael Kratky, Steven Lingnofski, Kathy McMahon, Katherine Mey, Diana Milliner, Liza Montoya, Laura Peck, Kirsten Perron, Elizabeth Peters, Valerie Peychal, John	Bowman, Melissa Buff, Michael Durand (f/k/a Gore), Kathy Eason (f/k/a Craig), Kim Emery, Gloria Gutierrez, Edgardo Lown, Carla Musgrave, Rick Norris, Corey Pels, John Skaff, Rob Stearns, Greg Vander Laan, Bonnie Wiese, Julie	Birnbaum, Gay Childs, Laura Gorman, Andrew Hall, Lisa Hudson, Mary Nelson, Jennifer Olson, Barbara Twitchell, Elizabeth

	Rickman, Audra Rodriguez, Erica San Agustin, Joelyna A. Sartori, Amber Simoens, Rebecca Lee Stiller, Nancy Todd, Christopher Trent, John Warren, Nigel Willoughby III, Thomas Zwirlein, Dan		

TAB 19A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE LIBOR-BASED FINANCIAL INSTRUMENTS ANTITRUST LITIGATION	MDL No. 11-md-2262 (NRB)
THIS DOCUMENT RELATES TO:	
The OTC Action	No. 11-cv-5450

~~[PROPOSED]~~ ORDER APPROVING OTC PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND INCENTIVE AWARDS

This matter having come before the Court by way of the OTC Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Incentive Awards, filed September 8, 2023:

IT IS HEREBY ORDERED THAT:

1. Class Counsel shall receive $21,871,993.48 in attorneys' fees, to be paid out of the settlement fund created by the settlement with Defendants MUFG Bank, Ltd., The Norinchukin Bank, and Société Générale (the "Settlement"), plus interest on the foregoing amount, accruing from entry of this Order until paid, at the same rate earned by the settlement fund.

2. Class Counsel shall be reimbursed $2,512,026.10 in costs and expenses reasonably incurred in the prosecution and settlement of this litigation, to be paid out of the settlement fund created by the Settlement, plus interest on the foregoing amount, accruing from entry of this Order until paid, at the same rate earned by the settlement fund.

3. Each of the OTC Plaintiffs shall be paid a service award equal to $100,000, to be paid out of the settlement fund created by the Settlement.

4. Susman Godfrey L.L.P. and Hausfeld L.L.P. ("Class Counsel") shall have the sole authority to allocate and distribute any attorneys' fees and expenses awarded from the Settlement pursuant to this order among counsel who performed work on behalf of the OTC Plaintiffs in a manner which, in the opinion of Class Counsel, fairly compensates such counsel for their services.

Dated: October 17, 2023

New York, New York

Hon. Naomi Reice Buchwald
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE LIBOR-BASED FINANCIAL INSTRUMENTS ANTITRUST LITIGATION	MDL No. 11-md-2262 (NRB)
THIS DOCUMENT RELATES TO:	
The OTC Action	No. 11-cv-5450

[PROPOSED] ORDER APPROVING OTC PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

This matter having come before the Court by way of the OTC Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Incentive Awards, filed October 27, 2023:

IT IS HEREBY ORDERED THAT:

1. Class Counsel shall receive $25,228,596.71 in attorneys' fees, to be paid out of the settlement fund created by the settlement with Defendants Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. (n/k/a Coöperatieve Rabobank U.A.), Lloyds Banking Group plc, Lloyds Bank plc, HBOS plc, and Bank of Scotland plc, Royal Bank of Canada, and WestLB AG (n/k/a Portigon AG) and Westdeutsche Immobilienbank AG (n/k/a Westdeutsche Immobilien Servicing AG) (the "Settlement"), plus interest on the foregoing amount, accruing from entry of this Order until paid, at the same rate earned by the settlement fund.

2. Class Counsel shall be reimbursed $85,613.16 in costs and expenses reasonably incurred in the prosecution and settlement of this litigation, to be paid out of the settlement fund created by the Settlement, plus interest on the foregoing amount, accruing from entry of this Order until paid, at the same rate earned by the settlement fund.

3. Susman Godfrey L.L.P. and Hausfeld L.L.P. ("Class Counsel") shall have the sole authority to allocate and distribute any attorneys' fees and expenses awarded from the Settlement pursuant to this order among counsel who performed work on behalf of the OTC Plaintiffs in a manner which, in the opinion of Class Counsel, fairly compensates such counsel for their services.

Dated: December 12, 2023
New York, New York

Hon. Naomi Reice Buchwald
UNITED STATES DISTRICT JUDGE

TAB 19B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE LIBOR-BASED FINANCIAL INSTRUMENTS ANTITRUST LITIGATION	MDL No. 11-md-2262 (NRB)
THIS DOCUMENT RELATES TO:	
The OTC Action	No. 11-cv-5450

MEMORANDUM IN SUPPORT OF OTC PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND INCENTIVE AWARDS

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Court-appointed co-lead class counsel Susman Godfrey L.L.P. and Hausfeld LLP ("Class Counsel") respectfully submit this memorandum in support of the OTC Plaintiffs' application for an award of attorneys' fees, expenses, and class representative service awards on their $90 million settlement with Defendants MUFG Bank, Ltd., The Norinchukin Bank, and Société Générale (the "Settlement").

Introduction

This litigation has been hard-fought by Class Counsel for nearly twelve years. Despite Defendants' repeated attempts to have this case dismiss and to defeat class certification, OTC Plaintiffs have persevered and repeatedly achieved outstanding results for the class. Because of Class Counsel's zealous pursuit of this case, OTC Plaintiffs recently achieved a fifth settlement, shortly followed by a sixth, and recovered nearly $200 million more for the class.

This settlement comes on top of OTC Plaintiffs' $590 million in prior settlements—$120 million from Barclays, $130 million from Citibank, $100 million from HSBC; and $240 million from Deutsche Bank. Two months after reaching this Settlement, OTC Plaintiffs reached yet another combined settlement, totaling $101 million, with four more defendants, namely Lloyds, Rabobank, RBC, and Portigon.

These settlements represent a tremendous recovery for the class: $680 million through the date of this Settlement and $781 million through the date of the subsequent settlement.

OTC Plaintiffs now request an interim award of attorneys' fees from the Settlement with MUFG, Norinchukin, and SocGen of 25% of the net settlement fund after the deduction of litigation expenses.[1] The 25% interim fee award OTC Plaintiffs request here is well within the

[1] As with OTC Plaintiffs' prior attorneys' fee applications, OTC Plaintiffs respectfully ask that the Court reserve judgment on a request for the difference between the fee sought now and a final award of 30% of the net Settlement (after deducting expenses) until a later stage of this litigation. *See* ECF 2350 at 6, 13; ECF 2387 at 1; ECF 2705 at 1.

range of interim awards regularly granted in comparable multi-defendant antitrust class actions and will, we respectfully submit, fairly compensate Class Counsel for the excellent result they have obtained for the OTC class. This is the same percentage the Court awarded as attorneys' fees from the Exchange Based Plaintiffs' (EBPs) settlements and a lower percentage than the Court awarded on the Lender and Non-Defendant OTC Plaintiffs' settlements. *See In re LIBOR-Based Fin. Instr. Antitrust Litig.* ("*EBP Fee Op.*"), 2020 WL 6891417, at *4–5 (S.D.N.Y. 2020). OTC Plaintiffs' request would result in a lodestar multiplier of 1.56, at the low end of the range awarded in comparable actions.

OTC Plaintiffs additionally seek reimbursement of $2,512,026.10 in unreimbursed costs and expenses incurred by Class Counsel on behalf of the OTC Class between February 15, 2018, the date of the HSBC Settlement (the cut off date for Class Counsel's last reimbursement request) and May 12, 2023 (the date of this Settlement). "[C]ourts in the Second Circuit normally grant expense requests in common fund cases as a matter of course." ECF 2683, at 2 (alteration in original) (quoting *In re IMAX Sec. Litig.*, 2012 WL 3133476, at *6 (S.D.N.Y. 2012)).

Argument

I. Class Counsel's Fee Request Is Fair and Reasonable

A. Class Counsel Are Entitled to Fees from the Common Fund

"[A] lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). This principle applies to class action settlements, including interim settlements. *See In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *9 (E.D.N.Y. Oct. 23, 2012) ("Where a class action settlement creates a common fund the plaintiffs' attorneys are entitled to a reasonable fee—set by the court—to be taken from the fund. Fees can be awarded based on an interim settlement fund.").

B. The Requested Fee Is Fair and Reasonable Under the Percentage Method

The Second Circuit's preferred method for calculating a fair and reasonable attorneys' fee is to award "some percentage of the recovery." *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). "The trend in this Circuit is toward the percentage method" because it "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.'" *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). This principle and preference hold equally true for interim fee awards drawn from partial settlements with one or more defendants in a multi-defendant action. *See In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *9 (noting that "[f]ees can be awarded based on an interim settlement" and recounting the Second Circuit's "trend" of "utiliz[ing] the percentage method" with the lodestar/multiplier method as a cross-check).

The percentage method, by tying the fee award to the result achieved for the class, "allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure,'" *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 330 (3d Cir. 2011); thus, Class Counsel's request also corresponds neatly to the settlement from which it arises. This Settlement—which provides $90 million in cash on top of OTC Plaintiffs' $590 million in prior settlements—is by any measure a substantially favorable result for the OTC Class. As the primary measure of Class Counsel's success is the recovery they have achieved for the OTC Class, granting Class Counsel's application for 25% of that favorable result provides a proportionate and appropriate reward for Class Counsel's efforts. *See Laydon I*, *infra*, slip op. ¶ 5(b)-(c), (f) (awarding "fair, reasonable, appropriate" fee of 25% of partial settlement fund, noting that "in the absence of a settlement, [the claims against the settling defendants] would have involved lengthy proceedings with uncertain resolution," and recognizing that "[h]ad Plaintiffs' Counsel not achieved the Settlements, a risk would remain that Plaintiffs and the

Settlement Class may have recovered less or nothing from [the settling defendants]").

1. OTC Plaintiffs' Requested Fee Aligns with Attorneys' Fee Awards in Other Large Antitrust Cases

Courts regularly make successive interim fee awards over the life of a multi-defendant antitrust class action at percentages equivalent to and higher than the 25% requested by Class Counsel here. Table 1 below describes fee awards made in a number of recent antitrust class actions—all cases where these awards were made from partial settlements—in descending order by size of the settlement fund. OTC Plaintiffs' current application for 25% of a $90 million common fund is well within the range of these other interim awards in recent antitrust cases.

Table 1

Case	Settlement Fund	Fee Awarded	Fee Percentage
In re Urethane Antitrust Litig. (*Urethane III*), No. 04-md-1616 (D. Kan. July 29, 2016), ECF 3276	$835 million	$278 million	33-1/3%
Alaska Elec. Pension Fund v. Bank of Am. Corp., 2018 WL 6250657, at *1 (S.D.N.Y. 2018)	$504.5 million	$126.4 million	26%
In re Auto. Parts Antitrust Litig., 2018 WL 11260510, at *4 (E.D. Mich. 2018)	$432.8 million	$108 million	25%
In re Air Cargo Shipping Servs. Antitrust Litig. (*Air Cargo V*), No. 06-md-1775 (E.D.N.Y. Oct. 25, 2016), ECF 2484	$388 million	$97 million	25%
In re Automotive Parts Antitrust Litig. (*Auto Parts II*), 2017 WL 3525415 (E.D. Mich. 2017)	$379 million	$75.7 million	20%
In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig., 2021 WL 5369798, at *6 (D. Kan. 2021)	$345 million	$115 million	33-1/3%
In re Air Cargo Shipping Servs. Antitrust Litig. (*Air Cargo IV*), 2015 WL 5918273 (E.D.N.Y. 2015)	$333 million	$73.2 million	22%
Sullivan v. Barclays Bank plc, No. 13-cv-2811 (S.D.N.Y. May 18, 2018), ECF 425	$309 million	$68.71 million	22.24%
In re Capacitors Antitrust Litig., 2020 WL 6544472, at *2 (N.D. Cal. 2020)	$232 million	$69.6 million	30%
In re Automotive Parts Antitrust Litig. (*Auto Parts I*), No. 12-cv-0103 (E.D. Mich. Dec. 5, 2016), ECF 545	$225 million	$44.9 million	20%
In re Air Cargo Shipping Servs. Antitrust Litig. (*Air Cargo III*), 2012 WL 3138596 (E.D.N.Y. Aug. 2, 2012)	$222 million	$54.4 million	24%

In re Domestic Drywall Antitrust Litig., No. 13-md-2437 (E.D. Pa. July 17, 2018), ECF 767, 768	$190 million	$63.53 million	33-1/3%
In re Auto. Parts Antitrust Litig., 2020 WL 5653257, at *4 (E.D. Mich. 2020)	$183 million	$40.47 million	22%
In re Broiler Chicken Antitrust Litig., 2021 WL 5709250, at *5 (N.D. Ill. 2021)	$169.6 million	$55 million	33-1/3%
Precision Assocs., Inc. v. Panalpina World Transport (Holding) Ltd. (*Freight Forwarders II*), 2015 WL 6964973 (E.D.N.Y. Nov. 10, 2015)	$169 million	$42.2 million	25%
In re Steel Antitrust Litig. (*Steel I*), No. 08-cv-5214 (N.D. Ill. Oct. 22, 2014), ECF 539	$164 million	$54.1 million	33%
In re Air Cargo Shipping Servs. Antitrust Litig. (*Air Cargo II*), 2011 WL 2909162 (E.D.N.Y. July 15, 2011)	$154 million	$38.5 million	25%
Laydon v. Mizuho Bank, Ltd. (*Laydon II*), No. 12-cv-3419 (S.D.N.Y. Dec. 7, 2017), ECF 837	$148 million	$34.9 million	23.6%
In re Lithium Ion Batteries Antitrust Litig., No. 13-md-2420 (N.D. Cal.), ECF 2322	$139.3 million	$41.79 million	30%
In re CRT Antitrust Litig. (*CRT I*), 2016 WL 183285 (N.D. Cal. Jan. 14, 2016)	$127.5 million	$38.2 million	30%
Precision Assocs., Inc. v. Panalpina World Transport (Holding) Ltd. (*Freight Forwarders III*), No. 08-cv-0042 (E.D.N.Y. Nov. 07, 2016), ECF 1396	$118 million	$29.7 million	25%
In re Auto. Parts Antitrust Litig., 2018 WL 7108072, at *4 (E.D. Mich. 2018)	$115 million	$33.3 million	30%
Precision Assocs., Inc. v. Panalpina World Transport (Holding) Ltd. (*Freight Forwarders I*), No. 08-cv-0042 (E.D.N.Y. Dec. 27, 2013), ECF 984	$112 million	$16.9 million	15%[2]
In re Municipal Derivatives Antitrust Litig. (*Muni Derivatives IV*), No. 08-cv-2516 (S.D.N.Y. July 8, 2016), ECF 2029	$101 million	$33 million	33-1/3%

Fee awards reaching up to one-third of the proceeds of partial settlements are consistent with fee awards granted in class actions generally, where "fees that are 30 percent or greater" are "routine[]." *Velez v. Novartis*, 2010 WL 4877852, at *21 (S.D.N.Y. 2010).[3]

[2] In *Freight Forwarders I*, Judge Gleeson granted an interim fee award of 15% of the initial settlement fund, rejecting class counsel's request for 33-1/3% of that fund. Class counsel later requested and received 25% of the subsequent settlement funds in *Freight Forwarders II* and *III*.

[3] *See also Hyun v. Ippudo USA Holdings*, 2016 WL 1222347, at *3 (S.D.N.Y. Mar. 24, 2016) ("Fee awards representing one third of the total recovery are common in this District."). This benchmark furthermore holds true for settlements with large common funds like this one. *See In re Initial Public Offering Secs. Litig.*, 671 F. Supp. 2d

Plus, the 25% fee requested here is significantly less than Class Counsel could obtain on the open market. For example, Susman Godfrey regularly takes high-stakes non-class commercial cases on a contingent fee basis, and typically negotiates contingent fee arrangements with individual non-class plaintiff clients equal to 40% of the gross sum recovered in cases where the firm advances expenses, with percentage increases based on the milestones reached at the time of settlement. *See* ECF 2280 ¶ 7. "This fact is highly relevant to determining the appropriateness of the award because the Court's ultimate task is to 'approximate the reasonable fee that a competitive market would bear.'" *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *17 (S.D.N.Y. 2015) (quoting *Johnson v. City of New York*, 2010 WL 5818290, at *4 (E.D.N.Y. 2010)); *accord In re Continental Ill. Secs. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) ("The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client.").

2. OTC Plaintiffs' Requested Fee Is Consistent with Other *Libor* Attorneys' Fee Awards

OTC Plaintiffs' requested fee of 25% of the net settlement fund is consistent with this Court's awards in other *Libor* cases. The Court awarded 25% of the net $187 million settlement fund from EBPs' settlements with seven defendants in November 2020. *See EBP Fee Op.*, 2020 WL 6891417, at *5; *see also Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 2018 WL 6250657, at *1 (awarding 26% of a net settlement fund on $504.5 million in settlements in the ISDA fix antitrust litigation). The Court awarded 28.06% of the Non-Defendant OTC Plaintiffs'

467, 516 (S.D.N.Y. 2009) (awarding plaintiffs' counsel one-third of the net settlement fund of $170 million); *In re Priceline.com, Inc. Secs. Litig.*, 2007 WL 2115592, at *4 (D. Conn. July 20, 2007) (awarding 30% of an $80 million settlement); *In re Deutsche Telekom AG Secs. Litig.*, 2005 WL 7984326, at *4 (S.D.N.Y. June 14, 2005) (Buchwald, J.) (awarding attorneys' fees of 28% of a $120 million settlement); *Kurzweil v. Philip Morris Companies, Inc.*, 1999 WL 1076105, at *3 (S.D.N.Y. Nov. 30, 1999) (awarding class counsel 30% of a $123 million settlement); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 394 (S.D.N.Y. 1999) (awarding plaintiffs' counsel attorneys' fees of 27.5% of a $116.6 million settlement).

$21.775 million settlement fund. *Id.* at *4 (citing ECF 3185). The Court awarded 29.38% and 28.08% in fees from the Lender Plaintiffs' $31 million and $4 million settlement funds, respectively. *See id.* at *4 (citing ECF 2777 and 3097).

The Court awarded 18.49% and 18.5% of the net settlement fund for OTC Plaintiffs' prior settlements. *See* ECF 2683 at 9–10; ECF 2745. OTC Plaintiffs respectfully submit that a higher percentage award from this Settlement is appropriate for three reasons. *First*, an award of 25% of the net settlement fund from the MUFG, Norinchukin, and SocGen settlement would result in a reasonable aggregate percentage award of attorneys' fees from all OTC settlements to date. Combined with the Court's earlier attorneys' fees awards, OTC Plaintiffs' requested fee here would result in a combined fee award of 19.4% of the combined $680 million in settlement funds through the MUFG, Norinchukin, and SocGen settlement. That aggregate fee award is comparable to the Court's prior awards of 18.49% and 18.5% from the Barclays–Citi and Deutsche Bank–HSBC settlements. *See Barclays–Citi OTC Fee Op.*, 2018 WL 3863445, at *4.

Second, OTC Plaintiffs' requested fee represents a lower lodestar multiplier (1.56) than OTC Plaintiffs' prior fee awards (1.65 for Barclays–Citi and 3.23 for Deutsche Bank–HSBC). *See* ECF 2705 at 10; ECF 2745; *OTC Barclays-Citi Fee Op.*, 2018 WL 3863445, at *4. This relatively low lodestar multiplier reflects Class Counsel's significant investment of attorney time in prosecuting this action by, among other things, successful appealing the dismissal of all three settling Defendants on personal jurisdiction grounds, reviewing 3.5 million documents produced by Defendants, including the painstaking review of more than 126,000 audio recordings of defendants' phone calls, along with continued litigation in this Court during that appeal and after

the Second Circuit's decision. *See* Joint Decl. ¶ 18.[4] That investment of attorney time ensured Class Counsel were well prepared to pursue the class's claims if and when the Second Circuit ruled in their favor and litigation in this Court re-commenced against the foreign bank defendants. *See Goldberger*, 209 F.3d at 50 (holding that "the time and labor expended by counsel" and "the magnitude and complexities of the litigation" are factors the Court should consider in evaluating the reasonableness of a requested fee).

On top of that, Class Counsel's increased lodestar—and decreased lodestar multiplier—demonstrates that the premise justifying the so-called "sliding scale" approach simply does not apply to this case. The "sliding scale" approach (*i.e.*, "awarding a smaller percentage for fees as the size of the settlement fund increases") is premised on the concern that "economies of scale could cause windfalls in common fund cases." *OTC Barclays–Citi Fee Op.*, 2018 WL 3863445, at *3 (quoting *Wal-Mart Stores*, 396 F.3d at 120). Class Counsel's increased lodestar, and correspondingly decreased lodestar multiplier, show that granting Class Counsel's requested fee would result in no such "windfall" here. *See* 5 William Rubenstein, Newberg on Class Actions § 15:81 (6th ed.) (Westlaw 2023) ("Given that a high multiplier is the best measuring stick of a windfall, courts ought to use the high multiplier to police windfalls, regardless of the size of the fund, rather than use the size of the fund as a policing mechanism."). The complexity of this case, reinforced by the Court's statement in *Libor VII*, 299 F. Supp. 3d 430, 607 n.189 (S.D.N.Y. 2018) that its "decision to certify a class as to OTC plaintiffs' antitrust claims rests on the action in its current form, including on OTC plaintiffs' allegations of a sixteen-bank conspiracy to suppress LIBOR," have meant that achieving additional settlements by pursuing this case through each subsequent phase of the case against the non-settling Defendants has required Class

[4] The Joint Declaration of William C. Carmody and Michael D. Hausfeld in Support of OTC Plaintiffs' Motion for

Counsel to continue to invest substantial time and resources to prosecute the claims of the OTC Class. Hence, far from resulting in a "windfall," awarding 25% of the fund would appropriately reward Class Counsel for that investment of time in proportion to the favorable result Class Counsel have obtained for the class as a result of their efforts.

Third, an award of 25% of the net settlement fund would result in 80.87% of all OTC settlement funds being distributed to class members—representing an increased percentage recovery compared to the recovery for the class from the Barclays–Citi and Deutsche Bank–HSBC settlements. As the Court explained in awarding fees from the Barclays–Citi settlement fund: "Given these amounts of expense reimbursements, incentive awards, and attorneys' fees, the class writ large will receive 76.62% of the aggregate settlement amounts (prior to other expenses, such as those incurred in providing notice to the classes) – a percentage that we find comports with public policy notions of allowing the class, rather than class counsel, to receive a sufficiently significant share of the recovery." *OTC Barclays-Citi Fee Op.*, 2018 WL 3863445, at *4; ECF 2705 at 2 (noting the fee award from the DB–HSBC settlements would "result in the class receiving 79.34% of the aggregate settlement amounts for all settlements to date").

3. Empirical Research on Attorneys' Fee Awards Supports OTC Plaintiffs' Requested Fee

OTC Plaintiffs' requested fee is also consistent with empirical research on attorneys' fee awards. A recent empirical study of contingent fee arrangements negotiated by sophisticated clients in non-class cases and class cases where the class representatives and members were sophisticated corporate parties concluded that "[d]ata from sophisticated clients shows both that they choose to pay fixed one-third percentages or even higher escalating percentages based on litigation maturity just like unsophisticated clients do, and they do so even in the most enormous

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Attorneys' Fees and Expenses ("Joint Decl.") is filed concurrently herewith.

cases." Brian T. Fitzpatrick, *A Fiduciary's Guide to Awarding Fees in Class Actions*, 90 Fordham L. Rev. 1151, 1170 (2021). The most recent empirical study of fee awards, and one previously cited by this Court, found an average percentile of 22.3% in the highest decile of settlements studied (those greater than $67.5 million). *See* Theodore Eisenberg & Geoffrey Miller, *Attorneys' Fees in Class Actions: 2009–2013*, 92 N.Y.U. L. Rev. 937, 948 (2017). While the Court has previously cited older empirical studies with a lower *mean* percentage fee award, those studies also found a large standard deviation and the Court thus concluded based on them in the EBP fee opinion that "a reasonable fee for EBP Class Counsel would fall somewhere between approximately 17% and 25% of the settlement fund." *See EBP Fee Op.*, 2020 WL 6891417, at *3, *4 (citing Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 837–39 (2010) and 4 William B. Rubenstein, *Newberg on Class Actions* § 15:81 fig.2 (5th ed.)).

C. The Requested Fee Is Reasonable Under Lodestar "Crosscheck"

The reasonableness of Class Counsel's requested fee is confirmed by the lodestar "crosscheck," which tests the reasonableness of a percentage method–based fee. *See Goldberger*, 209 F.3d at 50. The "lodestar" is calculated by multiplying the number of hours expended on the litigation by each particular attorney or firm professional by their current hourly rate, and totaling the amounts for all timekeepers.[5] When using this lodestar to crosscheck Class Counsel's requested award, courts employ a multiplier that "represents the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors." *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y.

[5] The lodestar is calculated at current hourly rates. *See, e.g.*, *Missouri v. Jenkins*, 491 U.S. 274, 283–84 (1989) (endorsing "an appropriate adjustment for delay in payment" by applying "current" rates); *Gierlinger v. Gleason*, 160 F.3d 858, 882 (2d Cir. 1998) (stating that rates "should be 'current rather than historic'").

2004) (citing *Goldberger*, 209 F.3d at 47).

Class Counsel have spent over 121,000 hours, with a lodestar of $82,265,759, from the inception of this matter through May 12, 2023.[6] *See* Joint Decl. ¶ 52. That time represents Class Counsel's tireless efforts in investigating and prosecuting the OTC Plaintiffs' claims over a nearly twelve-year period. By way of comparison, in the Yen LIBOR cases, class counsel reported a total lodestar of $54,532,316.55, corresponding to 105,775.61 hours worked, *before* any briefing on class certification. *See Laydon II* Br. at 29. Compared to those figures, Class Counsel's lodestar at the far more advanced stage of this case is presumptively reasonable.

When combined with Class Counsel's previous fee awards, Class Counsel's fee request of 25% of the net settlement fund here would correspond to a multiplier of 1.56 over Class Counsel's total lodestar, if the Court grants the requested expense reimbursements.[7]

This multiplier falls at the lower end of the range considered reasonable by courts in the Second Circuit.[8]

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[6] In addition to Class Counsel, six other firms have assisted in this litigation. *See* Joint Decl. ¶¶ 50-51. Four firms performed work for the benefit of the OTC Class by helping in evaluation of the plan of distribution. *See id.* ¶¶ 28, 50. Two other firms representing class representatives have also performed work related to those representations as well as other work at the direction of Class Counsel. *See id.* ¶ 51. These firms' time is not included in the lodestar reported in this application. OTC Plaintiffs request that the Court grant Class Counsel authority to allocate and distribute any attorneys' fees and expenses awarded from the settlement funds among counsel who performed work on behalf of OTC Plaintiffs as is customary in class action litigation.

[7] When evaluating successive applications for interim awards of attorneys' fees, the relevant multiplier for courts to consider when performing the lodestar crosscheck is the *cumulative* multiplier that compares class counsel's *total* fee award to class counsel's *total* lodestar. *See, e.g.*, *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) (approving a second fee award that when combined with a prior award "in its aggregate gives Lead Counsel $336.1 million in fees based on a *total* lodestar of approximately $83.2 million" (emphasis added)). This is the approach utilized by class counsel in the Yen LIBOR cases, without objection from Judge Daniels, who approved class counsel's first and second fee applications in full. *See Laydon II* Br. at 29 (presenting cumulative multiplier of 0.91, which compared class counsel's total lodestar of $54,532,316.55 from the initiation of the action to class counsel's second fee request for $34.88 million aggregated with their prior $14.5 million award).

[8] *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (finding a multiplier of 3.5 to be reasonable in an antitrust class action); *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *16 (S.D.N.Y. April 26, 2016) (approving fee award in complex antitrust action where lodestar was "just over 6"); *Colgate*, 36 F. Supp. 3d at 353 (holding a multiplier of 5 was "on the high end" but "not unreasonable"); *Beckman v. KeyBank N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) (approving an award of 33% of the common fund, representing a multiplier of 6.3, and explaining that "[c]ourts regularly award lodestar multipliers of up to eight times the

Class counsel's requested fee award would result in a lower lodestar multiplier than the average reported in empirical studies. This Court previously noted that "one study identifies an average multiplier of 3.18 for settlements above $175.5 million and a second study identifies an average multiplier of 2.39 for settlements above $44.6 million." ECF 2683 at 11 (citing 4 William B. Rubenstein, *Newberg on Class Actions* § 15:89 tbl. 2). Professor Eisenberg's 2017 study found an average multiplier of 2.72 for cases with a settlement fund of greater than $75 million. *See* Theodore Eisenberg & Geoffrey Miller, *Attorneys' Fees in Class Actions: 2009–2013*, 92 N.Y.U. L. Rev. 937, 967 tbl.13 (2017).

Further, all the work performed by Class Counsel through May 12, 2023, contributed to Class Counsel's analysis of the strengths and weaknesses of the claims against MUFG, Norinchukin, and SocGen, and furthered Class Counsel's ability to negotiate a favorable settlement. As the Court recognized at the fairness hearing for the settlement with Barclays, OTC Plaintiffs have "alleged a conspiracy" and "the same action against everybody." ECF 2352-1, Tr. 66:23-24. Class Counsel's efforts to strengthen the OTC Plaintiffs' litigation position as to all Defendants, including MUFG, Norinchukin, and SocGen. These efforts—which included motion practice, appeals, discovery efforts, and document review—generally involved all of the Defendants or had case-wide implications. Moreover, all of the work performed by Class Counsel was undertaken to benefit the same OTC Class. *See* ECF 2863 at 3 ("Further, attribution of these expenses to Barclays and Citi is appropriate – even though some portion undoubtedly pertains to other defendants also – given the joint and several liability in this action."). Thus,

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lodestar, and in some cases, even higher multipliers"); *Sewell v. Bovis Lend Lease, Inc.*, 2012 WL 1320124, at *13 (S.D.N.Y. Apr. 16, 2012) ("Courts commonly award lodestar multipliers between two and six."); *Johnson v. Brennan*, 2011 WL 4357376, at *13 (S.D.N.Y. Sept. 16, 2011) ("Courts routinely award counsel two to three times lodestar in class action settlements."); *In re Lloyd's Am. Trust Fund Litig.*, 2002 WL 31663577, at *27 (S.D.N.Y. Nov. 26, 2002) ("Here, the resulting multiplier of 2.09 is at the lower end of the range of multipliers awarded by courts within the Second Circuit.").

courts consider cumulatively, when performing the lodestar crosscheck, all of class counsel's time from the beginning of an action. *See supra* note 7.[9]

Finally, Class Counsel's hourly rates are also reasonable. The rates for Class Counsel who billed meaningful time to this case are Class Counsel's standard hourly rates and are regularly charged to (and paid by) clients who engage Class Counsel on an hourly basis. Joint Decl. ¶¶ 46-47; *Luciano v. Olsten Corp.*, 109 F.3d 111, 115 (2d Cir. 1997) ("The 'lodestar' figure should be in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."). Class Counsel's hourly rates are market rates for plaintiff- and defense-side law firms of similar quality litigating matters of similar complexity and magnitude in New York City.[10] Thus, OTC Plaintiffs' request for an award of 25% of the net settlement fund is fair and reasonable using a lodestar multiplier. *Colgate*, 36 F. Supp. 3d at 353.

D. The *Goldberger* Factors Support the Requested Fee Award

Under either the percentage method or the lodestar multiplier approach, the "'*Goldberger* factors' ultimately determine the reasonableness of a common fund fee," *Wal-Mart Stores*, 396 F.3d at 121. The *Goldberger* factors, which the Court weighs in its discretion, are:

> (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy

[9] *See also Auto Parts II*, 2017 WL 3525415, at *4 n.2 ("The Court rejects the argument . . . that time included with the Round 1 Settlement fee request should not be included in the lodestar cross-check for the Round 2 Settlements. In calculating the lodestar for purposes of the cross-check, it would be impractical to compartmentalize and isolate the work that EPPs' counsel did in any particular case at any particular time because all of their work assisted in achieving all of the settlements and has provided and will continue to provide a significant benefit to all of the EPPs classes.").

[10] *See* Sara Randazzo & Jacqueline Palank, *Legal Fees Cross New Mark: $1,500 an Hour*, The Wall Street Journal, Feb. 16, 2016 (finding that "[f]or lawyers at the very top of th[e] fields [of antitrust and high-stakes litigation and appeals], hourly rates can hit $1,800 or even $1,950" and citing a 2011 article and observing that the increases in hourly rates "mak[e] the $1,000-an-hour legal fees that once seemed so steep look quaint by comparison"), *available at* https://www.wsj.com/articles/legal-fees-reach-new-pinnacle-1-500-an-hour-1454960708.

considerations.

Goldberger, 209 F.3d at 50 (citation omitted). Courts regularly apply the *Goldberger* factors when considering applications for interim awards. *See, e.g.*, *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *9-10. Each of these factors confirms the requested fee is reasonable.

1. Time & Labor Expended by Counsel (Goldberger Factor 1)

The first *Goldberger* factor—the "time and labor expended by counsel"—strongly supports approval of the requested fee. Class Counsel have spent over 121,000 hours prosecuting this case and, as discussed above, the lodestar multiplier is within the range approved by courts in this Circuit. The substantial time devoted to this litigation over nearly twelve years reflects the immense effort Class Counsel have exerted in prosecuting this case and is reasonable, particularly given the complex nature of this action. Class Counsel have, among other things:

- Conducted an initial investigation of this case to develop the facts and legal theories that formed the basis of the allegations in the complaint and drafted and filed the complaint, amended complaint, second amended complaint, proposed third amended complaint, third amended complaint, and fourth amended complaint.

- Defended the complaint against eight Rule 12(b) motions to dismiss and Defendants' opposition to the OTC Plaintiffs' motions for leave to amend the complaint.

- Written scores of letters to the Court, on numerous matters, including providing supplemental authority, addressing discovery disputes, and presenting scheduling issues.

- Appealed the dismissal of the OTC Plaintiffs' antitrust claims to the Second Circuit, and successfully filed an amicus brief to the Supreme Court on an issue of appellate jurisdiction.

- Attended multiple full-day, in-person mediation sessions conducted by highly experienced mediators, preceded by mediation briefing, to achieve the Barclays, Citi, Deutsche Bank, and HSBC Settlements.

- Successfully briefed motions for preliminary and final approval of the Barclays, Citi, Deutsche Bank, and HSBC Settlements and worked with experts to develop a comprehensive notice program and plan of distribution.

- Reviewed more than 3.5 million documents produced by the Defendants and third parties, as well as trial transcripts and evidence from civil and criminal trials in the United States

and the United Kingdom relating to LIBOR manipulation.

- Listened to more than 125,000 audio files produced by the defendants.

- Drafted discovery requests to the Defendants for trading, cash-flow, and borrowing data on the Defendants' financial instruments and participated in scores of meet and confers to obtain the production of that data.

- Diligently pursued discovery from four third-party brokers that formed an important component of the OTC Plaintiffs' expert witness analysis.

- Defended six 30(b)(6) depositions of the named plaintiffs; defended three depositions of OTC Plaintiffs' experts; conducted two depositions of the Defendants' experts.

- Worked with the OTC Plaintiffs' expert witnesses to draft extensive 30(b)(6) notices setting out questions essential to understanding the trade, cash-flow, and borrowing data produced by the defendants.

- Assisted the OTC Plaintiffs' economic experts in analyzing 686 gigabytes of data and developing two expert witness reports totaling more than 300 pages.

- Prepared more than sixty pages of briefing, more than sixty pages of attorney declarations, and 149 exhibits in support of the OTC Plaintiffs' motion for class certification and vigorously defended against challenges thereto by the defendants.

- Attended a full-day, in-person mediation session conducted by the Honorable Layn Phillips, preceded by mediation briefing, and followed by extensive telephonic discussions and negotiations, to achieve the Citibank Settlement.

- Leveraged experience from the Barclays Settlement to successfully brief a motion for preliminary approval of the Citibank Settlement and adapt previously successful notice program for this second settlement.

- Attended a full-day, in-person mediation session conducted by the Honorable Layn Phillips, preceded by mediation briefing, and followed by extensive telephonic discussions and negotiations, to achieve the Deutsche Bank Settlement.

- Attended a full-day, in-person mediation session conducted by the Honorable Layn Phillips, preceded by mediation briefing, and followed by extensive telephonic discussions and negotiations, to achieve the HSBC Settlement.

- Successfully briefed motions for preliminary and final approval of both the Deutsche Bank and HSBC Settlements and designed a joint notice program for those two settlements as well as for the litigation class that saved substantial expense to the class.

- Collected, reviewed, and produced to the Defendants thousands of pages of documents from the named plaintiffs, and prepared supplemental class certification briefing regarding one named plaintiff's adequacy as a class representative.

- Appealed the dismissal of the OTC Plaintiffs' antitrust claims on personal jurisdiction grounds to the Second Circuit, including supplemental briefing on the Second Circuit's decision in *Schwab* and the Supreme Court's decision in *Ford Motor Co. v. Montana 8th Judicial Dist.*, No. 19-368.

- Briefed disputed issues concerning the case schedule after the Second Circuit's personal jurisdiction ruling and negotiated with Liaison Counsel for Defendants a proposed schedule for merits discovery, expert reports, class certification as to the foreign-bank Defendants, and summary judgment briefing.

- Drafted with the Direct-Action Plaintiffs a consolidated set of document requests to all defendants for merits discovery on "Upstream" issues.

- Worked with experts and the claims administrator to administer the Barclays, Citi, Deutsche Bank, and HSBC settlement funds and briefed the motion for distribution resulting in the successful distribution of those settlement funds to the members of the OTC Class.

- Proposed and negotiated search terms and custodians for merits discovery on "Upstream" issues with the twelve non-settling OTC Defendants and briefed a motion to compel on disputed search terms and custodians.

- Engaged in extensive negotiations and discussions mediated by the Honorable Layn Phillips to achieve the MUFG, Norinchukin, and SocGen Settlement and then the Lloyds, Rabobank, RBC, and Portigon Settlement.

- Briefed a motion for preliminary approval of this Settlement and worked with experts to develop a comprehensive notice program and plan of distribution that leverages prior claims submissions and extensive prior claims administration work.

In sum, Class Counsel have devoted considerable time and financial resources in prosecuting this case on behalf of the OTC Class.

2. Magnitude & Complexity of the Litigation (Goldberger Factor 2)

The second *Goldberger* factor—"the magnitude and complexities of the litigation"—also strongly supports approval of the requested fee. No other case better embodies the challenges faced by plaintiffs in antitrust litigation than this one. *See Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 263 (2d Cir. 2011) (noting the "factual complexities of antitrust cases"); *Wal-Mart Stores*, 396 F.3d at 118 ("Federal antitrust cases are complicated, lengthy, and bitterly fought."); *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *4 ("Federal antitrust

cases are complicated lengthy, and bitterly fought, as well as costly."). This action was initially filed nearly twelve years ago and has undergone multiple rounds of briefing on eight motions to dismiss, a motion for judgment on the pleadings, and an opposition to leave to amend that functioned as the equivalent to a motion to dismiss.

Meanwhile, the briefing of the OTC Plaintiffs' successful motion for class certification was extensive, and OTC Plaintiffs successfully opposed Defendants' Rule 23(f) petition. After class certification, the OTC Plaintiffs faced (and continue to face) the monumental task of completing merits discovery, including additional expert discovery, summary judgment briefing, class certification briefing as to the foreign bank Defendants, and ultimately a trial likely lasting weeks (if not months) from which the losing party will almost certainly appeal. *See, e.g.*, *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *4 ("This litigation has been pending since 2005 and has involved the production of thousands of documents, at least 17 fact witness depositions, expert discovery, and extensive motion practice. The Certified Classes are scheduled for a trial against the non-settling defendants that is expected to take at least three weeks.").

3. Risk of the Litigation (Goldberger Factor 3)

The third *Goldberger* factor—the "risk of the litigation"—also strongly supports approval of the requested fee. The Second Circuit has identified "the risk of success as perhaps the foremost factor to be considered in determining [a reasonable fee award]." *Goldberger*, 209 F.3d at 54. Class Counsel have taken on and overcome significant risks in this litigation.

a. Contingency Risk

"No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success." *Fleisher*, 2015 WL 10847814, at *21 (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974)). Here, OTC Counsel have invested more than

121,000 hours of time with a lodestar value of more than $82 million without *any* guarantee they would be compensated for their continued efforts or reimbursed for any of the millions of dollars in litigation expenses they have incurred. *See In re High-Crush Ptrs. L.P. Secs. Litig.*, 2014 WL 7323417, at *16 (S.D.N.Y. Dec. 19, 2014) ("Lead Counsel undertook the representation of Lead Plaintiffs and the Class in this Action on a wholly contingent basis, investing substantial time and funds to prosecute this Action, without any guarantee of compensation or of recovering out-of-pocket expenses."); *Fleisher*, 2015 WL 10847814, at *21 ("[T]he firm would not have been compensated for its time or expenses at all had it been unsuccessful in this litigation.").

Moreover, Class Counsel would not have been compensated their additional time or expenses at all had they been unsuccessful in this litigation. *See Grinnell*, 495 F.2d at 471 ("[D]espite the most vigorous and competent of efforts, success is never guaranteed."); *In re Beacon Assocs. Litig.*, 2013 WL 2450960, at *13 (S.D.N.Y. 2013) ("And all of these matters were taken on contingency, so in view of the novelty of the issues there was some possibility that counsel would recover nothing at all."); *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 366 (S.D.N.Y. 2002) ("The enormous risks of litigation are why settlement is frequently preferred. Settling avoids delay as well as uncertain outcome . . . ."). The risk of no recovery in complex class actions is real and supports Class Counsel's request.

Contingency risk takes on an additional layer in multi-defendant actions such as this one, where class counsel's efforts in securing partial settlements with certain defendants protect against the risk that there might *never* be any recovery from other defendants. Courts recognize this dynamic when awarding fees—and cite it as a reason to *reward* class counsel for the risk they take. For instance, in the *Online DVD Rental* case, plaintiffs settled with one defendant for $27.25 million and then lost the entire case against the remaining defendant a few months later, when the court granted that defendant's motion for summary judgment. *See In re Online DVD*

Rental Antitrust Litig., No. 09-md-2029 (N.D. Cal. Sept. 2, 2011), ECF 492 (granting preliminary approval to settlement); *In re Online DVD Rental Antitrust Litig.*, 2011 WL 5883772, at *1 (N.D. Cal. Nov. 23, 2011) (granting motion for summary judgment). The court not only granted class counsel's fee request for 25% of the settlement fund, *see In re Online DVD Rental Antitrust Litig.*, No. 09-md-2029, slip op. ¶ 1 (N.D. Cal. Mar. 29, 2012), ECF 607, *aff'd*, 779 F.3d 934, 955 (9th Cir. 2015), but in fact, specifically cited the summary judgment order as one reason to approve the fee request as reasonable:

> At this time, I'm prepared to find that the settlement is fair, reasonable, and adequate given the totality of the circumstances, ***particularly given the fact that half the case has been kind of wiped off the books for the plaintiffs***, I find that the settlement is fair, reasonable, and adequate, that something's better than nothing in this kind of case, and that ***the bench mark is a reasonable fee*** for this case. So I approve.

Transcript of Hearing, *In re Online DVD Rental Antitrust Litig.*, No. 09-md-2029 (N.D. Cal. Mar. 14, 2012), ECF 602 (emphasis added). In that case, class counsel's diligence in pursuing what turned out to be an unsuccessful claim was a compelling reason to *reward* class counsel for the contingency risk it took on and *award* the requested fees from the recovery that class counsel *did* achieve. Although Class Counsel are confident in the merits of the OTC Class's claims against the non-settling Defendants, there still remains significant contingency risk associated with those claims, which favors granting an interim fee award from the substantial and concrete recovery Class Counsel have obtained to date.

b. Liability Risk

"Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *14 (S.D.N.Y. 2014). The OTC Plaintiffs face significant risks in continuing to litigate, amplified by the complexity of the market for LIBOR-linked financial instruments and the fact

that Deutsche Bank and HSBC are global financial institutions with virtually unlimited litigation resources. Indeed, this case presents the Court, the parties, and eventually a jury with the task of understanding complex derivative instruments in an opaque, unregulated market, during a period of extraordinary economic upheaval. "The complexity of Plaintiff's claims *ipso facto* creates uncertainty . . . . A trial on these issues would likely be confusing to a jury." *Park v. The Thomson Corp.*, 2008 WL 4684232, at *4 (S.D.N.Y. Oct. 22, 2008); *see* 31 No. 7 Futures & Derivatives L. Rep. 1 ("Derivative instruments, in most cases, are highly complex and difficult to understand for even highly sophisticated and intelligent investors.").

Although the OTC Plaintiffs believe fervently in the merit of their case, at the time the MUFG, Norinchukin, and SocGen Settlement was reached, merits discovery, merits expert work, class certification as to those foreign-bank Defendants, summary judgment, and ultimately a trial lay ahead along with corresponding risks at each phase. *See Athale v. Sinotech Energy Ltd.*, 2013 WL 11310686, at *6 (S.D.N.Y. Sept. 4, 2013) ("Absent settlement, there is no assurance that Lead Plaintiff's motion for class certification would be granted or that Class status, if granted, would be maintained throughout trial.").[11]

c. Damages Risk

Equally as significant as the risks in establishing liability in this case were the OTC Plaintiffs' risks in establishing damages. The damages estimates in this case are heavily expert-driven, and, although the OTC Plaintiffs are confident in their ability to prove damages, the expert battle at class certification and the anticipated merits expert battle adds substantial risk to the OTC Plaintiffs' claims. *See In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550,

[11] *Sykes v. Harris*, 2016 WL 3030156, at *18 (S.D.N.Y. May 24, 2016) ("Defendants asserted numerous novel defenses to Lead Plaintiffs' claims which put recovery for Class Members and Class Counsel at risk."); *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970) ("[N]o matter how confident one may be of the outcome of litigation, such confidence is often misplaced.").

at *18 (S.D.N.Y. 2010) (noting that the burden in proving the extent of the class's damages weighed in favor of approving fee request, and that "[t]he jury's verdict . . . would . . . depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable"); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998) (observing that "[d]amages at trial would inevitably involve a battle of the experts" and noting that it is "difficult to predict with any certainty which testimony would be credited").

* * *

The only certainties from the outset of this litigation were that there would be no attorneys' fees or reimbursement of expenses without a successful result, and that a successful result, if any, could be achieved only after lengthy, difficult, and expensive effort.

4. Quality of the Representation (Goldberger Factor 4)

The fourth *Goldberger* factor, "the quality of representation," also supports approval of the requested fee. Courts have consistently recognized that the result achieved is a major factor to be considered in making a fee award and in assessing the quality of the representation. *See, e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). Class Counsel respectfully submits that the $90 million settlement amount, the $680 million achieved through this settlement, and the $781 million in total settlement funds achieved through the subsequent settlement is strong evidence of the quality of Class Counsel's representation. That is particularly true because none of MUFG, Norinchukin, or SocGen were the subject of regulatory orders relating to persistent suppression of LIBOR during the financial crisis—the subject of OTC Plaintiffs' claims.

"To determine the 'quality of the representation,' courts review, among other things, the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *Taft v. Ackermans*, 2007 WL 414493, at *10 (S.D.N.Y. Jan. 31, 2007). "Susman Godfrey has significant experience with . . . class actions, including settlements thereof . . . [and] [t]he lawyers working

for the Class have substantial experience prosecuting large-scale class actions." *Fleisher*, 2015 WL 10847814, at *22; *see also* Joint Decl. Ex. A. Hausfeld LLP's attorneys "are highly experienced practitioners in complex litigation generally and antitrust litigation specifically." *Air Cargo IV*, 2015 WL 5918273, at *7; *see also* Joint Decl. Ex. B.

"The quality of opposing counsel is also important in evaluating the quality of Lead Counsel's work." *Fleisher*, 2015 WL 10847814, at *22. Courts recognize that the caliber of the opposition faced by plaintiffs' counsel aids assessment of the quality of the plaintiffs' counsel's performance. *See Anwar v. Fairfield Greenwich Ltd.*, 2012 WL 1981505, at *2 (S.D.N.Y. June 1, 2012) (considering "the quality and vigor of opposing counsel"). All three settling defendants represented by skilled and highly regarded counsel from Sullivan & Cromwell LLP, Sidley Austin LLP, and Mayer Brown LLP—prestigious firms with well-deserved reputations for vigorous advocacy in the defense of complex civil cases, and the same is true of the other defendants in this action. *See In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d at 357–58 ("Lead Counsel obtained remarkable settlements for the Class while facing formidable opposing counsel from some of the best defense firms in the country.").

5. Requested Fee in Relation to the Settlement (Goldberger Factor 5)

The fifth *Goldberger* factor—"the requested fee in relation to the settlement"—also supports approval of the requested fee, as discussed *supra* at Section I.B.

6. Public Policy Considerations (Goldberger Factor 6)

Finally, the sixth *Goldberger* factor—public policy considerations—weighs heavily in favor of the requested fee. *Goldberger*, 209 F.3d at 50. Public policy considerations strongly favor incentivizing skilled private attorneys to undertake class action litigation both to vindicate the rights of class members and the law enforcement function of private action litigation. *See In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d at 359 ("[T]o attract well-qualified plaintiffs'

counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives."); *Hicks v. Stanley*, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) ("To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding."); *In re Sumitomo*, 74 F. Supp. 2d at 399 ("[T]he Second Circuit and courts in this district also have taken into account the social and economic value of class actions, and the need to encourage experienced and able counsel to undertake such litigation.").

Those interests are particularly salient in this case, which has required continual investments of large amounts of attorney time and expenses by Class Counsel. To incentivize the very best private attorneys to take on complex, lengthy, difficult, and expensive class actions, the fee awarded must be sufficient to justify the opportunity cost of foregoing hourly and fixed-fee cases where counsel are assured of compensation regardless of outcome.

II. Class Counsel's Request for Reimbursement of Litigation Expenses Is Reasonable

Class Counsel also request reimbursement in the amount of $2,512,026.10 for out-of-pocket expenses reasonably and necessarily incurred in connection with the prosecution of this case between February 15, 2018 (the date of the HSBC Settlement) and May 12, 2023 (the date of the MUFG-Norinchukin-SocGen Settlement). Joint Decl. ¶ 53.

"[C]ourts in the Second Circuit normally grant expense requests in common fund cases as a matter of course." ECF 2683 at 2 (alteration in original). The expenses incurred by Class Counsel include fees charged by experts, electronic document hosting services, translators, the mediator, court fees, electronic research services like Westlaw and Lexis, photocopy services, and travel providers in connection with this litigation. Courts regularly approve similar cost

applications in large, complex antitrust class actions.[12] Indeed, "[t]he fact that Class Counsel [were] willing to [incur these expenses], where reimbursement was entirely contingent on the success of this litigation, is perhaps the best indicator that the expenditures were reasonable and necessary." *Fleisher*, 2015 WL 10847814, at *23.

III. The Court Should Grant Service Awards to the Class Representatives

The OTC Plaintiffs also seek incentive awards of $100,000 for named plaintiffs the Mayor & City Council of Baltimore, the City of New Britain, Vistra Energy Corp., Yale University, and Jennie Stuart Medical Center Inc., as stated in the notice. "Courts consistently approve awards in class action lawsuits to compensate named plaintiffs for the services they provide and burdens they endure during litigation." *Anwar v. Fairfield Greenwich, Ltd.,* 2012 WL 1981505, at *3 (S.D.N.Y. 2012).

The named plaintiffs' service to the class over the twelve years of litigation so far was critical in achieving the $680 million recovered for absent class members through this Settlement and the prior settlements. They provided evidence to assist in the development of the OTC Plaintiffs' claims, collected thousands of documents in response to defendants' expansive discovery requests, responded to scores of questions from counsel about the documents and data produced, prepared and sat for lengthy 30(b)(6) depositions by Defendants, and have continued throughout to monitor the litigation alongside with class counsel. Providing this service to the class required the named plaintiffs to dedicate considerable time and take key personnel away from their normal duties—at an immediate cost that was not borne by the members of the class

[12] *See, e.g.*, *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *18 (approving $10 million in expenses "[m]ost of" which "were incurred in connection with retention of experts" where the case settled just prior to the due date for class certification motions); *In re Bank of Am. Corp. Secs., Derivatives & ERISA Litig.*, 2013 WL 12091355, at *1 (S.D.N.Y. Apr. 8, 2013) (approving $8 million in litigation expenses); *In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 380 (S.D.N.Y. 2013) (approving $7.3 million in litigation expenses); *In re IPO*, 671 F. Supp. 2d at 505 (approving $46 million in expenses).

but that benefitted those class members to the tune of hundreds of millions of dollars. Courts routinely approve incentive awards to class representatives who provide these types of services to the Class. *See, e.g.*, *Sewell v. Bovis Lend Lease, Inc.*, 2012 WL 1320124, at *15 (S.D.N.Y. 2012) (approving incentive awards where the named plaintiffs "served class members by providing counsel with relevant documents in their possession, assisting counsel to prepare for the mediation, participating in litigation strategy, and reviewing and commenting on the terms of the settlement" (internal quotation marks omitted)).

Courts have approved similar and higher incentive awards in numerous cases. *See, e.g.*, *Pearlstein v. Blackberry Ltd.*, 2022 WL 4554858, at *11 (S.D.N.Y. 2022) (awarding $100,000 to each class representative and finding "The award amount is consistent with similar awards granted in this district"); *In re Lidoderm Antitrust Litig.*, 2018 WL 11375216, at *3 (N.D. Cal. 2018) (awarding as "fair and reasonable" service awards to class representatives of "$100,000, to be paid out of the Settlement Fund, for representing the Direct Purchaser Class"); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 2019 WL 13213700, at *2 (E.D.N.Y. 2019) (approving service awards of between $50,000 and $200,000). Combined with the Court's earlier service award of $25,000 to each class representative, the service awards requested represent less than 0.12% of the settlement funds achieve for class members as a result of their efforts, net of attorneys' fees and litigation expenses (including those requested here).

Conclusion

OTC Plaintiffs respectfully request that the Court award from the MUFG, Norinchukin, and SocGen settlement the requested attorneys' fees equal to 25% of the net settlement fund, plus a pro rata share of interest thereon, and reimbursement of litigation expenses in the amount of $2,512,026.10, and service awards of $100,000 for each of the class representatives.

Dated: September 8, 2023

/s/ Michael D. Hausfeld
Michael D. Hausfeld
Hilary Scherrer
Nathaniel C. Giddings
HAUSFELD LLP
1700 Street NW, Suite 650
Washington, D.C. 20006
Telephone: 202-540-7200
mhausfeld@hausfeldllp.com
hscherrer@hausfeldllp.com
ngiddings@hausfeldllp.com

Scott Martin
HAUSFELD LLP
33 Whitehall Street, 14th Fl.
New York, NY 10004
Telephone: 646-357-1100
smartin@hausfeldllp.com

Gary I. Smith
HAUSFELD LLP
325 Chestnut Street
Suite 900
Philadelphia, PA 19106
Telephone: 215-985-3270
gsmith@hausfeld.com

Co-Lead Counsel for the OTC Plaintiff Class

/s/ William Christopher Carmody
William Christopher Carmody (WC8478)
Seth Ard (SA1817)
Geng Chen (GC2733)
Amy B. Gregory (5663299)
SUSMAN GODFREY L.L.P.
1301 Avenue of the Americas, 32nd Fl.
New York, New York 10019
Telephone: 212-336-3330
bcarmody@susmangodfrey.com
sard@susmangodfrey.com
gchen@susmangodfrey.com
agregory@susmangodfrey.com

Marc M. Seltzer
Glenn C. Bridgman
SUSMAN GODFREY L.L.P.
1901 Avenue of the Stars
Los Angeles, California 90067-6029
Telephone: 310-789-3100
mseltzer@susmangodfrey.com
gbridgman@susmangodfrey.com

Matthew Berry
Drew D. Hansen
SUSMAN GODFREY LLP
1201 Third Avenue, Suite 3800
Seattle, WA 98101
Telephone: 206-516-3880
mberry@susmangodfrey.com
dhansen@susmangodfrey.com

Barry C. Barnett (BB1984)
Karen Oshman
Michael Kelso
SUSMAN GODFREY L.L.P.
1000 Louisiana Street
Suite 5100
Houston, TX 77002-5096
Telephone: 713-651-9366
bbamett@susmangodfrey.com
koshman@susmangodfrey.com
mkelso@susmangodfrey.com

Co-Lead Counsel for the OTC Plaintiff Class

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE LIBOR-BASED FINANCIAL INSTRUMENTS ANTITRUST LITIGATION	MDL No. 11-md-2262 (NRB)
THIS DOCUMENT RELATES TO:	
The OTC Action	No. 11-cv-5450

MEMORANDUM IN SUPPORT OF OTC PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

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Court-appointed co-lead class counsel Susman Godfrey L.L.P. and Hausfeld LLP ("Class Counsel") respectfully submit this memorandum in support of the OTC Plaintiffs' application for an award of attorneys' fees and reimbursement of litigation expenses on their $101 million settlement (the "Settlement") with Defendants Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. (n/k/a Coöperatieve Rabobank U.A.) ("Rabobank"), Lloyds Banking Group plc, Lloyds Bank plc, HBOS plc, and Bank of Scotland plc (together, "Lloyds"), Royal Bank of Canada ("RBC"), and WestLB AG (n/k/a Portigon AG) and Westdeutsche Immobilienbank AG (n/k/a Westdeutsche Immobilien Servicing AG (together, "Portigon" and, with Rabobank, Lloyds, and RBC, the "Settling Defendants").

Introduction

This litigation has been hard-fought by Class Counsel for nearly twelve years. Despite Defendants' repeated attempts to have this case dismissed and to defeat class certification, OTC Plaintiffs have persevered and repeatedly achieved outstanding results for the class. Because of Class Counsel's zealous pursuit of this case, OTC Plaintiffs recently achieved a sixth settlement for the class. Combined with the prior settlements, OTC Plaintiffs have recovered to date a total of $781 million for the class—a tremendous recovery by any measure.

OTC Plaintiffs now request an interim award of attorneys' fees from the Settlement with Rabobank, Lloyds, RBC, and Portigon of 25% of the net settlement fund after the deduction of litigation expenses.[1] That request is exactly in line with the percentage the Court recently awarded from the MUFG, Norinchukin, and Société Générale settlement. ECF 3781. It is also the same percentage the Court awarded as attorneys' fees from the Exchange Based Plaintiffs' (EBPs)

[1] As with OTC Plaintiffs' prior attorneys' fee applications, OTC Plaintiffs respectfully ask that the Court reserve judgment on a request for the difference between the fee sought now and a final award of 30% of the net Settlement (after deducting expenses) until a later stage of this litigation. *See* ECF 2350 at 6, 13; ECF 2387 at 1; ECF 2705 at 1.

settlements and a lower percentage than the Court awarded on the Lender and Non-Defendant OTC Plaintiffs' settlements. *See In re LIBOR-Based Fin. Instr. Antitrust Litig.* ("*EBP Fee Op.*"), 2020 WL 6891417, at *4–5 (S.D.N.Y. 2020). OTC Plaintiffs' request would result in a lodestar multiplier of 1.83, at the low end of the range awarded in comparable actions, and would result in the OTC Class receiving 77.58% of all settlement funds to date, a higher percentage than the Court previously found comports with public policy. ECF 2683, at 10.

OTC Plaintiffs also seek $85,613.16 in unreimbursed costs and expenses incurred by Class Counsel on behalf of the OTC Class between May 12, 2023 (the date of the MUFG-Norinchukin-SocGen Settlement and the cut off date for Class Counsel's last reimbursement request) and July 21, 2023 (the date of this Settlement). "[C]ourts in the Second Circuit normally grant expense requests in common fund cases as a matter of course." ECF 2683, at 2 (alteration in original) (quoting *In re IMAX Sec. Litig.*, 2012 WL 3133476, at *6 (S.D.N.Y. 2012)).

Argument

I. Class Counsel's Fee Request Is Fair and Reasonable

A. Class Counsel Are Entitled to Fees from the Common Fund

"[A] lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). This principle applies to class action settlements, including interim settlements. *See In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *9 (E.D.N.Y. Oct. 23, 2012) ("Where a class action settlement creates a common fund the plaintiffs' attorneys are entitled to a reasonable fee—set by the court—to be taken from the fund. Fees can be awarded based on an interim settlement fund.").

B. The Requested Fee Is Fair and Reasonable Under the Percentage Method

The Second Circuit's preferred method for calculating a fair and reasonable attorneys' fee

is to award "some percentage of the recovery." *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). "The trend in this Circuit is toward the percentage method" because it "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.'" *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). This principle and preference hold equally true for interim fee awards drawn from partial settlements with one or more defendants in a multi-defendant action. *See In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *9 (noting that "[f]ees can be awarded based on an interim settlement" and recounting the Second Circuit's "trend" of "utiliz[ing] the percentage method" with the lodestar/multiplier method as a cross-check).

The percentage method, by tying the fee award to the result achieved for the class, "allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure,'" *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 330 (3d Cir. 2011); thus, Class Counsel's request also corresponds neatly to the settlement from which it arises. This Settlement—which provides $101 million in cash on top of OTC Plaintiffs' $680 million in prior settlements—is by any measure a substantially favorable result for the OTC Class. As the primary measure of Class Counsel's success is the recovery they have achieved for the OTC Class, granting Class Counsel's application for 25% of that favorable result provides a proportionate and appropriate reward for Class Counsel's efforts. *See Laydon I*, *infra*, slip op. ¶ 5(b)-(c), (f) (awarding "fair, reasonable, appropriate" fee of 25% of partial settlement fund, noting that "in the absence of a settlement, [the claims against the settling defendants] would have involved lengthy proceedings with uncertain resolution," and recognizing that "[h]ad Plaintiffs' Counsel not achieved the Settlements, a risk would remain that Plaintiffs and the Settlement Class may have recovered less or nothing from [the settling defendants]").

1. OTC Plaintiffs' Requested Fee Aligns with Attorneys' Fee Awards in Other Large Antitrust Cases

Courts regularly make successive interim fee awards over the life of a multi-defendant antitrust class action at percentages equivalent to and higher than the 25% requested by Class Counsel here. Table 1 below describes fee awards made in a number of recent antitrust class actions—all cases where these awards were made from partial settlements—in descending order by size of the settlement fund. OTC Plaintiffs' current application for 25% of a $101 million common fund is well within the range of these other interim awards in recent antitrust cases.

Table 1

Case	Settlement Fund	Fee Awarded	Fee Percentage
In re Urethane Antitrust Litig. (*Urethane III*), No. 04-md-1616 (D. Kan. July 29, 2016), ECF 3276	$835 million	$278 million	33-1/3%
Alaska Elec. Pension Fund v. Bank of Am. Corp., 2018 WL 6250657, at *1 (S.D.N.Y. 2018)	$504.5 million	$126.4 million	26%
In re Auto. Parts Antitrust Litig., 2018 WL 11260510, at *4 (E.D. Mich. 2018)	$432.8 million	$108 million	25%
In re Air Cargo Shipping Servs. Antitrust Litig. (*Air Cargo V*), No. 06-md-1775 (E.D.N.Y. Oct. 25, 2016), ECF 2484	$388 million	$97 million	25%
In re Automotive Parts Antitrust Litig. (*Auto Parts II*), 2017 WL 3525415 (E.D. Mich. 2017)	$379 million	$75.7 million	20%
In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig., 2021 WL 5369798, at *6 (D. Kan. 2021)	$345 million	$115 million	33-1/3%
In re Air Cargo Shipping Servs. Antitrust Litig. (*Air Cargo IV*), 2015 WL 5918273 (E.D.N.Y. 2015)	$333 million	$73.2 million	22%
Sullivan v. Barclays Bank plc, No. 13-cv-2811 (S.D.N.Y. May 18, 2018), ECF 425	$309 million	$68.71 million	22.24%
In re Capacitors Antitrust Litig., 2020 WL 6544472, at *2 (N.D. Cal. 2020)	$232 million	$69.6 million	30%
In re Automotive Parts Antitrust Litig. (*Auto Parts I*), No. 12-cv-0103 (E.D. Mich. Dec. 5, 2016), ECF 545	$225 million	$44.9 million	20%
In re Air Cargo Shipping Servs. Antitrust Litig. (*Air Cargo III*), 2012 WL 3138596 (E.D.N.Y. Aug. 2, 2012)	$222 million	$54.4 million	24%
In re Domestic Drywall Antitrust Litig., No. 13-	$190	$63.53	33-1/3%

md-2437 (E.D. Pa. July 17, 2018), ECF 767, 768	million	million	
In re Auto. Parts Antitrust Litig., 2020 WL 5653257, at *4 (E.D. Mich. 2020)	$183 million	$40.47 million	22%
In re Broiler Chicken Antitrust Litig., 2021 WL 5709250, at *5 (N.D. Ill. 2021)	$169.6 million	$55 million	33-1/3%
Precision Assocs., Inc. v. Panalpina World Transport (Holding) Ltd. (*Freight Forwarders II*), 2015 WL 6964973 (E.D.N.Y. Nov. 10, 2015)	$169 million	$42.2 million	25%
In re Steel Antitrust Litig. (*Steel I*), No. 08-cv-5214 (N.D. Ill. Oct. 22, 2014), ECF 539	$164 million	$54.1 million	33%
In re Air Cargo Shipping Servs. Antitrust Litig. (*Air Cargo II*), 2011 WL 2909162 (E.D.N.Y. July 15, 2011)	$154 million	$38.5 million	25%
Laydon v. Mizuho Bank, Ltd. (*Laydon II*), No. 12-cv-3419 (S.D.N.Y. Dec. 7, 2017), ECF 837	$148 million	$34.9 million	23.6%
In re Lithium Ion Batteries Antitrust Litig., No. 13-md-2420 (N.D. Cal.), ECF 2322	$139.3 million	$41.79 million	30%
In re CRT Antitrust Litig. (*CRT I*), 2016 WL 183285 (N.D. Cal. Jan. 14, 2016)	$127.5 million	$38.2 million	30%
Precision Assocs., Inc. v. Panalpina World Transport (Holding) Ltd. (*Freight Forwarders III*), No. 08-cv-0042 (E.D.N.Y. Nov. 07, 2016), ECF 1396	$118 million	$29.7 million	25%
In re Auto. Parts Antitrust Litig., 2018 WL 7108072, at *4 (E.D. Mich. 2018)	$115 million	$33.3 million	30%
Precision Assocs., Inc. v. Panalpina World Transport (Holding) Ltd. (*Freight Forwarders I*), No. 08-cv-0042 (E.D.N.Y. Dec. 27, 2013), ECF 984	$112 million	$16.9 million	15%[2]
In re Municipal Derivatives Antitrust Litig. (*Muni Derivatives IV*), No. 08-cv-2516 (S.D.N.Y. July 8, 2016), ECF 2029	$101 million	$33 million	33-1/3%

Fee awards reaching up to one-third of the proceeds of partial settlements are consistent with fee awards granted in class actions generally, where "fees that are 30 percent or greater" are "routine[]." *Velez v. Novartis*, 2010 WL 4877852, at *21 (S.D.N.Y. 2010).[3]

[2] In *Freight Forwarders I*, Judge Gleeson granted an interim fee award of 15% of the initial settlement fund, rejecting class counsel's request for 33-1/3% of that fund. Class counsel later requested and received 25% of the subsequent settlement funds in *Freight Forwarders II* and *III*.

[3] *See also Hyun v. Ippudo USA Holdings*, 2016 WL 1222347, at *3 (S.D.N.Y. Mar. 24, 2016) ("Fee awards representing one third of the total recovery are common in this District."). This benchmark furthermore holds true for settlements with large common funds like this one. *See In re Initial Public Offering Secs. Litig.*, 671 F. Supp. 2d 467,

Plus, the 25% fee requested here is significantly less than Class Counsel could obtain on the open market. For example, Susman Godfrey regularly takes high-stakes non-class commercial cases on a contingent fee basis, and typically negotiates contingent fee arrangements with individual non-class plaintiff clients equal to 40% of the gross sum recovered in cases where the firm advances expenses, with percentage increases based on the milestones reached at the time of settlement. *See* ECF 2280 ¶ 7. "This fact is highly relevant to determining the appropriateness of the award because the Court's ultimate task is to 'approximate the reasonable fee that a competitive market would bear.'" *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *17 (S.D.N.Y. 2015) (quoting *Johnson v. City of New York*, 2010 WL 5818290, at *4 (E.D.N.Y. 2010)); *accord In re Continental Ill. Secs. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) ("The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client.").

2. OTC Plaintiffs' Requested Fee Is Consistent with Other *Libor* Attorneys' Fee Awards

OTC Plaintiffs' requested fee of 25% of the net settlement fund is consistent with this Court's awards in other *Libor* cases. The Court awarded OTC Plaintiffs 25% of the net $90 million settlement fund from the settlement with MUFG, Norinchukin, and Société Générale on October 17, 2023. ECF 3781. The Court awarded 25% of the net $187 million settlement fund from EBPs' settlements with seven defendants in November 2020. *See EBP Fee Op.*, 2020 WL 6891417, at *5; *see also Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 2018 WL 6250657, at *1 (awarding

516 (S.D.N.Y. 2009) (awarding plaintiffs' counsel one-third of the net settlement fund of $170 million); *In re Priceline.com, Inc. Secs. Litig.*, 2007 WL 2115592, at *4 (D. Conn. July 20, 2007) (awarding 30% of an $80 million settlement); *In re Deutsche Telekom AG Secs. Litig.*, 2005 WL 7984326, at *4 (S.D.N.Y. June 14, 2005) (Buchwald, J.) (awarding attorneys' fees of 28% of a $120 million settlement); *Kurzweil v. Philip Morris Companies, Inc.*, 1999 WL 1076105, at *3 (S.D.N.Y. Nov. 30, 1999) (awarding class counsel 30% of a $123 million settlement); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 394 (S.D.N.Y. 1999) (awarding plaintiffs' counsel attorneys' fees of 27.5% of a $116.6 million settlement).

26% of a net settlement fund on $504.5 million in settlements in the ISDA fix antitrust litigation). The Court awarded 28.06% of the Non-Defendant OTC Plaintiffs' $21.775 million settlement fund. *Id.* at *4 (citing ECF 3185). The Court awarded 29.38% and 28.08% in fees from the Lender Plaintiffs' $31 million and $4 million settlement funds, respectively. *See id.* at *4 (citing ECF 2777 and 3097).

The Court awarded 18.49% and 18.5% of the net settlement fund for OTC Plaintiffs' prior settlements. *See* ECF 2683 at 9–10; ECF 2745. As with the MUFG, Norinchukin, and Société Générale settlement, OTC Plaintiffs respectfully submit that a higher percentage award from this Settlement is appropriate for three reasons. *First*, an award of 25% of the net settlement fund from this Settlement would result in a reasonable aggregate percentage award of attorneys' fees from all OTC settlements to date. Combined with the Court's earlier fee awards, OTC Plaintiffs' requested fee here would result in a combined fee award of 20.2% of the combined $781 million in settlement funds through the date of this Settlement. That aggregate fee award is well within the range of percentage awards this Court has previously found reasonable and well within the range of percentage awards Judge Furman found reasonable in the *ISDAFix* case. *See EBP Fee Op.*, 2020 WL 6891417, at *3, *4 (finding that "a reasonable fee for EBP Class Counsel would fall somewhere between approximately 17% and 25% of the settlement fund"); *Alaska Elec. Pension Fund v. Bank of Am. Corp.* (*ISDAFix*), 2018 WL 6250657, at *1, 3 (S.D.N.Y. 2018) (finding "a reasonable fee in this case would fall somewhere between 15% and 25% of the settlement fund" and awarding 26% of a 504.5 million settlement fund).

Second, and again as with OTC Plaintiffs' fee application from the MUFG-Norinchukin-SocGen settlement, OTC Plaintiffs' requested fee represents a lower lodestar multiplier (1.83) than a prior fee award granted to OTC Plaintiffs (3.23 for Deutsche Bank–HSBC). *See* ECF 2705 at 10; ECF 2745. This relatively low lodestar multiplier reflects Class Counsel's significant investment

of attorney time in prosecuting this action by, among other things, successfully appealing the dismissal of all four settling Defendants on personal jurisdiction grounds, reviewing 3.5 million documents produced by Defendants, including the painstaking review of more than 126,000 audio recordings of defendants' phone calls, along with continued litigation in this Court during that appeal and after the Second Circuit's decision. *See* Joint Decl. ¶ 18.[4] That investment of attorney time ensured Class Counsel were well prepared to pursue the class's claims if and when the Second Circuit ruled in their favor and litigation in this Court re-commenced against the foreign bank defendants. *See Goldberger*, 209 F.3d at 50 (holding that "the time and labor expended by counsel" and "the magnitude and complexities of the litigation" are factors the Court should consider in evaluating the reasonableness of a requested fee).

On top of that, Class Counsel's increased lodestar—and decreased lodestar multiplier—demonstrates that the premise justifying the so-called "sliding scale" approach simply does not apply to this case. The "sliding scale" approach (*i.e.*, "awarding a smaller percentage for fees as the size of the settlement fund increases") is premised on the concern that "economies of scale could cause windfalls in common fund cases." *OTC Barclays–Citi Fee Op.*, 2018 WL 3863445, at *3 (quoting *Wal-Mart Stores*, 396 F.3d at 120). Class Counsel's increased lodestar, and correspondingly decreased lodestar multiplier, show that granting Class Counsel's requested fee would result in no such "windfall" here. *See* 5 William Rubenstein, Newberg on Class Actions § 15:81 (6th ed.) (Westlaw 2023) ("Given that a high multiplier is the best measuring stick of a windfall, courts ought to use the high multiplier to police windfalls, regardless of the size of the fund, rather than use the size of the fund as a policing mechanism."). The complexity of this case, reinforced by the Court's statement in *Libor VII*, 299 F. Supp. 3d 430, 607 n.189 (S.D.N.Y. 2018)

[4] The Joint Declaration of William C. Carmody and Michael D. Hausfeld in Support of OTC Plaintiffs' Motion for Attorneys' Fees and Expenses ("Joint Decl.") is filed concurrently herewith.

that its "decision to certify a class as to OTC plaintiffs' antitrust claims rests on the action in its current form, including on OTC plaintiffs' allegations of a sixteen-bank conspiracy to suppress LIBOR," have meant that achieving additional settlements by pursuing this case through each subsequent phase of the case against the non-settling Defendants has required Class Counsel to continue to invest substantial time and resources to prosecute the claims of the OTC Class. Hence, far from resulting in a "windfall," awarding 25% of the fund would appropriately reward Class Counsel for that investment of time in proportion to the favorable result Class Counsel have obtained for the class as a result of their efforts.

Third, an award of 25% of the net settlement fund would result in 77.58% of all OTC settlement funds being distributed to class members. As the Court explained in awarding fees from the Barclays–Citi settlement fund: "Given these amounts of expense reimbursements, incentive awards, and attorneys' fees, the class writ large will receive 76.62% of the aggregate settlement amounts (prior to other expenses, such as those incurred in providing notice to the classes) – a percentage that we find comports with public policy notions of allowing the class, rather than class counsel, to receive a sufficiently significant share of the recovery." *OTC Barclays-Citi Fee Op.*, 2018 WL 3863445, at *4; ECF 2705 at 2 (noting the fee award from the DB–HSBC settlements would "result in the class receiving 79.34% of the aggregate settlement amounts for all settlements to date").

3. Empirical Research on Attorneys' Fee Awards Supports OTC Plaintiffs' Requested Fee

OTC Plaintiffs' requested fee is also consistent with empirical research on attorneys' fee awards. A recent empirical study of contingent fee arrangements negotiated by sophisticated clients in non-class cases and class cases where the class representatives and members were sophisticated corporate parties concluded that "[d]ata from sophisticated clients shows both that

they choose to pay fixed one-third percentages or even higher escalating percentages based on litigation maturity just like unsophisticated clients do, and they do so even in the most enormous cases." Brian T. Fitzpatrick, *A Fiduciary's Guide to Awarding Fees in Class Actions*, 90 Fordham L. Rev. 1151, 1170 (2021). The most recent empirical study of fee awards, and one previously cited by this Court, found an average percentile of 22.3% in the highest decile of settlements studied (those greater than $67.5 million). *See* Theodore Eisenberg & Geoffrey Miller, *Attorneys' Fees in Class Actions: 2009–2013*, 92 N.Y.U. L. Rev. 937, 948 (2017). While the Court has previously cited older empirical studies with a lower *mean* percentage fee award, those studies also found a large standard deviation and the Court thus concluded based on them in the EBP fee opinion that "a reasonable fee for EBP Class Counsel would fall somewhere between approximately 17% and 25% of the settlement fund." *See EBP Fee Op.*, 2020 WL 6891417, at *3, *4 (citing Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 837–39 (2010) and 4 William B. Rubenstein, *Newberg on Class Actions* § 15:81 fig.2 (5th ed.)).

C. The Requested Fee Is Reasonable Under Lodestar "Crosscheck"

The reasonableness of Class Counsel's requested fee is confirmed by the lodestar "crosscheck," which tests the reasonableness of a percentage method–based fee. *See Goldberger*, 209 F.3d at 50. The "lodestar" is calculated by multiplying the number of hours expended on the litigation by each particular attorney or firm professional by their current hourly rate, and totaling the amounts for all timekeepers.[5] When using this lodestar to crosscheck Class Counsel's requested award, courts employ a multiplier that "represents the risk of the litigation, the complexity of the

[5] The lodestar is calculated at current hourly rates. *See, e.g.*, *Missouri v. Jenkins*, 491 U.S. 274, 283–84 (1989) (endorsing "an appropriate adjustment for delay in payment" by applying "current" rates); *Gierlinger v. Gleason*, 160 F.3d 858, 882 (2d Cir. 1998) (stating that rates "should be 'current rather than historic'").

issues, the contingent nature of the engagement, the skill of the attorneys, and other factors." *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004) (citing *Goldberger*, 209 F.3d at 47).

Class Counsel have spent over 124,000 hours, with a lodestar of $83,590,017, from the inception of this matter through July 21, 2023.[6] *See* Joint Decl. ¶ 70. That time represents Class Counsel's tireless efforts in investigating and prosecuting the OTC Plaintiffs' claims over a nearly twelve-year period. By way of comparison, in the Yen LIBOR cases, class counsel reported a total lodestar of $54,532,316.55, corresponding to 105,775.61 hours worked, *before* any briefing on class certification. *See Laydon II* Br. at 29. Compared to those figures, Class Counsel's lodestar at the far more advanced stage of this case is presumptively reasonable.

When combined with Class Counsel's previous fee awards, Class Counsel's fee request of 25% of the net settlement fund here would correspond to a multiplier of 1.83 over Class Counsel's total lodestar, if the Court grants the requested expense reimbursements.[7]

This multiplier falls at the lower end of the range considered reasonable by courts in the Second Circuit. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (finding a multiplier of 3.5 to be reasonable in an antitrust class action); *In re Credit Default Swaps*

[6] In addition to Class Counsel, six other firms have assisted in this litigation. *See* Joint Decl. ¶¶ 68-69. Four firms performed work for the benefit of the OTC Class by helping in evaluation of the plan of distribution. *See id.* ¶¶ 68. Two other firms representing class representatives have also performed work related to those representations as well as other work at the direction of Class Counsel. *See id.* ¶ 69. These firms' time is not included in the lodestar reported in this application. OTC Plaintiffs request that the Court grant Class Counsel authority to allocate and distribute any attorneys' fees and expenses awarded from the settlement funds among counsel who performed work on behalf of OTC Plaintiffs as is customary in class action litigation.

[7] When evaluating successive applications for interim awards of attorneys' fees, the relevant multiplier for courts to consider when performing the lodestar crosscheck is the *cumulative* multiplier that compares class counsel's *total* fee award to class counsel's *total* lodestar. *See, e.g.*, *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) (approving a second fee award that when combined with a prior award "in its aggregate gives Lead Counsel $336.1 million in fees based on a *total* lodestar of approximately $83.2 million" (emphasis added)). This is the approach utilized by class counsel in the Yen LIBOR cases, without objection from Judge Daniels, who approved class counsel's first and second fee applications in full. *See Laydon II* Br. at 29 (presenting cumulative multiplier of 0.91, which compared class counsel's total lodestar of $54,532,316.55 from the initiation of the action to class counsel's second fee request for $34.88 million aggregated with their prior $14.5 million award).

Antitrust Litig., 2016 WL 2731524, at *16 (S.D.N.Y. April 26, 2016) (approving fee award in complex antitrust action where lodestar was "just over 6"); *Colgate*, 36 F. Supp. 3d at 353 (holding a multiplier of 5 was "on the high end" but "not unreasonable"); *Beckman v. KeyBank N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) (approving an award of 33% of the common fund, representing a multiplier of 6.3, and explaining that "[c]ourts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers"); *Sewell v. Bovis Lend Lease, Inc.*, 2012 WL 1320124, at *13 (S.D.N.Y. Apr. 16, 2012) ("Courts commonly award lodestar multipliers between two and six."); *Johnson v. Brennan*, 2011 WL 4357376, at *13 (S.D.N.Y. Sept. 16, 2011) ("Courts routinely award counsel two to three times lodestar in class action settlements."); *In re Lloyd's Am. Trust Fund Litig.*, 2002 WL 31663577, at *27 (S.D.N.Y. Nov. 26, 2002) ("Here, the resulting multiplier of 2.09 is at the lower end of the range of multipliers awarded by courts within the Second Circuit.").

Class counsel's requested fee award would result in a lower lodestar multiplier than the average reported in empirical studies. This Court previously noted that "one study identifies an average multiplier of 3.18 for settlements above $175.5 million and a second study identifies an average multiplier of 2.39 for settlements above $44.6 million." ECF 2683 at 11 (citing 4 William B. Rubenstein, *Newberg on Class Actions* § 15:89 tbl. 2). Professor Eisenberg's 2017 study found an average multiplier of 2.72 for cases with a settlement fund of greater than $75 million. *See* Theodore Eisenberg & Geoffrey Miller, *Attorneys' Fees in Class Actions: 2009–2013*, 92 N.Y.U. L. Rev. 937, 967 tbl.13 (2017).

Further, all the work performed by Class Counsel through July 21, 2023, contributed to Class Counsel's analysis of the strengths and weaknesses of the claims against Rabobank, Lloyds, RBC, and Portigon, and furthered Class Counsel's ability to negotiate a favorable settlement. As the Court recognized at the fairness hearing for the settlement with Barclays, OTC Plaintiffs have

"alleged a conspiracy" and "the same action against everybody." ECF 2352-1, Tr. 66:23-24. Class Counsel's efforts to strengthen the OTC Plaintiffs' litigation position—which included motion practice, appeals, discovery efforts, and document review—generally involved all of the Defendants or had case-wide implications. Consequently, those efforts strengthened OTC Plaintiffs' case against *each* defendant and contributed to the recovery here from Rabobank, Lloyds, RBC, and Portigon. Moreover, all of the work performed by Class Counsel was undertaken to benefit the same OTC Class. *See* ECF 2863 at 3 ("Further, attribution of these expenses to Barclays and Citi is appropriate – even though some portion undoubtedly pertains to other defendants also – given the joint and several liability in this action."). Thus, courts consider cumulatively, when performing the lodestar crosscheck, all of class counsel's time from the beginning of an action. *See supra* note 7.[8]

Finally, Class Counsel's hourly rates are also reasonable. The rates for Class Counsel who billed meaningful time to this case are Class Counsel's standard hourly rates and are regularly charged to (and paid by) clients who engage Class Counsel on an hourly basis. Joint Decl. ¶¶ 64-65; *Luciano v. Olsten Corp.*, 109 F.3d 111, 115 (2d Cir. 1997) ("The 'lodestar' figure should be in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."). Class Counsel's hourly rates are market rates for plaintiff- and defense-side law firms of similar quality litigating matters of similar complexity and magnitude in New York City.[9] Thus, OTC Plaintiffs' request for an award of 25% of the net

[8] *See also Auto Parts II*, 2017 WL 3525415, at *4 n.2 ("The Court rejects the argument . . . that time included with the Round 1 Settlement fee request should not be included in the lodestar cross-check for the Round 2 Settlements. In calculating the lodestar for purposes of the cross-check, it would be impractical to compartmentalize and isolate the work that EPPs' counsel did in any particular case at any particular time because all of their work assisted in achieving all of the settlements and has provided and will continue to provide a significant benefit to all of the EPPs classes.").

[9] *See* Sara Randazzo & Jacqueline Palank, *Legal Fees Cross New Mark: $1,500 an Hour*, The Wall Street Journal, Feb. 16, 2016 (finding that "[f]or lawyers at the very top of th[e] fields [of antitrust and high-stakes litigation and appeals], hourly rates can hit $1,800 or even $1,950" and citing a 2011 article and observing that the increases in

settlement fund is fair and reasonable using a lodestar multiplier. *Colgate*, 36 F. Supp. 3d at 353.

D. The *Goldberger* Factors Support the Requested Fee Award

Under either the percentage method or the lodestar multiplier approach, the "'*Goldberger* factors' ultimately determine the reasonableness of a common fund fee," *Wal-Mart Stores*, 396 F.3d at 121. The *Goldberger* factors, which the Court weighs in its discretion, are:

> (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

Goldberger, 209 F.3d at 50 (citation omitted). Courts regularly apply the *Goldberger* factors when considering applications for interim awards. *See, e.g.*, *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *9-10. Each of these factors confirms the requested fee is reasonable.

1. Time & Labor Expended by Counsel (Goldberger Factor 1)

The first *Goldberger* factor—the "time and labor expended by counsel"—strongly supports approval of the requested fee. Class Counsel have spent over 124,000 hours prosecuting this case and, as discussed above, the lodestar multiplier is within the range approved by courts in this Circuit. The substantial time devoted to this litigation over nearly twelve years reflects the immense effort Class Counsel have exerted in prosecuting this case and is reasonable, particularly given the complex nature of this action. Class Counsel have, among other things:

- Conducted an initial investigation of this case to develop the facts and legal theories that formed the basis of the allegations in the complaint and drafted and filed the complaint, amended complaint, second amended complaint, proposed third amended complaint, third amended complaint, and fourth amended complaint.
- Defended the complaint against eight Rule 12(b) motions to dismiss and Defendants' opposition to the OTC Plaintiffs' motions for leave to amend the complaint.
- Written scores of letters to the Court, on numerous matters, including providing

hourly rates "mak[e] the $1,000-an-hour legal fees that once seemed so steep look quaint by comparison"), *available at* https://www.wsj.com/articles/legal-fees-reach-new-pinnacle-1-500-an-hour-1454960708.

supplemental authority, addressing discovery disputes, and presenting scheduling issues.

- Appealed the dismissal of the OTC Plaintiffs' antitrust claims to the Second Circuit, and successfully filed an amicus brief to the Supreme Court on an issue of appellate jurisdiction.

- Attended multiple full-day, in-person mediation sessions conducted by highly experienced mediators, preceded by mediation briefing, to achieve the Barclays, Citi, Deutsche Bank, and HSBC Settlements.

- Successfully briefed motions for preliminary and final approval of the Barclays, Citi, Deutsche Bank, and HSBC Settlements and worked with experts to develop a comprehensive notice program and plan of distribution.

- Reviewed more than 3.5 million documents produced by the Defendants and third parties, as well as trial transcripts and evidence from civil and criminal trials in the United States and the United Kingdom relating to LIBOR manipulation.

- Listened to more than 125,000 audio files produced by the defendants.

- Drafted discovery requests to the Defendants for trading, cash-flow, and borrowing data on the Defendants' financial instruments and participated in scores of meet and confers to obtain the production of that data.

- Diligently pursued discovery from four third-party brokers that formed an important component of the OTC Plaintiffs' expert witness analysis.

- Defended six 30(b)(6) depositions of the named plaintiffs; defended three depositions of OTC Plaintiffs' experts; conducted two depositions of the Defendants' experts.

- Worked with the OTC Plaintiffs' expert witnesses to draft extensive 30(b)(6) notices setting out questions essential to understanding the trade, cash-flow, and borrowing data produced by the defendants.

- Assisted the OTC Plaintiffs' economic experts in analyzing 686 gigabytes of data and developing two expert witness reports totaling more than 300 pages.

- Prepared more than sixty pages of briefing, more than sixty pages of attorney declarations, and 149 exhibits in support of the OTC Plaintiffs' motion for class certification and vigorously defended against challenges thereto by the defendants.

- Attended a full-day, in-person mediation session conducted by the Honorable Layn Phillips, preceded by mediation briefing, and followed by extensive telephonic discussions and negotiations, to achieve the Citibank Settlement.

- Leveraged experience from the Barclays Settlement to successfully brief a motion for preliminary approval of the Citibank Settlement and adapt previously successful notice program for this second settlement.

- Attended a full-day, in-person mediation session conducted by the Honorable Layn Phillips, preceded by mediation briefing, and followed by extensive telephonic discussions and negotiations, to achieve the Deutsche Bank Settlement.

- Attended a full-day, in-person mediation session conducted by the Honorable Layn Phillips, preceded by mediation briefing, and followed by extensive telephonic discussions and negotiations, to achieve the HSBC Settlement.

- Successfully briefed motions for preliminary and final approval of both the Deutsche Bank and HSBC Settlements and designed a joint notice program for those two settlements as well as for the litigation class that saved substantial expense to the class.

- Collected, reviewed, and produced to the Defendants thousands of pages of documents from the named plaintiffs, and prepared supplemental class certification briefing regarding one named plaintiff's adequacy as a class representative.

- Appealed the dismissal of the OTC Plaintiffs' antitrust claims on personal jurisdiction grounds to the Second Circuit, including supplemental briefing on the Second Circuit's decision in *Schwab* and the Supreme Court's decision in *Ford Motor Co. v. Montana 8th Judicial Dist.*, No. 19-368.

- Briefed disputed issues concerning the case schedule after the Second Circuit's personal jurisdiction ruling and negotiated with Liaison Counsel for Defendants a proposed schedule for merits discovery, expert reports, class certification as to the foreign-bank Defendants, and summary judgment briefing.

- Drafted with the Direct-Action Plaintiffs a consolidated set of document requests to all defendants for merits discovery on "Upstream" issues.

- Worked with experts and the claims administrator to administer the Barclays, Citi, Deutsche Bank, and HSBC settlement funds and briefed the motion for distribution resulting in the successful distribution of those settlement funds to the members of the OTC Class.

- Proposed and negotiated search terms and custodians for merits discovery on "Upstream" issues with the twelve non-settling OTC Defendants and briefed a motion to compel on disputed search terms and custodians.

- Engaged in extensive negotiations and discussions mediated by the Honorable Layn Phillips to achieve the MUFG, Norinchukin, and SocGen Settlement and then the Lloyds, Rabobank, RBC, and Portigon Settlement.

- Briefed a motion for preliminary approval of the MUFG, Norinchukin, and SocGen settlement and subsequently this Settlement and worked with experts to develop a comprehensive notice program and plan of distribution that leverages prior claims submissions and extensive prior claims administration work.

In sum, Class Counsel have devoted considerable time and financial resources in

prosecuting this case on behalf of the OTC Class.

2. Magnitude & Complexity of the Litigation (Goldberger Factor 2)

The second *Goldberger* factor—"the magnitude and complexities of the litigation"—also strongly supports approval of the requested fee. No other case better embodies the challenges faced by plaintiffs in antitrust litigation than this one. *See Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 263 (2d Cir. 2011) (noting the "factual complexities of antitrust cases"); *Wal-Mart Stores*, 396 F.3d at 118 ("Federal antitrust cases are complicated, lengthy, and bitterly fought."); *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *4 ("Federal antitrust cases are complicated lengthy, and bitterly fought, as well as costly."). This action was initially filed nearly twelve years ago and has undergone multiple rounds of briefing on eight motions to dismiss, a motion for judgment on the pleadings, and an opposition to leave to amend that functioned as the equivalent to a motion to dismiss.

Meanwhile, the briefing of the OTC Plaintiffs' successful motion for class certification was extensive, and OTC Plaintiffs successfully opposed Defendants' Rule 23(f) petition. After class certification, the OTC Plaintiffs faced (and continue to face) the monumental task of completing merits discovery, including additional expert discovery, summary judgment briefing, class certification briefing as to the foreign bank Defendants, and ultimately a trial likely lasting weeks (if not months) from which the losing party will almost certainly appeal. *See, e.g.*, *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *4 ("This litigation has been pending since 2005 and has involved the production of thousands of documents, at least 17 fact witness depositions, expert discovery, and extensive motion practice. The Certified Classes are scheduled for a trial against the non-settling defendants that is expected to take at least three weeks.").

3. Risk of the Litigation (Goldberger Factor 3)

The third *Goldberger* factor—the "risk of the litigation"—also strongly supports approval

of the requested fee. The Second Circuit has identified "the risk of success as perhaps the foremost factor to be considered in determining [a reasonable fee award]." *Goldberger*, 209 F.3d at 54. Class Counsel have taken on and overcome significant risks in this litigation.

a. Contingency Risk

"No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success." *Fleisher*, 2015 WL 10847814, at *21 (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974)). Here, OTC Counsel have invested more than 124,000 hours of time with a lodestar value of more than $83 million without *any* guarantee they would be compensated for their continued efforts or reimbursed for any of the millions of dollars in litigation expenses they have incurred. *See In re High-Crush Ptrs. L.P. Secs. Litig.*, 2014 WL 7323417, at *16 (S.D.N.Y. Dec. 19, 2014) ("Lead Counsel undertook the representation of Lead Plaintiffs and the Class in this Action on a wholly contingent basis, investing substantial time and funds to prosecute this Action, without any guarantee of compensation or of recovering out-of-pocket expenses."); *Fleisher*, 2015 WL 10847814, at *21 ("[T]he firm would not have been compensated for its time or expenses at all had it been unsuccessful in this litigation.").

Moreover, Class Counsel would not have been compensated for their additional time or expenses at all had they been unsuccessful in this litigation. *See Grinnell*, 495 F.2d at 471 ("[D]espite the most vigorous and competent of efforts, success is never guaranteed."); *In re Beacon Assocs. Litig.*, 2013 WL 2450960, at *13 (S.D.N.Y. 2013) ("And all of these matters were taken on contingency, so in view of the novelty of the issues there was some possibility that counsel would recover nothing at all."); *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 366 (S.D.N.Y. 2002) ("The enormous risks of litigation are why settlement is frequently preferred. Settling avoids delay as well as uncertain outcome . . . ."). The risk of no recovery in complex

class actions is real and supports Class Counsel's request.

Contingency risk takes on an additional layer in multi-defendant actions such as this one, where class counsel's efforts in securing partial settlements with certain defendants protect against the risk that there might *never* be any recovery from other defendants. Courts recognize this dynamic when awarding fees—and cite it as a reason to *reward* class counsel for the risk they take. For instance, in the *Online DVD Rental* case, plaintiffs settled with one defendant for $27.25 million and then lost the entire case against the remaining defendant a few months later, when the court granted that defendant's motion for summary judgment. *See In re Online DVD Rental Antitrust Litig.*, No. 09-md-2029 (N.D. Cal. Sept. 2, 2011), ECF 492 (granting preliminary approval to settlement); *In re Online DVD Rental Antitrust Litig.*, 2011 WL 5883772, at *1 (N.D. Cal. Nov. 23, 2011) (granting motion for summary judgment). The court not only granted class counsel's fee request for 25% of the settlement fund, *see In re Online DVD Rental Antitrust Litig.*, No. 09-md-2029, slip op. ¶ 1 (N.D. Cal. Mar. 29, 2012), ECF 607, *aff'd*, 779 F.3d 934, 955 (9th Cir. 2015), but in fact, specifically cited the summary judgment order as one reason to approve the fee request as reasonable:

> At this time, I'm prepared to find that the settlement is fair, reasonable, and adequate given the totality of the circumstances, ***particularly given the fact that half the case has been kind of wiped off the books for the plaintiffs***, I find that the settlement is fair, reasonable, and adequate, that something's better than nothing in this kind of case, and that ***the bench mark is a reasonable fee*** for this case. So I approve.

Transcript of Hearing, *In re Online DVD Rental Antitrust Litig.*, No. 09-md-2029 (N.D. Cal. Mar. 14, 2012), ECF 602 (emphasis added). In that case, class counsel's diligence in pursuing what turned out to be an unsuccessful claim was a compelling reason to *reward* class counsel for the contingency risk it took on and *award* the requested fees from the recovery that class counsel *did* achieve. Although Class Counsel are confident in the merits of the OTC Class's claims against the

non-settling Defendants, there still remains significant contingency risk associated with those claims, which favors granting an interim fee award from the substantial and concrete recovery Class Counsel have obtained to date.

b. Liability Risk

"Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *14 (S.D.N.Y. 2014). The OTC Plaintiffs face significant risks in continuing to litigate, amplified by the complexity of the market for LIBOR-linked financial instruments and the fact that Defendants are global financial institutions with virtually unlimited litigation resources. Indeed, this case presents the Court, the parties, and eventually a jury with the task of understanding complex derivative instruments in an opaque, unregulated market, during a period of extraordinary economic upheaval. "The complexity of Plaintiff's claims *ipso facto* creates uncertainty . . . . A trial on these issues would likely be confusing to a jury." *Park v. The Thomson Corp.*, 2008 WL 4684232, at *4 (S.D.N.Y. Oct. 22, 2008); *see* 31 No. 7 Futures & Derivatives L. Rep. 1 ("Derivative instruments, in most cases, are highly complex and difficult to understand for even highly sophisticated and intelligent investors.").

Although the OTC Plaintiffs believe fervently in the merit of their case, at the time this Settlement was reached, merits discovery, merits expert work, class certification as to those foreign-bank Defendants, summary judgment, and ultimately a trial lay ahead along with corresponding risks at each phase. *See Athale v. Sinotech Energy Ltd.*, 2013 WL 11310686, at *6 (S.D.N.Y. Sept. 4, 2013) ("Absent settlement, there is no assurance that Lead Plaintiff's motion for class certification would be granted or that Class status, if granted, would be maintained

throughout trial.").[10]

c. Damages Risk

Equally as significant as the risks in establishing liability in this case were the OTC Plaintiffs' risks in establishing damages. The damages estimates in this case are heavily expert-driven, and, although the OTC Plaintiffs are confident in their ability to prove damages, the expert battle at class certification and the anticipated merits expert battle adds substantial risk to the OTC Plaintiffs' claims. *See In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *18 (S.D.N.Y. 2010) (noting that the burden in proving the extent of the class's damages weighed in favor of approving the fee request, and that "[t]he jury's verdict . . . would . . . depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable"); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998) (observing that "[d]amages at trial would inevitably involve a battle of the experts" and noting that it is "difficult to predict with any certainty which testimony would be credited").

* * *

The only certainties from the outset of this litigation were that there would be no attorneys' fees or reimbursement of expenses without a successful result, and that a successful result, if any, could be achieved only after lengthy, difficult, and expensive effort.

4. Quality of the Representation (Goldberger Factor 4)

The fourth *Goldberger* factor, "the quality of representation," also supports approval of the requested fee. Courts have consistently recognized that the result achieved is a major factor to be considered in making a fee award and in assessing the quality of the representation. *See, e.g.*,

[10] *Sykes v. Harris*, 2016 WL 3030156, at *18 (S.D.N.Y. May 24, 2016) ("Defendants asserted numerous novel defenses to Lead Plaintiffs' claims which put recovery for Class Members and Class Counsel at risk."); *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970) ("[N]o matter how confident one may be of the outcome of litigation, such confidence is often misplaced.").

Hensley v. Eckerhart, 461 U.S. 424, 436 (1983). Class Counsel respectfully submits that the $101 million settlement amount and the $781 million in total settlement funds achieved through the subsequent settlement is strong evidence of the quality of Class Counsel's representation.

"To determine the 'quality of the representation,' courts review, among other things, the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *Taft v. Ackermans*, 2007 WL 414493, at *10 (S.D.N.Y. Jan. 31, 2007). "Susman Godfrey has significant experience with . . . class actions, including settlements thereof . . . [and] [t]he lawyers working for the Class have substantial experience prosecuting large-scale class actions." *Fleisher*, 2015 WL 10847814, at *22; *see also* Joint Decl. Ex. A. Hausfeld LLP's attorneys "are highly experienced practitioners in complex litigation generally and antitrust litigation specifically." *Air Cargo IV*, 2015 WL 5918273, at *7; *see also* Joint Decl. Ex. B.

"The quality of opposing counsel is also important in evaluating the quality of Lead Counsel's work." *Fleisher*, 2015 WL 10847814, at *22. Courts recognize that the caliber of the opposition faced by plaintiffs' counsel aids assessment of the quality of the plaintiffs' counsel's performance. *See Anwar v. Fairfield Greenwich Ltd.*, 2012 WL 1981505, at *2 (S.D.N.Y. June 1, 2012) (considering "the quality and vigor of opposing counsel"). All four settling defendants represented by skilled and highly regarded counsel from Milbank LLP, Herbert Smith Freehills LLP, Hogan Lovells LLP, Steptoe and Johnson LLP, and Katten Muchin Rosenman LLP—prestigious firms with well-deserved reputations for vigorous advocacy in the defense of complex civil cases, and the same is true of the other defendants in this action. *See In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d at 357–58 ("Lead Counsel obtained remarkable settlements for the Class while facing formidable opposing counsel from some of the best defense firms in the country.").

5. Requested Fee in Relation to the Settlement (Goldberger Factor 5)

The fifth *Goldberger* factor—"the requested fee in relation to the settlement"—also supports approval of the requested fee, as discussed *supra* at Section I.B.

6. Public Policy Considerations (Goldberger Factor 6)

Finally, the sixth *Goldberger* factor—public policy considerations—weighs heavily in favor of the requested fee. *Goldberger*, 209 F.3d at 50. Public policy considerations strongly favor incentivizing skilled private attorneys to undertake class action litigation both to vindicate the rights of class members and the law enforcement function of private action litigation. *See In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d at 359 ("[T]o attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives."); *Hicks v. Stanley*, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) ("To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding."); *In re Sumitomo*, 74 F. Supp. 2d at 399 ("[T]he Second Circuit and courts in this district also have taken into account the social and economic value of class actions, and the need to encourage experienced and able counsel to undertake such litigation.").

Those interests are particularly salient in this case, which has required continual investments of large amounts of attorney time and expenses by Class Counsel. To incentivize the very best private attorneys to take on complex, lengthy, difficult, and expensive class actions, the fee awarded must be sufficient to justify the opportunity cost of foregoing hourly and fixed-fee cases where counsel are assured of compensation regardless of outcome.

II. Class Counsel's Request for Reimbursement of Litigation Expenses Is Reasonable

Class Counsel also request reimbursement in the amount of $85,613.16 for out-of-pocket expenses reasonably and necessarily incurred in connection with the prosecution of this case

between May 12, 2023 (the date of the MUFG-Norinchukin-SocGen Settlement) and July 21, 2023 (the date of this Settlement). Joint Decl. ¶ 71.

"[C]ourts in the Second Circuit normally grant expense requests in common fund cases as a matter of course." ECF 2683 at 2 (alteration in original). The expenses incurred by Class Counsel include fees charged by experts, electronic document hosting services, translators, the mediator, court fees, electronic research services like Westlaw and Lexis, photocopy services, and travel providers in connection with this litigation. Courts regularly approve similar cost applications in large, complex antitrust class actions.[11] Indeed, "[t]he fact that Class Counsel [were] willing to [incur these expenses], where reimbursement was entirely contingent on the success of this litigation, is perhaps the best indicator that the expenditures were reasonable and necessary." *Fleisher*, 2015 WL 10847814, at *23.

Conclusion

OTC Plaintiffs respectfully request that the Court award the requested attorneys' fees equal to 25% of the net settlement fund, plus a pro rata share of interest thereon and reimbursement of litigation expenses in the amount of $85,613.16.

Dated: October 27, 2023

/s/ Michael D. Hausfeld
Michael D. Hausfeld
Hilary Scherrer
Nathaniel C. Giddings
HAUSFELD LLP
1700 Street NW, Suite 650
Washington, D.C. 20006

/s/ William Christopher Carmody
William Christopher Carmody (WC8478)
Seth Ard (SA1817)
Geng Chen (GC2733)
Amy B. Gregory (5663299)
SUSMAN GODFREY L.L.P.
1301 Avenue of the Americas, 32nd Fl.

[11] *See, e.g.*, *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *18 (approving $10 million in expenses "[m]ost of" which "were incurred in connection with retention of experts" where the case settled just prior to the due date for class certification motions); *In re Bank of Am. Corp. Secs., Derivatives & ERISA Litig.*, 2013 WL 12091355, at *1 (S.D.N.Y. Apr. 8, 2013) (approving $8 million in litigation expenses); *In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 380 (S.D.N.Y. 2013) (approving $7.3 million in litigation expenses); *In re IPO*, 671 F. Supp. 2d at 505 (approving $46 million in expenses).

Telephone: 202-540-7200
mhausfeld@hausfeldllp.com
hscherrer@hausfeldllp.com
ngiddings@hausfeldllp.com

Scott Martin
HAUSFELD LLP
33 Whitehall Street, 14th Fl.
New York, NY 10004
Telephone: 646-357-1100
smartin@hausfeldllp.com

Gary I. Smith
HAUSFELD LLP
325 Chestnut Street
Suite 900
Philadelphia, PA 19106
Telephone: 215-985-3270
gsmith@hausfeld.com

Co-Lead Counsel for the OTC Plaintiff Class

New York, New York 10019
Telephone: 212-336-3330
bcarmody@susmangodfrey.com
sard@susmangodfrey.com
gchen@susmangodfrey.com
agregory@susmangodfrey.com

Marc M. Seltzer
Glenn C. Bridgman
SUSMAN GODFREY L.L.P.
1901 Avenue of the Stars
Los Angeles, California 90067-6029
Telephone: 310-789-3100
mseltzer@susmangodfrey.com
gbridgman@susmangodfrey.com

Matthew Berry
Drew D. Hansen
SUSMAN GODFREY LLP
1201 Third Avenue, Suite 3800
Seattle, WA 98101
Telephone: 206-516-3880
mberry@susmangodfrey.com
dhansen@susmangodfrey.com

Barry C. Barnett (BB1984)
Karen Oshman
Michael Kelso
SUSMAN GODFREY L.L.P.
1000 Louisiana Street
Suite 5100
Houston, TX 77002-5096
Telephone: 713-651-9366
bbamett@susmangodfrey.com
koshman@susmangodfrey.com
mkelso@susmangodfrey.com

Co-Lead Counsel for the OTC Plaintiff Class

TAB 20A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In re Polyurethane Foam Antitrust Litigation

This document relates to:
INDIRECT PURCHASER CLASS

Case No. 1:10 MD 2196

MEMORANDUM OPINION AND ORDER RE: SETTLEMENT MOTIONS

JUDGE JACK ZOUHARY

INTRODUCTION

The Class of Indirect Purchaser Plaintiffs ("IPPs") moves for final approval of nine class action settlement agreements listed in the following table. Further, Class Counsel for the IPPs moves for an award of attorney fees, reimbursement of expenses, and incentive awards for representative plaintiffs (Doc. 1908).

Settling Defendants	Gross Settlement Amount	Portions of Settlement Amount that are Contingent or Payable More than 3 Weeks in the Future	Docket Number of Agreement
Carpenter Co.	$63,500,000	**$43.5 million** is not payable until all appellate rights are exhausted	1751-2
FFP Holdings, LLC	$2,750,000	none	1854, Ex. A
Future Foam, Inc.	$10,500,000	**$2.5 million** is not due until July 31, 2016; and **$4 million** is contingent on a successful outcome in separate litigation against Dow Chemical	1854, Ex. C
FXI Holdings, Inc.	$9,500,000	none	1854, Ex. B
Hickory Springs Manufacturing Co.	$10,250,000	**$1.5 million** is not due until June 30, 2016; another **$1.5 million** is not due until June 30, 2017; and **$5.25 million** is contingent on a successful outcome in separate litigation against Dow Chemical	1751-3
Leggett & Platt Incorporated	$26,500,000	none	1751-4

Settling Defendants	Gross Settlement Amount	Portions of Settlement Amount that are Contingent or Payable More than 3 Weeks in the Future	Docket Number of Agreement
Mohawk Industries Inc.	$16,000,000	none	1751-5
Vitafoam Products Canada Limited and Vitafoam, Inc. ("Vitafoam")	$2,750,000	none	1751-6
Woodbridge Foam Corporation, Woodbridge Sales & Engineering, Inc., and Woodbridge Foam Fabricating, Inc. ("Woodbridge")	$9,500,000	**$2.25 million** is not due until a year from now; and **$2.25 million** is not due until December 31, 2017	1751-7
TOTAL	$151,250,000	**$62.75 million**	

PROCEDURAL BACKGROUND

Plaintiffs in this multidistrict antitrust litigation asserted claims that numerous dominant firms in the flexible polyurethane foam market engaged in a decade-long conspiracy to fix, raise, and maintain the price of foam products. Plaintiffs bringing these claims included: (1) direct purchasers -- that is, businesses that purchased foam directly from Defendants and incorporated that foam into consumer products, such as furniture, mattresses, or carpet underlay; and (2) indirect purchasers -- that is, individuals and businesses that purchased these foam-containing consumer products.

This Court previously certified both a class of Direct Purchaser Plaintiffs ("DPPs") and also a class of Indirect Purchaser Plaintiffs ("IPPs") (Doc. 1102 (redacted version at Doc. 1408); Docs. 1115 & 1117). This Court recently granted final approval to DPP settlement agreements, and also granted in part the fee petition filed by Class Counsel for the DPPs (Doc. 1971).

The IPPs followed a similar pattern of sequential settlements. This Court preliminarily approved nine settlement agreements, along with the plan of notice, claim forms, and Plan of Allocation (Doc. 1861).

The IPP class now moves for final approval of these settlement agreements (Doc. 1988). In addition, Class Counsel submits a fee application, seeking: (1) an award of attorney fees in the amount of $45,375,000, which is 30% of the nine classwide settlements totaling $151,250,000; (2) reimbursement of $5,115,811.72 in expenses; and (3) a total of $200,000 in incentive awards payable to the Class Representatives (Doc. 1908 at 1–2, 18).

This Court received objections to the settlements and/or the fee application from the following class members:[1]

1.	Chris Andrews (*pro se*)	Doc. 1920 & 1928
2.	Jill Cannata	Doc. 1950
3.	Melissa Holyoak and John Tabin by the Center for Class Action Fairness ("CCAF")	Doc. 1960
4.	Sean Cochran	Doc. 1964
5.	Michael Narkin (*pro se*)	Doc. 1965
6.	Jennifer Hinojosa (*pro se*)	Doc. 1967
7.	Patrick Sweeney (*pro se*)	Doc. 1968

Class Counsel were directed by this Court to answer questions (Docs. 1973 & 1997) as part of a final fairness hearing, at which time this Court heard argument from IPP Class Counsel and two objectors -- Andrews and CCAF. In addition, this Court heard from the IPP Claims Administrator, Eric Miller who, after the hearing, submitted a Declaration elaborating upon some of his comments at the hearing (Doc. 2010).

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[1] An attorney also filed a notice of appearance on behalf of "Objector Kelly Marie Spann," but neither Spann nor her attorney ever filed any objection (Doc. 1962).

Sweeney's objection was filed on November 17, 2015. The due date was November 13, 2015, and IPPs assert the objection is untimely. Sweeney indicates in his certificate of service, however, that he mailed his objection on November 11, so this Court accepts it as timely.

Finally, IPPs argue that Andrews and Hinojosa do not have standing to object, because they have not provided sufficient documentation to show they purchased a covered foam-containing product in a covered State. This Court agrees their claim documentation is weak, but nevertheless chooses to simply address their respective objections on the merits.

Based upon all this available information, along with this Court's five-year oversight of this MDL, this Court is prepared to clear the final hurdle in these cases.

THE SETTLEMENT AGREEMENTS

Before addressing the merits of the IPPs' motions and objections, this Court summarizes the nine settlement agreements and the current claims status. These agreements have a total potential value of $151,250,000. Of this amount, (a) Defendants have already deposited $85 million into escrow accounts; (b) Hickory Springs and Woodbridge will deposit another $3.5 million within 15 days of final approval by this Court; (c) Future Foam, Hickory Springs, and Woodbridge will deposit another $10 million over the next two years; (d) Carpenter will deposit another $43.5 million once all appellate rights are exhausted; and (e) another $9.25 million may eventually become payable, contingent upon whether Hickory Springs and Future Foam succeed in separate litigation against Dow Chemical scheduled to go to trial in mid- to late-2016.[2]

As a general matter, the settlement amounts will be used to pay benefits to class members; common benefit fees and expenses to Class Counsel; expenses to the Claims Administrator; incentive awards to Class Representatives; and "leftovers" to *cy pres* beneficiaries. The objectors have raised issues regarding all these payment categories (*see, e.g.*, Doc. 2018 at 5–20, 29–33). This Court examines these objections below.

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[2] If Hickory Springs succeeds in separate litigation against Dow Chemical, the proceeds are payable as follows: (1) Hickory must use the proceeds to pay certain amounts to the "Sealy Plaintiffs" in this case; (2) if there are additional proceeds, Hickory must pay the $5.25 million contingent amount to the IPP class; and (3) if there are additional proceeds, Hickory must accelerate its guaranteed future payments to the IPP class. By comparison, if Future Foam succeeds in separate litigation against Dow Chemical, provisions (2) and (3) listed above also apply; but there is *no* analogous requirement as in provision (1) that Future Foam pay the "Sealey Plaintiffs" before the IPP class receives the $4 million contingent amount.

Regarding payments to class members, the claim form is designed so that a class member will participate in all nine settlements, unless the class member affirmatively chooses to be excluded from a particular settlement agreement. Each of the settlement agreements provide for the following allocations and weightings:

- First, each settlement agreement allocates the settlement funds as follows: 36.93% to bedding claims, 30.70% to carpet padding claims, and 32.37% to furniture claims. These percentages represent the proportional volume of commerce that each product category bears to the total volume of polyurethane foam products.

- Second, each class member's claim is "weighted" as follows: bedding claims at 80% of purchase price, carpet padding claims at 90% of purchase price, and furniture claims at 75% of purchase price. These percentages reflect roughly the proportion of the product that is made up of foam (that is, carpet padding contains proportionally more foam overall than does bedding, so the purchase price of carpet padding is weighted higher than the purchase price for bedding, for purposes of claim-valuation).

- Third, bedding claims are paid *pro rata* from the bedding sub-fund, carpet claims from the carpet sub-fund, and furniture claims from the furniture sub-fund. If any sub-fund is not fully paid out -- which, in light of the claim submission statistics cited below, is extremely unlikely -- it pours over into the other sub-funds. Further, if there is any money left over after all distributions are made, then the remainder goes to *cy pres* beneficiaries approved by this Court. Any *cy pres* remainder is forecast to be very small.

CLAIMS TO DATE

The deadline for class members to submit claims is February 29, 2016. The Claims Administrator reports the following statistics as of December 23, 2015:

Total Claims Received:	$27,473 million
From Individuals:	$26,402 million
From Businesses:	$ 1,071 million
Total Gross Claim Amount:	$456.9 million
Carpet Claims:	$ 93 million
Bedding Claims:	$151.6 million
Furniture Claims:	$212.3 million

The Claims Administrator believes these figures are likely to increase substantially, because: (1) there is one more month for class members to submit claims; (2) class members with larger claims (businesses) tend to take longer to submit their claims than class members with smaller claims (individuals), since businesses have more records to gather -- thus, many of the largest claims are probably not yet filed; and (3) historically, in class actions, a large proportion of class members wait until the deadline to file claims (Doc. 2018 at 64; Doc. 2010-1 at 2–3).

These figures reveal the total value of claims made so far ($456.9 million) already exceeds the total value of potential settlement funds ($151.25 million), and also that the value of claims made for each category (carpet, bedding, and furniture) exceed, respectively, the total value of potential settlement funds for each category. This suggests every sub-fund *will* be fully paid out -- there will not be any "pour-over" from one sub-fund to another.

These figures reflect that claimants will definitely not receive full reimbursement for their claims. Rather, claimants will receive some percentage of their claims, paid on a *pro rata* basis. Given the Claims Administrator's statistics to date, it appears very likely claimants will ultimately receive less than 20% (maybe less than 10%) of their claim value.

LEGAL STANDARDS FOR APPROVAL OF THE SETTLEMENT AGREEMENTS

Federal Civil Rule 23(e) mandates that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." To certify a class for settlement, a court must first consider whether the proposed class meets the requirements of Rule 23(a) & (b). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). The court is also required to direct adequate notice to members of the settlement class. Federal Civil Rule 23(c)(2)(B). If these requirements are met, then the court must ensure the proposed class action settlement is "fair,

reasonable, and adequate." Federal Civil Rule 23(e)(2); *see also In re Flonase Antitrust Litig.*, 291 F.R.D. 93, 98 (E.D. Pa. 2013) (quoting *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 148 F.3d 283, 316 (3rd Cir. 1998)) ("[A] class action cannot be settled without the approval of the court and a determination that the proposed settlement is 'fair, reasonable and adequate.'"). "Whether a class action settlement satisfies Rule 23(e) is committed to the sound discretion of the district court." *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 778 (N.D. Ohio 2010) (citing *Bailey v. Great Lakes Canning, Inc.*, 908 F.2d 38, 42 (6th Cir. 1990)).

This Court has already addressed the propriety of class certification and the adequacy of notice. Specifically, in 2014, this Court issued a lengthy decision concluding the IPPs met the requirements for class certification under Rule 23(a) and (b)(3) (*see* Docs. 1102, 1408, & 1117). The Sixth Circuit denied a petition for interlocutory review (*see* Doc. 1345). For all the reasons stated previously, this Court concludes the IPP settlement class -- which is defined the same as the IPP litigation class -- also satisfies the Rule 23 requirements of commonality, typicality, adequacy, numerosity, predominance, and superiority.

Further, this Court earlier approved the plan of notice and the claim forms, concluding they "satisfy Federal Civil Rule 23(e) and due process" (*see* Doc. 1861 at 2). The Claims Administrator undertook "broad paid-media notice involving print and Internet vehicles, including . . . [c]onsumer magazines; [a] newspaper supplement; [t]rade magazines; Internet banner and text ads on multiple networks, including social media and targeted websites; and [a] news release" (*see* Doc. 1751-12 at 11). For example, notice was placed in 598 different newspapers, reaching into every major media market in the country; on website banners on Facebook and Google for 60 days; and in numerous magazines directed both at the general populace and also at businesses likely to be large consumers of foam-

containing products, such as hotels (*id.* at 13–15). This notice plan was designed to reach at least 85% of the target audience, which is essentially national in scope (*id.* at 15). Under the circumstances of this case, the Claims Administrator's notice program was the "best notice practicable," Federal Civil Rule 23(c)(2), and was "reasonably calculated to reach interested parties," *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950).

The analysis still remaining for this Court is whether the nine proposed class action settlements are "fair, reasonable, and adequate." Federal Civil Rule 23(e)(2). To conduct this analysis, courts within the Sixth Circuit refer to a list of seven factors identified in *UAW v. General Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007). These factors are: "(1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest." *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 754 (6th Cir. 2013) (quoting *UAW*, 497 F.3d at 631). In addition, "[a]lthough not included in the seven *UAW* factors, in evaluating the fairness of a settlement [the Sixth Circuit has] also looked to whether the settlement 'gives preferential treatment to the named plaintiffs while only perfunctory relief to unnamed class members.'" *Id.* at 755 (quoting *Williams v. Vukovich*, 720 F.2d 909, 925 n.11 (6th Cir.1983)).

This Court will assess these factors two different ways, first setting out general assessments before addressing specific concerns raised by the objectors. Finally, because the question of attorney fees is especially important when determining the fairness of a class action settlement, this Court will analyze that issue separately.

THE *UAW* / *VASSALLE* FACTORS

Risk of Fraud or Collusion

In this case, there is no evidence to remove the "presumption that the class representatives and counsel handled their responsibilities with the independent vigor that the adversarial process demands." *UAW*, 497 F.3d at 628. Settlement talks took place directly between the parties as well as with the assistance of respected mediators. The nearly five years of litigation that preceded settlement talks were not "pretense and posturing," *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 351 (6th Cir. 2009), but rather knock-down, drag-out fights over (for example) class certification, admissibility of expert testimony, and the propriety of summary judgment. The result of these fights ultimately led experienced counsel and sophisticated clients to reasonably choose negotiated settlements rather than continued litigation. There is absolutely no basis for this Court or any objector to suspect any of the nine settlements reached between IPPs and Defendants are the result of fraud or collusion. This Court rejects completely the inflammatory and conclusory accusations of fraud by *pro se* objector Andrews.

Complexity, Expense, and Likely Duration of the Litigation

The complexity, expense, and likely additional duration of this litigation clearly favor voluntary settlement of the class claims rather than continued fighting. Class Counsel invested substantial attorney time and litigation expenses, in the form of discovery and motion practice, before reaching the nine settlements. There remained the prospect of a lengthy trial, post-trial motions, and appeals from a jury's verdict. This would have generated additional fees and costs, and would have delayed recovery (if any) by IPP class members.

Moreover, the IPPs' case involved multiple defendants and a lengthy Class Period, requiring Plaintiffs to discover facts against each Defendant; prepare for a trial where they would have to address

and overcome each Defendant-specific argument; and prove to a jury that the alleged conspiracy extended over the entire decade-long conspiracy period. In light of ongoing litigation risks, this factor weighs heavily in favor of approving the nine settlements.

Amount of Discovery Engaged in by the Parties

Before entering settlement discussions, Class Counsel received document productions from Defendants and third parties totaling nearly 4 million pages, and participated in more than 150 fact and expert witness depositions. Class Counsel also reviewed expert reports from nearly a dozen defense expert witnesses, and were repeatedly called upon to defend the opinions of IPPs' own damages expert, Dr. Lamb, at deposition, in briefing, and at hearings. "All of this discovery matters for settlement purposes because it provides [both IPPs] and the settling Defendants with a clear picture of the relative merits of claims and defenses. The parties entered into these settlements with full view of the evidentiary record to assess the class claims." (Doc. 1971 at 7 (approving settlements with DPPs)). *Cf. Olden v. Gardner*, 294 F. App'x 210, 218 (6th Cir. 2008) (explaining that the lack of pre-settlement discovery can "weaken[] the class counsels' ability to advocate effectively for the plaintiff class during settlement negotiations and therefore suggests that the settlement was not fair, reasonable, and adequate").

In sum, the lengthy and thorough discovery undertaken by IPPs, together with their testing (through summary judgment and *Daubert* motions) of the strength of the facts discovered, supplied IPPs with a clear picture of what their class claims were worth. Accordingly, this factor weighs in favor of final approval.

Likelihood of Success on the Merits

"The most important of the factors to be considered in reviewing a settlement is the probability of success on the merits. The likelihood of success, in turn, provides a gauge from which the benefits of the settlement must be measured." *In re Gen. Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1086 (6th Cir. 1984) (citation omitted). Both IPPs and Defendants faced substantial risk if this case proceeded to trial. As previously noted: "In this Court's view, a jury could return (1) a no-liability verdict with respect to some or all Defendants, or (2) a substantially smaller damages figure than is contemplated by [Dr. Lamb's] best-case scenario assumptions, or (3) a 'home run' for the Class." *In re Polyurethane Foam Antitrust Litig.*, 2015 WL 1639269, at *5.

At trial, Defendants would have attacked the IPPs from many angles. Each Defendant would have worked to separate itself from the crowd of co-defendants, contesting proof of conspiratorial agreement and antitrust impact. At a more fundamental level, IPPs had to develop a persuasive, coherent explanation, understandable by lay jurors, that (1) "connected the dots" to show conspiracy through use of e-mail, fax, phone conversations, and the use of price increase announcements ("PIA") over a ten-year-plus Class Period; and (2) illustrated the fact and amount of "pass-through damages." Moreover, Defendants would surely appeal any adverse verdict, and "this Court's class certification decision (among other important interlocutory rulings) [would] be fair game for appellate review" (Doc. 1534 at 7–8). It must also be noted there is some evidence that a few Defendants might have been judgment-proof (Doc. 1988-1 at 9–17 (accurately summarizing the risks of going to trial)). All this makes clear that collecting a judgment from Defendants was far from guaranteed.

In light of these trial challenges, the benefit of the settlements is substantial. The total potential settlement amount of $151.25 million equates to more than 54% of the total, uncapped class damages

estimated by Dr. Lamb using chemical manufacturer cost data, and 87% of the total estimated class damages using this data if pass-through is capped at 100% of the direct purchaser overcharge. Class Counsel states the $151.25 million total settlement amount is the fourth largest antitrust recovery obtained by an indirect purchaser class in the United States.

Given the real possibility that IPPs could have received much less -- even zero -- from a jury at trial or following an appeal, this factor also weighs in favor of approval.

Opinions of Class Counsel and Class Representatives

This Court easily credits the opinion of Class Counsel that the settlements do provide fair, reasonable, and adequate compensation for a release of the class claims. Class Counsel has extensive experience litigating class actions, including leadership roles in similarly large antitrust cases. *See, e.g.*, *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 412 (7th Cir. 2015) (liaison counsel Marvin Miller, who is Lead Class Counsel in this case, was part of the trial team in a securities class action that obtained a jury verdict of $2.46 billion); *Messner v. Evanston Northwestern Healthcare Corp. Antitrust Litig.*, 2013 WL 6490152 (N.D. Ill. 2013) (co-lead class counsel Marvin Miller, who is Lead Class Counsel in this case, obtained reversal of the denial of class certification of an antitrust class). Class Counsel has spent tens of thousands of hours learning the strengths and weaknesses of IPPs' claims. Further, the Class Representatives have at least implicitly endorsed the settlements by virtue of having already submitted claims or indicating their intention to do so.

In sum, this Court has no reason to second-guess Class Counsel's conclusion that these settlements are in the best interest of the IPP class.

Reaction of Absent Class Members

The size of the class of IPPs in this case is enormous; indeed, in a brief submitted to the Supreme Court, defense counsel characterized this case as "likely the largest class action ever

certified." Petition for Writ of Certiorari at 2, *Carpenter Co. v. Ace Foam, Inc.*, 135 S. Ct. 1493 (2015) (No. 14-577). Nonetheless, only a handful of class members have chosen to opt out of the settlements.[3]

Further, another small group of objections, filed by serial objectors, are not well-taken. In contrast, over 27,000 individuals and businesses have so far filed claims. None of the business or institutional entities, the largest potential claimants, has opted out or filed an objection.

These statistics weigh in favor of final approval. "That the overwhelming majority of class members have elected to remain in the Settlement Class, without objection, constitutes the 'reaction of the class,' as a whole, and demonstrates that the Settlement is 'fair, reasonable, and adequate.'" *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 527 (E.D. Mich. 2003).

The Public Interest

Resolution of disputes through settlement rather than trial is normally in the public interest, as settlement serves to conserve scarce judicial resources. Further, "[s]ettlement of this antitrust action serves the public interest by ensuring effective enforcement of the antitrust laws and deterrence of anti-competitive conduct in the marketplace." *In re Cardizem*, 218 F.R.D. at 530. No party has suggested (and this Court does not apprehend) any legitimate countervailing interest that weighs against settlement approval.

Treatment of the Named Plaintiffs

A settlement can be unfair if it "gives preferential treatment to the named plaintiffs while only perfunctory relief to unnamed class members." *Vassalle*, 708 F.3d at 755 (internal quotation marks

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[3] Class counsel explains that eight entities or individuals have requested exclusion, but: (1) three have done so even though they are *direct* purchasers -- that is, not members of the IPP class -- but want to make clear they will not be bound by orders in this case; (2) one is a school in Pennsylvania, which is not a Class State; (3) two have not provided the requisite information about their purchases; (4) one submitted the exclusion request after the deadline; and (5) one purchased two pillows for a total of $10.

omitted). In this case, it is clear that the unnamed class members are receiving much more than "perfunctory relief." The vast bulk of the settlement funds in this case will *not* be received by the named, representative Plaintiffs, most of whom are individuals with relatively small claims. Rather, the settlement funds will be distributed in a straightforward fashion, *pro rata*, to every claimant equally.

This is very different from the circumstances in *Vassalle*, where the named plaintiffs each received $2,000 plus exoneration of debts, while the unnamed class members received no money and their debts were not exonerated. *Id.* at 755–56. The disparity in *Vassalle* was stark, amounting to essentially *no* relief to unnamed class members. That is certainly not the case here.

OBJECTIONS

The *UAW* / *Vassalle* factors listed above each weigh in favor of final approval. This Court has also carefully examined the submissions filed by the objectors, who contend various aspects of the nine settlement agreements are unfair. The IPPs have responded to all the objections on the merits, but also spend several pages detailing the background of each objector. To varying degrees, IPPs assert that all the objectors (1) are serial objectors; (2) have improper motives; (3) plainly misstate the facts; (4) offer boilerplate language they have presented to other courts unsuccessfully; (5) have suffered serious disciplinary proceedings; (6) make scurrilous, unfounded accusations (*e.g.*, perjury and fraud by IPP counsel); and/or (7) make extortionist threats. Except for the fact that objector CCAF has appeared and objected in numerous other class-action cases, these characterizations do *not* apply to CCAF -- CCAF's objection is lucid and filed in good faith. In contrast, *all* these characterizations *do* apply to objector Narkin, and at least some apply to every other objector. IPPs ask this Court to impose sanctions against at least some of the objectors, and also to require each objector to post a bond for any appeal.

"It is undisputed that some objectors add value to the class-action settlement process by: (1) transforming the fairness hearing into a truly adversarial proceeding; (2) supplying the Court with both precedent and argument to gauge the reasonableness of the settlement and lead counsel's fee request; and (3) preventing collusion between lead plaintiff and defendants." *In re Cardinal Health, Inc. Sec. Litig.*, 550 F. Supp. 2d 751, 753 (S.D. Ohio 2008). Unfortunately, however, "class actions also attract those in the legal profession who subsist primarily off of the skill and labor of, to say nothing of the risk borne by, more capable attorneys. These are the opportunistic objectors. Although they contribute nothing to the class, they object to the settlement, thereby obstructing payment to lead counsel or the class in the hope that lead plaintiff will pay them to go away." *Id.* at 754.

Several of the objectors in this case clearly fall into the latter category. Nonetheless, this Court chooses not to impose any sanction -- at least now. Even objector Andrews, who repeatedly makes baseless accusations using inappropriate language (*e.g.*, Doc. 1928 at 43) (asserting Class Counsel engaged in "high on meth document discovery review"), also identifies a few legitimate concerns (*e.g.*, Doc. 1920 at 9) (questioning why counsel did not identify specific potential *cy pres* beneficiaries in the settlement agreement). Andrews deserves opprobrium, but his objection is not entirely devoid of color. Accordingly, even though the objectors raise many unfounded, conclusory, and frivolous objections, this Court will simply focus on the merits of the objections that deserve analysis.

Content of Forms and Claims Administration Process

Objector Andrews offers a litany of questions as a means of complaining about the claims process and claim forms. For example, he asks (Doc. 1920):

1. Why do claimants have to provide a social security number?

2. Why do they have to check off each separate settlement from which exclusion is desired, rather than check off the ones in which they want to be included?

3. Why don't claimants receive acknowledgment of their claim by the Administrator?

4. Why is it not stated how long it will take for checks to arrive?

Of course, there are good answers to each of these questions:

1. To prevent fraud and comply with potential tax requirements.

2. To make a claimant's participation in all settlements more likely.

3. Because it would increase administrative costs.

4. Because it is impossible to predict accurately how long it will take to investigate spurious claims and finally determine benefit amounts.

None of the issues Andrews raises suggests the design of the claim forms or the claims administration process carries any meaningful or serious faults.

Andrews also challenges the requirements for opting-out. For example, Andrews asks (1) Why can't opt-outs file their form online instead of having to mail it in?; and (2) Why are opt-outs asked to provide "unnecessary" information, such as which particular settlements they want to opt out of, and what foam-products they bought? It suffices to say, again, there are good answers to these questions and Andrews does not identify any serious faults in the opt-out process. Indeed, even if the occasional suggestion Andrews offers is reasonable, he does not show the existing format is *unreasonable*. And, so long as the settlement agreements and the processes used to effectuate them are "fair, reasonable, and adequate," Federal Civil Rule 23(e)(2), this Court has no reason to disapprove them.

In a two-page objection, Sweeney offers a list of boilerplate, conclusory assertions, including the "[c]laims administration process fails to require reliable oversight, accountability, and reporting about whether the claims process actually delivers what was promised;" and the claim "[t]imeframes and deadlines benefit Defendants and Class Counsel, but not Class Members" (Doc. 1968). Sweeney

offers absolutely no analysis or factual support for these statements. His objections, like Andrews, are also overruled.

Plan of Allocation

Andrews asserts there "should be a minimum distribution amount set, say $10.00, because a de minimis threshold is necessary to ensure an efficient allocation of the settlement fund" (Doc. 1920 at 8–9). The effect of such a threshold, however, would be -- if anything -- to deprive a number of class members with low-value claims from receiving any payment. While it is true there comes a point where the cost of sending a check for settlement benefits can exceed the value of the check itself, it is also true that "something is better than nothing" in a class settlement. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 2010 WL 2756947, at *3 n.3 (N.D. Ohio 2010) (citing *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015–16 (7th Cir. 2002)), *aff'd*, 722 F.3d 838 (6th Cir. 2013); *see also Miller v. Ghirardelli Chocolate Co.*, 2015 WL 758094, at *1 (N.D. Cal. 2015) (granting final approval of a class settlement where claimants received up to $1.50 per uncorroborated product purchase, up to a maximum of $24). Andrews may be correct that it is appropriate for *some* settlements to have a minimum distribution amount, but he has not shown it is inappropriate for the settlements in this case not to have one.

Objector Cochran offers a different criticism, complaining that, by "weighting" various claims (*e.g.*, bedding claims are weighted at 80% while carpet claims are weighted at 90%), the Plan of Allocation "sets improper limits on the amount that a claimant may receive for each Qualifying Claim" (Doc. 1964 at 1). Cochran implies that a claim for a $1,000 mattress should be weighted at 100%, not 80%, and the 80% weighting deprives the claimant of funds he is due: "If the entire amount of the Net Settlement Fund is not consumed by filed claims at the existing caps, the caps should be removed and the entire Settlement Fund paid out to the claimants *pro rata*." *Id.* at 3.

This objection is not well-taken for three reasons. First, the mattress is not made up entirely of foam, so the purchaser is not entitled to 100% of the purchase price as damages. Second, even if the mattress was 100% foam, the "pass through" of illegal foam markup attributable to the final mattress price is not 100% of that price. In other words, the weightings reflect a reasonable estimate of the relative proportions of how much the illegal foam markup affected the total price of different categories of a final product. And third, it is already clear that "the entire amount of the Net Settlement Fund" *will* be "consumed by filed claims at the existing caps" (*id.*).

Incentive Awards

The settlements provide for a total of $200,000 in incentive awards for the Class Representatives -- $10,000 each for the 13 individuals, and $35,000 each for the two companies.[4] Andrews asserts these awards "may be excessive" and suggests it will create an "unfair disparity" between the named Plaintiffs and the unnamed class members. Andrews cites *Vassalle*, 708 F.3rd 747, where the Sixth Circuit reversed final approval of a class settlement because, among other things, "the disparity in the relief afforded under the settlement to the named plaintiffs, on the one hand, and the unnamed class members, on the other hand, made the settlement unfair." *Id.* at 755.

As noted above, the disparity in *Vassalle* was stark, amounting to essentially no relief to unnamed class members, compared with $2,000 incentive awards to the representative plaintiffs. In other words, *all* the available compensation went to the named plaintiffs. In this case, there will be over $100 million available to all claimants on a *pro rata* basis; the $200,000 in incentive awards will amount to less than 0.2% of the total payments. There is no unfair disparity.

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[4] Objectors Andrews, Hinojosa, and Cannata all state the incentive awards will be $285,000, but their math is incorrect -- the total will be $200,000. Hinojosa simply asserts "the requested $285,000 in incentive payments" is excessive, without any analysis or explanation (Doc. 1967 at 1). Cannata does even less, merely asserting that all requested fees and awards are unreasonable (Doc. 1950 at 1). This Court's analysis of Andrews' objection applies equally to Hinojosa and Cannata.

Moreover, the Sixth Circuit has endorsed the use of incentive awards. *See Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003) ("Numerous courts have authorized incentive awards . . . [as] efficacious ways of encouraging members of a class to become class representatives and rewarding individual efforts taken on behalf of the class."); *see also* Doc. 1971 at 23–24 (granting final approval to the DPP settlement agreements and noting, "[d]istrict courts in this Circuit routinely grant incentive awards to representative plaintiffs in antitrust matters, when the representative plaintiff actively participates in the litigation") (citing cases).

The incentive awards of $10,000 each for the individuals and $35,000 each for the companies are well within an appropriate range. And this Court accepts Class Counsel's explanation that "[t]he requested incentive award for the corporate plaintiffs is higher than for the individuals because . . . [the corporations] did a more substantial amount of work on the case -- reviewing and producing a much larger quantity of documents and making their corporate executive available for lengthy depositions" (Doc. 1997 at 21).

Amount of Damages versus Amount of Settlements

Several objectors suggest the settlement results are so unimpressive that the settlement agreements are inadequate. Cochran characterizes the settlements as "a very modest result," "decidedly mediocre," and "underwhelming" (Doc. 1964 at 3, 5). Narkin asserts "[t]here is no adequate showing that the proposed Settlement bears any relationship to the alleged damages inflicted by Defendant [sic] on Plaintiffs" (Doc. 1965 at 1). And Andrews throws muck by asking rhetorically "what are the highest single damages calculated by the expert that the class can recover before [trebling]?"; and suggesting the $151.25 million total settlement is inadequate by quoting the statistic that wholesale U.S. mattress revenues in 2012 were $6.8 billion (Doc. 1920 at 7–8).

This Court rejects these mischaracterizations. Addressing Andrews' objection first, the answer to his question is that IPP expert Dr. Lamb calculated damages in this case using four different methods. The first method was to use chemical price data published by Independent Chemical Information Services ("ICIS"), and *not* capping the possible pass-through at 100%, which yielded a damages calculation of $2.2 billion. The second method was to use ICIS chemical price data and capping the possible pass-through at 100%, which yielded a damages calculation of $1.25 billion. The third was to use data obtained by the DPPs from Defendants' own chemical suppliers, and not capping the possible pass-through at 100%, which yielded a damages calculation of $279.5 million. And the fourth was to use data obtained by the DPPs from Defendants' own chemical suppliers and capping the possible pass-through at 100%, which yielded a damages calculation of $173.3 million. During *Daubert* briefing, Defendants insisted the lowest number was more reliable than the other three.

Calculated against these different damage assessments, the $151.25 million settlement is, respectively, 7%, or 12%, or 54%, or 87% of Lamb's estimates. Measured in this way, it is unfair to call the $151.25 million settlement "mediocre." For example, IPPs cite *In re Rite Aid Corp. Securities Litigation*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001), which observed that, since 1995, securities class action settlements "have recovered between 5.5% and 6.2% of the class members' estimated losses." In *Van Horn v. Nationwide Property & Casualty Insurance Co.*, 2010 WL 1751995 (N.D. Ohio 2010) *aff'd*, 436 F. App'x 496 (6th Cir. 2011), the court described the settlement result -- where class members received approximately 50% of their actual damages in a *simple contract* case -- as "a moderately good one." *Id.* at *5. And in the DPP case, this Court described the settlement as "excellent," where it represented "roughly 52 percent of [Plaintiff expert] Leitzinger's damages model prior to trebling." Doc. 1971 at 15. These comparisons undermine any argument that the result in this case is inadequate.

Further, the statistic cited by Andrews -- that wholesale U.S. mattress revenues in 2012 were $6.8 billion -- is a *non sequitur*. This figure does not in any way measure the "antitrust markup / pass-through" at issue, which is how damages must be measured, much less account for the fact that the class definition does not include numerous states.

More important, "[i]t is well-settled that a cash settlement amounting to only a fraction of the potential recovery will not *per se* render the settlement inadequate or unfair. Indeed, there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *In re Bear Stearns Cos., Inc. Sec. Litig.*, 909 F. Supp. 2d 259, 270 (S.D.N.Y.2012) (citations and internal quotation marks omitted). The propriety of a settlement must be assessed as "a function of both (1) the size of the amount relative to the best possible recovery; and (2) the likelihood of non-recovery (or reduced recovery)." *Id.* Here, there was a very real risk of complete non-recovery, and the ratio of actual recovery to best-possible recovery is, at the least, above average. The possibility "that the settlement could have been better . . . does not mean the settlement presented was not fair, reasonable or adequate," because "[s]ettlement is the offspring of compromise; the question . . . is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998).

The objectors' armchair-quarterbacking and wishing-for-more does not provide valid grounds to disapprove the settlements. The objection that the settlement is insufficient, inadequate, or unfair is not well-taken.

Matters Not Mentioned in the Class Notice

Contingent Amounts. Although the Class Notice lists nine settlement amounts and the $151.25 million total, it does not state that $9.25 million (6.1%) is contingent upon whether Defendants Hickory

Springs and Future Foam succeed in separate litigation against Dow Chemical. Nor does it state that $10 million (6.6%) will not be paid into the settlement escrow account(s) for some period of time. Objector CCAF argues the Notice is therefore deficient.

CCAF cites to no case directly on point; rather, it cites cases for the general proposition that "notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance." *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1950) (citation omitted). CCAF also cites cases where the court found notice was insufficient, but those scenarios are egregious. *See, e.g.*, *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 198 (5th Cir. 2010) (finding notice insufficient because "the notice did not inform class members of the possibility that they would not receive *any* direct benefit from the settlement" and "does not clearly inform class members of the real possibility, acknowledged by all parties, that there may be [*only*] a *cy pres* distribution *in lieu of* any direct distribution of funds to the class members") (emphasis added). Indeed, *Katrina* also emphasized that class notice "is not required to provide a complete source of settlement information." *Id.* at 197 (quoting *Maher v. Zapata Corp.*, 714 F.2d 436, 452 (5th Cir. 1983)).

In *Vassalle*, the Sixth Circuit set out the relevant standard for assessing whether class notice is adequate:

> [D]ue process requires that notice to the class be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Due process, however, does not require the notice to set forth every ground on which class members might object to the settlement. Rather, all that the notice must do is fairly apprise the prospective members of the class of the terms of the proposed settlement so that class members may come to their own conclusions about whether the settlement serves their interests.

Vassalle, 708 F.3d 747, 759 (6th Cir. 2013) (citations and internal quotation marks omitted).

The Notice in this case meets this standard. The Notice directs class members to the website www.polyfoamclassaction.com, where the full settlement agreements are posted. The amount of contingent funds is only 6.1% of the total, which is highly unlikely to be a decisive factor in whether a class member would decide to participate or instead opt out.[5] The same conclusion is all the more true with respect to settlement funds that are payable over the next two years instead of immediately. *See, e.g., In re Oral Sodium Phosphate Solution-Based Prods. Liab. Action*, No. 09-SP-80000, Doc. 427 (N.D. Ohio 2015) (documenting the history of seven payments of settlement benefits to class members over a period of more than five years). Nor is it unusual for class action claimants to receive their first payment over a year after submitting their claim (Doc. 2010-1 at 1–3).

Identity of Cy Pres Beneficiaries. Several objectors raised issues related to *cy pres* beneficiaries. One issue is whether Class Notice was inadequate because it did not identify with particularity the entities that might receive settlement funds pursuant to the *cy pres* doctrine. The second issue is whether it is appropriate for the settlement agreements to provide for *cy pres* distribution of settlement proceeds *at all*. This Court addresses the first issue now and the second issue later.

Objector CCAF, and to a lesser extent objector Andrews, take issue with the failure of Class Notice to provide the specific identities of potential *cy pres* beneficiaries. The Notice does explain that "it is possible that any money remaining after claims are paid will be distributed to charities or other beneficiaries approved by the Court" (Doc. 1860 at 16), but gives no other information. The Plan of Allocation adds only this (*id.* at 27):

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[5] For example, a $1,000 mattress claim will be valued at 80% ($800), and will then ultimately be assigned a *pro rata* payment of, say, 20% ($160) -- probably less. The contingent settlement funds (assuming all are received) would pay only 6.1% of this amount, or about $9.75 of this $160. This potential difference is unlikely to be a factor in the class member's decision to participate or opt out, especially when the alternative is to bring an independent lawsuit.

> In the event there are Settlement Funds remaining after distribution of all payments to Eligible Claimants according to Section III of this Plan of Allocation, the remaining Funds will be distributed to charities or other beneficiaries that have objectives related as closely as possible to the purposes and remedies sought by the class action. These beneficiaries will be suggested by Lead Counsel and are subject to approval by the Court at the appropriate time, if circumstances warrant.

Thus, class members do not know, before electing to participate or not, whether there will be a *cy pres* distribution and if so, to whom.

CCAF does provide support for the proposition that *cy pres* beneficiaries must be disclosed with particularity at the time of settlement. In *Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012), the benefits provided by the class-action settlement agreement included (1) $2.75 million, used to pay eligible claimants up to $15 each; (2) donation of any left-over funds -- which, ultimately, amounted to almost $2 million -- "to unidentified 'charities chosen by the parties and approved by the Court pursuant to the *cy pres* doctrine'"; and (3) donation of $5.5 million worth of specific Kellogg food items to charities that feed the indigent. *Id.* at 862–63. The district court granted final approval to the settlement agreement, but the appellate court reversed, because (i) the agreement did not specifically identify the *cy pres* recipients; and (ii) the category of charities mentioned, although laudable, had nothing to do with the purpose of the lawsuit (rectifying false advertising) or the plaintiffs involved (purchasers of Kellogg's cereal). The *Dennis* court added that its "concerns are not placated by the settlement provision that the charities will be identified at a later date and approved by the court." *Id.* at 867.

Several other federal appellate courts, however, disagree with *Dennis*. In *Baby Products Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013), the court reversed final approval and remanded for further consideration because the district court could not have known how large a portion of the settlement funds would ultimately be distributed *cy pres* instead of to members of the class -- $18.5

million out of the $35.5 million settlement. Importantly, however, the *Baby Products* court also held that the "failure to identify the *cy pres* recipients [in the settlement agreement and class notice] is not a due process violation. Class members know there is a possibility of a *cy pres* award and that the Court will select among recipients proposed by the parties at a later date. This knowledge is adequate to allow any interested class member to keep apprised of the *cy pres* recipient selection process." *Id.* at 180. Even though the *Baby Products* court agreed with and cited *Dennis* for other propositions, *id.* at 178, it simply disagreed with *Dennis* on the necessity of listing specific *cy pres* beneficiaries in the class notice.

This Court has found another appellate case that sets out a well-considered approach for choosing between *Dennis* and *Baby Products*. In *BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060 (8th Cir. 2015), after the district court granted final approval of a class action settlement, the claims administration process proceeded to the point where $2.44 million remained in the $333.2 million settlement fund. *Id.* at 1062. Class counsel asked that this remainder be distributed as follows: (1) a final, additional attorney fee award of $98,000; and (2) the rest ($2.34 million) to three charities suggested by class counsel. *Id.* The district court granted the motion but the appellate court reversed, finding several problems with the *cy pres* distribution process, including the large amount and the choice of recipients. *Id.* at 1064–67.

Relevant to CCAF's objection, the *BankAmerica* court also discussed under what circumstances class notice will be inadequate for failing to identify the *cy pres* recipients. The court concluded: "[The objector] argues that the award must be reversed because [class counsel] did not notify the class of its motion for a *cy pres* distribution. We agree that, *unless the amount of funds to be distributed cy pres is de minimis*, the district court should make a *cy pres* proposal publicly available and allow class

members to object or suggest alternative recipients before this court selects a *cy pres* recipient. This gives class members a voice in choosing a 'next best' third party [*cy pres* recipient] and minimizes any appearance of judicial overreaching." *Id.* at 1066 (emphasis added) (citing *Baby Prods.*, 708 F.3d at 180).

In this case, as discussed below, any *cy pres* distribution will be *de minimis*. Unlike *Dennis*, *Baby Products*, and *BankAmerica*, where the *cy pres* distributions were in the millions of dollars, a *cy pres* distribution in this case will occur only after "the marginal cost of making an additional pro rata distribution to the class members exceeds the amount available for distribution." *Klier v. Elf Atochem N. America, Inc.*, 658 F.3d 468, 475 n.15 (5th Cir. 2011). As *BankAmerica* suggests, even under the more stringent standard, class notice may be silent about the identity of recipients of *de minimis cy pres* distributions without violating Rule 23. Those are the circumstances present in this case. Accordingly, CCAF's objection is not well-taken.

Having concluded that Class Notice in this case is fair and adequate, despite its silence about the identity of potential *cy pres* recipients, this Court also adds that CCAF has nonetheless identified a best practice. Especially because the term "*de minimis*" carries no precise definition, and also in the interest of full disclosure, this Court agrees that class counsel in most cases would be wise to identify in their class action settlement precisely what entities may receive *cy pres* distributions. This practice increases transparency and minimizes the likelihood that a settlement agreement will not receive final approval, or that approval is reversed on appeal.

Accordingly, rather than put this issue off until the claims administration process comes to a close, this Court orders as follows.

Within thirty (30) days of the date of this Order, Lead Counsel shall submit a proposal identifying the "charities or other beneficiaries that have objectives related as closely as possible to the

purposes and remedies sought by the class action," to whom any *cy pres* distributions will be made. Doc. 1860 at 27; *see also BankAmerica*, 775 F.3d at 1067 (adding that "unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated" and noting that the geographic distribution of *cy pres* funds should be similar to the geographic scope of the class). This Court commends to Class Counsel, as they consider potential *cy pres* recipients, the above-cited cases, as well as: *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) (discussing mechanisms necessary to correct "some court[s'] . . . abandon[ment of] the 'next best use' principle implicit in the *cy pres* doctrine"); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014); and the American Law Institute's *Principles of the Law of Aggregate Litigation* ("ALI *Principles*") § 3.07 (2010) (often cited in these cases). *See also* discussion at the final fairness hearing (Doc. 2018 at 33–36, 43–45, 49–50).

***Cy Pres* Distribution**

Objector Cochran takes issue not with the absence in the Class Notice of the identity of *cy pres* beneficiaries, but with any *cy pres* distributions at all. For example, Cochran asserts that "no settlement money may be paid to *cy pres* [sic] *until every class member who has filed a claim has received 100% of alleged damages*, which in this case would include treble and punitive damages" (Doc. 1964 at 1–2) (emphasis changed from original). In support of this assertion, Cochran cites *Klier* and *BankAmerica*. But these authorities do not stand for the proposition Cochran asserts. Rather, *Klier* states as follows:

> Because the settlement funds are the property of the class, a *cy pres* distribution to a third party of unclaimed settlement funds is permissible "*only when it is not feasible to make further distributions to class members*" [quoting ALI *Principles* § 3.07 cmt. a]. Where it is still logistically feasible and economically viable to make additional pro rata distributions to class members, the district court should do so, except where an additional distribution would provide a windfall to class members with liquidated-damages claims that were 100 percent satisfied by the initial distribution. A cy *pres* distribution puts settlement funds to their next-best use by providing an indirect benefit to the class. That option arises only if it is not possible to put those funds to their very best use: benefitting the class members directly.

Klier, 658 F.3d 468 at 475 (emphasis added, footnotes omitted). *BankAmerica* quoted with approval this language from *Klier*, and also quoted the entirety of ALI *Principles* § 3.07 which is increasingly followed by appellate courts. *See Bank America*, 775 F.3d at 1063–64.

The essence of these authorities is that a "*cy pres* award is supposed to be limited to money that can't feasibly be awarded to the intended beneficiaries." *Pearson*, 772 F.3d at 784. This will occur, for example, when "the amounts involved are too small to make individual distributions economically viable." ALI *Principles* § 3.07(b). The *Klier* court explains:

> In large class actions, substantial administrative costs attend the distribution of settlement funds. As the settlement funds are disbursed and the amount still available for distribution to the class declines, there comes a point at which the marginal cost of making an additional pro rata distribution to the class members exceeds the amount available for distribution. It is only at this point that a district court has discretion to order a *cy pres* distribution.

Klier, 658 F.3d at 475 n.15 (internal citation omitted).

In this case, Class Counsel and the Claims Administrator have made clear that the claims administration process will follow the precepts set out above. Specifically, the Claims Administrator explained that (1) there will be at least two distributions; (2) expectations are that, after all distributions are made, "[less] than $50,000 will remain as residual," mostly due to uncashed checks; and (3) "To avoid having leftover funds at the completion of the settlement process and to ensure the residual balance remaining in the fund after the initial and subsequent distributions are distributed to the Class to the greatest extent possible, [the Claims Administrator] will undertake an analysis, in consultation with Class Counsel, to determine whether it is economically feasible to perform additional rounds of distributions to class members" (Declaration of Eric Miller (Doc. 2010-1) at ¶¶ 7, 9). Only after funds have "reach[ed] a point whe[re] it is no longer economical to continue making distributions" will the Administrator notify Class Counsel that "the [remaining] funds should become part of the residual for *cy pres* as stated in the Plan of Allocation and referenced in the Notice to the Class" (*id.* at ¶ 12).

In sum, this case is not like *Klier*, *BankAmerica*, or *Pearson*, where hundreds of thousands or even millions of dollars were directed to *cy pres* recipients instead of to class members. Rather, *cy pres* distributions will be made only after it is no longer economically practical to make distributions to the class, and only with this Court's approval that this *de minimis* distribution is appropriate.

ATTORNEY FEES

The single most-addressed issue raised by all the objectors is the amount of attorney fees and expenses requested by Class Counsel. In addition to the amount of fees, objectors also challenge the timing of Counsel's receipt of fees, and how the fees are divided among Class Counsel. This Court addresses these issues in reverse order.

Division of Common Benefit Fees Between Counsel

Although the nine settlement agreements do not speak to how any fee award will be divided among IPP Class Counsel, the motion for fee award does state: "Lead Counsel also requests the Court's authorization to distribute the fees in a manner that, in the judgment of Lead Counsel, fairly compensates each firm for its contribution to the prosecution of Plaintiffs' claims" (Doc. 1987-1 at 14–15 n.1). CCAF objects to this plan, asserting that "Rule 23(h) requires the district court to set and allocate the fee award. It is legal error for the court to delegate the allocation of that fee award to a non-judicial third party or to defer to the allocation proposed by the attorneys themselves." (Doc. 1960 at 36).

CCAF is wrong. Courts routinely permit counsel to divide common benefit fees among themselves. *See, e.g.*, *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 533 n.15 (3d Cir. 2004) (affirming the district court's decision to permit co-chairs of the Executive Committee to divide attorney fees according to their discretion, and declining to "deviate from the accepted practice of allowing counsel to apportion fees amongst themselves"); *In re Telectronics Pacing Sys., Inc.*, 137 F.

Supp. 2d 1029, 1033 (S.D. Ohio 2001) (approving distribution of a "single fee from which the [plaintiffs' Steering Committee] will allocate the attorneys' fees among the attorneys who provided a benefit to the Class"); *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 383 (S.D. Ohio 2006) ("Class Counsel shall allocate the award of attorneys' fees among counsel for the Class based on their good-faith assessment of the contribution of such counsel to the prosecution of this Action."); *In re BP Propane Indirect Purchaser Antitrust Litig.*, No. 06-CV-3541, Doc. 209 at 2 (N.D. Ill. 2010) ("Any and all allocations of attorneys' fees and expenses shall be allocated among Plaintiffs' Counsel at the direction of Lead Counsel at its discretion, who shall apportion the fees and expenses based upon their assessment, in its sole discretion, of the respective contributions to the litigation made by each counsel.").

Furthermore, the Sixth Circuit has suggested it would adopt the approach approved in *Warfarin* and the other cases cited above. In *Bowling v. Pfizer, Inc*., 102 F.3d 777 (6th Cir. 1996), the objectors wanted to discover class counsel's fee-sharing agreements. The district court denied discovery, stating it "will not become involved in how the counsel and court-appointed special counsel divide the total fee award." *Id.* at 781. The Sixth Circuit affirmed, observing:

> The district court examined the work performed by [both] class and special counsel and the value their work conferred upon the class. Thus, the district court decided exactly what that *group* of attorneys' work was worth and then awarded a fee commensurate with that worth. *How special counsel and class counsel ultimately divide that fee among themselves appears to be irrelevant*. As long as class and special counsel are paid only what their collective work is worth, their distributions among themselves, even if done in a manner unrelated to the services a particular counsel has performed for the class, will in no way harm the class or negatively impact the fund from which the class's benefit is measured.

Id. (emphasis added).

CCAF cites one case that gives some support to its position. *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 229 (5th Cir. 2008), reversed a common benefit fee award because

a five-member fee committee determined who would get what, and the district court rubber-stamped their determination. *High Sulfur* contrasted that with circumstances where all the attorneys come to agreement among themselves (*id.* at 234 (internal citations omitted)):

> Appellees cite several district court cases from this circuit in which courts . . . award[ed] a lump-sum attorneys' fee and allow[ed] counsel to divide up the award by agreement. That fee allocation procedure, however, is significantly different from the procedures used here. It is one thing for all attorneys to come to an agreement about dividing up fees, and quite another for five attorneys to declare how an award will cover themselves and seventy-four other attorneys with no meaningful judicial supervision or review.

High Sulfur is inapposite for two reasons. First, as between *High Sulfur* and *Bowling*, this Court is bound to follow the latter which is from the Sixth Circuit. Second, from the beginning of this case, all attorneys working as Class Counsel have long known the procedure for how any fee award would be divided (*see* Doc. 29 at 2) (making Lead Counsel responsible for "[a]llocating among counsel any attorneys fees that may be awarded by the Court (subject to the jurisdiction of the Court to resolve any disputes related to such allocation)"). Unlike *High Sulfur*, where there was no fee agreement between counsel, all the Plaintiffs' attorneys who participated in this case agreed (at least implicitly) to receive remuneration under this mechanism.

Accordingly, the objection that this Court may not delegate to Lead Counsel the task of allocating the fee award among Class Counsel is overruled. This Court adds, however, that if a fee dispute does erupt -- and this Court does not expect one will -- this Court retains jurisdiction to settle that dispute.

Timing of Payment of Attorney Fee Awards

As noted earlier, of the $151.25 million in settlement funds, Defendants will have deposited $88.5 million into escrow within fifteen (15) days of the date of this Order. There is another $10 million in payments payable over the next two years, plus $43.5 million payable once all appellate

rights are exhausted, plus $9.25 million in contingent funds. Objector Cannata asserts that "Class Counsel's fees should be deferred until such time as the Court has received reports indicating the amount of monetary relief that has actually been delivered to the Class" (Doc. 1950 at 2). Similarly, CCAF insists that "Counsel is not entitled to a fee award based on funds that may never materialize and never benefit the class" (Doc. 1960 at 21). CCAF cites several cases where courts delayed payment to class counsel until the distribution process was complete. *See, e.g.*, *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996) (affirming common benefit fee award consisting of an immediate payment of "10% of the $102.5 million that has been paid into the common fund to date," plus "up to $6.25 million more over the next ten years [based upon] . . . up to 10% of the [ten future] $6.25 million annual [settlement] payments").

This objection is well-taken, as Class Counsel concedes. In fact, Class Counsel cites another case standing for the same proposition (Doc. 1991 at 40):

> Class Counsel has always been willing to wait to obtain the portion of its . . . fee until the contingency is satisfied and Defendants deposit such funds in escrow. Courts have applied this sort of fee payment schedule in cases where there is a delayed payment into the fund. *See, e.g.*, *In re Flonase Antitrust Litig.*, 291 F.R.D. 93, 113 (E.D. Pa. 2013) (awarding 33⅓% of the amounts paid into the initial settlement fund "plus 33⅓% of any sums that may become part of the Settlement Fund after the calculation provided for in the Plan of Allocation").

It is worth noting there are good reasons for IPPs to agree that some of the settlement funds should not be payable immediately. The delayed-payment mechanism was necessary in order to secure a larger total fund from Defendants, some of whom were at risk of bankruptcy and had already obligated themselves to pay other settlements to DPPs. Ultimately, IPPs will get more money by agreeing to accept some of it as deferred or contingent.

That said, however, it is only fair that counsel and the class they represent are treated equally. Class members will receive benefits, and Class Counsel will receive fees, only if and when funds

become available. Payment of common benefit attorney fees to IPP Class Counsel will be made on a percentage basis only as settlement funds are deposited into the settlement escrow account(s).

The Amount of the Award of Attorney Fees and Expenses

In their fee petition, Class Counsel for IPPs asks this Court to (a) use the "percentage-of-the-fund" method to calculate a common benefit fee award; and (b) award a fee of 30% of the gross settlement amount of $151.25 million, which equals $45,375,000. IPPs also ask for reimbursement of $5,122,065.78 in expenses.

Objectors attack these figures in three ways, arguing (1) the 30% figure is too high; (2) Counsel's lodestar, which this Court must use as a cross-check against the 30% figure, is inflated; and (3) the percentage should be applied against the net settlement amount, not the gross amount. This Court examines the last contention first, and then weighs the other two objections together.

Gross versus Net. Objectors Andrews and CCAF assert that any common benefit fee percentage should be assessed only after subtracting the $5.1 million in expenses, $200,000 in incentive awards, and roughly $1.57 million in notice costs (*see* Doc. 1920 at 23–24 (misstating some of these numbers); Doc. 1960 at 20–23). Andrews and CCAF cite several cases supporting this position. *See, e.g.*, *Pearson*, 772 F.3d at 781 ("[A]dministrative costs should not have been included in calculating the division of the spoils between class counsel and class members. Those costs are part of the settlement but not part of the value received from the settlement by the members of the class. The costs therefore shed no light on the fairness of the division of the settlement pie between class counsel and class members.") (internal quotation marks omitted); *In re Cardinal Health Inc. Secs. Litig.*, 528 F. Supp. 2d 752, 771 (S.D. Ohio 2007) ("The net recovery more truly approximates the amount of money that benefits the Class. Because the percentage approach is meant to align the attorneys' fees with the amount of money the class receives, the net recovery is a more appropriate metric.").

As CCAF concedes, however, other cases hold it is within the discretion of this Court to use the gross amount. *See, e.g., In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 953 (9th Cir. 2015) ("The district court did not abuse its discretion in calculating the fee award as a percentage of the total settlement fund, including notice and administrative costs, and litigation expenses. We have repeatedly held that the reasonableness of attorneys' fees is not measured by the choice of the denominator. . . . [T]he choice of whether to base an attorneys' fee award on either net or gross recovery should not make a difference so long as the end result is reasonable.") (citations and internal quotation marks omitted); *Powers v. Eichen*, 229 F.3d 1249, 1258 (9th Cir. 2000) ("[T]he choice of whether to base an attorneys' fee award on either net or gross recovery should not make a difference so long as the end result is reasonable. Our case law teaches that the reasonableness of attorneys' fees is not measured by the choice of the denominator.").

Furthermore, numerous district courts in the Sixth Circuit have based fees on the gross settlement amount, and none have been reversed on that ground. *See, e.g., In re Prandin Direct Purchaser Antitrust Litig.*, 2015 WL 1396473, at *4 (E.D. Mich. 2015) (granting fee award of one-third of the gross settlement fund); *In re Sulzer Orthopedics, Inc.*, 398 F.3d 778, 780–82 (6th Cir. 2005) (affirming individual fee awards made from a common benefit fund based on the gross settlement amount); *Bowling*, 102 F.3d at 779 ("It is within the district court's discretion to determine the 'appropriate method for calculating attorney's fees.'" (quoting *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir.1993))).

Accordingly, this Court overrules objectors' assertion that, when using the "percentage-of-the-fund" method to determine a common benefit fee award, the percentage this Court chooses must be applied to the net settlement amount.

The Fee Award. The Sixth Circuit directs district courts, "[w]hen awarding attorney's fees in a class action, [to] . . . make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved." *Rawlings*, 9 F.3d at 516. At the same time, however, the fee award must account for the reality that "[t]he interest of class counsel in obtaining fees is adverse to the interest of the class in obtaining recovery because the fees come out of the common fund set up for the benefit of the class." *Id.*; *see also Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 968 (9th Cir. 2009) ("At the fee-setting stage when fees are to come out of the settlement fund, the district court has a fiduciary role for the class.").

A court has available "two methods for calculating [common benefit] attorney's fees: the lodestar and the percentage-of-the-fund." *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 F. App'x 496, 498 (6th Cir. 2011). "District courts have discretion 'to select the more appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them.'" *Rawlings*, 9 F.3d at 516. "The lodestar method better accounts for the amount of work done, while the percentage of the fund method more accurately reflects the results achieved." *Id.*

In this case, for three reasons, this Court elects to use the percentage-of-the-fund method, with a lodestar cross-check. First, Class Counsel requests the percentage approach, and none of the objectors argue otherwise -- they argue only that the percentage requested is too high. Second, "[i]n general, . . . percentage of the fund has been the preferred method for common fund cases, where there is a single pool of money and each class member is entitled to a share (*i.e.*, a 'common fund')." *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 789 (N.D. Ohio 2010); *see also Connectivity Sys. Inc. v. Nat'l City Bank*, 2011 WL 292008, at *13 (S.D. Ohio 2011) (the percentage-of-the-fund method "most closely approximates how lawyers are paid in the private market and incentivizes

lawyers to maximize class recovery, but in an efficient manner"). And third, the percentage-of-the-fund method avoids the need for highly-detailed examinations and calculations required when fact-checking the lodestar. *See In re Cardinal Health Inc. Sec. Litigs.*, 528 F. Supp. 2d 752, 761 (S.D. Ohio 2007) ("The lodestar method has been rightly criticized for . . . burdening district judges with the tedious task of auditing time records."). Still, "most courts adopting the percentage approach [also] conduct a 'lodestar cross-check' to prevent counsel from receiving a windfall. The cross-check requires the Court to calculate the lodestar multiplier in the case and ensure that the fee award is still *roughly* aligned with the amount of work the attorneys contributed." *Id.* at 764 (emphasis added).

When assessing the reasonableness of a fee award, courts examine these factors: "(1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides." *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009) (quoting *Bowling*, 102 F.3d at 780). This Court's assessment of these factors in this case is as follows.

Value of the Benefit Provided. As discussed above, the value of the nine settlements is substantial. The total settlement amount is excellent, amounting to 87% of Dr. Lamb's most conservative damages model prior to trebling. *See Rodriguez*, 563 F.3d at 964 (except where the merits of a plaintiff's claims are very strong, "courts generally determine fairness of an antitrust class action settlement based on how it compensates the class for past injuries, without giving much, if any, consideration to treble damages"). And the settlements provide a clear benefit to the class: quick and certain payment of a portion of their damages on a *pro rata* basis.

Class Counsel's Fee Arrangement. The representative Plaintiffs entered into contingent fee agreements with Class Counsel. This Court has reviewed *in camera* copies of those agreements. Each agreement conditions payment of attorney fees on recovery by the client, and several agreements specify that attorney fees will be at least 35% of the client recovery. Class Counsel also have gone out-of-pocket for the heavy expenses of litigating the IPPs' case -- over $5.1 million.

Societal Interest in Rewarding Class Counsel. "Attorneys who take on class action matters serve a benefit to society and the judicial process by enabling . . . small claimants to pool their claims and resources." *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d at 1043. Moreover, "[s]ociety's interests are clearly furthered by the private prosecution of civil cases which further important public policy goals, such as vigorous competition by marketplace competitors." *In re Se. Milk Antitrust Litig.*, 2013 WL 2155387, at *5 (E.D. Tenn. 2013). Class Counsel's efforts are also notable for continuing despite significant delay in parallel criminal investigations, which produced results far more limited than this MDL lawsuit.

Case Complexity and Risk. "Antitrust class actions are inherently complex. The legal and factual issues are complicated and highly uncertain in outcome." *In re Skelaxin (Metaxalone) Antitrust Litig.*, 2014 WL 2946459, at *3 (E.D. Tenn. 2014). In this case, the IPPs' success at trial would depend heavily on explaining the meaning of a vast web of communication between numerous alleged conspirators over a lengthy Class Period. Plaintiffs faced substantial obstacles in establishing antitrust liability, causation, and damages. It is still not clear how Class Counsel would have accomplished these tasks. The nine settlements are impressive considering the difficulty of presenting this sprawling case to a jury. Moreover, Class Counsel filed this suit as a putative class action during a period of change and uncertainty in class certification standards. *See, e.g., Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013) (vacating decision affirming class certification and remanding for further consideration);

Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013) (reversing class certification in an antitrust action); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (reversing class certification in a gender discrimination action). In sum, Class Counsel undertook significant risk that they would not succeed in a complex case.

Skill and Reputation of Class and Defense Counsel. Lead Counsel is a respected antitrust practitioner, litigating important antitrust matters in other courts while at the same time managing the IPPs' case. *See Messner v. Evanston Nw. Healthcare Corp. Antitrust Litig.*, 2013 WL 6490152 (N.D. Ill. 2013). Each Defendant was represented by top antitrust defense firms. All counsel tackled the enormous task of discovery, the complicated legal and factual issues surrounding the class certification, the dispositive and *Daubert* motions, and the commitment to this complex litigation.

Value of Attorney Services. Class Counsel invested a large amount of attorney time and money in prosecuting this case on behalf of the IPP Class. Class Counsel submits a final lodestar calculation showing that (1) they spent a total of 75,361 hours (after some write-offs); (2) their rates, including secretaries through partner-level attorneys, ranged from $75 to $900, averaging $448; and (3) their total lodestar is about $33.74 million. Class Counsel calculates this lodestar using historical hourly rates -- that is, the hourly rate the attorney charged (for example) in 2013 when the work was performed, not the attorney's hourly rate at the time the fee petition was filed. Class Counsel tout this billing tactic as an added benefit to the Class, explaining that class counsel in other cases often estimate a lodestar using rates in effect at the time of the fee petition. This Court agrees that this decision not to recoup the time value of past work is a benefit to the Class.

A 24% Fee Award is Appropriate. Given Class Counsel's lodestar calculation of $33.74 million, and its request for a fee award of $45.375 million, Counsel is essentially advocating for a

multiplier of 1.34. While this multiplier is reasonable, the lodestar calculation is overstated. A more appropriate lodestar calculation is 20% lower, so a more appropriate fee award is also 20% lower.

This Court thoroughly reviewed the time sheets and summaries submitted by Class Counsel in order to assess the strength of the objectors' attacks upon the fee petition. The objectors assert that (i) many of the rates charged by Counsel are too high and above-market, (ii) many of the hours charged are unnecessary or duplicative, (iii) there is insufficient documentation of hours spent, (iv) expensive partner-level attorneys did work that other individuals with lower rates could have done, and (v) counsel paid contract attorneys low rates and then billed them at many times what they were paid. Some of these concerns are valid. In particular:

- Are the rates charged too high?

The rates charged by Counsel are high. But IPPs provide the following statistics, which generally undercut this objection: (i) the average billing rate for partners in the DPPs' lodestar was 25.8% higher than the average rate for partners in the IPPs' lodestar ($705.06 versus $560.13); (ii) the average rate for all other (non-partner) attorneys in the DPPs' lodestar was 25.1% higher than the average rate for all other attorneys in the IPPs' lodestar ($438.30 versus $350.22); and (iii) the average rate for paralegals in the DPPs' lodestar was 27.8% higher than the average rate for paralegals in the IPPs' lodestar ($244.84 versus $191.60). Ultimately, the hourly rates used by Counsel in the lodestar calculation are not unreasonable, with the understanding that they are already "calculated to account for litigation risk" (Doc. 1971 at 22 (entering the final fee award for DPP Class Counsel)).

- Are some of the hours charged unnecessary or duplicative?

There are certainly hours lurking in the time sheets that could have been avoided. "While this Court does not doubt that all the work billed was in fact performed, it does doubt that all of that time

was reasonably necessary to advance this case. . . . The Class Counsel legal team includes leading antitrust lawyers, but even they are not perfect" (*id.*).

But nothing stands out as a clear waste of time. Based on this Court's review, it would be fair to decrease the number of hours used by Counsel in the lodestar calculation by a few percentage points, but not more.

- Is there insufficient documentation of hours spent?

Put simply, no.

- Did expensive attorneys do work that cheaper attorneys or paralegals could have done?

Analysis of the time sheets leads to the same conclusion noted above, that some of the law firms were better than others at ensuring work was performed by the least expensive individual capable of doing the job. This factor leads this Court to conclude it would be fair to decrease the lodestar calculation by another few percentage points, but not more.

- Did counsel pay contract attorneys low rates but bill them at high rates?

The answer is "yes," and this factor gives this Court the greatest concern. Counsel submitted for *in camera* review a chart showing what contract attorneys were paid. These same attorneys were billed out at $250–$525/hour. As CCAF points out, "the rate passed through by law firms to paying clients [for contract attorneys] rarely exceeds $150/hour" (Doc. 1960 at 11). IPPs answer that "it is beyond cavil that law firms may charge more for contract attorneys' services than these services directly cost the law firm." *City of Pontiac Gen. Empls. Ret. Sys. v. Lockheed Martin Corp.*, 954 F. Supp. 2d 276, 280 (S.D.N.Y. 2013). But it is also true that "there is absolutely no excuse for paying these temporary, low-overhead employees $40 or $50 an hour and then marking up their pay ten times for billing purposes." *In re Beacon Assocs. Litig.*, 2013 WL 2450960, at *18 (S.D.N.Y. 2013). Careful

review of the time sheets shows the total time billed by contract attorneys is 16,935 hours, for a total of $6,589,434, or an average of $389/hour. If instead these hours are all billed at $150/hour, the lodestar would decrease by $4.05 million, or 12%.

With these factors, this Court concludes the lodestar is about 20% higher than it should be. Rather than $33.74 million, an appropriate lodestar is closer to $27 million. Using this figure, Class Counsel's request for a $45.375 million fee award would translate to a multiplier of 1.68.

As this Court noted in its Order entering the final fee award for DPP Class Counsel, discussions by other courts of the fund percentage selected, and the effective multiplier that this percentage implied, provide "at best only anecdotal evidence of how other district courts, confronting different facts, have exercised their broad discretion to set a reasonable fee award" (Doc. 1971 at 19). It is easy to find cases with higher percentages and higher multipliers than the ones IPPs request (*see* Doc. 1987-1 at 19–21, 29–30), and easy to find cases with much lower ones as well (*see* Doc. 1960 at 16, 18–20, 32–33). In the Sixth Circuit, "[w]hen using a percentage-of-the-fund approach to calculate attorneys' fees, twenty-five percent has traditionally been the benchmark standard, with the ordinary range for attorney's fees between 20–30%." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 532–33 (E.D. Mich. 2003) (citations and internal quotation marks omitted).

In the DPP case, final award to Class Counsel totaled "23.6 percent of the gross settlement amount," yielding an effective multiplier of 1.57 (Doc. 1971 at 19). Weighing all the factors discussed above, this Court concludes IPPs are entitled to a final award amounting to 24% of the gross settlement amount, which is an effective multiplier of 1.34 of the appropriate lodestar of $27 million. This means that Class Counsel essentially received the multiplier requested. It is this Court's understanding that, within fifteen (15) days of the date of this Order, Defendants will have deposited a total of $88.5

million in settlement funds into the settlement escrow account(s). Accordingly, IPP Class Counsel are entitled to payment of 24% of this amount (equal to $21,240,000) immediately upon deposit of those funds. As additional settlement funds are deposited, Class Counsel are entitled to payment of 24% of those amounts. Counsel is not entitled to any portion of the interest generated by the settlement funds.

Finally, "under the common fund doctrine, 'class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and settlement, including expenses incurred in connection with document production, consulting with experts and consultants, travel and other litigation-related expenses.'" *New England Health Care Emps. Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 634–35 (W.D. Ky. 2006) (quoting *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. at 535), *aff'd sub nom. Fidel v. Farley*, 534 F.3d 508 (6th Cir. 2008). Class Counsel ask for reimbursement of $5,115,811.72 in expenses. This Court's review confirms these unreimbursed expenses are of the kind typically paid by clients in antitrust litigation. Accordingly, this Court grants reimbursement of these expenses.

APPELLATE BOND

Class Counsel asks that, if any objector files an appeal from this Order, this "Court [should] require each objector to post a bond for appellees' attorneys' fees, as well as any litigation costs (*e.g.*, escrow fees, distribution costs) or other expenses necessitated by an unsuccessful appeal" (Doc. 1991 at 89). The decision whether to require an appellate bond and its amount, however, will depend on the nature of the individual objector's appeal. *See Gemelas v. Dannon Co.*, 2010 WL 3703811, at *1 (N.D. Ohio 2010) ("In deciding whether to impose a Rule 7 bond, courts typically consider (1) the appellant's financial ability to post a bond; (2) the risk that the appellant would not pay appellee's costs if the appeal is unsuccessful, (3) the merits of the appeal, and (4) whether the appellant has shown any bad

faith or vexatious conduct."). Moreover, until an objector actually files an appeal, the question of the propriety of an appellate bond is premature. Accordingly, Counsel's request for an appellate bond is denied without prejudice.

CONCLUSION

This Court grants the Motions by the Indirect Purchaser Plaintiff Class for Final Approval of the nine settlement agreements (Docs. 1987 & 1988), and grants in part and denies in part the Motion for Attorney Fees and Expenses, and an Incentive Award to the Class Representatives (Doc. 1908).

Therefore:

- Final approval of the nine Settlement Agreements is granted pursuant to Federal Civil Rule 23(e).

- Each Indirect Purchaser Settlement Class consists of the certified Indirect Purchaser Litigation Class minus the persons and entities who request exclusion from the Litigation Class or from the relevant Indirect Purchaser Settlement Class. For the reasons explained in this Court's Order on Class Certification (Doc. 1102), the Indirect Purchaser Settlement Classes meet the requirements of Rule 23 and are therefore certified for the purposes of these settlements.

- The persons and entities identified in Exhibit A have timely and validly requested exclusion from the Indirect Purchaser Settlement Classes or from the Litigation Class and therefore are excluded from the Indirect Purchaser Settlement Classes and are not bound by this Order, and may not make any claim or receive any benefit from the relevant settlement, whether monetary or otherwise. These excluded persons and entities may not pursue any Released Claims on behalf of those who are bound by this Order. Each Indirect Purchaser Settlement Class member who has not requested to be excluded from the Indirect Purchaser Settlement Classes for a specified settlement, and is not listed in Exhibit A, is bound by this Order, and will remain forever bound.

- As to the Released Parties, as defined in the respective Settlement Agreements, the Class Action and any and all currently pending indirect purchaser class action lawsuits directly related to the subject matter of this litigation are dismissed with prejudice and in their entirety, on the merits, and, except as provided for in the Settlement Agreements, without costs. This dismissal shall not affect, in any way, Indirect Purchasers' right to pursue claims, if any, outside the scope of the releases set forth in the nine Settlement Agreements.

- The Releasing Parties release, forever discharge, and covenant not to sue the Released Parties from and for Claims as set forth in the nine Settlement Agreements. The Releasing Parties are permanently enjoined and barred from instituting, commencing, or prosecuting any action or other proceeding asserting any Released Claims released in the nine Settlement Agreements against any of the Released Parties, either indirectly, individually, representatively, derivatively, or in any other capacity, by whatever means, in any local, state, or federal court, or in any agency or other authority or arbitral or other forum wherever located.

- This Order does not settle or compromise any other claims by Class Representatives or the Indirect Purchaser Settlement Classes against the Defendants or other persons or entities other than Released Parties, and all rights against any other Defendant or other person or entity are specifically reserved. The sales of goods containing Polyurethane Foam to members of the Indirect Purchaser Settlement Classes by Released Parties shall remain against the non-settling Defendants, to the extent any exist, as a basis for damage claims, and shall be part of any joint and several liability claims against any non-settling Defendant or other person or entity other than the Released Parties.

- Pursuant to Federal Civil Rule 54(b), this Court directs entry of final judgment of dismissal as to the Released Parties, as set forth in its separate orders entered following this Order.

- Without affecting the finality of this Order, this Court retains exclusive jurisdiction over the Class Action and the Settlement Agreements, including the administration, interpretation, consummation, and enforcement of these Settlement agreements.

- The escrow accounts established by certain of the parties, and into which Settlement Funds have been and will be deposited, plus accrued interest, are approved as Qualified Settlement Funds pursuant to Internal Revenue Code Section 468B and related Treasury Regulations.

IT IS SO ORDERED.

s/ *Jack Zouhary*
JACK ZOUHARY
U. S. DISTRICT JUDGE

January 27, 2016

EXHIBIT A

Entities Excluded from the Nine Settlements				
Identifier No.	**Name**	**Date Exclusion Request Received**	**Excluded From Nine Settlements?**	**Notes**
28219511	Ford Motor Company	8/18/2015	YES	"Protective exclusion" – not actually a class member.
28219512	Western Gas Partners, LP	10/5/2015	YES	"Protective exclusion" – not actually a class member.
28219513	CAP Carpet, INC.	10/14/2015	YES	"Protective exclusion" – not actually a class member.
28219514	Willis Anthony Johnson	11/9/2015	YES	
28219515	Providence School	10/19/2015	YES	"Protective exclusion" – not actually a class member.
28219516	Bill Gibson	11/12/2015	NO	Did not supply any information re: qualifying product purchases; submission not signed.
28219517	John O. Noland Jr.	11/25/2015	YES	
28219519	Robert W. Robinson	12/1/2015	YES	

TAB 20B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE: POLYURETHANE FOAM ANTITRUST LITIGATION	)	MDL Docket No. 2196
	)	Index No. 10-MD-2196 (JZ)
THIS DOCUMENT RELATES TO: INDIRECT PURCHASER CLASS	)	Hon. Jack Zouhary

MEMORANDUM OF LAW IN SUPPORT OF THE INDIRECT PURCHASER CLASS PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, FOR REIMBURSEMENT OF EXPENSES, AND FOR INCENTIVE AWARDS TO THE INDIRECT PURCHASER CLASS REPRESENTATIVES

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INTRODUCTION

The Indirect Purchaser Class ("Plaintiffs") submit this memorandum of law in support of their motion for an award of attorneys' fees, reimbursement of litigation expenses, and incentive awards to the class representative to be paid from the aggregate of $151,250,000 cash settlements with Defendants (*i*) Carpenter Co., (*ii*) Hickory Springs Manufacturing Company, (*iii*) Leggett & Platt, Incorporated, (*iv*) Mohawk, Inc., (*v*) Vitafoam Products Canada Limited and Vitafoam, Inc. (collectively, "Vitafoam"), (*vi*) Woodbridge Foam Corporation, Woodbridge Sales & Engineering, Inc., and Woodbridge Foam Fabricating, Inc. (collectively, "Woodbridge"), (*vii*) FFP Holdings LLC, (*viii*) FXI Holdings, Inc., and (*ix*) Future Foam, Inc. (collectively, the "Cash Settlements").

For the reasons set forth below, and those reasons set forth in Plaintiffs' preliminary approval papers (Dkt. 1751), fee petition papers (Dkts. 1908 and 1908-1), the Memorandum of Law In Support of The Indirect Purchaser Class Plaintiffs' Motion For Final Approval of Settlement Agreements With Remaining Settling Defendants ("Final Approval Memo"), the Supplemental Declaration of Marvin A. Miller in Support of Plaintiffs' Application For Award of Attorneys' Fees, Reimbursement of Expenses, and Incentive Awards to Indirect Purchaser Class Representatives ("M. Miller Supp. Decl.") attached as Exhibit 1, and Class Counsel's Response To Objections To Proposed Class Action Settlement ("Class Counsel's Response"), all of which are being filed contemporaneously, Class Counsel respectfully submit that a fair, reasonable, and appropriate award of attorneys' fees for the Cash Settlements is 30% of $151,250,000 (the "Settlement Amount") and such other amount that becomes part of the Settlement Amount.

The Settlement Amount represents one of the largest settlement amounts ever achieved on behalf of indirect purchasers in an antitrust class action. Dkt. 1908-1, ¶ 55. This result was made possible only because of the dedication, effort, industry, skill and capital expenditure made by Class Counsel on a completely contingent-fee basis, and through the assistance and active involvement of the Class Representatives. *See* Dkt. 1908-1, ¶¶ 8-9.

The Settlement Amount equates to more than 54% of the total, uncapped class member damages estimated by Dr. Lamb using the chemical manufacturer costs data, and 89% of the total Class' damages estimated by Dr. Lamb using this same data if pass through is capped at 100% of the direct purchaser overcharge. Dkt. 1647-1 at Table 18 and ¶¶ 179-180; Final Approval Memo at p. 9, n. 1. Considering the significant risks involved in trying this case and in preserving any award obtained on appeal, the substantial value of Class Counsel's services rendered on behalf of the Class is beyond reproach.

The 30% percentage-of-fund fee requested is consistent with similar class action awards, and when crosschecked with Class Counsel's lodestar, the requested multiplier of a modest 1.34 is well within the accepted range. It does not result in a windfall to Class Counsel who took on substantially more risk than any Plaintiff group in this complex multidistrict litigation.

Until Class Counsel achieved the first of the Cash Settlements, Class Counsel had litigated this action for more than four years but had not achieved a single cash settlement with any of the Defendants. *See* Dkt. 1908-1, ¶¶ 49. This stands in stark contrast to the comparatively early cash settlements achieved by counsel for the Direct Purchaser Class and which lowered their risk of proceeding to trial. Indeed, at the time that Class Counsel had achieved most of these Cash Settlements, motions to decertify and motions for summary judgment remained pending. *Id.*, ¶ 54.

Class Counsel also request reimbursement of their out-of-pocket costs and expenses reasonably and necessarily incurred in litigating claims on behalf of the Class. Finally, the requested incentive awards to the Class Representatives appropriately and fairly compensate them for their efforts in coming forward and putting their reputations on the line.

BACKGROUND

The extensive efforts of Class Counsel in achieving these excellent results are detailed below and in the Declaration of Marvin A. Miller (Doc. # 1908-1) and in the M. Miller Supp. Decl. As explained in those declarations, the extensive services rendered by Class Counsel on behalf of the Class for more than four years and on a completely contingent- fee basis involved, among other services:

- preparing and filing complaints and a consolidated, amended complaint after conducting extensive legal research and factual investigations of the flexible polyurethane foam industry and end-use market for products containing flexible polyurethane foam;

- successfully defeating multiple attacks on those pleadings filed by Defendants; engaging in extensive written and oral fact discovery by attending no less than 150 depositions across the country, by reviewing and analyzing no less than 3.9 million pages of documents produced in this matter, and by participating in multiple meet-and-confers and third-party discovery;

- developing the factual and expert record to support this Court's rigorous analysis of the applicable Rule 23 factors and to prepare for trial on the merits;

- successfully obtaining class certification of the Class and defeating Defendants' multiple attempts to reverse the order granting class certification; successfully defeating not only two attempts by Defendants to appeal to the Sixth Circuit Court of Appeals, but also their filing in the Supreme Court of United States a petition for a writ of *certiorari* in connection with the Court's class certification decision and issues relating to disseminating class notice;

- opposing certain Defendants' summary judgment and standing motions, which consisted of over 90 pages of briefing;

- preparing for a jury trial by drafting motions in *limine*, deposition designations, trial exhibits, demonstrative exhibits, opening statements, witness summaries, and by

conferring with trial witnesses, and negotiating various stipulations with opposing counsel relating to trial;

- participating and engaging in intensive and protracted settlement negotiations and working with a notice/claims administrator to formulate a robust notice plan and with economics expert to formulate a plan of allocation; and

- defending the Settlement Amount achieved for the Class from serial objectors.

Dkt. 1908-1, ¶ 8. All of this work was done on behalf of the Class on a purely contingency-fee basis with no guarantee of the compensation. *Id.*, ¶ 9. Especially considering the significant risks inherent in representing this Indirect Purchaser Class (*see* Final Approval Memo at pp. 9-17), Class Counsel achieved an exceptional result for the Class.

The 30% fee percentage requested is one that has been approved by other courts in the Sixth Circuit and is justified by all relevant factors identified by this Circuit. Accordingly, for the reasons set forth below, Class Counsel request that the Court award fees equal to 30% of the Settlement Amount and earnings that become part of the Settlement Amount.

Class Counsel also request reimbursement of $5,122,065.78 in out-of-pocket expenses incurred in connection with this litigation and incentive awards of $10,000 for each of the individual class representatives and $35,000 for each of the two corporate class representatives.

ARGUMENT

A. Class Counsel Should Be Awarded The Requested Fees

1. Class Counsel Are Entitled To Compensation Based Upon The Benefits Created By The Class.

Courts have long recognized that a lawyer who recovers a "common fund" is entitled to a reasonable attorneys' fee from the fund as a whole. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993).[1]

[1] Lead Counsel also requests the Court's authorization to distribute the fees in a manner that, in the judgment of Lead Counsel, fairly compensates each firm for its contribution to the

The rationale for such awards is that "persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched …" *Id*. at 478; *Rosenbaum v. Macallister*, 64 F.R.D. 1439, 1444 (10th Cir. 1995); *Fournier v. PFS Investments, Inc.*, 997 F. Supp. 828, 830 (E.D. Mich. 1998); *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974), *cert denied*, 422 U.S. 1048 (1975); *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 268 F. Supp. 2d 907, 921 (N.D. Ohio 2003) ("*Sulzer*").

Fee awards which recognize the success reflected by the recoveries are in the "best interests" of current and future class members:

> It is unquestionably true that without able lawyers handling these matters not only do some of them go unprosecuted, but the big difference in my experience is in the amount obtained and you don't get the highest recovery and when you are paying at the low end of the scale of fee recovery in contingent actions, it seems to me that I as the protector of the class, can fairly say, and honestly say, that I believe it is in the class' best interests – of this class of future classes yet unknown – to pay this kind of money for these kinds of benefits.

---

prosecution of Plaintiffs' claims. This is consistent with the Lead Counsel's duties under the Order Re Interim Lead Counsel and Executive Committee (Dkt. 29) to "[c]oordinat[e] the activities of Plaintiffs' counsel and implement[] procedures to ensure that schedules are met and avoid[] unnecessary expenditures of time and funds," and to "[c]ollect[] time and expense reports on a periodic basis, endeavor[] to keep attorneys' fees reasonable, and choos[e] appropriate levels of staffing for the tasks required." *See also* Class Counsel's Response at pp. 11 - 14 (*citing* case law supporting that Lead Counsel can and should be granted discretion to distribute funds among Class Counsel); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 533 n.15 (3d Cir. 2004) (affirming the District Court's decision to permit co-chairs of the Executive Committee to divide attorneys' fees according to their discretion, and declining to "deviate from the accepted practice of allowing counsel to apportion fees amongst themselves"); *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 1029, 1033 (S.D. Ohio 2001) (approving distribution of a "single fee from which the [Plaintiffs' Steering Committee] will allocate the attorneys' fees among the attorneys who provided a benefit to the Class"); *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 383 (S.D. Ohio 2006) ("Class Counsel shall allocate the award of attorneys' fees among counsel for the Class based on their good-faith assessment of the contribution of such counsel to the prosecution of this Action."); *In Re BP Propane Indirect Purchaser Antitrust Litigation*, Case No. 06-cv-3541, Dkt. 209 at p. 2 (N.D. Ill. Feb. 10, 2010), Dkt. 209. (" any and all allocations of attorneys' fees and expenses shall be allocated among Plaintiffs' Counsel at the direction of Lead Counsel at its discretion, who shall apportion the fees and expenses based upon their assessment, in its sole discretion, of the respective contributions to the litigation made by each counsel.").

In re Pepsico Sec. Litig., No. 82-Civ-8403 (S.D.N.Y. April 26, 1985), Transcript of April 26, 1985 at 17-18, cited in Herbert B. Newberg, *Attorney Fee Awards* §1.04 at 6 (1986), and quoted with approval in *In re M.D.C. Holdings Sec. Litig.*, 1990 WL 454747 at *10, Fed. Sec. L. Rep. (CCH) ¶ 95,474 at 97,492 (S.D. Cal. 1990); *Sulzer*, 268 F. Supp. 2d at 922 ("The Court must ensure that counsel is fairly compensated for the amount of work done as well as for the results achieved.") (quoting *Rawlings*, 9 F.3d at 516); *Basile v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 640 F. Supp. 697, 706 (S.D. Ohio 1986) ("Class counsel, their associates, and the other attorneys with whom they consulted demonstrated . . . the level of professionalism to which we encourage each member of the Bar to strive, and it merits due reward") (citations omitted).

As these courts and others have repeatedly recognized, attorney fee awards that fully reward excellent results encourage the successful prosecution of meritorious cases. This Court should follow that lead.

2. The Percentage-Of-The-Fund Method Is The Appropriate Method For Calculating Attorneys' Fees In This Case.

The Supreme Court has held in decisions involving the computation of a common fund fee award that it is appropriate for the fee to be determined on a percentage-of-the-fund basis. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("under the 'common fund doctrine,' . . . a reasonable fee [is] based on a percentage of the fund bestowed on the class"); *see also Trustees v. Greenough*, 105 U.S. 527, 532 (1882); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 124-25 (1885); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165-66 (1939).

In the Sixth Circuit, district courts have discretion to use either the lodestar method or the "percentage of fund" method to calculate attorneys' fees for class actions. *See Rawlings*, 9 F.3d at 515 (6th Cir. 1993) (noting however, the "recent trend towards adoption of a percentage-of-the-fund method in [common fund] cases"). The standard for district courts is that "awards

of attorney's fees by federal courts in common fund cases [must] be reasonable under the circumstances." *Id., citing Smillie v. Park Chem. Co.*, 710 F.2d 271, 275 (6th Cir. 1983).

Despite the discretion given to the district courts in choosing whether to apply the lodestar or percentage-of-the-fund method, as *Rawlings* noted, courts within the Sixth Circuit have indicated their preference for the percentage-of-the-fund method. *See, e.g., In re F&M Distributors, Inc., Sec. Litig.*, 1999 U.S. Dist. LEXIS 11090, Fed. Sec. L. Rep. (CCH) ¶ 90,621 (E.D. Mich. June 29, 1999) (choosing percentage-of-the-fund as the better method for determining attorneys' fees in a securities class action); *In re Rio Hair Naturalizer Prod. Liab. Litig.*, 1996 WL 780512, *16 (E.D. Mich. Dec. 20, 1996) ("more commonly, fee awards in common fund cases are calculated as a percentage of the fund created, typically ranging from 20 to 50 percent of the fund"); *Fournier*, 997 F. Supp. at 830. As Judge Julian A. Cook, Jr. held in *F&M Distributors*:

> [T]he Court concludes that the percentage-of-the-fund method should be applied for two reasons. First the lodestar method is too cumbersome and time-consuming of the resources of the Court. *See Rawlings*, 9 F.3d at 516-517. Second, and more importantly, the "percentage of the fund" approach "more accurately reflects the result achieved." *Id*. at 516.

1999 U.S. Dist. LEXIS 11090 at *8; *see also In re Cardinal Health Inc. Sec. Litigations*, 528 F. Supp. 2d 752, 761 (S.D. Ohio 2007) ("The lodestar method has been rightly criticized for generating avoidable hours, discouraging early settlement, and burdening the district judges with the tedious task of auditing time records.").[2]

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[2] *See also Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1268 (D.C. Cir. 1993) ("First, attorneys are given an incentive to spend as many hours as possible, billable to a firm's most expensive attorneys. Second, there is a strong incentive against early settlement since attorneys will earn more the longer the litigation lasts."); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 48-49 (2d Cir. 2000) (lodestar analysis "created an unanticipated disincentive to early settlements" and "was an inevitable waste of judicial resources"); *In re Cendant Corp. Litig.*, 264 F.3d 201, 256 (3d Cir. 2001) (lodestar approach creates "a risk that it will cause lawyers to work

The use of the percentage method in this Circuit is consistent with decisions nationwide when awarding fees in common fund cases on this same basis. *See e.g.*, *In re Thirteen Appeals Arising out of the San Juan DuPont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995) ("[c]ontrary to popular belief, it is the lodestar method, not the [percentage] method, that breaks from precedent"); *Goldberger*, 209 F.3d at 50 (approving the use of percentage method); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 822 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995) ("In common fund cases, a district judge can award attorneys' fees as a percentage of the fund recovered," and in prior cases, "fee awards have ranged from nineteen percent to forty-five percent of the settlement fund"); *In re Continental Illinois Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (fee award should not be based on "individual hours," but rather on the percentage that counsel "would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client"); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) ("a reasonable fee under the common fund doctrine is calculated as a percentage of the recovery"); *Camden I Condominium Assoc., Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) ("Henceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class"); *Swedish Hosp. Corp.*, 1 F.3d at 1271 ("percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases").

This Court followed the plethora of other courts applying a percentage of the fund methodology when it awarded counsel for the Direct Purchaser Class a percentage of the funds they created in this case, *see* Dkts. 1534 and 1971, and should do so here.

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excessive hours, inflate their hourly rate, or decline beneficial settlement offers that are made early in litigation" and requires "an enormous investment of judicial time").

3. The Requested 30% Fee is Fair And Reasonable

The requested 30% fee is fair and reasonable and is squarely within the range of fees awarded in similar cases. *See, e.g., In re Scrap Metal Antitrust Litig.*, No. 1:02-cv-0844 (N.D. Ohio Mar. 24, 2005) (awarding 30% fee plus expenses); *In re Southeastern Milk Antitrust Litig.*, No. 2:08-MD-1000, 2013 WL 2155387 (E.D. Tenn. May 17, 2013) (awarding antitrust counsel 33% fee plus expenses from $158.6 million settlement); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1359 (S.D. Fla. 2011) (awarding class counsel 30% of the $410 million settlement fund); *In re Cardizem CD Antitrust Litig.,* No. 99-md-1278 (E.D. Mich. Nov. 25, 2002) (granting antitrust class action counsel 30% fee award plus expenses and interest accrued); *In re F&M Distribs., Inc. Sec. Litig.*, No. 95-CV-71778, 1999 U.S. Dist. LEXIS 11090 (E.D. Mich. June 29, 1999) (awarding a 30% fee award plus expenses in common fund case); *In re Vitamins*, 2001 U.S. Dist. LEXIS 25067, at *57 (approving fees of 34.06% of $359 million antitrust settlement fund); *In re Lorazepam*, 2003 WL 22037741, at *8-9 (awarding fees of 30% of $35 million antitrust settlement fund); *In re Linerboard Antitrust Litig.*, No. MDL 1261, 2004 WL 1221350 (E.D.Pa. June 2, 2004) (awarding fees of 30% of $202 million antitrust settlement fund); *In re Cardizem CD Antitrust Litig.*, No. 99-MD-1278, MDL No. 1278 (E.D. Mich. Nov. 26, 2002) (awarding fees of 30% of $110 million antitrust settlement fund); *see also In re Ampicillin Antitrust Litig.*, 526 F. Supp. 494, 498 (D.D.C. 1981) (noting that several courts have awarded more than 40% of the settlement fund in antitrust cases).

Fee decisions from various jurisdictions confirm that even in cases with large recoveries above $100 million, attorneys' fees of more than 30% are regularly awarded. *See, e.g., In re Vitamins*, 2001 U.S. Dist. LEXIS 25067, at *57 (approving fees of 34.06% of $359 million); *In re Buspirone Antitrust Litig.*, No. 01-Md-1410, (S.D.N.Y. Apr. 11, 2003) (awarding fees of 33.3% of $220 million antitrust settlement fund, plus expenses); *In re Lease Oil Antitrust Litig.*,

186 F.R.D. 403 (S.D. Tex. 1999) (awarding fees and expenses of 35.1% from $190 million antitrust settlement fund); *In re Combustion Inc.*, 968 F. Supp. 1116 (W.D. La. 1997) (awarding maximum reserve of 36% in attorneys' fees, and 48.4% in combined fees and expenses, from fund of $127 million); *In re Linerboard*, 2004 WL 1221350 (awarding 30% of approximately $202 million); *In re Cardizem*, No. 99-MD-1278 (awarding 30% of $110 million); *In re Ikon*, 194 F.R.D. at 166 (awarding 30% of approximately $108 million); *In re Rite Aid*, 146 F. Supp. at 736 (awarding 35% of $193 million); *In re Ikon*, 194 F.R.D. at 192-97 (awarding fees and expenses of 32.4% of $111.8 million fund).

Awarding fees equal to 30% of a common settlement fund is entirely consistent with, and in many cases less than, awards in analogous cases. Indeed, in many of the cases in which a percentage below 30% was awarded, the lodestar multipliers in those cases were significantly greater than the 1.34 multiplier requested here. M. Miller Supp. Decl., ¶ 11; *see Merkner v. AK Steel*, 2011 U.S. Dist. Lexis 157375 (S.D. Ohio Jan. 10, 2011) (awarding a multiplier of 5.3); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (awarding a multiple of 3.5); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (awarding a multiplier of 3.97 which was "not unreasonable in this type of case"); *see also In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 401 (S.D.N.Y. 2013) (awarding a multiplier of 2.8); *In re Wachovia Preferred Sec. & Bond/Notes Litig.*, 2012 WL 2589230, at *2 (S.D.N.Y. Jan. 3, 2012) (awarding a multiplier of 2.3 in a case that never entered formal discovery); *In re Charles Schwab Corp. Secs. Litig*., 2011 U.S. Dist. Lexis 44547 (N.D. Cal. April 19, 2011) (awarding a multiplier of 2.68); *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 461 F. Supp. 2d 383, 387 (D. Md. 2006) (awarding a multiplier of 2.5 in a case that settled "well before

trial"). Indeed, as the court in *NASDAQ* in pointed out, "multipliers of between 3 and 4.5 have become common." *Id*., 187 F.R.D. at 489 (internal citations omitted).

4. Application Of The Sixth Circuit's Reasonableness Factors Supports Class Counsel's Request For A 30% Fee.

The Sixth Circuit has set forth various factors that should be evaluated when determining the reasonableness of an attorney fee request: (1) whether the services were undertaken on a contingent fee basis; (2) the complexity of the litigation; (3) the professional skill and standing of counsel involved on both sides; (4) the value of the benefit rendered to the class; (5) the value of the services on an hourly basis; and (6) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others. *Smillie*, 710 F.2d at 275. An application of these factors to this case confirms that the fee requested here is well within the reasonable range. *See also, Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974) (setting forth the six factors to be considered in assessing a reasonable award); *In re Dun & Bradstreet Credit Serv. Customer Litig.*, 130 F.R.D. 366, 373 (S.D. Ohio 1990).

(i) The Contingent Nature of the Fee

A determination of a fair fee must include consideration of the sometimes undesirable characteristics of a contingent antitrust action, including the uncertain nature of the fee, the wholly contingent outlay of large out-of-pocket sums by plaintiffs, and the fact that the risks of failure and nonpayment in an antitrust case are extremely high. Numerous cases recognize that attorneys' risk is "perhaps the foremost factor" in determining an appropriate fee award. *Goldberger*, 209 F.3d at 54 (citations omitted); *accord Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir.) *cert. dismissed sub nom. Ledbetter v. Jones*, 453 U.S. 950 (1981) ("Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of result."). In *Behrens v.*

Wometco Enter., Inc., 118 F.R.D. 534, 548 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990), the court noted that:

> Generally, the contingency retainment must be promoted to assure representation when a person could not otherwise afford the services of a lawyer. . . A contingency fee arrangement often justifies an increase in the award of attorneys' fees. This rule helps assure that the contingency fee arrangement endures. If this "bonus" methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing.

Id. at 548 (citations omitted). As Judge Nimmons explained in *Ressler v. Jacobson*:

> The Court is well aware that there are numerous contingent cases such as this where plaintiff's counsel, after investing thousands of hours of time and effort, have received no compensation whatsoever. Numerous cases recognize that the attorney's contingent fee risk is an important factor in determining the award . . . . In evaluating [the contingent fee] factor the Court will not ignore the pecuniary loss suffered by plaintiff's counsel in other actions where counsel received little or no fee.

149 F.R.D. 651, 656-57 (M.D. Fla 1992) (citations omitted).[3]

Success before a jury in complex litigation is highly unpredictable. As one court observed in another antitrust class action: "It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced." *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied sub nom., Cotler Drugs, Inc. v. Chap. Pfizer & Co.*, 404 U.S. 871 (1971).

The history of antitrust litigation is replete with cases in which plaintiffs succeeded at trial on liability, but recovered no damages or very small damages at trial or after appeal. *See, e.g., United States Football League v. National Football League*, 644 F. Supp. 1040, 1042

[3] The Fourth Circuit made a similar observation in *McKittrick v. Gardner*, 378 F.2d 872, 875 (4th Cir. 1967):

> The effective lawyer will not win all of his cases, and any determination of the reasonableness of his fees in those cases in which his client prevails must take into account of the lawyer's risk of receiving nothing for his services. Charges on the basis of a minimal hourly rate are surely inappropriate for a lawyer who has performed creditably when payment of any fee is so uncertain.

(S.D.N.Y. 1986) ("the jury chose to award plaintiffs only nominal damages, concluding that the USFL had suffered only $1.00 in damages"), *aff'd*, 842 F.2d 1335 (2d Cir. 1988). *Eisen v. Carlisle & Jacqueline*, 479 F.2d 1005 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974), illustrates the risks faced by Class Counsel. *Eisen* was brought as an antitrust class action. After two trips to the Second Circuit and one to the Supreme Court, plaintiffs and the putative class and their counsel recovered nothing.

This case is no exception to the rule. *See* Final Approval Memo at pp. 9-17 (identifying the risks Class Counsel faced in prosecuting this action). When Class Counsel undertook the representation of Class Plaintiffs and the Class, there were no assurances that any fees would be received. 1908-1, ¶ 9. Class Counsel were aware that they would likely have to expend tens of thousands of hours and millions of dollars in prosecuting this case over an extended period of time before having even a possibility of recovering a fee. *See id*. In doing so, Class Counsel alone bore the risk of the case being dismissed in the pretrial stage, of not prevailing at trial if the case progressed that far, or even possibly losing on appeal.

For example, this case clearly involves many defendants and the prosecution of this case has been a labor-intensive task, to put it mildly. While Plaintiffs did succeed at the class certification stage, there is no guarantee that they would win at trial or that they would be able to recover damages equaling or surpassing the Settlement Amount, even if they established Defendants' liability. The risk involved in succeeding at trial and on appeal on liability, causation and damages, along with the financial risks and outlays borne by Class Counsel to date in this contingency matter, all support the fee requested.

Indeed, to date, Class Counsel has not received any compensation as a result of their tireless and persistent efforts on behalf of this Class during the almost five years of this litigation.

(ii) The Complexity of The Case.

As to the complexity of the case, "[a]n antitrust class action is arguably the most complex action to prosecute. … The legal and factual issues involved are always numerous and uncertain in outcome." *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *10 (E.D. Pa. June 2, 2004) (quoting *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000)). This antitrust action is no different. In fact, in addition to obtaining class certification, this case involves some highly technical and complex issues that are not present in all antitrust cases and involved a gaggle of defendants and a conspiracy that allegedly lasted more than a decade. Further, Class Counsel was obligated to fully understand every aspect of the flexible polyurethane business in order to investigate and prosecute this case. Through extensive document review, consultation with experts, and interviews and depositions of witnesses, Class Counsel was able to gather significant information that was of invaluable assistance in the litigation and the settlement negotiations.

(iii) The Skill, Experience and Reputation of Counsel.

Class Counsel includes some of the preeminent class action and litigation firms in the country that collectively possess decades of experience in prosecuting and trying complex actions. The experience and skill were demonstrated by Class Counsel's efficient and effective prosecution of this action as well as the excellent Settlement Amount and settlement terms obtained for the Class.

(iv) The Excellent Result Achieved On Behalf Of The Class.

The result achieved is a major factor to consider in making a fee award. *Hensley v. Eckhart*, 461 U.S. 424, 436 (1983) ("the most critical factor is the degree of success obtained"); *see also Behrens*, 118 F.R.D. at 547-48 ("The quality of work performed in a case that settles

before trial is best measured by the benefit obtained."); *Goldberger*, 209 F.3d at 55 ("the quality of representation is best measured by results").

The results achieved in this case fully support the requested fee. The $151,250,000 Settlement Amount is substantial in both absolute terms and in light of the circumstances of this litigation. Specifically, the cash payments here represent more than 54% of the total, uncapped class member damages estimated by Dr. Lamb using the actual chemical manufacturer costs data, and 89% of the total, capped class member damages estimated by him using this data. Even if Plaintiffs' succeeded in obtaining a jury verdict as to liability, there was a reasonable chance that the jury might conclude that damages should be estimated based upon the chemical manufacturer costs data.

In addition, although there has been a governmental investigation into the facts underlying this case, by this Court's Order ([Doc. 243]), Class Counsel was precluded from tracking that investigation. Moreover, although the government's case has been pending since at least April 2010, there has only been one U.S. indictment to date (covering conduct and a time period far narrower than the scope of the Indirect Purchasers' claims in this case). Class Counsel did not build Plaintiffs' case by relying on government indictments or evidence produced as part of such indictments. Dkt 1908-1, ¶ 31. Instead, Class Counsel relied entirely on their own investigation and the discovery, admissions, testimony, and evidence collected solely through their efforts in this litigation and by cooperating with other plaintiff groups whenever appropriate in order to maximize efficiencies and avoid unnecessary duplicative work. *Id*., ¶¶ 31, 25.

(v) The Value of Class Counsel's Services On An Hourly Basis

Class Counsel has been litigating this case for over four years. Thousands of hours were spent developing the case against Defendants, obtaining relevant and critical documents from

Defendants and third parties, obtaining damages information, eliciting admissible testimony from witnesses, obtaining class certification, working with experts, and negotiating and documenting the settlements. *See* 1908-1, ¶ 59. The significant investment of time required by this action necessarily precluded Class Counsel's opportunity to work on other and perhaps more lucrative matters. *Id.*, ¶ 60.

There is no question that the considerable amount of time and effort expended by Class Counsel resulted in an excellent settlement for the Class.

(vi) Society's Stake In Rewarding Attorneys Who Produce Such Benefits

The Supreme Court has repeatedly recognized the importance of private antitrust litigation as a necessary and desirable tool to assure the effective enforcement of the antitrust laws. *See, e.g., Pillsbury Co., v. Conboy*, 459 U.S. 248, 262-63 (1983); *Reitner v. Sonotone Corp.*, 442 U.S. 330, 331 (1979); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972); *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968); *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318-19 (1965). Fee awards similar to that requested here encourage and support meritorious class actions, and thereby promote private enforcement of, and compliance with, the antitrust laws. As the court noted in *Alpine Pharmacy v. Chas. Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2d Cir.), *cert. denied*, 414 U.S. 1092 (1973), "[i]n the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced . . . ."

Here, through their efforts to obtain redress for the alleged wrongs committed by Defendants, Class Counsel substantially contributed to enforcement of applicable antitrust and unfair compensation laws and helped restore market efficiency in an important segment of the economy.

Moreover, encouraging qualified counsel to bring highly risky but beneficial class actions like this one benefits society in general. *See, e.g., In re M.D.C. Holdings Sec. Litig.*, Fed. Sec. L. Rep. (CCH) ¶ 95,474, 1990 U.S. Dist. LEXIS 15488, at *30-31 (S.D. Cal. Aug. 30, 1990) ("without able lawyers handling these matters not only do some of them go unprosecuted, but ... you don't get the highest recovery) (quoting *In re Pepsico Securities Litig.*, Civil Action No. 82-Civ-8403 (S.D.N.Y. April 26, 1985)). Class Counsel undertook, at a significant risk, this litigation involving some very complex liability and damages issues. Payment of attorneys' fees in the requested amount adequately and fairly compensates Class Counsel for the risk they undertook at the inception of the case and the benefit they have achieved for the Class. Class Counsel should be compensated such that they will have an incentive to pursue additional cases similar to this one.

5. A Lodestar Cross-Check Demonstrates That The Requested Fee Is Reasonable

The reasonableness of Class Counsel's fee request is further confirmed by a lodestar cross-check. *See Bowling*, 102 F.3d at 780 (6th Cir. 1996) (affirming district court's methodology which based the fee award on a percentage of the fund and then cross-checked the fee against class counsel's lodestar); *see also Connectivity Sys. Inc. v. Nat'l City Bank*, 2011 WL 292008 (S.D. Ohio Jan. 26, 2011) ("In this Circuit, the lodestar figure is used to confirm the reasonableness of the percentage of the fund award.").

Given the risks of contingent litigation, lodestar multipliers—*i.e.*, positive multipliers applied to the baseline lodestar amount—are frequently awarded in common fund cases. *See, e.g., Rawlings*, 9 F.3d at 517 (6th Cir. 1993) ("Counsel had requested a multiplier of 3.3 based upon the contingency risk undertaken and the quality of the work performed. Such factors are indeed the focus of a district court's analysis when determining whether to utilize a multiplier.");

Sulzer, 268 F. Supp. 2d at 922 (N.D. Ohio 2003) (multiplier may be used to account for the "costs and risks involved in the litigation," and applying multipliers as high as 19.8); *In re Oral Sodium Phosphate Solution-Based Products Liab. Action*, 2010 WL 5058454, at *4–5 (N.D. Ohio Dec. 6, 2010) (applying 2.0 multiplier).

Here, the cumulative lodestar value of Class Counsel's time spent on the case is $33,743,941.00 (through the end of November 30, 2015). M. Miller Supp. Decl. ¶ 10. As more fully explained in Class Counsel's Response to the Objectors, the attorney rates and number of hours spent litigating this case, which were used to derive this figure, are entirely appropriate. Class Counsel's Response at pp. 33 - 50. Class Counsel's sworn submissions, for instance, demonstrate that such hours were necessary and reasonably expended in the prosecution of the litigation. *Id*. at p. 33-35. Similarly, the hourly rates utilized to calculate the lodestar are well within the range of reasonableness for the type of work performed and are entirely consistent with the rates among the relevant national community of experienced antitrust class action practitioners. *Id*. at p. 35-40. Moreover, each of the attorneys included in the lodestar calculation was well qualified to do the work performed and tasks were appropriately assigned to attorneys based upon their assessed skill level and experience. *See id*. at p. 41-46. Even though Class Counsel worked collaboratively with counsel for the other plaintiff groups in order to maximize efficiencies, issues unique to this Indirect Purchaser Class meant that Class Counsel need to address matters over and above those liability and damages considerations relevant to the Direct Purchaser Class. *Id*. at pp. 46-49. Despite this fact, Class Counsel's lodestar is significantly lower than the lodestar figure submitted by counsel for the Direct Purchaser Class (*compare* Class Counsel's lodestar of less than $34 million (M. Miller Supp. Decl., ¶ 10), *with* counsel for Direct Purchaser Class's lodestar of more than $65 million (Dkt. 1971 at p. 15)), as is

the cross-check multiplier (*compare* the 1.34 multiplier for Class Counsel (M. Miller Supp. Decl., ¶ 11), *with* the 1.57 multiplier awarded to counsel for the Direct Purchaser Class (Dkt. 1971 at p. 22)).

The requested 30% of the Settlement Amount, equal to a 1.34 multiplier, is well within the acceptable multiplier range accepted by courts. *See supra*. Indeed, typical lodestar multipliers—particularly in cases where counsel expended substantial amounts of time, effort, and resources pursuing the defendants—range from two to five, and are determined on a case-by-case basis. *See In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 750-51 (E.D. Pa. 2013) (awarding fees equal to 2.99 lodestar multiplier); *Bailey v. AK Steel Corp.*, 2008 WL 553764, at *7 (S.D. Ohio Feb. 28, 2008) (awarding multiplier of 3.04, noting that "[c]ourts typically ... increas[e] the lodestar amount by a multiple of several times itself and identifying a "normal range of between two and five"); *Manners v. Am. Gen. Life Ins. Co.*, 1999 WL 33581944, at *93 (M.D. Tenn. Aug 11, 1999) (3.8 multiplier); *In re Cardinal Health Sec. Litig.*, 528 F. Supp. 2d. at 770 (5.9 multiplier); *Cardizem*, 218 F.R.D. at 533 (3.7 multiplier); *Meijer, Inc. v. 3M*, 2006 WL 2382718, at *24 (E.D. Pa. Aug. 14, 2006) (4.77 multiplier in case that settled after one year). As the foregoing citations show, courts seek to reward class counsel for taking the risks of bringing successful class actions such as this.

Plaintiffs' fee request is well within the range recognized by courts, even for cases (like here) with large and extremely successful resolutions for the Class. *See, e.g.*, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 WL 1365900, at *7 (N.D. Cal. Apr. 3, 2013) (awarding $308 million in attorneys' fees in indirect purchaser antitrust class action, which represented a 2.4-2.6x multiplier to counsel's lodestar); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 524 (E.D.N.Y. 2003) (awarding $220 million in attorneys' fees, which equated to 3.5 lodestar multiplier); *see also In re Se. Milk Antitrust Litig.*, 2013 WL 2155387, at *4-5 (E.D. Tenn. May 17, 2013) ($101 million in total attorneys' fees where counsel obtained $303 million for the class and where total fees

represented 1.9x lodestar multiplier, which was "clearly within, but in the bottom half of, the range of typical lodestar multipliers"); *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 U.S. Dist. LEXIS 27013, at **47-48 (D.N.J. Nov. 9, 2005) (1.86 multiplier is on the "low end of the spectrum").

Accordingly, the lodestar cross-check provides this Court with additional confirmation of the reasonableness of the requested fee.

B. Class Counsel's Expenses Are Reasonable And Were Necessarily Incurred To Achieve The Benefit Obtained

Substantial out-of-pocket expenses have been incurred in prosecuting this litigation over the past two and a half years. To date, Class Counsel have incurred $5,122,065.78 in expenses that have not been reimbursed. M. Miller Supp. Decl. at ¶ 2. These expenses were reasonable and necessary to prosecute the litigation, and included, among other things, expert fees, costs for document collection and management, electronic hosting for Defendants' and third parties' document productions, travel for depositions and meetings, photocopying, overnight mail, process service fees, long distance telephone, electronic research, and contributions to the common expense litigation fund. *Id*., Group Ex. C.

"Under the common fund doctrine, 'class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and settlement, including expenses incurred in connection with document production, consulting with experts and consultants, travel and other litigation-related expenses.'" *New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 634-35 (W.D. Ky. 2006), *aff'd sub nom. Fidel v. Farley*, 534 F.3d 508 (6th Cir. 2008) (quoting *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 535 (E.D. Mich. 2003)); *see also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 389-98 (1970); *In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D.

483, 504 (E.D. Mich. 2008) ("Expense awards are customary when litigants have created a common settlement fund for the benefit of a class").

The appropriate analysis to apply in deciding whether expenses are compensable in a common fund case is whether the particular costs are the type typically billed by attorneys to paying clients in the marketplace. *Synthroid Mktg. Litig.*, 264 F.3d at 722 (expenses paid by private clients in similar cases should be paid); *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee paying client.'") (citation omitted); *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they 'were incidental and necessary to the representation' of those clients.") (citation omitted). The categories of expenses for which Class Counsel seek reimbursement here are the type of expenses routinely charged to hourly-fee paying clients and, therefore, should be reimbursed out of the common fund.

A large component of these reasonable and necessary expenses consists of fees paid to experts and consultants who were instrumental in, among other things, helping Class Counsel win class certification, prove liability, calculate damages, and obtain these favorable settlements for the Class. Dkt. 1908-1, ¶¶ 61-63; M. Miller Supp. Decl., Group Ex. C.

The expenses incurred in this litigation are described in Group Exhibit C of the M. Miller Supp. Decl. Class Counsel believe that the expenses were all reasonably incurred, are reasonable in amount and should be reimbursed in full. *See In re Vitamin C Antitrust Litig.*, 2012 U.S. Dist. LEXIS 152275 (E.D.N.Y. 2012) (awarding fees and expenses together totaling 39% of $9.5 million settlement).

C. Incentive Awards For The Named Plaintiffs Are Appropriate And Reasonable.

Class Counsel request the Court to approve incentive awards in the amount of $10,000 for each individual class representatives and $35,000 for each corporate class representative. The Class Representatives have diligently and completely fulfilled their obligations as representatives for the class. They stepped forward and pursued the Class' interest by filing suit on behalf of the members of the Class and undertaking the responsibilities attendant upon serving as a named plaintiff, including being deposed and responding to document requests and interrogatories. *See* Dkt. 1971 at 23-24 ("[d]istrict courts in this Circuit routinely grant incentive awards to representative plaintiffs in antitrust matters, when the representative plaintiff actively participates in the litigation.") (citations omitted).

The Class Representatives have acted as private attorneys general seeking a remedy for what appeared to be a public wrong, in effect providing private enforcement of the law. It is well recognized that private class action suits are a primary weapon in the enforcement of the laws for the protection of the public. *See, e.g., P.D.Q. Inc. of Miami v. Nissan Motor Corp. in USA*, 61 F.R.D. 372, 380 (S.D. Fla. 1973) (private civil suits are an important tool in enforcing the antitrust laws); *Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3d Cir. 1970) ("the effectiveness of the securities laws may depend, in large measure, on the application of the class action device").

Numerous courts have found it appropriate to specially reward named class plaintiffs for the benefits they have conferred. *See In re Dun & Bradstreet Credit Serv. Customer Litig.*, 130 F.R.D. at 376 (two incentive awards of $55,000 and three incentive awards of $35,000); *In re REVCO Sec. Litig., Arsam Co. v. Salomon Bros., Inc.*, No. 89CV593, 1992 U.S. Dist. LEXIS 7852 (N.D. Ohio, May 5, 1992) ($200,000 to the named plaintiff); *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 250-51 (S.D. Ohio 1991) ($50,000 each to six named plaintiffs); *Bogosnian v. Gulf Oil Corp.*, 621 F. Supp. 27 (E.D. Pa. 1985) (incentive

awards of $20,000 to each of two named plaintiffs). Indeed, this Court recently awarded each Direct Purchaser Class Representative $35,000 for their efforts in prosecuting their claims. Dkt. 1971 at pp. 23-24.

The requested incentive award for the corporate plaintiffs is higher than for the individuals because the corporations did a more substantial amount of work on the case – reviewing and producing a much larger quantity of documents from numerous entities and making their corporate executive available for lengthy depositions. The requested $10,000 awards for each individual plaintiff and $35,000 awards for each corporate plaintiff are fair, reasonable, and warranted. For these reasons, Class Counsel submits that the requested incentive awards are both appropriate and reasonable in amount.

CONCLUSION

Without any guarantee of success, Class Counsel pursued this litigation effectively and efficiently at their own risk and expense for over four years. For the reasons set forth above, Class Counsel request the Court to approve the fee and expense application and enter an order: awarding Class Counsel a fee of 30% of the Settlement Amount; reimbursing them in the amount of $5,122,065.78 for incurred out-of-pocket expenses; and awarding incentive awards of $10,000 to each of the individual class representatives and $35,000 to each corporate class representative.

Dated: December 7, 2015

Respectfully submitted,

/s/ *Marvin A. Miller*
Marvin A. Miller
MILLER LAW LLC
115 S. LaSalle Street, Suite 2910
Chicago, IL 60603
Phone: 312-332-3400
Fax: 312-676-2676
Email: mmiller@millerlawllc.com

Lead Counsel for Indirect Purchaser Plaintiff Class

Richard M. Kerger (0015864)
KERGER & HARTMAN, LLC
33 S. Michigan Street, Suite 100
Toledo, OH 43604
Telephone: (419) 255-5990
Fax: (419) 255-5997
Email: rkerger@kergerlaw.com

Executive Committee for Indirect Purchaser Plaintiff Class

Jay B. Shapiro
STEARNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON, P.A.
150 West Flagler Street, Suite 2200
Miami, Florida 33130
Telephone: (305) 789-3200
Fax: (305) 789-3395
Email: jshapiro@stearnsweaver.com

Eric D. Barton
WAGSTAFF & CARTMELL LLP
4740 Grand Avenue, Suite 300
Kansas City, MO 64112
(816) 701-1100
Email: ebarton@wagstaffcartmell.com

Shpetim Ademi
ADEMI & O'REILLY, LLP
3620 East Layton Avenue
Cudahy, Wisconsin 53110
(414) 482-8000
Email: sademi@ademilaw.com

Martin D. Holmes
DICKINSON WRIGHT PLLC
424 Church Street
Suite 1401
Nashville, TN 37219
(615) 244-6538
Email: mdholmes@dickinsonwright.com

Avidan J. Stern
LYNCH & STERN LLP
150 South Wacker Drive
Suite 2600
Chicago, IL 60606
(312) 346-1600
Email: avi@lynchandstern.com

David Schiller
SCHILLER & SCHILLER, PLLC
Professional Park at Pleasant Valley
5540 Munford Road, Suite 101
Raleigh, North Carolina 27612
Telephone: (919) 789-4677
Email: dschiller@yahoo.com

Susan Bernstein
Attorney at Law
200 Highland Avenue, Suite 306
Needham, MA 02494
Telephone: (781) 290-5858
Email: susan@sabernlaw.com

Counsel for Indirect Purchaser Plaintiff Class

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 7, 2015, the foregoing document, and any exhibits thereto, were filed electronically using the Court's ECF system, which will send notification of such filing to counsel of record; and additionally will be served via U.S. mail upon the following counsel and/or pro se parties:

Michael Narkin
85391 Chezem Road
Eugene, OR 97405

Patrick S. Sweeney
2590 Richardson Street
Madison, WI 53711

Jennifer Hinojosa
4932 S.W. 19th Street
Gainesville, FL 32608

Christopher Andrews
P.O. Box 530394
Livonia, MI 48153-0394

/s/ Marvin A. Miller
MARVIN A. MILLER

TAB 21A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
In re:

LIBOR-Based Financial Instruments Antitrust Litigation.

This Document Applies to:

Exchange-Based Action

----------X

MEMORANDUM AND ORDER

11 MD 2262 (NRB)

11 Civ. 2613

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

On September 17, 2020, the Court granted final approval to settlements between the Exchange-Based Plaintiffs ("EBP") and Bank of America, Barclays, Citi, Deutsche Bank, HSBC, JP Morgan Chase, and Société Générale defendants (together, the "Settling Defendants"), worth a combined $187 million. (ECF Nos. 3175–80.)[1] This Memorandum and Order addresses EBP class counsel's application for attorney's fees in connection with those settlements. (ECF No. 3144.)

DISCUSSION

I. Work by Firms Other than Class Counsel is Not Compensable

In the fall of 2011, numerous firms applied for appointment as interim counsel for several LIBOR classes. In connection with those applications, the Court issued a

[1] Unless noted otherwise, all docket numbers referenced in this Memorandum and Opinion are to the In re LIBOR-Based Financial Instruments Antitrust Litigation, 11 MD 2262 (S.D.N.Y.) docket.

memorandum raising several concerns. (ECF No. 32.) One of the issues addressed was whether appointing more than one law firm would lead to inefficient and duplicative efforts. (Id. at 8 (citing Manual for Complex Litigation (Fourth) § 10.221 (2004)).)[2]

After receiving assurances from the law firms of Kirby McInerney LLP and Lovell Stewart Halebian Jacobson LLP (together, "EBP Class Counsel") that they had the "financial, professional, investigative, international, and technological resources required to prosecute these claims," that they would be "willing and able to devote and expend the vast resources necessary to properly prosecute this litigation," and that appointment of both firms would not "defeat the efficiency purposes of lead counsel

[2] The potential conflict between a class and class counsel in the context of fee applications is well recognized, especially in the absence of a meaningful adversary process. See In re Colgate-Palmolive Co. ERISA Litig., 36 F. Supp. 3d 344, 349 (S.D.N.Y. 2014) (citations omitted). Accordingly, it falls to the Court to protect the interests of the class, see Goldberger v. Integrated Res., Inc., 209 F.3d 43, 52 (2d Cir. 2000) (citation omitted), by discouraging inefficient litigation by class counsel both prospectively at the outset of the case and retrospectively in awarding fees at the case's conclusion.

A recent case in this District illustrates the depth of the Court's concern in fulfilling this responsibility. In In re Allergan PLC Securities Litigation, Chief Judge McMahon ordered that only a single firm could serve as class counsel, noting that it had been her experience that "the involvement of multiple firms tends to inflate legal fees to the detriment of the other class members." No. 18 Civ. 12089, 2020 WL 5796763, at *4-6 (S.D.N.Y. Sept. 29, 2020). Despite that admonition, the firm appointed as class counsel proceeded to effectively split the work with another law firm whose application to serve as co-lead class counsel had been denied. Id. at *6-7. As a result, Judge McMahon denied lead plaintiff's motion for class certification. Id. *5-9.

appointments," (ECF No. 42 at 2-4, 7), the Court appointed them as interim co-lead class counsel for the EBP class. (ECF No. 66.)

Nevertheless, given the Court's desire to avoid duplicative litigation that could result from appointing more than one law firm, the Court ordered that EBP Class Counsel could only delegate work assignments to other law firms to the extent necessary "to facilitate the orderly and efficient prosecution of this litigation and to avoid duplicative or unproductive effort." (ECF No. 90 ¶ 18.f. (emphasis added).)[3]

In light of the Court's stated concerns and the scope of its order, the Court was, to say the least, surprised to learn from their fee application that EBP Class Counsel involved **twelve** additional law firms. (ECF No. 3146 ¶ 129.) The fees claimed by EBP Class Counsel associated with those law firms are far from merely incidental. Rather, they constitute over 18.5% of the lodestar hours claimed in the fee application (see id.) and account for more than half of the attorneys who

[3] That qualification was intended to give EBP Class Counsel flexibility to seek outside help if, as never actually happened, extraordinary circumstances arose, such as finding counsel to assist with simultaneous triple- or quadruple-tracked depositions or hiring international counsel to advise on issues of foreign law. It was also a safeguard in case plaintiffs had to respond to separate briefs from each of the dozen-plus defendant groups, a situation that never came to pass because of defense counsel's admirable cooperation throughout this lawsuit.

worked on the case (compare id. Exs. B-C, with id. Exs. D–O).

Moreover, after reviewing the affidavits in support of the motion for attorney's fees and given EBP Class Counsel's resources, the Court cannot divine any reason why it was necessary, efficient, or in the best interests of the class to have **twelve** additional law firms litigate this case. (See id. Exs. B–O.) If anything, the hours were claimed for work that was duplicative, unnecessary, and easily could have been performed by the two appointed firms. This conclusion is informed by the Court's active engagement in resolving an unusual number of substantive issues, leading to the issuances of eight lengthy opinions and numerous other decisions. It is fair to say that this litigation was heavily weighted to the resolution of legal issues before the Court rather than, for example, deposition discovery outside the Court's view.

EBP Class Counsel's decision to involve a dozen other law firms in the class representation thus exceeded the scope of their authority. Accordingly, none of the work done by the twelve additional firms will be rewarded or credited towards any lodestar calculation. See Torres v. Gristede's Operating Corp., 519 F. App'x 1, 4 (2d Cir. 2013) (noting "the recognized practice of percentage cuts as a practical

means of trimming fat from a fee application") (citation and quotation marks omitted). Irrespective of our determination that EBP Class Counsel had no authority to engage a dozen additional firms, the Court concludes that the 65,000+ hours of work done on this case by EBP Class Counsel alone was more than sufficient. Therefore, putting aside that the additional 15,000 hours of work is from firms not appointed as class counsel, those hours were not reasonably incurred and may not be tallied in the lodestar calculation. See id.

II. Determining a Reasonable Fee Award

We now turn to the issue of the appropriate fee to be awarded EBP Class Counsel. The Court assumes familiarity with the factors governing fee awards, which it addressed in a prior opinion in this multidistrict litigation concerning attorney's fees for OTC class counsel. In re LIBOR-Based Fin. Instruments Antitrust Litig., No. 11 Civ. 5450, 2018 WL 3863445, at *3–4 (S.D.N.Y. Aug. 14, 2018) ("OTC Fee Op."). Consistent therewith, the Court will utilize the percentage-of-fund method and then cross-check that baseline fee award against the lodestar calculation. Id.

A. The Percentage-of-Fund Analysis

To determine an appropriate percentage fee award, the Court will evaluate: (1) historical fee award data published in empirical studies; (2) fee award trends from the cases in

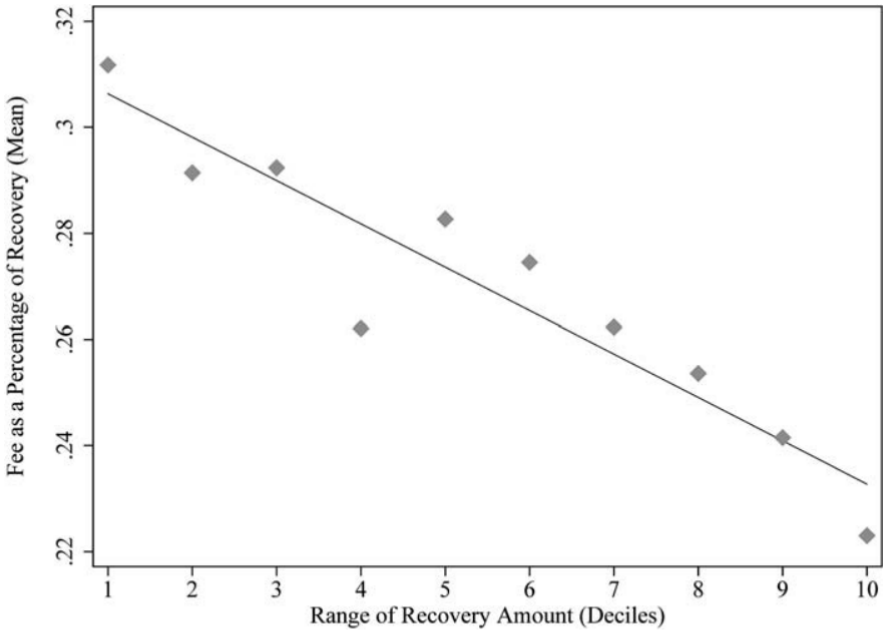
this District cited by EBP Class Counsel; and (3) fees awarded by this Court in other LIBOR class action settlements. As noted in the OTC Fee Opinion, the percentage award should reflect a sliding scale in which the portion of the settlement fund awarded as fees decreases as the size of the fund grows. Id. at *3 (citing Colgate-Palmolive, 36 F. Supp. 3d at 348).

1. Empirical Studies of Historical Fee Award Data

As a starting point for calibrating an appropriate sliding scale, "[h]istorical data of fees awarded in common fund cases provides an unbiased and useful reference for comparing fees cases of similar magnitude . . . ." Colgate-Palmolive, 36 F. Supp. 3d at 349.

One empirical study of 458 class actions between 2009 and 2013, often cited in this District, notes that the average fee award for settlement funds over $67.5 million was 22.3%:

FIGURE 5. FEE PERCENTAGE, BY CLASS RECOVERY AMOUNT (DECILE RANGES), 2009–2013

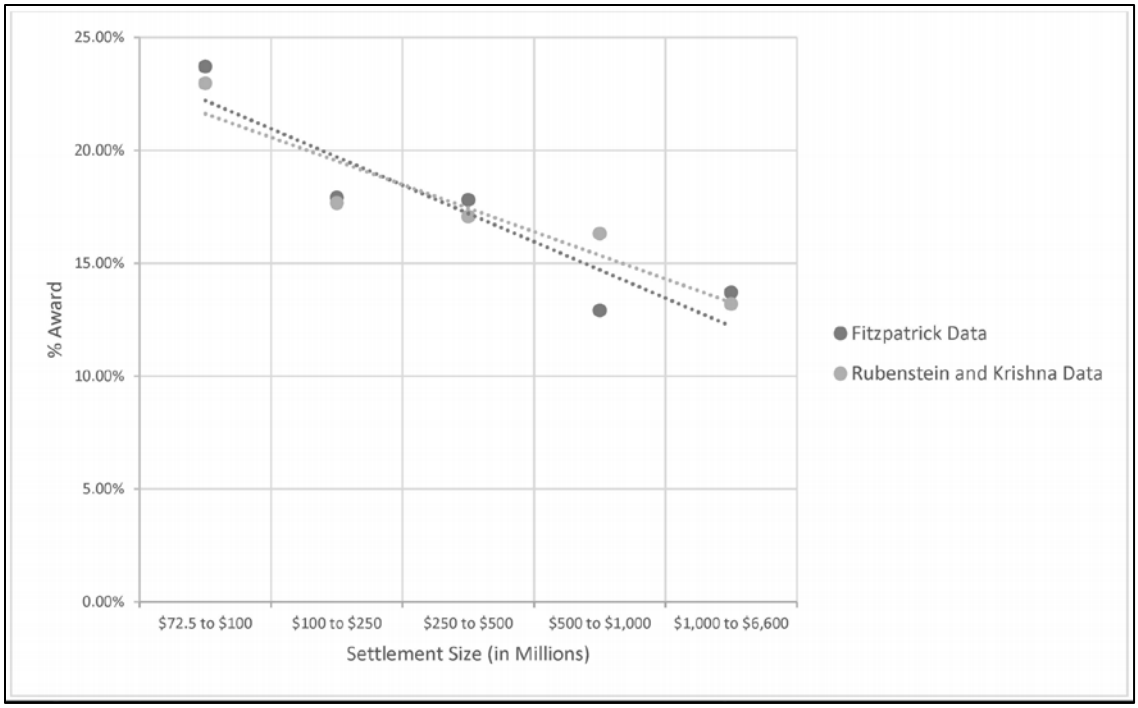


Class recovery ranges are as follows. First decile: less than $400,000; second decile: $400,000–$750,000; third decile: $750,000–$1.4 million; fourth decile: $1.4–$2.65 million; fifth decile: $2.65–$3.9 million; sixth decile: $3.9–$6.5 million; seventh decile: $6.5–$12 million; eighth decile: $12–$23.4 million; ninth decile: $23.5–$67.5 million; tenth decile: greater than $67.5 million.

Theodore Eisenberg, Geoffrey P. Miller, & Roy Germano, Attorneys' Fees in Class Actions: 2009–2013, 92 N.Y.U. L. Rev. 937, 948 & fig. 5 (2017).

A second widely cited study of fee awards in 688 class actions in 2006 and 2007 observed that for settlement funds between $100 million and $250 million, the average award was 17.9% and the median award was 16.9%. Brian T. Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee Awards, 7 J. Empirical Legal Stud. 811, 839 & tbl. 11 (2010).

And a third empirical study published in a leading treatise on class actions found that the average fee award for settlement funds studied by the author between $100 million and $250 million was approximately 17%, as reflected on the chart below (which also incorporates the data from the Fitzpatrick study discussed immediately above):

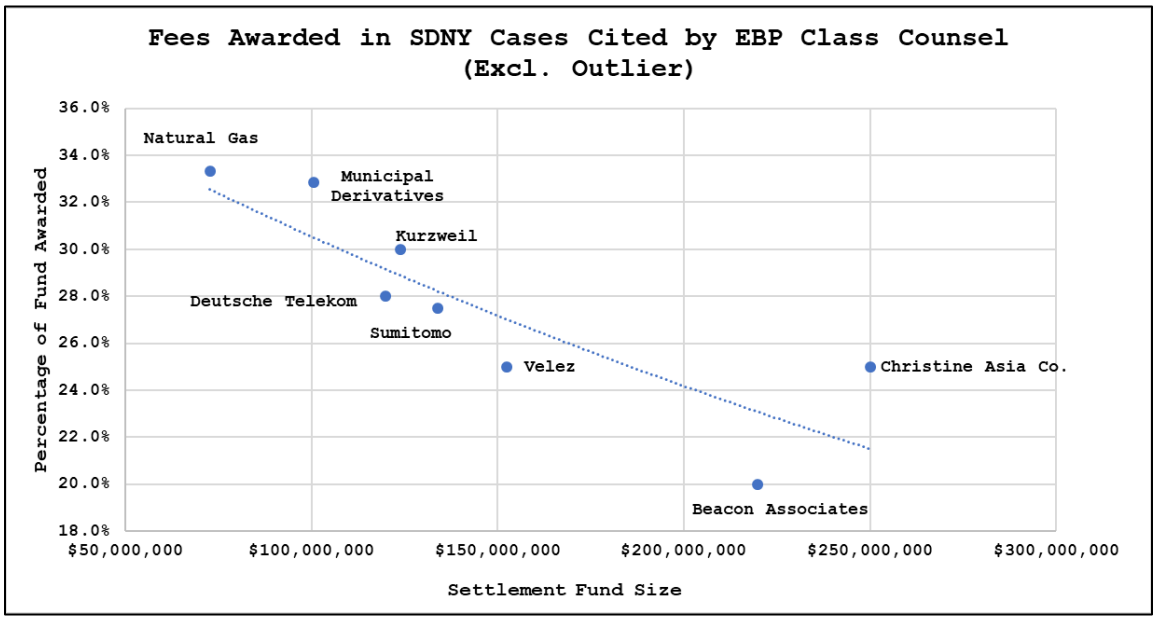


5 William B. Rubenstein, Newberg on Class Actions § 15:81 & graph 2 (5th ed.) (Westlaw 2020).

2. Fee Award Trends from Cases Cited by EBP Class Counsel in this District

While "the sheer volume of federal court class action settlements means that [an] isolated string cite[] to cases in which class counsel received a higher percentage of the settlement [is] not particularly meaningful," Alaska Elec.

Pension Fund v. Bank of Am. Corp., No. 14 Civ. 7126, 2018 WL 6250657, at *3 (S.D.N.Y. Nov. 29, 2018) (citation omitted), the cases cited in EBP Class Counsel's brief provide another set of datapoints. (See ECF No. 3145 at 4 n.8, 10-11 & n.11; ECF No. 3146-17 at Ex. Q.) The cases EBP Class Counsel cite from this District for settlement funds over $50 million, excluding one outlier case, form the following sliding scale:[4]



[4] See Christine Asia Co. v. Yun Ma, No. 15 MD 2631, 2019 WL 5257534, at *17 (S.D.N.Y. Oct. 16, 2019), appeal withdrawn sub nom. Tan Chao v. William, No. 19-3823, 2020 WL 763277 (2d Cir. Jan. 2, 2020); In re Mun. Derivatives Antitrust Litig., No. 08 Civ. 02516, 2016 WL 11543257, at *1 (S.D.N.Y. July 8, 2016); In re Beacon Assoc. Litig., No. 09 Civ. 3907, 2013 WL 2450960, at *5, *14 (S.D.N.Y. May 9, 2013); Velez v. Novartis Pharm. Corp., No. 04 Civ. 09194, 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010); Order, In re Nat. Gas Commodity Litig., No. 03 Civ. 6186 (S.D.N.Y. May 24, 2006), ECF No. 445; In re Deutsche Telekom AG Sec. Litig., No. 00 Civ. 9475, 2005 WL 7984326, at *4 (S.D.N.Y. June 9, 2005); Kurzweil v. Philip Morris Companies, Inc., No. 94 Civ. 2373, 1999 WL 1076105, at *3 (S.D.N.Y. Nov. 30, 1999); In re Sumitomo Copper Litig., 74 F. Supp. 2d 393, 400 (S.D.N.Y. 1999).

The one notable outlier is In re Initial Public Offering Securities Litigation in which the court awarded one-third of a $586 million settlement fund. 671 F. Supp. 2d 467, 471 (S.D.N.Y. 2009). That award

3. Other LIBOR Class Fee Awards

The most immediate benchmarks for determining an appropriate fee award for EBP Class Counsel are the fees the Court has already approved as reasonable in other LIBOR class actions.

In the OTC action, the Court awarded $43,478,572 from a $250,000,000 settlement fund and $62,788,212 from a $340,000,000 settlement fund. These awards translate to 18.49% and 18.50% of the remainder of the funds after deducting expenses, respectively. OTC Fee Op., 2018 WL 3863445, at *5; ECF No. 2745.

In the Lender action, the Court awarded $8,680,000 from a $31,000,000 settlement fund and $1,120,000 from a $4,000,000 settlement fund. These awards are the equivalent to 29.38% and 28.08% of the remainder of the respective funds after deducting expenses. (ECF Nos. 2777, 3097.)

And, in the Non-Defendant OTC action, the Court recently awarded class counsel $6,097,000 from a $21,775,000 settlement fund, which represents 28.06% of the fund's remainder after deducting expenses. (ECF No. 3185.)

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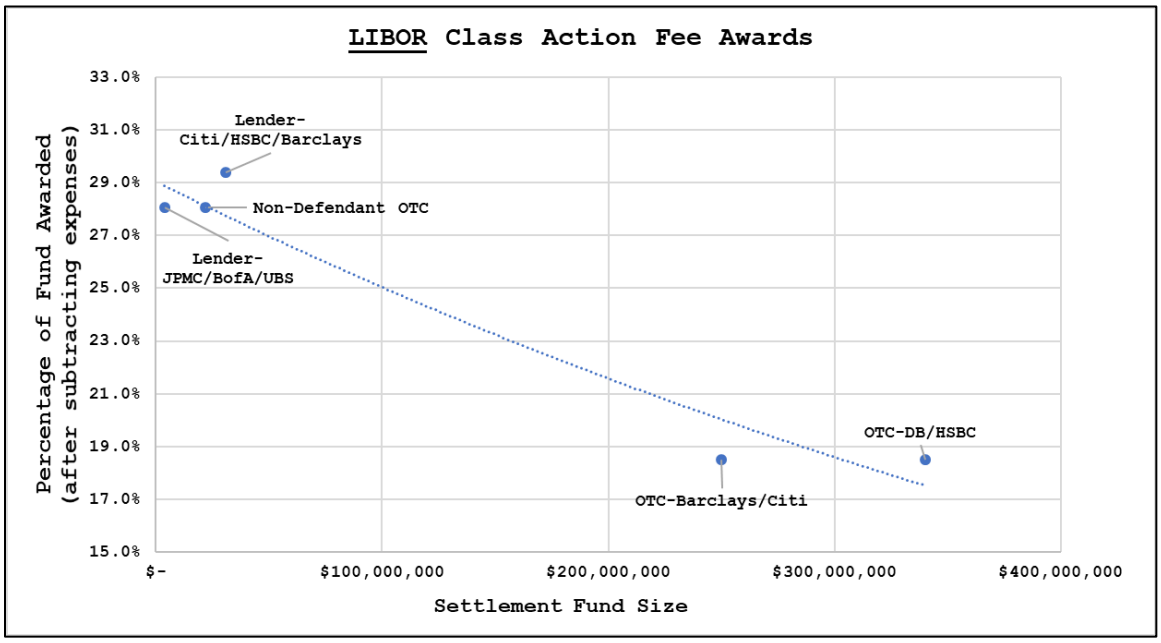
appears to reflect the exceptional circumstances of that case where class counsel expended over 677,000 hours of work prosecuting over 300 different actions and the court's award still resulted in a negative lodestar multiplier. See id. at 515. The circumstances here are not analogous.

The sliding scale below reflects these awards:



4. A Baseline Percentage Fee Award Range of 17% to 25% is Reasonable

Based on the above data, the 30% fee award EBP Class Counsel request is unreasonably high. An award of that size well exceeds the sliding scales formed by the empirical studies and the cases from this District cited by EBP Class Counsel. It also would represent the largest percentage of a fund awarded in the LIBOR litigation despite that the EBP settlement fund is several times larger than the Lender and Non-Defendant OTC settlements.

The trendlines established by these sources instead suggest that a reasonable fee for EBP Class Counsel would fall somewhere between approximately 17% and 25% of the settlement fund.

B. Other Goldberger Factors Weigh in Favor of a 25% Award

The baseline fee range of 17%-25% of the fund accounts for two of the so-called Goldberger factors governing fee awards in the Second Circuit: (1) the "magnitude and complexities of the litigation"; and (2) the "fee in relation to the settlement." 209 F.3d at 50; see Colgate–Palmolive, 36 F. Supp. 3d at 348.

The Court may adjust the baseline percentage fee based on the following Goldberger factors: (1) the "risk of the litigation"; (2) the "quality of representation"; and (3) "public policy considerations." 209 F.3d at 50; see Colgate–Palmolive, 36 F. Supp. 3d at 351–53. While "courts have traditionally awarded fees . . . in the lower range of what is reasonable" to avoid "windfalls," Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 122–23 (2d Cir. 2005) (citation omitted), an award of 25% of the fund after deducting for expenses is appropriate here in light of these other Goldberger factors. See, e.g., Alaska Elec., 2018 WL 6250657, at *3. Based on the $181,386,421.14 settlement fund remaining after deducting $5,613,578.86 in expenses, a 25% award would be $45,346,605.29.

No further adjustment to that baseline percentage award is warranted under the circumstances of this case. See

Colgate–Palmolive, 36 F. Supp. 3d at 351 (If a case was "demonstrably exceptional in any of these areas, then an increase or decrease of the baseline percentage would be warranted.").

C. Lodestar Cross-Check

The last step in the Court's analysis is to cross check the 25% award against a lodestar calculation of EBP Class Counsel's fees, which satisfies the final Goldberger factor: the time and effort contributed by counsel. 209 F.3d at 50; see Colgate–Palmolive, 36 F. Supp. 3d at 353. To calculate fees under the lodestar method, the Court multiplies the reasonable hours billed by a reasonable hourly rate. Goldberger, 209 F.3d at 47 (citation omitted).

As discussed above, the Court will not credit the hours represented by work done by non-EBP Class Counsel towards the lodestar calculation. Alone, EBP Class Counsel's hours total 65,787.36. (See ECF No. 3146 ¶ 129.) That is over 10,000 hours more than what OTC class counsel claimed in support of their fee application for a case of similar magnitude, (compare id., with ECF No. 2706 ¶¶ 48–50), and is also the rough equivalent to a four-person law firm working on this case full-time for nine years billing 40 hours-per-week, 48 weeks-per-year. While the sheer quantum of hours suggests

some amount of over-litigation, the Court will credit EBP Class Counsel the full amount of time they claim.

EBP Class Counsel's hourly rates, which produce blended rates of roughly $860 for partners, $470 for associates, and $230 for paralegals, are not out of line with the amounts sought and approved in other cases in this District.[5] (See ECF No. 3146 Exs. B, C.) For purposes of the lodestar cross-check, the Court will thus apply the full rates claimed by EBP Class Counsel.

Fully credited, EBP Class Counsel's lodestar is $42,463,194.85. (Id. ¶ 129.) When compared to the 25% baseline fee award of $45,346,605.29, the cross-check results in a lodestar multiplier of 1.07. This cross-check confirms that the 25% award is reasonable.

CONCLUSION

EBP Class Counsel's motion for attorney's fees is granted in part and denied in part. The Court awards EBP Class Counsel $45,346,605.29 in attorney's fees, equal to 25% of the remainder of the $187,000,000 settlement fund after deducting $5,613,578.86 in expenses. The fee award shall be paid pro rata across the settlement funds created by the

[5] In a recent opinion, Judge Failla surveyed fee decisions in this District and approved of reasonable hourly rates of up to $900 for experienced partners, up to $425 for senior associates, and up to $200 for paralegals. Carrington v. Graden, No. 18 Civ. 4609, 2020 WL 5758916, at *12–15 (S.D.N.Y. Sept. 28, 2020) (listing cases).

settlements between Exchange-Based Plaintiffs and Settling Defendants. That fee shall be paid to EBP Class Counsel pursuant to the terms, conditions, and obligations of the settlement agreements. Consistent with Pretrial Order No. 1, EBP Class Counsel may distribute those fees to other counsel in their discretion. (ECF No. 90 ¶ 18.j.)

As stated at the Fairness Hearing, the Court also approves the Exchange-Based Plaintiffs' request for $5,613,578.86 in litigation costs and expenses and for $25,000 service awards for each of the six named plaintiffs. The expenses and service awards shall be paid be pro rata across the settlement funds created by the settlements between Exchange-Based Plaintiffs and the Settling Defendants.

The Clerk of Court is respectfully directed to terminate the motions currently pending at ECF No. 3144 in Case No. 11 MD 2262 and ECF No. 787 in Case No. 11 Civ. 2613.

SO ORDERED.

Dated: New York, New York
November 24, 2020

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

TAB 21B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE LIBOR-BASED FINANCIAL INSTRUMENTS ANTITRUST LITIGATION	Master File No. 11-md-2262 (NRB)
THIS DOCUMENT RELATES TO:	
METZLER INVESTMENT GmbH, et al., Plaintiffs, v. CREDIT SUISSE GROUP AG, et al. Defendants.	No. 11 Civ. 2613

MEMORANDUM OF LAW IN SUPPORT OF EXCHANGE-BASED PLAINTIFFS' COUNSEL'S MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND SERVICE AWARDS FOR NAMED PLAINTIFFS

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TABLE OF DEFINED TERMS

The following defined terms are used in this Memorandum:

Parties	
Term	**Definition**
Bank of Tokyo	The Bank of Tokyo-Mitsubishi UFJ, Ltd.
Barclays	Barclays Bank plc.
BOA	Bank of America Corporation and Bank of America, N.A.
Citi	Citigroup Inc., Citibank, N.A., and Citigroup Global Markets Inc.
Credit Suisse	Credit Suisse Group AG, Credit Suisse International, and Credit Suisse (USA) Inc.
Defendants	Credit Suisse, BOA, JPMorgan, HSBC, Barclays, Lloyds, WestLB, UBS, RBS, Deutsche Bank, Citi, Rabobank, Norinchukin, Bank of Tokyo, HBOS, SG, and RBC.
Deutsche Bank	Deutsche Bank AG, Deutsche Bank Securities Inc., and DB Group Services (UK) Ltd.
Exchange-Based Plaintiffs or Plaintiffs	Metzler Asset Management GmbH (f/k/a Metzler Investment GmbH), FTC Futures Fund SICAV, FTC Futures Fund PCC Ltd., Atlantic Trading USA, LLC, 303030 Trading LLC, Gary Francis, and Nathanial Haynes.
HBOS	HBOS plc.
HSBC	HSBC Bank plc.
JPMorgan	JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A.
Lloyds	Lloyds Banking Group plc.
Norinchukin	Norinchukin Bank.
Rabobank	Coöperatieve Centrale Raiffeisen Boerenleenbank B.A.
RBC	Royal Bank of Canada.
RBS	Royal Bank of Scotland Group plc.
Settling Defendants	BOA, Barclays, Citi, Deutsche Bank, HSBC, JPMorgan, and SG.
Settling Parties	Settling Defendants and Settlement Class Members.
SG	Société Générale.
UBS	UBS AG.
WestLB	WestLB AG and Westdeutsche Immobilienbank AG.

Settlement Agreements	
Term	**Definition**
Barclays Settlement Agreement	Settlement Agreement with Barclays, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 Md. 2262, (Oct. 7, 2014) [ECF No. 680-3] and Barclays Amendment to Settlement Agreement, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 Md. 2262 (Sept. 15, 2017) [ECF. 2307-3].
Citi Settlement Agreement	Settlement Agreement with Citi, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 Md. 2262 (July 27, 2017) [ECF. 2307-4].

Settlement Agreements	
Term	**Definition**
Deutsche Bank Settlement Agreement	Settlement Agreement with Deutsche Bank, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 Md. 2262 (July 13, 2017) [ECF. 2307-5].
HSBC Settlement Agreement	Settlement Agreement with HSBC, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 Md. 2262 (July 6, 2017) [ECF. 2307-6].
JPMorgan/BOA Settlement Agreement	Stipulation and Agreement of Settlement with JPMorgan and BOA, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 Md. 2262 (June 14, 2018) [ECF. 2728-5].
SG Settlement Agreement	Stipulation and Agreement of Settlement with SG, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 Md. 2262 (January 13, 2020) [ECF. 3023-4].

Settlement Classes	
Term	**Definition**
Barclays Settlement Class	All Persons (other than Defendants, their employees, affiliates, parents, subsidiaries, and co-conspirators) that transacted in LIBOR-based Eurodollar futures or options on exchanges such as the Chicago Mercantile Exchange between January 1, 2003 through May 31, 2011.
Citi Settlement Class	All Persons, corporations and other legal entities (other than Defendants, their employees, affiliates, parents, subsidiaries, and co- conspirators) that transacted in Eurodollar futures and/or options on Eurodollar futures on exchanges, including without limitation, the Chicago Mercantile Exchange, between January 1, 2003 and May 31, 2011. Excluded from the Class are: (i) Defendants, their employees, affiliates, parents, subsidiaries, and co- conspirators; (ii) the Releasees (as defined in Section 1(GG)); and (iii) any Class Member who files a timely and valid request for exclusion.
Deutsche Bank Settlement Class	All Persons that transacted in Eurodollar futures and/or options on Eurodollar futures on exchanges, including, without limitation, the Chicago Mercantile Exchange, between January 1, 2003 and May 31, 2011. Excluded from the Class are: (i) Defendants, their employees, Affiliates, parents, subsidiaries, and co-conspirators; (ii) the Releasees (as defined in Section 1(GG)); and (iii) any Class Member who files a timely and valid request for exclusion.
HSBC Settlement Class	All Persons, corporations and other legal entities (other than Defendants, their employees, affiliates, parents subsidiaries, and co- conspirators) that transacted in Eurodollar futures and/or options on Eurodollar futures on exchanges, including without limitation, the Chicago Mercantile Exchange, between January 1, 2003 and May 31, 2011. Excluded from the Class are: (i) Defendants, their employees, affiliates, parents, subsidiaries, and co- conspirators; (ii) the Releasees (as defined in Section 1(GG)); and (iii) any Class Member who files a timely and valid request for exclusion.

Settlement Classes	
Term	**Definition**
JPMorgan/BOA Settlement Class	All persons, corporations and other legal entities that transacted in Eurodollar futures and/or options on Eurodollar futures, including without limitation transactions on the Chicago Mercantile Exchange, between January 1, 2003 and May 31, 2011; provided that, if Exchange-Based Plaintiffs expand the class period in any subsequent amended complaint, motion or settlement, the class period in the Settlement Class definition in this Agreement shall be expanded so as to include such expansion. Excluded from the Class are: (i) Defendants, their employees, affiliates, parents, subsidiaries, and alleged co- conspirators; (ii) the Releasees (as defined in Section 1(II)); (iii) any Class Member who files a timely and valid request for exclusion; and (iv) any Persons dismissed from this Action with prejudice. Solely for purposes of the Settlement, the parties agree that Investment Vehicles are not excluded from the Settlement Class solely on the basis of being deemed to be Defendants or affiliates or subsidiaries of Defendants. However, to the extent that any Defendant or any entity that might be deemed to be an affiliate or subsidiary thereof (i) managed or advised, and (ii) directly or indirectly held a beneficial interest in, said Investment Vehicle during the Class Period, that beneficial interest in the Investment Vehicle is excluded from the Settlement Class.
SG Settlement Class	All persons, corporations and other legal entities that transacted in Eurodollar futures and/or options on Eurodollar futures on exchanges, including, without limitation, the Chicago Mercantile Exchange, between January 1, 2003 and May 31, 2011, inclusive; provided that if Exchange-Based Plaintiffs expand the class period in any subsequent amended complaint, motion or settlement, the period in the Settlement Class definition in this Agreement shall be modified so as to include that expanded class period. Excluded from the Settlement Class are: (i) Defendants, their employees, affiliates, parents, subsidiaries, and alleged co-conspirators; (ii) the Releasees (as defined in Section 1(CC)); (iii) any Settlement Class Member who files a timely and valid request for exclusion; and (iv) any Persons dismissed from this Action with prejudice.
Settlement Class Members	All persons falling within the definition of the Settlement Classes.
Settlement Classes	Barclays Settlement Class, Citi Settlement Class, Deutsche Bank Settlement Class, HSBC Settlement Class, JPMorgan/BOA Settlement Class, and SG Settlement Class.

Settlement Terminology	
Term	**Definition**
Citibank, N.A.	Escrow agent for the BOA, Barclays, HSBC, Deutsche Bank, JPMorgan, and SG settlements.

Settlement Terminology	
Term	**Definition**
Claim Form	The Proof of Claim and Release for the Exchange-Based Plaintiffs' Settlements with Bank of America, Barclays, Citi, Deutsche Bank, HSBC, JPMorgan, and Société Générale, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 Md. 2262 (January 23, 2020) [ECF. 3025-5].
Claims Administrator or Settlement Administrator	A.B. Data, Ltd.
Exchange-Based Settlements or Settlements	The Barclays Settlement Agreement, Citi Settlement Agreement, Deutsche Bank Settlement Agreement, HSBC Settlement Agreement, JPMorgan/BOA Settlement Agreement, and SG Settlement Agreement.
Internet Notice	Internet Notice provided additional notice opportunities through targeted digital media such as banner ads, e-newsletters, email blasts, Google AdWords/Search campaign and press release over *PR Newswire* which, in addition to print format, included broadcast and digital websites across the United States.
Mail Notice or Notice	The Notice of Class Action Settlements, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 Md. 2262 (January 23, 2020) [ECF. 3025-3].
Net Settlement Fund	The total Settlement Fund from the Settlements approved by the Court, minus the costs, expenses, and fees approved by the Court.
Notice Program	The notice protocol detailed in the Declaration of Linda V. Young Regarding Notice Program, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 Md. 2262 (January 23, 2020) [ECF. 3025-2].
Period 0	January 1, 2005 through August 8, 2007.
Periods 1 and 2	August 2007 through April 14, 2009.
Period 3	April 15, 2009 through May 2010.
Preliminary Approval Order	The Order (1) Preliminarily Approving Settlements with Defendants Bank of America, Barclays Bank PLC, Citi, Deutsche Bank, HSBC Bank PLC, JPMorgan, and Société Générale; (2) Approving the Proposed Form and Program of Notice; and (3) Scheduling a Fairness Hearing, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 Md. 2262, 2020 WL 1059489 (S.D.N.Y. Mar. 2, 2020) [ECF. 3038].
Revised Plan of Distribution	The Corrected Plan of Distribution for the Exchange-Based United States Dollar LIBOR Settlement, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 Md. 2262 (June 23, 2020) [ECF. 3106].
Settlement Class Counsel	Kirby McInerney LLP and Lovell Stewart Halebian Jacobson LLP.
Settlement Class Period	January 1, 2003 through May 31, 2011.
Settlement Fund	The aggregate cash consideration provided for in the Settlements, which were reached separately, is $187,000,000: BOA has agreed to pay $15 million; Barclays has agreed to pay $19.975 million; Citi has agreed to

Settlement Terminology	
Term	**Definition**
	pay $33.4 million; Deutsche Bank has agreed to pay $80 million; HSBC has agreed to pay $18.5 million; JPMorgan has agreed to pay $15 million; and SG has agreed to pay $5.125 million.
Settlement Website	www.USDLiborEurodollarSettlements.com.
Signature Bank	The escrow agent for the Citi settlement.
Summary Notice	The Summary Notice of Class Action Settlements, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 Md. 2262 (January 23, 2020) [ECF. 3025-4].

Declarations	
Term	**Definition**
Joint Decl.	The accompanying Joint Declaration of David E. Kovel and Christopher Lovell in Support of Exchange-Based Plaintiffs' Motion for Final Approval of Class Action Settlements with Defendants Bank of America, Barclays Bank plc, Citi, Deutsche Bank, HSBC Bank plc, JPMorgan and Société Générale and Exchange-Based Plaintiffs' Counsel's Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards for Named Plaintiffs.
Straub Decl.	The accompanying Declaration of Steven Straub on Behalf of A.B. Data, Ltd. Regarding Notice and Claims Administration for Class Action with Settling Defendants.

Other Defined Terms	
Term	**Definition**
2018 Advisory Note	Fed. R. Civ. P. 23(e), Adv. Comm. Notes to 2018 Amendments.
Action	The action captioned *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 Md. 2262 (S.D.N.Y.).
CEA	Commodity Exchange Act.
CFTC	United States Commodity Futures Trading Commission.
DOJ	The United States Department of Justice.
Eurodollar Futures	Eurodollar futures contracts and options on Eurodollar futures contracts.
FCA	United Kingdom Financial Conduct Authority.
LIBOR	London Interbank Offered Rate.
Operative Complaint	[Corrected] Fourth Amended Consolidated Class Action Complaint, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 Md. 2262 [ECF. 2363].
Partial OTC LIBOR Settlement	The OTC Barclays Settlement Agreement, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 Md. 2262 (November 11, 2015) [ECF. 1338-1] and OTC Citi Settlement Agreement, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 Md. 2262 (July 27, 2017) [ECF. 2226-1].
SEC	United States Securities and Exchange Commission.
Second Circuit	United States Court of Appeals for the Second Circuit.

Pursuant to Rule 23(h) of the Federal Rules of Civil Procedure and Paragraph 10 of the Order (1) Preliminarily Approving Settlements With Defendants Bank of America, Barclays Bank, plc, Citi, Deutsche Bank, HSBC Bank plc, JPMorgan, and Société Générale; (2) Approving the Proposed Form and Program Notice; and (3) Scheduling a Fairness Hearing dated March 2, 2020, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 Md. 2262, 2020 WL 1059489 (S.D.N.Y. Mar. 2, 2020), [ECF No. 3038] (the "Preliminary Approval Order"), Court-appointed interim co-lead class counsel Lovell Stewart Halebian Jacobson LLP and Kirby McInerney LLP ("Settlement Class Counsel" or "Class Counsel") for the Exchange-Based Plaintiffs hereby respectfully submit this Memorandum of Law and the accompanying Joint Declaration in support of Settlement Class Counsel's motion for an award of attorneys' fees, litigation expenses, and service awards for named plaintiffs in connection with the settlements between Exchange-Based Plaintiffs and Defendants Barclays, BOA, Citi, Deutsche Bank, HSBC, JPMorgan, and SG (the "Exchange-Based Settlements" or "Settlements").[1]

I. INTRODUCTION

As this case approaches its tenth year, Settlement Class Counsel have performed legal services on a fully contingent basis and advanced $5,613,578.86 million in expenses on behalf of Plaintiffs and the Settlement Class without receiving any remuneration to date. As a result of their zealous representation of Plaintiffs, Class Counsel have succeeded in obtaining one hundred and eighty-seven million dollars ($187,000,000) in Settlements, which this Court preliminarily approved on March 2, 2020. *See LIBOR*, 2020 WL 1059489.[2] If and to the extent that any

[1] Unless otherwise defined herein, all capitalized terms not defined herein shall have the meaning ascribed in the "Table of Defined Terms." All references to "¶" are to the Joint Declaration unless otherwise noted. All "Exhibit" or "Ex." references are to the Joint Declaration. All "ECF No." references are to the MDL docket unless otherwise noted.

[2] The aggregate Settlements, if all receive final approval from the Court, will create a $187 million Settlement Fund: BOA has agreed to pay $15 million; Barclays has agreed to pay $19.975 million; Citi has agreed to pay $33.4 million;

Settlement is finally approved, Class Counsel respectfully request that the Court (1) grant reimbursement of litigation expenses in the amount of $5,613,578.86, (2) award attorneys' fees, and (3) award plaintiffs service awards.

Attorneys' Fee Request. As discussed herein (*see* Section III.A, *infra*), Settlement Class Counsel pursued this case on a wholly contingent basis without any guarantee of success or compensation. Class Counsel now respectfully request that the Court award attorneys' fees in the amount of **thirty percent (30%)** of the remainder of the Settlement Fund minus Class Counsel's litigation expenses approved by the Court.[3] This nature of this request is consistent with the Court's previously articulated view "that awarding fees as a percentage of net recovery is more consistent with notions of public policy in that doing so encourages class counsel's prudence and discretion in incurring expenses." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 Civ. 5450, 2018 WL 3863445, at *4 (S.D.N.Y. Aug. 14, 2018) (emphasis in original). Settlement Class Counsel respectfully submits that the percentage fee award is justified by, *inter alia*, the following considerations.

As an initial matter, the $187 million recovered for members of the Exchange-Based Settlement Classes is unquestionably substantial. If all the Settlements are approved, then this Action would represent the largest class action settlement of manipulation claims in the history of

Deutsche Bank has agreed to pay $80 million; HSBC has agreed to pay $18.5 million; JPMorgan has agreed to pay $15 million; and SG has agreed to pay $5.125 million.

[3] Example: if $5,613,578.86 in litigation expenses are reimbursed, then the requested fee is for 30% of $181,386,421.14, which is the remainder of $187,000,000 minus $5,613,578.86. 30% of $181,386,421.14 is $54,415,926.34. As reflected in the declarations attached to the Joint Declaration, the total "lodestar" value of Class Counsel's fee compensable services is $52,134,123.35. Multiplying $52,134,123.35 by 1.04 equals approximately $54,219,488.28. Courts frequently award percentage fees based on the total common fund rather than the common fund minus expenses. If $5,613,578.86 in litigation expenses were reimbursed, and this fee request were granted, it would actually represent a percentage fee of 28.99%. Thus, Class Counsel's actual fee request made herein of (approximately) 28.99% if calculated on a gross basis of the common fund is materially less than the up to one-third of the Settlement Fund from the Settlements which was specified in the notice given to members of the Settlement Classes.

the Commodity Exchange Act, 7 U.S.C. § 1 *et seq*. ("CEA").[4] Even so, the requested fee would provide Class Counsel with a modest **1.04 risk** multiplier. This is because the requested fee represents 1.04 times the total "lodestar" value of the more than nine years of fee compensable professional services performed by Class Counsel.

There were very substantial risks of prosecuting Plaintiffs' claims that arose in the "esoteric"[5] commodity futures markets and involved "complex and difficult" issues of proof,[6] which characterize commodity futures manipulation claims. *Compare In re LIBOR-Based Fin. Instruments Antitrust Litig*., No. 11 Md. 2262 (NRB), 2016 WL 7378980, at *22-23 (S.D.N.Y. Dec. 20, 2016) ("*LIBOR VI*"); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 Md. 2262 (NRB), 299 F. Supp. 3d 430, 489 (S.D.N.Y. Feb. 28, 2018) ("*LIBOR VII*"). For example, this Court previously found that the over-the-counter ("OTC") plaintiffs' claims were "undeniably complex and fraught with risks."[7] But unlike the OTC plaintiffs, the Exchange-Based Plaintiffs were not in privity and did not have a contract with each Defendant specifying the amount of interest to be paid or received as arithmetically calculated from LIBOR. *Id.* Instead, Plaintiffs made open market purchases and sales in the "volatile" commodity futures markets, and confronted the "complex and difficult" task of establishing the fact and amounts of impact in such

[4] The five next largest "futures only" settlements are: *In re Sumitomo Copper Litig.* ("*Sumitomo*"), No. 96 Civ. 4854 (S.D.N.Y.) (monetary settlement of $149,000,000); *Hershey v. Pac. Inv. Mgmt. Co. LLC*, No. 05 Civ. 4681 (N.D. Ill. 2010) (monetary settlement of $118,750,000); *In re Natural Gas Commodity Litig.*, No. 03 Civ. 6186 (VM) (S.D.N.Y.) (monetary settlement of $101,000,000); *In re Amaranth Natural Gas Commodities Litig.*, No. 07 Civ. 6377 (S.D.N.Y) (monetary settlement of $77,100,000); and *White v. Moore Capital Management, L.P.*, No. 10 Civ. 3634 (S.D.N.Y.) (monetary settlement of $70,000,000).

[5] *Dunn v. CFTC*, 519 U.S. 465, 468-69 (1997) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 356 (1982)).

[6] *See Sumitomo*, 74 F. Supp. 2d 393, 395 (S.D.N.Y. 1999) (noting that CEA manipulation cases are "complex and difficult").

[7] This Court recognized that the OTC Action "has undisputedly been complex and fraught with risk." *LIBOR*, 2018 WL 3863445, at *4 (awarding a fee of 18.5% in connection with settlements totaling $235 million, which constituted a 1.65 lodestar multiplier).

"esoteric" markets of Defendants' alleged manipulations of LIBOR upon the EDF prices at which Plaintiffs transacted. *See, e.g., id.* Thus, Plaintiffs faced more substantial risks in establishing the fact and amount of price impact and injury than were present in the OTC plaintiffs' claims which were "undeniably complex and fraught with risks." *See* n. 7, *supra*.

Given these and many other risks, as well as the more than 9.5 years of delay before **any** attorneys' fees or reimbursement of expenses may be received, Class Counsel respectfully submit that 30% of the remainder of the Settlement Fund after counsel's litigation expenses are reimbursed, representing a 1.04 risk multiplier, is fair, reasonable, and equitable. *See Sumitomo*, 74 F. Supp. 2d at 395 (fee of **27.5%** of the $134 million settlement amount on claims of copper futures manipulation, representing a **2.5 risk multiplier** after a delay in payment from inception of **3.5 years**.); *In re Deutsche Telekom AG Sec. Litig*., No. 00 Civ. 9475, 2005 WL 7984326, at *4 (S.D.N.Y. June 14, 2005) (Buchwald, J.) (awarding attorneys' fees of 28% of a $120 million settlement, representing a 3.96 risk multiplier after 5 years from inception); *see also* n.3, *supra*; *LIBOR*, 2018 WL 3863445, at *4 (noting "mean multiplier in this Circuit is approximately 1.55, with multipliers in antitrust and securities cases recently averaging 1.77 and 1.43, respectively" (citing 4 William B. Rubenstein, Newberg on Class Actions § 15:89 tbls.3, 4 (5th ed.)); *id.* (noting study identifying "an average multiplier of 3.18 for settlements above $175.5 million).[8]

Litigation Expense Reimbursement. Settlement Class Counsel also respectfully seek reimbursement for $5,613,578.86 in litigation expenses, composed largely ($4,127,205.68) of

[8] *See, e.g.*, *Christine Asia Co., Ltd. v Ma*, No. 15 Md. 2631, 2019 WL 5257534, at *17 (S.D.N.Y. Oct. 16, 2019), *appeal withdrawn sub nom. Tan Chao v William*, No. 19 Civ. 3823, 2020 WL 763277 (2d Cir. Jan. 2, 2020) ("When determining whether a fee request is reasonable in relation to a settlement amount, the court compares the fee application to fees awarded in similar [] class-action settlements of comparable value." (quotation omitted)); *In re Neurontin Antitrust Litig.*, No. 02 Civ. 1830, slip op. (D.N.J. Aug. 6, 2014) (ECF No. 114) [Joint Decl. Ex. Q, Tab 6] (awarding 33⅓% representing a 1.99 multiplier of a $191 million settlement 12 years after inception); *In re Steel Antitrust Litig.*, No. 08 Civ. 5214, slip op. (N.D. Ill. Oct. 22, 2014) (ECF No. 539) [Joint Decl. Ex. Q, Tab 9] (awarding 33% representing a 1.97 multiplier on a $163 million settlement).

expert fees. Courts regularly approve reimbursement of such litigation expenses in class actions as a matter of course. *See, e.g.*, *LIBOR*, 2018 WL 3863445, at *1 (approving $14,855,689.55 in costs and expenses to OTC Plaintiffs); *In re Credit Default Swaps Antitrust Litig.*, No. 13 Md. 2476, 2016 WL 2731524, at *18 (S.D.N.Y. Apr. 26, 2016) (approving $10 million in expenses "[m]ost of which "were incurred in connection with retention of experts"). *See* Section III.B, *infra*.

Service Award Request. Settlement Class Counsel also respectfully request service awards in the amount of $25,000 each for the six representative plaintiffs: Metzler Asset Management GmbH (f/k/a Metzler Investment GmbH), FTC Capital GmbH (advisor to Plaintiffs FTC Futures Fund SICAV and FTC Futures Fund PCC Ltd.), Atlantic Trading USA, LLC, 303030 Trading LLC, Gary Francis, and Nathanial Haynes. *See* Section III.C, *infra*.

II. RELEVANT BACKGROUND

At the outset of and continuing throughout this litigation, the risks of successfully pleading, proving, and otherwise prosecuting the claims in this Action were substantial. There was no government settlement or complaint prior to the commencement of this Action, nor until well after the filing of the motion to dismiss the consolidated amended complaint. *See generally* ¶¶ 11-53. In fact, there was never any government settlement or complaint asserting a conspiracy or antitrust violation among or by any Defendants. And there was never any government settlement or complaint even for individual wrongdoing against three of the Settling Defendants (BOA, HSBC, and JPMorgan), relating to the alleged manipulation of U.S. Dollar LIBOR. Further, the remaining government orders or complaints focused on individual B.B.A. U.S. Dollar LIBOR panel banks' wrongdoing related to LIBOR, and the regulatory settlements did not primarily focus on how alleged manipulation impacted Eurodollar Futures prices.

In investigating and drafting the complaints and preparing to defend the motions to dismiss, Class Counsel faced numerous pleading, proof, and personal jurisdiction risks. On the antitrust claims, the risks included whether the alleged conduct injured competition, constituted a conspiracy, impacted LIBOR, impacted EDF prices, and/or caused antitrust injury in a way that conferred on Plaintiffs "efficient enforcer" standing to sue. On the CEA claims, the risks included, but were not limited to, whether Defendants (i) acted to suppress LIBOR, (ii) did so with scienter to manipulate EDF prices, (iii) did impact EDF prices, and (iv) did so knowing what one another was doing for purposes of aiding and abetting or other joint liability. To take just one of many examples, if one or more Defendants did intend to suppress LIBOR to help their own reputation, how did that produce a conspiracy? Or scienter to manipulate EDF prices? Or aiding and abetting another bank's suppression of its LIBOR quote?

In preparing the complaint, defending the numerous motions to dismiss, preparing multiple amended complaints, and engaging in extensive discovery, Class Counsel worked with economists and market experts, performed factual investigation and legal research, and otherwise performed professional services to try to overcome these risks. Class Counsel sought to plead that LIBOR was suppressed compared to the Federal Reserve Deposit Rate and other benchmarks. *E.g., In re LIBOR-Based Fin. Instruments Antitrust Litig.*, ("*LIBOR I*"), No. 11 Md. 2262 (NRB), 935 F. Supp. 2d 666, 716 (S.D.N.Y. 2013). Class counsel successfully alleged facts and developed legal arguments to plead that Defendants' conduct, even if aimed predominantly or exclusively at LIBOR alone (and not EDF prices), was sufficient for a reasonable inference of the requisite scienter. *See, e.g.*, *id.* at 715; *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, (*"LIBOR II"*), No. 11 Md. 2262 (NRB), 962 F. Supp. 2d 606, 615-16 (S.D.N.Y. 2013); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 Md. 2262 (NRB) ("*LIBOR III"*), 27 F. Supp. 3d 447, 466-71

(S.D.N.Y. 2014). And Class Counsel sought to develop multiple fact allegations and legal theories to support aiding and abetting. *See LIBOR I*, 935 F. Supp. 2d at 722-23.

Defendants, represented by the highest caliber defense counsel, made no fewer than four motions to dismiss Plaintiffs' claims on the foregoing and additional grounds (also including for lack of personal jurisdiction). In a series of four detailed opinions, this Court not only repeatedly rejected Defendants' multiple efforts to dismiss large portions of the CEA claims but also granted Plaintiffs leave to amend to substantially enlarge the Class. ¶¶ 15, 17, 20, 27; *see also In re Initial Public Offering Sec. Litig.*, 21 MC 92, 2011 WL 2732563, at *2 (S.D.N.Y. July 8, 2011) (Scheindlin, J) (Executive Committee incurred "significant risk that it would never be compensated for its time and effort. . . " including "[b]riefing multiple rounds of motions to dismiss. . . .").

As a result, after Defendants' motions to dismiss were resolved, Plaintiffs had broader CEA claims than they did at the case's outset. Even so, after appeal and further motion practice, Plaintiffs' "efficient enforcer" status to pursue their antitrust claim was almost entirely eliminated. *LIBOR VI*, 2016 WL 7378980, at *15-17, 21-23. Class Counsel repeatedly sought to appeal portions of the motions to dismiss on which they did not prevail. *E.g.*, Joint Decl. ¶¶ 22, 38. In this context, both before and after this period, Class Counsel also coordinated and worked extensively with counsel from other *LIBOR* cases on the various joint appeals stemming from this Court's rulings. *See, e.g.*, ¶ 21; Joint Decl. Ex. B (Declaration of David E. Kovel) at ¶ 2.

Risks of Proving the Remaining Claims. Given the liberal federal pleading standards, the risks of proving all the elements of Plaintiffs' claims that survived Defendants' lengthy motions to dismiss were much greater than the risks of surviving the motions to dismiss in the first place. *See LIBOR VI*, 2016 WL 7378980, at *17 (denying motion to dismiss, but expressing skepticism

about the ability to prove the allegations). Through discovery, Plaintiffs developed and later submitted on May 2, 2017 extensive evidence that they contended established a prima facie claim for members of the Settlement Classes. ECF Nos. 1885, 1890-91 (Plaintiffs' class motion).

During discovery, Class Counsel worked diligently to find in the approximately 18 million pages of productions incriminating documents supporting claims against each of the Defendants for suppression and/or TBM manipulation, establishing impact, and supporting class certification. ¶¶ 57-59.[9]

During discovery, Plaintiffs faced arguments from Defendants that the jargon in the conversations which Plaintiffs' market experts construed to be manipulative, actually was harmless. Defendants argued that non-harmless communications were not acted upon in a suppressed or inflated LIBOR submission. Defendants argued that the daily release of LIBOR supposedly did not appreciably change EDF prices. Among other points, Class Counsel responded to the last of such arguments by arguing that the futures markets are anticipatory markets, accordingly EDF prices anticipated and adjusted to the falsity in LIBOR **before** the British Banking Association released LIBOR and while the Defendants were making their false submissions in London. In reply, Defendants argued that there was no causation by any suppressed LIBOR of inflated EDF prices and, instead, the movement in EDF prices caused changes in LIBOR. Plaintiffs argued that the only changes in EDF prices were changes of what anticipated LIBOR would be when it was released or at the final expiration of the trading in the EDF contract.

On May 2, 2017, Plaintiffs filed their motion for class certification. ¶ 34. However, as discovery and the foregoing arguments were progressing, Class Counsel entered into settlement negotiations with various Settling Defendants. Class Counsel sought to use their investigation and

[9] *See* generally Exhibit 4 to the Declaration of Benjamin M. Jaccarino (Ex. C to Joint Decl.).

discovery to convince these Defendants to settle. Notwithstanding the greater risks of proving the claims than pleading them, Class Counsel succeeded in concluding agreements to settle with five Defendants (Citi, Deutsche Bank, HSBC, BOA, and JPMorgan) after the filing of Plaintiffs' class certification motion. ¶¶ 75-88. The last two Settlements (with BOA and JPMorgan) were not reached in principle until after the completion of class certification briefing and on the day before oral argument on the class certification motion. ¶ 91.

Through Class Counsel's efforts in investigating and pleading the Class's claims, defending motions to dismiss, preparing amended complaints, moving for leave to amend, reviewing extensive document productions, conducting oral arguments, briefing for class certification, negotiating settlements, and multiple other tasks, Class Counsel were able to conclude $162 million in Settlements after the filing of the class motion.[10]

Class Counsel faced the substantial risks of proving the claims described above. By virtue of their extensive professional services, Class Counsel overcame those risks sufficiently to create the $187 million in Settlements for the Class, which, if approved, will constitute the largest class action settlement of CEA manipulation claims in the history of the CEA.

III. ARGUMENT

A. Settlement Class Counsel Are Entitled to A Reasonable Fee from the Common Fund They Recovered For The Benefit of the Settlement Classes

Under the common fund doctrine, "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from

[10] The initial "icebreaker" $19,975,000 Barclays settlement came before, and the $5,250,000 Société Générale settlement came well after, the class certification briefing process. But even as to the Barclays initial icebreaker Settlement, Class Counsel engaged in negotiations with Barclays after the filing of the class motion in order to amend the Barclays settlement and obtain material improvements in the terms. ¶¶ 72-73. Class Counsel negotiated extensively to make the Barclays and Société Générale settlements and obtained valuable cooperation, especially from Barclays. ¶¶ 65-74, 94-99.

the fund as a whole." *Boeing v. Van Gemert*, 444 U.S. 472, 478 (1980). If the Settlements receive final approval, Eligible Claimants will receive distributions from the $187 million common fund generated by the efforts of Settlement Class Counsel. An award of attorneys' fees and the reimbursement of litigation expenses would compensate Settlement Class Counsel for bringing and prosecuting the Action on a wholly contingent basis without any remuneration for well in excess of nine years.

1. The Requested Fee Is Fair and Reasonable Under the Preferred "Percentage Method"

Under the percentage method, the Court "sets some percentage of the recovery as a fee" for class counsel. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). This Court has recognized in this proceeding that "'[i]t remains the case that adoption of the percentage method continues to be the trend of district courts in the Second Circuit but . . . an analysis of counsel's lodestar as a cross check on the reasonableness of the requested percentage remains common.'" *LIBOR*, 2018 WL 3863445, at *3 quoting *In re IMAX Sec. Litig.*, No. 06 Civ. 6128 (NRB), 2012 WL 3133476, at *5 (S.D.N.Y. Aug. 1, 2012)).

Courts in the Second Circuit have routinely awarded attorneys' fees in an amount equal to 30 percent or more of the common fund in cases where there was a comparably sized common fund. *See Velez v Novartis Pharm. Corp.*, No. 04 Civ. 9194, 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010) (collecting cases awarding 30 percent or more); *In re Beacon Assoc. Litig.*, No. 09 Civ. 3907, 2013 WL 2450960, at *5 (S.D.N.Y. May 9, 2013) ("In this Circuit, courts routinely award attorneys' fees that run to 30% and even a little more of the amount of the common fund.").[11]

[11] *See, e.g.*, *In re Domestic Drywall Antitrust Litig.*, No. 13 Md. 2437, 2018 WL 3439454, at *20 (E.D. Pa. July 17, 2018) (awarding one-third fee on settlements totaling $190 million); *In re Mun. Derivatives Antitrust Litig.*, No. 08 Civ. 2516, 2016 WL 11543257, at *1 (S.D.N.Y. July 8, 2016) (one-third fee from $101 million settlement fund); *In re Titanium Dioxide Antitrust Litig.*, No. 10 Civ. 00318, 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) (one-third fee from $163.5 million settlement fund); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 748-52 (E.D. Pa. 2013) (granting attorneys' fees of one-third from a $150 million settlement fund); *In re Initial Public Offering Secs. Litig.*,

The requested 30% fee is also in line with prior CEA manipulation class actions that have awarded fees constituting one-third of the common fund. *See, e.g.*, *In re Nat. Gas Commodity Litig.*, No. 03 Civ. 6186, slip op. (S.D.N.Y. May 24, 2006) (ECF No. 445) [Joint Decl. Ex. Q, Tab 5] (33⅓% fee award that resulted in a 1.44 lodestar multiplier); *In re Soybeans Futures Litig.*, No. 89 Civ. 7009, slip op. (N.D. Ill. Nov. 27, 1996) (ECF No. 470) [Joint Decl. Ex. Q, Tab 8] (33⅓% fee award that resulted in a 1.03 lodestar multiplier); *In re BP Propane Direct Purchaser Antitrust Litig.*, No. 06 Civ. 3541, slip op. (N.D. Ill. Feb. 10, 2010) (ECF No. 209) [Joint Decl. Ex. Q, Tab 2] (33% fee award that resulted in a 2.7 lodestar multiplier).

2. The Requested Fee Would Result In A Lodestar Multiplier of 1.04, Confirming the Reasonableness of the Requested Fee

Settlement Class Counsel have spent over 80,758 hours litigating the Action, representing a total lodestar of $52,134,123.35 based on counsel's current hourly rates. ¶¶ 125-26. The requested fee of 30% of the Settlement Fund (after deducting counsel's requested out-of-pocket expenses totaling $ $5,613,578.86) would result in a lodestar multiplier of approximately 1.04.

A Lodestar Multiplier of 1.04 is Reasonable. The requested 1.04 risk multiplier is well *below* what this Court recently recognized as the mean multiplier in this Circuit of approximately 1.55 for antitrust and securities actions. *See LIBOR*, 2018 WL 3863445, at *4 (awarding of a fee that yielded a 1.65 multiplier and noting that such a multiplier "fits comfortably within the range of lodestar multipliers generally observed.").[12] Indeed, numerous courts have awarded attorneys'

671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding plaintiffs' counsel one-third of the $586 million settlement fund); *In re Deutsche Telekom AG*, 2005 WL 7984326, at *4 (awarding attorneys' fees of 28% of a $120 million settlement); *see also Sumitomo*, 74 F. Supp. 2d at 395 (awarding attorneys' fees equal to 27.5% of the $134 million settlement amount on claims of copper futures manipulation); *In re Neurontin*, ECF No. 114 [Joint Decl. Ex. Q, Tab 6] (awarding 33⅓% of a $191 million settlement); *In re Steel*, ECF No. 539 [Joint Decl. Q, Tab 9] (awarding 33% of a $163,900,000 settlement); *Kurzweil v. Philip Morris Cos., Inc.*, No. 94 Civ. 2373, 1999 WL 1076105, at *3 (S.D.N.Y. Nov. 30, 1999) (awarding 30% of a $123 million settlement); *In re Polyurethane Foam Antitrust Litig.*, No. 10 Md. 2196, 2015 WL 1639269, at *7 (N.D. Ohio Feb. 26, 2015) (awarding attorneys' fees of 30% of $147.8 million fund).

[12] *See also In re GSE Bonds Antitrust Litig.*, No. 19 Civ. 1704 (JSR), 2020 WL 3250593, at *5 (S.D.N.Y. June 16, 2020) ("Although on the high end, a 4.09 multiplier is within the range of what has considered reasonable by courts.");

fees in antitrust class actions of 30% or more and that yielded substantially higher lodestar multipliers between 1.66 and 4.88.[13] The requested 1.04 risk multiplier is extremely reasonable.

The Hours Expended By Counsel are Reasonable. Settlement Class Counsel and counsel for Plaintiffs have spent a total of over 80,758 hours litigating the Action for the last nine years (excluding time relating to this motion). ¶¶ 125, 127.[14] Counsel's work in this case overcame many of the substantial risks associated with the claims here (*see* Section II, *supra*) and resulted in the largest historical "futures and options on futures only" settlement class for manipulation claims under the CEA. *See* n.4, *supra.*

Settlement Class Counsel's and additional Plaintiffs' counsel's professional services in this case are summarized above and set forth in detail in the individual declarations submitted by each firm. *See* Joint Decl. Exs. B-O.

CDS Litig., 2016 WL 2731524, at *17 (approving a lodestar multiplier of "just over 6" in a complex antitrust class action); *Sewell v. Bovis Lend Lease, Inc.*, No. 09 Civ. 6548, 2012 WL 1320124, at *13 (S.D.N.Y. Apr. 16, 2012) ("Courts commonly award lodestar multipliers between two and six."); *Johnson v. Brennan*, No. 10 Civ. 4712, 2011 WL 4357376, at *13 (S.D.N.Y. Sept. 16, 2011) ("Courts routinely award counsel two to three times lodestar in class action settlements."); *In re Lloyd's Am. Tr. Fund Litig.*, No. 96 Civ. 1262 RWS, 2002 WL 31663577, at *27 (S.D.N.Y. Nov. 26, 2002) ("Here, the resulting multiplier of 2.09 is at the lower end of the range of multipliers awarded by courts within the Second Circuit.").

[13] *See, e.g.*, *In re Relafen Antitrust Litig.*, No. 01-12239, slip op. (D. Mass. Apr. 9, 2004) (ECF No. 297, at 7) [Joint Decl. Ex. Q, Tab 7] (awarding a 33⅓% fee in connection with $175 million settlement, which constituted a 4.88 lodestar multiplier); *In re Linerboard Antitrust Litig.*, No. 98 Civ. 5055, 2004 WL 1221350, at *19 (E.D. Pa. June 2, 2004), *amended*, No. 98 Civ. 5055, 2004 WL 1240775 (E.D. Pa. June 4, 2004) (awarding a 30% fee in connection with settlements totaling $202.5 million, which constituted a 2.66 lodestar multiplier); *In re Neurontin*, (ECF No. 114) [Joint Decl. Ex. Q, Tab 6] (awarding a 33⅓ % fee in connection with settlements totaling $190.4 million, which constituted 1.99 lodestar multiplier); *In re Domestic Drywall*, 2018 WL 3439454, at *20 (awarding a 33⅓% fee in connection with settlements totaling $190 million, which constituted a 1.66 lodestar multiplier); *In re Steel*, (ECF No. 539) [Joint Decl. Ex. Q, Tab 9] (awarding a 33% fee in connection with settlements totaling $163.9 million, which constituted a 1.97 risk multiplier); *In re Titanium Dioxide*, 2013 WL 6577029, at *1 (awarding a 33⅓% fee in connection with settlements totaling $163.5 million, which constituted a 2.39 lodestar multiplier); *In re Flonase*, 951 F. Supp. 2d at 748-52 (awarding a 33⅓% fee in connection with settlements totaling $150 million, which constituted a 2.99 lodestar multiplier); *Kurzweil*, 1999 WL 1076105, at *3 (awarding a 30% fee in connection with a $123.8 million settlement, which constituted a 2.46 lodestar multiplier).

[14] For purposes of this fee application, Settlement Class Counsel excluded time incurred by non-lead counsel prior to the period between November 29, 2011 (*i.e.*, the date the Court appointed Kirby and Lovell as interim co-lead counsel for the Exchange-Based Plaintiffs) and following December 31, 2019. ¶ 127.

Counsel's Hourly Rates are Reasonable. The hourly rates for the professional services undertaken by Plaintiffs' counsel have been billed at the regular current hourly rates in cases involving complex class action litigation and/or have been accepted in other antitrust or complex class action litigations. ¶ 128.[15] The hourly billing rates for attorneys working on this case ranged from $125 to $1,140.[16] Billing rates in the same range have been previously approved by this Court and others in this District as reflective of market rates in New York for work of comparable size and complexity.[17] The hourly rates charged by Plaintiffs' counsel are well within the range of reasonable fees for attorneys working on complex class action litigation in this District and are comparable to peer plaintiff and defense firms litigating matters of similar magnitude. *See* Joint Decl. Ex. P (table reflecting comparable billing rates).[18]

In sum, Settlement Class Counsel's requested 30% fee award is reasonable as a percentage of the Settlement Fund and also satisfies the "lodestar cross-check" because such a fee would result in a lodestar multiplier of 1.04—well below the average multiplier in this Circuit generally and

[15] Courts use "prevailing market rates" and current rates to calculate the lodestar figure to account for the delay in payment. *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir. 1998) (citing *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 283-84 (1989)).

[16] *See* Plaintiffs' Counsel Declarations attached to the Joint Declaration at Exhibits B through O.

[17] *See, e.g.*, *In re GSE Bonds*, 2020 WL 3250593, at *6 (granting fee award using partner rates of $575 to $1,050 and associate rates of $340 to $795, *see also* ECF Nos. 355-56); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 13 Civ. 7789, 2018 WL 5839691 (S.D.N.Y. Nov. 8, 2018) (granting fee award using partner rates up to $1,375 and associate rates of $350 to $500, *see also* ECF No. 939-3); *CDS Litig*, 2016 WL 2731524, at *17 (granting fee award using partner rates of $834 to $1,125 and associate rates of $411 to $714, *see also* ECF No. 482).

[18] Settlement Class Counsel's hourly billing rates are also lower than those charged by defense counsel in this Action. *See* Joint Decl. Ex. P. For example, according to recent filings in federal bankruptcy cases, (1) Paul, Weiss, Rifkind, Wharton & Garrison LLP's rates are (a) partner, between $1,165-$1,560, and (b) for associates and counsel, between $640-$1,160; (2) Simpson Thacher & Bartlett LLP's rates are (a) for partners, between $1,350-$1,550, and (b) $540-$1,170 for non-partners; (3) Mayer Brown LLP's rates are (a) for partners, between $960-$1,130, and (b) $605-$895 for non-partners; (4) Sullivan & Cromwell LLP's rates are (a) for partners, between $1,140-$1,295, (b) $995 for special counsel, and (c) for associates, between $460-$865; (5) Davis Polk Wardwell LLP's rates are (a) for partners, between $1,445-$1,685, (b) for counsel, between $1,075-$1,295, and (c) for associates, between $525-$1,095; (6) Covington & Burling LLP's rates are (a) for partners, between $825-$1,110, (b) senior of counsel and special counsel, between $775-$1,215, and (c) for associates, between $490-$730; and (7) Locke Lord LLP's rates are (a) for partners, between $660-$1,040, (b) for senior counsel, between $670-$855, and (c) for associates, between $390-$450. *Id.*

well below the 1.6 multiplier awarded by this Court in the OTC Action. As discussed below, the requested fee is also supported by each of the *Goldberger* factors considered by courts in this Circuit.

3. Each *Goldberger* Factor Supports the Requested Fee Award

In the Second Circuit, courts evaluating whether a fee is "reasonable" must consider: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger*, 209 F.3d at 50. Each *Goldberger* factor weighs in favor of the reasonableness of Settlement Class Counsel's fee request in this Action.

a) The Risk of the Litigation

The risk of the litigation is perhaps "the most important *Goldberger* factor." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014); *see also Goldberger*, 209 F.3d at 54 ("We have historically labeled the risk of success as 'perhaps the foremost' factor to be considered in determining whether to award an enhancement.") (internal citation omitted). Claims for manipulation in violation of the CEA have been recognized as "notoriously difficult to prove" and "more difficult and risky than securities fraud cases." *Sumitomo*, 74 F. Supp. 2d at 395, 397. The numerous and very substantial, pleading, proof and personal jurisdiction risks inherent in the settled claims have been set forth in Section II, *supra*. They strongly support the requested fee.

b) The Magnitude and Complexities of the Litigation

It is hard to overstate the complexity and magnitude of this litigation, which is now entering its tenth year. This Court previously recognized that the prosecution of price manipulation claims in violation of the CEA is notoriously "complex and difficult." *Compare Sumitomo*, 74 F. Supp.

2d at 395, *with Merrill Lynch v. Curran*, 456 U.S. at 356 (commodity futures markets are "esoteric"); *see also In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998) ("Class actions have a well-deserved reputation as being most complex") (internal citation and quotations omitted); *In re Vitamin C Antitrust Litig.*, No. 06 MDL 1738, 2012 WL 5289514, at *4 (E.D.N.Y. Oct. 23, 2012) (antitrust cases involving collusion and price manipulation is "complicated, lengthy, and bitterly fought.").

With regard to magnitude of the litigation, Plaintiffs have alleged that the sixteen U.S. Dollar LIBOR Panel Banks, many of which are among the largest banks in the world, conspired to fix and manipulate USD LIBOR over a period of more than five years. *See* [Corrected] Fourth Amended Consolidated Class Action Complaint, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262, [ECF No. 2363], ¶¶ 5-21, 93-705. The operative complaint is more than 320 pages long. *Id*. The Court has issued numerous lengthy decisions on substantive issues. More than 18 million pages of documents have been produced to Plaintiffs' counsel by Defendants and non-parties. ¶ 57. The docket specific to the Exchange Based action has more than 780 entries and the primary docket for this action has more than 3,100 entries. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262. Settlement Class Counsel respectfully submit that the complexity and magnitude of the Exchange-Based Action fully support the requested fee.

c) The Quality of Representation Supports The Requested Fee

"[T]he quality of representation is best measured by results," *Goldberger*, 209 F.3d at 55, which are evaluated in light of "the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 141 (S.D.N.Y. 2008).

The Results. The proposed partial Settlements of this Action have resulted in a combined Settlement Fund of $187 million for the benefit of the Settlement Classes and collectively represent the largest class-wide recovery for a "futures only" settlement class.

The Representation. Settlement Class Counsel have extensive experience prosecuting commodity manipulation and antitrust cases. *See* Joint Decl. Exs. B-3, C-3. The Lovell Stewart Firm has forty years' experience litigating commodity futures manipulation cases and, as sole lead or co-lead counsel, has obtained several of the largest settlements in the history of the CEA. The Kirby Firm similarly has decades of experience representing investors in litigation relating to the manipulation of physical commodities, commodity futures, and related derivative products, and as sole lead or co-lead counsel, has recovered millions in manipulation cases.

The quality of representation provided by opposing counsel is also a relevant consideration. *Maley v. Del Global Tech. Corp.*, 186 F. Supp. 2d 358, 373 (S.D.N.Y. 2002). The Settling Defendants are represented by several of the nation's biggest and most highly regarded defense firms. The fact that Settlement Class Counsel prosecuted this Action for more than nine years against such formidable opponents to successfully produce these results, further supports the requested fee. *See Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 670 (S.D.N.Y. 2015) (noting that counsel's achievement in "obtaining valuable recompense . . . for its clients is particularly noteworthy given the caliber and vigor of its adversaries").

d) The Time and Labor Expended by Settlement Class Counsel Support the Requested Fee

As detailed in Section III.A.2 above and in the Joint Declaration, Settlement Class Counsel devoted over 80,758 hours to the successful prosecution of the claims here. The lodestar value of this time totals $52,134,123.35.

e) The Requested Fee in Relation to the Settlements

As detailed above, the requested fee of 30% of the Settlement Fund (after deducting Court-approved expenses) is well within the range of fees approved within this Circuit in actions that involved similarly-sized common funds. *See* n.8, 11, 13, *supra* (collecting cases that awarded fees totaling 30% or more of common funds).[19] The requested 30% fee would result in a lodestar multiplier of 1.04. *See* Section III.A.2, *supra*. As detailed above, a lodestar multiplier of 1.04 is well below multipliers in actions that awarded fees equal to or greater than 30% of similarly-sized common funds. *Id.*; *see also* n. 8, 11-13, *supra* (collecting cases that awarded fees totaling 30% or more of common funds and that yielded lodestar multipliers between 1.66 and 4.88).

f) Public Policy Supports Approval of the Fee Request

Private lawsuits asserting claims for manipulation further the overarching purpose of the CEA which is "to deter and prevent price manipulation." 7 U.S.C. § 5(b) (the "purpose" of the CEA is to "deter and prevent price manipulation"). Indeed, private lawsuits such as this one are regarded by Congress as "**critical** to protecting the public and fundamental to maintaining the credibility of the futures market." *Cange v. Stotler & Co.,* 826 F.2d 581, 584 (7th Cir. 1987) (emphasis added) *citing* to H.R. Rep. No. 565, 97th Cong., 2d Sess., pt. 1 at 56-7, *reprinted* in 1982 U.S. Code Cong. & Admin. News 3871, 3905-06; *see also Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 572 n.10 (1982) ("[p]rivate suits are an important element of the Nation's antitrust enforcement effort."); *Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983)

[19] Reducing the percentage award as the settlement size increases disincentivizes class counsel from creating incremental value for the class by holding out for more money on the class's behalf. *See In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71, 80 (S.D.N.Y. 2000) ("By adjusting downward the percentage of the recovery awarded to counsel as plaintiffs' recovery increases . . . this method may give rise to an attorney incentive problem by creating declining marginal returns to effort for counsel . . . . Again, this method can create an incentive to settle quickly and cheaply, when the returns to effort are highest, rather than investing additional time and maximizing plaintiffs' recovery."). *See also In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094, 1114 (D. Kan. Dec. 7, 2018) (articulating same "incentive" problem and therefore awarding 33⅓% fee on a $1.51 billion settlement).

("[t]his Court has emphasized the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws.").

Awarding a reasonable percentage of the common fund "provid[es] lawyers with sufficient incentive to bring common fund cases that serve the public interest." *See Goldberger*, 209 F.3d at 51. Settlement Class Counsel respectfully submit that the requested fee award would further these important public policies and help promote the future integrity of the county's important financial markets. Without this private action, the vast majority of investors in the Eurodollar futures markets would have no other source of potential recovery for the alleged manipulation of USD LIBOR and its impact on Eurodollar futures prices.

g) The Reaction of the Class to Date Supports the Requested Fee

Through August 11, 2020, the Settlement Administrator has disseminated the long form Notice to 20,978 potential members of the Settlement Class informing them, among other things, that the Settlement Class intended to apply to the Court for an award of attorneys' fees in an amount up to one-third of the aggregate Settlement Fund. *See* Joint Decl. Ex. A (Straub Declaration) at ¶ 10; Straub Ex. A (Notice) at 10. The deadline for objections is August 27, 2020, but to date, no objections have been received. ¶ 104.[20]

B. Settlement Class Counsel's Costs and Expenses Are Reasonable and Were Necessary to the Result

"[C]ourts in the Second Circuit normally grant expense requests in common fund cases as a matter of course." *LIBOR*, 2018 WL 3863445, at *1 (citation omitted). It is not uncommon that in complex antitrust cases such as this one, "substantial expenses [are] necessary," including costs related to initial investigations and research, testifying and consultant experts, discovery expenses,

[20] Should any objections be received, Settlement Class Counsel will address them in their reply papers, due on September 10, 2020.

travel, postage and mailing, and copying costs. *Meredith Corp.*, 87 F. Supp. 3d at 671; *see also Guevoura Fund Ltd. v. Sillerman*, No. 15 Civ. 07192, 2019 WL 6889901, at *22 (S.D.N.Y. Dec. 18, 2019). Such costs are "compensable if they are of the type normally billed by attorneys to paying clients." *Guevoura Fund*, 2019 WL 6889901, at *22.

Here, Settlement Class Counsel incurred litigation expenses relating to this Action totaling $5,613,578.86 for out-of-pocket expenses reasonably and necessarily incurred in connection with the prosecution of this case. ¶ 131. These expenses have been itemized by category for the Court's convenience. ¶¶ 131-32; Exs. B-O. Approximately 73.52% of the requested expenses are associated with payments to experts. *See* ¶ 132; Exs. B-O.[21] Further, the requested expenses total approximately 3% of the total Settlement Funds, which is consistent with the ratio previously approved by this Court in connection with partial OTC LIBOR Settlements. *See LIBOR*, 2018 WL 3863445, at *1 (noting "given the complexities of this case and the necessity for extensive expert involvement" that "we are persuaded that 5.94% is not so high as to be unreasonable.").

C. Service Awards for the Named Plaintiffs Are Appropriate

Exchange-Based Plaintiffs seek service awards of $25,000 (for a total aggregate award of $150,000) for named plaintiffs Metzler Asset Management GmbH (f/k/a Metzler Investment GmbH), FTC Capital GmbH (advisor to Plaintiffs FTC Futures Fund SICAV and FTC Futures Fund PCC Ltd.), Atlantic Trading USA, LLC, 303030 Trading LLC, Gary Francis, and Nathanial Haynes, as stated in the Notice.

[21] Additional categories of expenses include computerized legal research, the creation and maintenance of an electronic document database, travel and lodging expenses, copying, court reports, deposition transactions, and mediation. *Id.* These are all the type of out-of-pocket expenses that are routinely reimbursed from common funds. *Yang v. Focus Media Holding Ltd.*, No. 11 Civ. 9051, 2014 WL 4401280, at *19 (S.D.N.Y. Sept. 4, 2014) (finding computer research, photocopying, postage, meals, and court filing fees "necessary for Lead counsel to successfully prosecute this case").

This Court and others in this District have approved similar service awards in similar circumstances. *See, e.g.*, *LIBOR*, 2018 WL 3863445, at *2 (awarding $25,000 to each of the five named OTC plaintiffs); *Anwar v. Fairfield Greenwich Ltd.*, No. 09 Civ. 118, 2012 WL 1981505, at *3-4 (S.D.N.Y. June 1, 2012) (awarding $25,000 to class representative and holding that "[c]ourts consistently approve awards in class action lawsuits to compensate named plaintiffs for the services they provide and burdens they endure during litigation."). The requested service awards represent only a small fraction (approximately 0.08%) of the total Settlement Funds. *See, e.g.*, *Dial Corp. v. News Corp.*, 317 F.R.D. 426, 438-39 (awarding 0.12% of a settlement fund to six class representatives).

The Exchange-Based Plaintiffs provided invaluable services to the Settlement Classes over the course of the litigation. ¶¶ 133-34. These services helped to achieve recovery of $187 million for the benefit of the Settlement Classes. Among other things, the Exchange-Based Plaintiffs provided factual information to assist in the development of Exchange-Based Plaintiffs' claims, collected discovery, prepared and sat for lengthy depositions by the defendants, and conferred with Settlement Class Counsel throughout the case. *Id.*

Courts routinely approve incentive awards to class representatives who provide these types of services. *See, e.g.*, *Sewell*, 2012 WL 1320124, at *15 (approving incentive awards where the named plaintiffs "served class members by providing counsel with relevant documents in their possession, assisting counsel to prepare for the mediation, participating in litigation strategy, and reviewing and commenting on the terms of the settlement.") (internal quotation marks omitted). Plaintiffs' duties in this Action required them to dedicate considerable time and take key personnel away from their normal duties.

Accordingly, Settlement Class Counsel respectfully submit that the Court should grant service awards of $25,000 to each of the individual Exchange-Based Plaintiffs.

IV. CONCLUSION

For the reasons set forth above and in the Joint Declaration, Settlement Class Counsel respectfully request that this Court enter an Order reimbursing expenses in the amount of $5,613,578.86, awarding Class attorneys' fees in the amount of 30% of the remainder of $187,000,000 minus the amount of litigation expenses reimbursed (*see* n. 3, *supra*), and approving service awards of $25,000 for each named plaintiff for their efforts on behalf of the Settlement Classes.

Dated: August 13, 2020
New York, New York

KIRBY McINERNEY LLP

By: */s/ David E. Kovel*
David E. Kovel
Karen M. Lerner
Thomas W. Elrod
250 Park Avenue, Suite 820
New York, New York 10177
Telephone: (212) 371-6600
dkovel@kmllp.com
klerner@kmllp.com
telrod@kmllp.com

LOVELL STEWART HALEBIAN JACOBSON LLP

By: */s/ Christopher Lovell*
Christopher Lovell
Gary S. Jacobson
Jody R. Krisiloff
Christopher M. McGrath
500 Fifth Avenue, Suite 2440
New York, NY 10110
Telephone: (212) 608-1900
clovell@lshllp.com

gsjacobson@lshllp.com
jkrisiloff@lshllp.com
cmcgrath@lshllp.com

Co-Interim Lead Counsel for the Exchange-Based Plaintiffs and the Settlement Classes

TAB 22A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

In re LIDODERM ANTITRUST LITIGATION	Case No. 14-md-02521-WHO
THIS DOCUMENT RELATES TO: DIRECT PURCHASER ACTIONS	**ORDER GRANTING FINAL APPROVAL OF SETTLEMENT WITH DIRECT PURCHASER CLASS AND ENTERING FINAL JUDGMENT OF DISMISSAL WITH PREJUDICE**

This matter has come before the Court to determine whether there is any cause why this Court should not approve the three separate settlements between Plaintiffs American Sales Company, LLC, Droguería Betances, Inc., and Rochester Drug Co-Operative, Inc. (collectively, the "Direct Purchaser Class Plaintiffs") and each of defendants (1) Endo Pharmaceuticals Inc. ("Endo"); (2) Teikoku Pharma USA, Inc. and Teikoku Seiyaku Co., Ltd. (together, "Teikoku"); and (3) Actavis, Inc. (f/k/a Watson Pharmaceuticals, Inc.), Watson Laboratories, Inc., and Actavis plc (collectively, "Watson," and together with Endo and Teikoku, "Defendants"), pursuant to Rules 23(e) and 54(b) of the Federal Rules of Civil Procedure, and in accordance with the terms of the respective Settlement Agreements. The Court, after carefully considering all papers filed and proceedings held herein, and good cause appearing, has determined: (a) the settlement is fair, reasonable, and adequate and should be finally approved; (b) the proposed plan of allocation of the Settlement Fund should be approved; (c) the proposed awards of attorneys' fees and reimbursement of the expenses to Class Counsel should be approved pursuant to Rule 23(h); (d) the proposed incentive awards should be awarded to each of the three Direct Purchaser Class Plaintiffs; and (e) a final judgment terminating this litigation should be entered, subject to this Court's continuing jurisdiction to enforce the settlement and this Order and Final Judgment. Good cause appearing therefor, it is:

ORDERED, ADJUDGED, AND DECREED that:

1. This Court has subject matter jurisdiction over this Direct Purchaser Class Action (the "Action") and each of the Direct Purchaser Class Plaintiffs, individually and on behalf of the certified direct purchaser plaintiff class in this Action, and all Defendants.

2. This Order and Final Judgment incorporates by reference the definitions in the Settlement Agreements and all terms used herein shall have the same meanings set forth in the Settlement Agreements.

3. In light of this Court's previous order dated Feb 21, 2017 [ECF No. 670] certifying the direct purchaser class pursuant to Fed. R. Civ. P. 23(a) and (b)(3), the exclusion

notices received during the opt-out period established by that order, the now proposed Settlements in this Action, and this Court's Preliminary Approval Order [ECF No. 1018], the Direct Purchaser Class (the "Class") is defined as follows:

> All persons or entities in the United States, including its territories, possessions, and the Commonwealth of Puerto Rico, who purchased brand or generic Lidoderm directly from any of the Defendants at any time during the period August 23, 2012 through May 1, 2014 (the "Class"). Excluded from the Class are Endo Pharmaceuticals Inc., Teikoku Pharma USA, Inc. and Teikoku Seiyaku Co., Ltd., Actavis, Inc., Actavis plc, Watson Laboratories, Inc., and their officers, directors, management, employees, subsidiaries, or affiliates, and all federal governmental entities.
>
> Also excluded from the Class are the following Retailer Plaintiffs that pursued claims separately from the Class: Walgreen Co., The Kroger Co., Safeway Inc., HEB Grocery Company LP, Albertson's LLC, Rite Aid Corporation, Rite Aid Hdqtrs. Corp., and CVS Pharmacy, Inc.

4. The Court finds that due notice was given in accordance with the Preliminary Approval Order [ECF No. 1018], and that the form and content of that Notice, and the procedures for dissemination thereof as set forth in the Preliminary Approval order, satisfy the requirements of Fed. R. Civ. P. 23(e) and due process and constitute the best notice practicable under the circumstances.

5. Adequate notice of the proceedings having been given to the Class, and a full opportunity having been offered to the Class to participate in the fairness hearing, it is hereby determined that all Class Members are bound by this Order and Final Judgment.

6. The settlement of this Action was not the product of collusion between Plaintiffs and Defendants or their counsel, but rather was the result of bona fide and arm's-length negotiations conducted in good faith between Class Counsel and Counsel for each of the Defendants under Court supervision.

7. The Court has held a hearing to consider the fairness, reasonableness and adequacy of the proposed settlement, and has been advised that there have been no objections to

the settlement, or to the motion for reimbursement of costs, attorneys' fees, and incentive awards to the class representatives [ECF Nos. 1023 & 1024] from any members of the Class.

8. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Court hereby finally approves in all respects the Settlements as set forth in (a) the settlement agreement between Direct Purchaser Class and Teikoku dated December 31, 2017 ("Teikoku Agreement") [ECF No. 1004-2]; (b) the settlement agreement between Direct Purchaser Class and Watson dated March 19, 2018 ("Watson Agreement") [ECF No. 1004-3]; and (c) the settlement agreement between Direct Purchaser Class and Endo dated March 19, 2018 ("Endo Agreement") [ECF No. 1004-4] and finds that each of the three Settlements is in all respects, fair, reasonable, adequate, and in the best interests of the Direct Purchaser Class. The Court further approves the establishment of the Settlement Fund upon the terms and conditions set forth in the Settlement Agreements. The parties are hereby directed to carry out the Settlements in accordance with the terms and provisions of the three Settlement Agreements.

9. The Court approves the Plan of Allocation of Settlement Proceeds as proposed by Class Counsel as fair and reasonable. The claims administrator RG/2 Claims Administration LLC ("Claims Administrator"), is directed to administer the Settlement, with the assistance of Econ One Research, Inc. ("Econ One"), in accordance with the terms and conditions of the Settlement Agreements. All expenses incurred by the Class Administrator or Econ One must be reasonable, are subject to Court approval, and shall be payable solely from the Settlement Fund. The Claims Administrator will distribute the Settlement Funds to the Class on a *pro rata* basis in the manner described in the Plan of Allocation.

10. All claims in the above-captioned action against the Defendants are hereby dismissed with prejudice, and without costs, with the Court retaining jurisdiction for the limited purpose of enforcing compliance with the terms and conditions of the Settlement Agreements and this Order and Final Judgment. All Released Claims of the Direct Purchaser Plaintiffs and

Class in the above-captioned Action are released and dismissed with prejudice, and, except as provided for in the Settlement Agreements, without costs.

11. All Class Members shall be forever enjoined and barred from asserting any of the matters, claims or causes of action released by the Settlement Agreements, and all Class Members shall be deemed to have forever released any and all such matters, claims and causes of action as provided in the Settlement Agreements.

12. Class Counsel are awarded Attorneys' Fees in the amount of $45,000,070.46 (*i.e.*, 27.5% of $163,636,619.85, which represents the $166 million settlement less litigation expenses of $2,363,380.15), plus 27.5% of the accrued interest on the Settlement Fund. Additionally, Class Counsel shall be reimbursed for reasonable litigation expenses of $2,363,380.15 incurred in the representation of the Class, for a total Attorneys' Fees and Expenses award of $47,363,450.61 plus 27.5% of the accrued interest on the Settlement Fund. The Court finds that the amount of Attorneys' Fees and Expenses awarded is fair and reasonable. The award of Attorneys' Fees and Expenses shall be allocated among Class Counsel by Co-Lead Counsel. The Attorneys' Fees and Expenses awarded shall be paid out of the Settlement Fund.

13. Neither this Order and Final Judgment, the Settlement Agreements, nor any of their respective terms or the negotiations or papers related thereto shall constitute evidence or an admission by any party that any acts of wrongdoing have been committed, and they shall not be deemed to create any inference that there is any liability therefor. Neither this Order and Final Judgment, the Settlement Agreements, nor any of the terms or negotiations or papers related thereto, shall be offered or received in evidence or used for any purpose whatsoever, in this or any other matter or proceeding in any court, administrative agency, arbitration or other tribunal, other than as expressly set forth in the Settlement Agreements.

14. Without affecting the finality of the judgment, the Court retains exclusive jurisdiction over the Settlement Agreement, including the administration and consummation of the Settlement Agreement, Plan of Allocation, and in order to determine any issues relating to

the attorneys' fees and expenses and any distribution to members of the Class. In addition, without affecting the finality of this judgment, Defendants and each member of the Class hereby irrevocably submit to the exclusive jurisdiction of the United States District Court for the Northern District of California, for any suit, action, proceeding or dispute arising out of or relating to the Settlement Agreements or the applicability of the Settlement Agreements, including, without limitation any suit, action, proceeding or dispute relating to the release provisions therein.

15. The Class Representatives, American Sales Company, LLC, Droguería Betances, Inc., and Rochester Drug Co-Operative, Inc. are each hereby awarded $100,000, to be paid out of the Settlement Fund, for representing the Direct Purchaser Class, which amount is in addition to whatever monies these plaintiffs will receive from the Settlement Fund pursuant to the Plan of Allocation. This Court finds these awards to be fair and reasonable in light of the efforts of each.

16. In the event the Settlement does not become final, this Order and Final Judgment shall be rendered null and void as provided by the Settlement Agreements, shall be vacated, and all orders entered and releases delivered in connection herewith shall be null and void to the extent provided by and in accordance with the Settlement Agreements.

17. The Court hereby directs that this judgment be entered by the clerk forthwith pursuant to Federal Rule of Civil Procedure 54(b).

IT IS SO ORDERED.

Dated: September 20, 2018.

WILLIAM H. ORRICK
United States District Judge

TAB 22B

[Submitting Counsel on Signature Page]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

In re LIDODERM ANTITRUST LITIGATION	Case No. 14-md-02521-WHO
THIS DOCUMENT RELATES TO: DIRECT PURCHASER ACTIONS	**DIRECT PURCHASER PLAINTIFFS' MOTION FOR REIMBURSEMENT OF COSTS AND ATTORNEYS' FEES** **ORAL ARGUMENT REQUESTED** Date: September 12, 2018 Time: 2:00 p.m. Courtroom 2, 17th Floor The Honorable William H. Orrick

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NOTICE OF MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that at 2:00 pm on September 12, 2018, Counsel for the Direct Purchaser Class Plaintiffs (hereinafter "DPPs") will and hereby do move before the Honorable William H. Orrick, United States District Judge, at the Phillip Burton Federal Building & United States Courthouse, 450 Golden Gate Avenue, Courtroom 2, 17th Floor, San Francisco, California, pursuant to Federal Rules of Civil Procedure 23(h) and 54(d) for the following:

An award of attorneys' fees in the amount of $45,000,070.46 (27.5% of the total $166 million settlement after the deduction of litigation expenses of 2,363,380.15);

Reimbursement of litigation expenses in the amount of $ 2,363,380.15; and

Service awards of $100,000 for each the three class representatives.

This Motion is made on the grounds that: the requested attorneys' fees are fair and reasonable in light of counsel for DPPs' efforts in litigating this case and creating a settlement fund for the benefit of all class members; the expenses for which reimbursement is sought were reasonably and necessarily incurred in connection with the prosecution of this action; and the requested service awards are warranted in light of the class representatives' efforts in bringing this litigation and their extensive time and involvement therein.

This Motion is based upon the accompanying Memorandum of Points and Authorities, the Declaration of Co-Lead Counsel Peter Kohn filed herewith ("Kohn Decl."), the individual declarations of DPPs filed herewith, the proposed Order submitted herewith, all pleadings and/or other papers filed in this action, and upon such argument as may be presented to the Court at the hearing on this Motion.

This Motion will be available today on the website established for this case, for review by class members: http://www.lidodermantitrustdppsettlement.com.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Following an investigation that began in 2011, counsel representing class representatives Droguería Betances, Inc. ("Betances"), Rochester Drug Co-Operative, Inc. ("RDC") and American

Sales Company, LLC ("ASC") and a proposed class of direct purchasers (collectively, "DPPs") filed this antitrust litigation in late 2013. For more than four years, DPPs aggressively litigated a highly-complex, high-stakes and hotly-contested case against three sophisticated pharmaceutical companies represented by some of the most prominent defense firms in the country. In the Fall of 2017, the parties were in the midst of intensive preparation for a trial to commence on February 23, 2018. Contemporaneouly with preparing for trial, during three separate settlement conferences conducted under the supervision of Chief Magistrate Judge Joseph C. Spero, DPPs settled their claims against all three defendants. Pursuant to Judge Spero's "mediator's proposals," DPPs, in exchange for dismissal of the litigation with prejudice and certain releases, reached cash settlements of $35 million with Teikoku, $71 million with Watson, and $60 million with Endo ($40 million immediately with the balance of $20 million to be paid in the first quarter of 2019), for a total of $166 million. DPPs believe that the settlements represent an excellent result for DPPs. Kohn Decl. ¶¶ 1, 102.

Undersigned counsel prosecuted DPPs' claims on a wholly contingent basis, without any guarantee of success or compensation for time spent, or for reimbursement of expenses. Kohn Decl. ¶ 104. At the outset, DPPs knew that they would incur millions of dollars in out-of-pocket expenses, face obstacles at every stage of the litigation, and potentially would have to obtain (and defend on appeal) a jury verdict in DPPs' favor. From DPPs's investigation through February of 2018, counsel for DPPs expended 69,838.2 hours of uncompensated professional time. As compensation for their efforts, DPPs seek an award of attorneys' fees in the amount of 45,000,070.50, *i.e.*, 27.5% of the total settlement after deduction of unreimbursed litigation costs. As described more fully below and in the Kohn Declaration, the requested fee award is commensurate with the results achieved, the efforts of DPPs, the risk undertaken, and fees that have been awarded in this District and in other, similar cases that counsel for DPPs have participated in.

DPPs also seek $2,363,380.15 in unreimbursed out-of-pocket expenses, and service awards of $100,000 for each of the three Class representatives in recognition of their vital participation in this litigation.

II. HISTORY OF THE LITIGATION

DPPs are direct purchasers of Endo/Teikoku's brand-name prescription pharmaceutical product, Lidoderm. The facts alleged by DPPs are the subject of numerous opinions. *E.g.*, *United Food and Com. Workers Loc. 1776 & Participating Employers Health and Welfare Fund v. Teikoku Pharma USA, Inc.*, 74 F. Supp. 3d 1052, 1064 (N.D. Cal. 2014); *In re Lidoderm Antitrust Litig.*, 2017 WL 679367, at *2 (N.D. Cal. Feb. 21, 2017). In brief, DPPs alleged that Endo/Teikoku and Watson engaged in anticompetitive behavior in violation of the antitrust laws in connection with the settlement of patent litigation, causing DPPs to pay artificially inflated prices for Lidoderm and generic Lidoderm. Kohn Decl. ¶ 9. Defendants denied wrongdoing and asserted numerous defenses. A detailed history of this litigation is fully set forth in the Part I of the Kohn Declaration, ¶¶ 5-103 .

III. DPP COUNSEL'S LITIGATION EFFORTS

Counsel for DPPs are from some of the leading antitrust law firms in the country working for plaintiffs. DPPs have almost two decades of extensive experience prosecuting and trying Hatch-Waxman antitrust cases on behalf of the same core class of direct purchasers, and have been involved in most of the critical decisions in this evolving area of antitrust law, including the Supreme Court's landmark *Actavis* decision and subsequent decisions interpreting *Actavis*. Litigating any Hatch-Waxman antitrust case requires expertise in many discrete and highly technical areas, including, among other things, patent law, antitrust law, economics, pharmaceutical regulation, drug manufacturing, and the particular therapeutic class of the relevant drug. This is expertise that DPP counsel possessed. Kohn Decl. ¶¶ 32, 40, 49, 51, 56. Aside from the typical issues in Hatch-Waxman antitrust cases, this case involved two different patent litigations, up to seven patents (several of which ultimately were rendered essentially irrelevant based upon DPP counsel's efforts), a citizen petition, highly specific causation defenses associated with the unique pharmaceutical formulation and manufacturing process at issue, and an attack on all plaintiff counsel's continued prosecution of the case. Kohn Decl. ¶¶ 6, 19, 27, 45, 48, 56. DPPs took advantage of each firm's expertise to litigate this case in the most effective and efficient manner possible, without duplication of effort. A detailed description of counsel for DPPs' efforts is fully

set forth in the Kohn Declaration.

IV. ARGUMENT

A. The Percentage-of-the-Fund Method For Calculating Fees is Appropriate

Federal Rules of Civil Procedure 23(h) and 54(d) permit courts overseeing class actions to award reasonable attorneys' fees and costs. The Supreme Court has long recognized that a lawyer who recovers a "common fund" on behalf of a class is entitled to reasonable attorneys' fees and expenses from the fund. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003) (same). The rationale for the "common fund" doctrine is that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994).

In the Ninth Circuit, there are two methods that courts may use in order to award attorneys' fees: (1) the "percentage-of-fund" method, which bases the fee on a percentage of the total amount of a common settlement fund; or (2) the "lodestar" method, which multiplies the amount of attorney hours reasonably expended by reasonably hourly rates. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015). "[C]ourts have discretion to choose which calculation method they use," but "their discretion must be exercised so as to achieve a reasonable result." *Jones v. GN Netcom, Inc. (In re Bluetooth Headset Prods. Liab. Litig.)*, 654 F.3d 935, 942 (9th Cir. 2011). "The lodestar method is preferred when calculating statutory attorney fees, whereas the percentage-of-recovery approach is preferred when fees will be drawn from a common fund." *Jones v. San Diego Metro. Transit Sys.*, 2017 U.S. Dist. LEXIS 198284, *10 (S.D. Cal. Nov. 30, 2017) (citation and internal quotation marks omitted).[1] The Ninth Circuit instructs that when the percentage-of-the-fund method is used for calculation of fees, a lodestar cross-check can "confirm that a percentage of [the] recovery amount does not award

[1] Statutory attorneys' fees are not available here under the Clayton Act. Only if there is a judgment in favor of plaintiff are statutory shifted fees available. *E.g.*, *Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 255 (7th Cir. 1988).

counsel an exorbitant hourly rate." *Online DVD*, 779 F.3d at 949 (citation and internal quotation marks omitted).

When the percentage-of-recovery approach is used to determine an appropriate fee award, courts take into account all of the facts and circumstances of the particular case. *Beaver v. Tarsadia Hotels*, 2017 U.S. Dist. LEXIS 160214, at *31 (S.D. Cal. Sept. 28, 2017). When the requested percentage departs from the Ninth Circuit's 25% "benchmark," courts consider the following factors: "(1) the results achieved; (2) the risk undertaken by class counsel in pursuing the case; (3) whether the settlement generated benefits beyond a cash payment; (4) the market rate for similar representations; and (5) the nature of the representation, including whether it was executed on a contingency basis." *Id.* (internal citations and quotations omitted). *See also Goodwin v. Winn Mgmt. Grp. LLC*, 2018 U.S. Dist. LEXIS 29684, at *19 (E.D. Cal. Feb. 22, 2018) ("Reasons to vary the benchmark award may be found when counsel achieves exceptional results for the class, undertakes 'extremely risky' litigation, generates benefits for the class beyond simply the cash settlement fund, or handles the case on a contingency basis").

Here, DPPs's efforts have created a common fund of $166 million in cash for the benefit of the direct purchaser class. As detailed herein, using a "percentage-of-the-fund" method with a lodestar cross-check, counsel for DPPs' requested fee award of 27.5% is a justified departure from the benchmark, after consideration of all of the relevant factors.

B. DPPs Achieved an Exceptional Result for the Class

"The 'most critical factor" in determining appropriate attorneys' fee awards 'is the degree of success obtained.'" *Thomas v. Magnachip Semiconductor Corp.*, 2018 U.S. Dist. LEXIS 82801, at *11 (N.D. Cal. May 15, 2018) (quoting *Ensley v. Eckerhart*, 461 U.S. 424, 436 (1983)); *Moyle v. Liberty Mut. Ret. Ben. Plan*, 2018 U.S. Dist. LEXIS 34730, *27-28 (S.D. Cal. Mar. 2, 2018) ("The overall result and benefit to the class from the litigation is the most critical factor in granting a fee award") (internal quotation omitted).

Here, the amount of the proposed settlements — $166 million — is unquestionably substantial and will provide a significant guaranteed cash recovery to each member of the class.[2] This amount represents between 55% and 79% of DPPs' total aggregate damages.[3] This is the third highest drug or device antitrust class action in terms of percentage recovery of total damages, therefore. Kohn Decl. ¶ 1. As one court in this District has observed, "[f]ar lesser results (with 20% of recovery of damages or less) have justified upward departures from the 25% benchmark." *In re NCAA Ath. Grant-in-Aid Cap Antitrust Litig.*, 2017 U.S. Dist. LEXIS 201108, at *6 (N.D. Cal. Dec. 6, 2017). *See also Boyd v. Bank of Am. Corp.*, 2014 U.S. Dist. LEXIS 162880, at *24 (C.D. Cal. Nov. 18, 2014) (deeming recovery of 36% of damages "impressive"). Moreover, if the proposed settlements are finally approved, each class member's share will be calculated on a *pro rata* basis based on that class member's actual purchases, and all that class members need do in order to receive their recovery is fill out a simple claim form that will be directly mailed to them by the claims administrator. *See generally In re Capacitors Antitrust Litig.*, 2017 U.S. Dist. LEXIS 99616, at *28 (N.D. Cal. June 27, 2017) ("There is a real value to Class members of receiving a cash distribution from the Settlements in the near term"). This excellent recovery, which ensures that all class members are treated fairly and equally in that they are compensated directly in proportion to their actual purchases, and will receive their shares of the settlement fund promptly.

The exceptional result in this case is illustrated not just by the recovery or its rank among other cases, but also by the accomplishments of the DPPs throughout the litigation process, from initial investigation through trial preparation. Counsel for the DPPs were the first to discover, investigate, and file this case, relative to the government. Kohn Decl. ¶¶ 5-10. Counsel for the DPPs successfully defeated defendants' motion to dismiss, overcoming defendants' proposal to

[2] The results obtained by DPPs stand in stark contrast to those obtained by the Federal Trade Commission, whose investigation started nearly contemporaneously with DPPs' filings, but which has to date obtained only consent judgments with Endo and Teikoku merely to enjoin each from entering into similar agreements in the future, and no monetary recovery.

[3] If the jury found that Watson would have entered the market with generic Lidoderm in mid-December 2012, DPPs' damages were $300 million. If the jury found that Watson would have entered the market with generic Lidoderm in late March 2013, DPPs' damages were $211 million. Kohn Decl. ¶¶ 1 & n.1, 102.

depart from the shifting burdens of production and persuasion supplied by the structured rule of reason analysis, and obtaining a favorable interpretation of *Actavis*. *Id.* ¶¶ 12-15. Counsel for the DPPs also obtained an order requiring defendants to elect to waive the attorney-client privilege or be precluded from making multiple assertions at trial, one of the few successful such motions in any antitrust (or other) case. *Id.* ¶¶ 27-28. Counsel for DPPs obtained an order requiring Endo's general counsel to disclose her handwritten attorney notes of settlement discussions with Watson's counsel. *Id.* ¶ 24 (entry 21). Counsel for the DPPs also obtained partial affirmative summary judgment on the issue of the relevant antitrust product market, another rarity. *Id.* ¶¶ 60-61. And, together with other counsel, DPP counsel obtained a favorable standard for the jury to find that a patent would not have prevented generic competition in a reverse-payment settlement case. *Id.* ¶¶ 63-66. Plaintiffs resisted three (3) separate trips to the Ninth Circuit on *mandamus* and Rule 23(f) proceedings.

The exceptional result in this case can also be seen through the Court's periodic observations. The Court has repeatedly recognized the complexity of the issues in this case, the quality of the lawyering, the cooperation among counsel, and the work that counsel put into the case. This consistent recognition of the lawyering on both sides of the aisle underscores that the result that DPPs obtained was extraordinary. Defendants' counsel aggressively defended their clients' interests every step of the way. This necessarily required intense responsive efforts by plaintiffs' counsel to prepare their affirmative case and to fend off the intense defenses and other arguments that defense counsel pursued.

Specifically, in October of 2015, the Court observed, "I have been impressed by the way that you all have been working[.] This may be … completely opaque to my eyes, … but it seems to me that you're working very effectively and collaboratively over difficult issues in a way that is … at the higher level of professionalism and … I want to applaud you for that and encourage you to keep up that hard and good work. I know there is a ton that you are going through, and there are going to be places that will be hard, but … I appreciate the efforts that you're all making." ECF 290 at 10 (Oct. 6, 2015 Status Conference). The Court later acknowledged that discovery was extremely contentious, noting that "when you are not present and I am discussing this case, I usually complement the manner in which you are working through and pursuing the discovery on what is

often very contentious work, I know. So I appreciate it, and keep up the good work." ECF 374 at 25 (of Jan. 12, 2016 Status Conference). In February 2016, the Court noted: "Well, you continue to do an enormous amount of work on this matter. And I appreciate the quality of what gets presented to me. So, thank you for that, and I'll look forward to the timeliness, as well." ECF 385, at 22 (Feb. 2, 2016 Status Conference).

In dealing with several discovery disputes, the Court noted, "as always, I am impressed by the amount of work that you're doing, even though I was also impressed by the number of discovery disputes that you gave me for this status conference." ECF 416, at 45 (March 1, 2016 Status Conference). In April, 2016, the Court noted: "I appreciate the work that you're doing. And these issues are not simple to me, and I suspect they're not simple to you. So thank you for your good work in trying to work through the issues as much as you can before you bring them to me." ECF 440, at 44-45 (Apr. 5, 2016 Status Conference).

At the class certification hearing, the Court noted: "As has always been the case throughout this case, the arguments were excellent and I appreciate them[.]" ECF 644, at 118 (Nov. 29, 2016 argument). At summary judgment, the Court noted: "I am constantly impressed by the quality of the lawyering in this case and by the arguments of counsel." ECF 882, at 98 (Sept. 15, 2017 argument).

These recognized efforts of all counsel is yet another illustration of the exceptional results obtained in the face of highly competent and able defense counsel, and strongly supports the requested fee.

C. This Case was Extremely Risky and Complex

As numerous courts have recognized, antitrust cases typically present very significant risk. *See, e.g.*, *Edwards v. Nat'l Milk Producers Fed'n*, 2017 U.S. Dist. LEXIS 145217, *26 (N.D. Cal. June 26, 2017) ("[a]n antitrust class action is arguably the most complex action to prosecute. . . . The legal and factual issues involved are always numerous and uncertain in outcome.") (citing *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *10 (E.D. Pa. June 2, 2004)). "The history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or negligible damages, at trial or on appeal." *Rodriguez v. West Publ'g Corp.*, 2007 U.S. Dist. LEXIS 74849, *43 (C.D. Cal. Sept. 10, 2007). "Antitrust litigation in

general, and class action litigation in particular, is unpredictable." *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 475 (S.D.N.Y. 1998). "The 'best' case can be lost and the 'worst' case can be won, and juries may find liability but no damages. None of these risks should be underestimated." *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 127 (N.D. Ill. 1990). *See also In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 743 (E.D. Pa. 2013) ("Antitrust class actions are particularly complex to litigate and therefore quite expensive."); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2015 U.S. Dist. LEXIS 138479, at *148-49 (E.D.N.Y. Oct. 9, 2015) (price-fixing conspiracy required "complex expert analysis and review of mountains of documents").

This case exemplifies these observations about risk. The issues in this case were complex, and defendants asserted vigorous defenses to each and every aspect of DPPs' claims. At the time the litigation was filed in November 2013, the Supreme Court had just issued the *Actavis* decision, and district and appellate courts were tasked with its interpretation and implementation. In filing their motion to dismiss DPPs' complaint, defendants contended that the challenged settlement could not even be said to contain "reverse payments" under *Actavis* because Endo/Teikoku's provision of product and "no-AG" agreement were pro-competitive vehicles by which Watson could achieve early entry, rather than "payments for delay." At that point in time, two district courts had dismissed complaints alleging "no-AG" promises on the basis that a "no-AG" provision was not a cognizable reverse payment. Moreover, proving causation (*i.e.*, that Watson could and would have entered the market earlier with a less-expensive version of generic Lidoderm) also presented significant obstacles for DPPs because Watson contended that it could not and would have launched earlier than it had agreed to, in view of serious equipment, supply and FDA approval problems.

Another particularly complex aspect of the case concerned the underlying patent litigations. As the Court is well aware, a key patent at issue in this litigation was the '529 patent, which was the subject of a bench trial before Judge Sleet in the District of Delaware. The Court is also aware that the reverse payment agreement covered not just the '529 patent, but an additional 5 patents, referred to as the "Rolf" patents, which had previously been asserted by their former owner, LecTec, against Endo. The Rolf patents added a layer of complexity and effort to this case that likely is much less

apparent than the effort related to '529 patent, because defendants ultimately placed little reliance upon the Rolf patents in expert discovery, on summary judgment, and in the joint pretrial conference statement. However, for the bulk of this litigation, Endo and Watson contended that those patents in fact blocked earlier entry by Watson, erecting a causation barrier that DPPs had to overcome to prevail. As a result, DPPs' counsel expended significant effort analyzing and taking discovery on all five (5) of the Rolf patents. This involved satellite litigation to obtain materials from an unrelated patent case, which involved numerous third parties, and ultimately motions practice in the Eastern District of Texas. *See LecTec Corp., v. Chattem, Inc*., E.D. Tex. No. 5:08-cv-00130 (Robert W. Schroeder, U.S.D.J.). Kohn Decl. ¶¶ 18-19. While these difficult and often contentiously litigated issues were described to the Court in status reports (*see* ECF 272; ECF 306 at 4-5; ECF 352 at 4; ECF 365 at 5), DPP counsel were largely able to avoid burdening this Court with any disputes concerning the Rolf patents. And, ultimately, after DPPs engaged in significant discovery and analysis of the Rolf patents and submitted extensive expert analysis of these patents through Professor Adelman and Dr. Shah, defendants' experts barely mentioned them in their reports and did not even raise them in their summary judgment motion. Thus, while DPP counsel expended significant time on the five (5) Rolf patents throughout the course of this litigation, that effort, while appearing to have borne significant fruit in marginalizing those patents in this litigation, may not be readily apparent to the Court.

Defendants also vigorously challenged DPPs claims based on the pendency of a citizen petition Endo filed with the FDA in 2006. Defendants argued that, without the challenged reverse payments, settlement would not have been reached and a generic launch would have been indefinitely delayed due to the pending petition. In their motion to dismiss, defendants referenced the citizen petition no fewer than 25 times, and retained an expert to provide testimony at trial concerning its strength.

Finally, this case involved protracted disputes concerning monopoly power and relevant market. And of course, absent the settlement, DPPs would have had to obtain a jury verdict in DPPs' favor (and defend that verdict on an inevitable appeal to the Ninth Circuit), which also

involved significant risk. Counsel for DPPs have sometimes lost cases analogous to this one, recovering nothing.

Accordingly, this factor strongly supports the requested fee.

D. DPPs's Performance Generated Benefits Beyond the Settlement Fund

This factor examines whether counsel's performance generated some non-monetary or public policy benefit beyond the creation of the settlement fund, such as by clarifying a point of law or obtaining a ruling on a significant issue. *See, e.g.*, *Beaver*, 2017 U.S. Dist. LEXIS 160214 at *36-37 (class counsel clarified a statute of limitations issue and obtained a Ninth Circuit decision on other significant issues); *Vizcaino*, 290 F. 3d at 1049 (litigation caused defendant to change its employee benefit practices).

Here, counsel for DPPs unarguably evoked decisions by this Court that advanced the law in several respects. The Court's motion to dismiss opinion (ECF 117, reported at 74 F. Supp.3d 1052) was one of the first post-*Actavis* decisions to set forth the pleading standards for an antitrust case alleging a reverse payment, including by clarifying the allocation of the burdens of pleading, production and persuasion on the issue of procompetitive justifications. In the face of contrary decisions that it deemed "not persuasive," the Court ruled that a no-AG promise was a cognizable reverse payment. It ruled that the free-goods promise was a cognizable reverse payment, even though "Plaintiffs have not cited, and I have not found any case where brand product is used as payment for the delay in a post-*Actavis* case." ECF 117 at 16. The opinion was not just groundbreaking, but it was influential: Westlaw says the Court's motion to dismiss opinion has been cited by appellate and district courts 57 times thus far, and has been cited another 65 times in secondary sources (including several times in ¶ 2046 of Areeda & Hovenkamp).

Further, the Court's several at-issue waiver opinions (ECF 350, 536, 795) show that this case is one of the very few times any antitrust court has required defendants to elect to produce or be precluded. The Court's main opinion (ECF 536) clarified and advanced the law substantially, by exploring the largely untrodden territory between the relatively "easy" case of a privilege holder's explicitly asserting the substance of legal advice as a defense, and the far more complicated case of a privilege holder's making assertions that, while not containing the legal advice itself, are either

necessarily or in fact the product of that legal advice. In the course of its decision, the Court set forth limiting factors on the invasion of the privilege that will guide future courts faced with similar defense assertions.

Finally, the Court's summary judgment opinion (ECF 900, 978) made law in two respects: first, it is one of the few applying the summary judgment standard in a post-*Actavis* case, and blazed a trial as one of the first to decide how a jury should be instructed on the quantum of proof required to show relevant patents would not have prevented generic launch (the "some evidence" standard); second, it is one of few courts in the history of antitrust to rule in favor of plaintiff as a matter of law on the composition of the relevant antitrust product market.

Counsel for the DPPs were either principally (Kohn Decl. ¶¶ 14-15, 28, 60-61) or substantially (*id.* ¶¶ 63-64) responsible for the briefing that evoked these developments in the law. Accordingly, this factor strongly supports the requested fee.

E. The Requested Fee is Consistent With Awards in Similar Representations

This factor examines whether DPPs's requested fee is in line with awards for similar representations. *Moyle*, 2018 U.S. Dist. LEXIS at *26-27. The most comparable representations are other, similar delayed entry cases that DPPs have litigated, in which DPPs have routinely been awarded fees of one-third, as demonstrated by the following chart:

Case	Fee Award
In re K-Dur Antitrust Litig., No. 01-1652 (D.N.J. Oct. 5, 2017)	33⅓% of $60 million settlement
In re Provigil Antitrust Litig., No. 06-1797 (E.D. Pa. Oct. 15, 2015)	27.5% of $512 million settlement (partial settlement)[4]

[4] Though 33$^1/_3$% is a typical award granted in direct purchaser pharmaceutical antitrust cases, there are outliers. In the *Provigil* case, for example, the court granted a fee award of 27.5% in 2015. That settlement involved a $512 million cash payment — the highest cash payment ever awarded in a pharmaceutical antitrust case — and generated a $140.8 million fee that represented a multiplier of 4.12 on the total lodestar. *See King Drug Co. of Florence v. Cephalon, Inc.*, No. 06-cv-0197 (E.D. Pa. 2015), ECF No. 870. The court in *Aggrenox* (2017) similarly departed from the norm, granting a 20% fee award. But *Aggrenox*, settled for $146 million very early in the litigation, before any class certification or summary judgment briefing had been submitted and after only a few preliminary depositions had been taken. *See generally In re Aggrenox Antitrust Litig.*, No. 14-md-2516 (D.

Case	Fee Award
In re Prograf Antitrust Litig., No. 11-md-2242 (D. Mass. May 20, 2015)	33⅓% of $98 million settlement
In re Doryx Antitrust Litig., No. 12-3824 (E.D. Pa. Sept. 15, 2014)	33⅓% of $15 million settlement
In re Neurontin Antitrust Litig., No. 02-1830 (D.N.J. Aug. 6, 2014)	33⅓% of $191 million settlement
In re Skelaxin (Metaxalone) Antitrust Litig., No. 12-cv-83 (E.D. Tenn. June 30, 2014)	33⅓% of $73 million settlement
In re Flonase Antitrust Litig., No. 08-cv-3149 (E.D. Pa. June 14, 2013)	33⅓% of $150 million settlement
In re Wellbutrin XL Antitrust Litig., No. 08-cv-2431 (E.D. Pa. Nov. 7, 2012)	33⅓% of $37.5 million settlement
Rochester Drug Co-Operative, Inc. v. Braintree Labs., Inc., No. 07-142 (D. Del. May 31, 2012)	33⅓% of $17.25 million settlement
In re DDAVP Antitrust Litig., No. 05-2237 (S.D.N.Y. Nov. 28, 2011)	33⅓% of $20.25 million settlement
In re Wellbutrin SR Antitrust Litig., No. 04-5525 (E.D. Pa. Nov. 21, 2011)	33⅓% of $49 million settlement
Meijer, Inc. v. Abbott Labs., No. 07-5985 CW (N.D. Cal. Aug. 11, 2011)	33⅓% of $52 million settlement
In re Nifedipine Antitrust Litig., No. 03-mc-223-RJL (D.D.C. Jan. 31, 2011)	33⅓% of $35 million settlement
In re Oxycontin Antitrust Litig., No. 04-md-1603-SHS (S.D.N.Y. Jan. 25, 2011)	33⅓% of $16 million settlement
In re Tricor Direct Purchaser Antitrust Litig., No. 05-cv-340 (D. Del. April 23, 2009)	33⅓% of $250 million settlement
In re Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013 (D.N.J. Nov. 9, 2005)	33⅓% of $75 million settlement

Conn.). In contrast, the fee amount sought here is clearly proportionate to the recovery obtained in light of the late stage of the litigation.

Case	Fee Award
In re Terazosin Hydrochloride Antitrust Litig., No. 99-MDL-1317, 2005 U.S. Dist. LEXIS 43082 (S.D. Fla. Apr. 19, 2005)	33⅓% of $74 million settlement
In re Relafen Antitrust Litig., No. 01-12239, 2004 U.S. Dist. LEXIS 28801 (D. Mass. April 9, 2004)	33⅓% of $175 million settlement
In re Buspirone Antitrust Litig., No. 01-CV-7951, 2003 U.S. Dist. LEXIS 26538 (S.D.N.Y. April 11, 2003)	33⅓% of $220 million settlement
In re Cardizem CD Antitrust Litig., MDL No. 1278 (E.D. Mich. Nov. 26, 2002)	30% of $110 million settlement

Further, "[d]istrict courts in [the Ninth] Circuit have routinely awarded fees of one-third of the common fund or higher after considering the particular facts and circumstances of each case." *Id.* (listing cases awarding one-third of a common fund and noting that "[i]n most common fund cases, the award exceeds [the] benchmark") (internal quotation omitted). *Accord Beaver*, 2017 U.S. Dist. LEXIS 160214, at *31-32 (observing that "[t]he Ninth Circuit has [] upheld awards of one-third of a common fund"). And notably, an award of 27.5% here would not trigger any concerns of "windfall profits," because unlike some cases "in which mere disclosure of a government investigation all but guarantees the creation of a megafund, notwithstanding what counsel does or does not do," *In re NCAA*, 2017 U.S. Dist. LEXIS 201108, at *14-15, here the opposite is true: the DPPs were years ahead of the FTC and state Attorneys General, and it is they who wanted to join our litigation. Kohn Decl. ¶¶ 5-8, 22 n.4. The settlements here were achieved directly because of DPPs's efforts in investigating, filing and litigating this case all the way to trial, as discussed herein.

Accordingly, this factor strongly supports the requested fee.

F. DPPs Expended Significant Time and Effort in Litigating This Case

DPPs expended almost 70,000 hours in investigating and prosecuting this case over the course of eight (8) years, starting from the initial investigation that began in 2011 up through February of 2018. As detailed fully in the Kohn Declaration, counsel for DPPs, *inter alia*: (a) successfully defeated Defendants' motion to dismiss (Kohn Decl. ¶ 15); (b) reviewed and analyzed

more than 3.6 million pages of documents produced by Defendants and third-parties (*id.* ¶ 31); (c) served as lead questioner at 40 depositions of defendants' fact and expert witnesses (*id.* ¶¶ 38, 50); (e) consulted with and retained seven (7) expert witnesses, and defended those experts at deposition (*id*. ¶¶ 44, 50); (f) engaged in substantial motion practice on various issues (*id.* ¶¶ 24-30); (g) obtained certification of a direct purchaser class (*id.* ¶¶ 55-57); (h) obtained partial summary judgment on two issues (concerted action and market power) and defeated defendants' motions for summary judgment (*id.* ¶¶ 59-66); (i) engaged in intensive trial preparation (*id.* ¶¶ 71-75); and (j) prepared for and participated in multiple mediation sessions, during which DPPs engaged in hard-fought settlement negotiations and ultimately agreed to the three proposed settlements with defendants (*id.* ¶¶ 95-103). Consequently, DPPs expended a significant amount of time and effort over an eight (8) year period in litigating this case. *See In re NCAA*, 2017 U.S. Dist. LEXIS 201108, at *18 (where counsel expended over $11 million in professional time and over $3 million in expenses, such represented a significant "commitment of time, personnel and money to the classes"); *In re BioScrip, Inc. Sec. Litig.*, 273 F. Supp. 3d 474, 498 (S.D.N.Y. 2017) (litigation was "a hard-fought, complicated case, requiring extensive work on the part of Lead Counsel"); *Velez v. Novartis Pharms. Corp.*, 2010 U.S. Dist. LEXIS 125945, at *54 (S.D.N.Y. Nov. 30, 2010) ("Class Counsel devoted 36,996.77 hours from 68 attorneys and staff members to the successful prosecution of this matter").

Moreover, DPPs will be expending a significant number of hours in connection with securing approval of and administering the settlements without any compensation. *See In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 U.S. Dist. LEXIS 24951, *305 (N.D. Cal. Jan. 26, 2016) (acknowledging that "Lead Counsel and a handful of other firms have and will invest many hundreds of uncompensated hours . . . in obtaining approval of the settlement, administering the distribution of funds, dealing with objectors, and other post-settlement tasks"); *Garcia v. Pancho Villa's of Huntington Vill., Inc.*, 2012 U.S. Dist. LEXIS 144446, at *22-23 (E.D.N.Y. Oct. 4, 2012) (acknowledging that class counsel would perform more work on behalf of the class after final approval, including "assisting with the administration of the settlement, and answering Class Member questions, which further supports their fee request"); *Aros v. United Rentals, Inc.*, 2012 U.S. Dist.

LEXIS 104429, at *17 (D. Conn. July 26, 2012) (acknowledging that class counsel would continue to perform work on behalf of the class during the settlement approval process and the disbursement phase).

Finally, DPPs have spent over $2.3 million of their own money in necessary out-of-pocket litigation costs, without any resort to third-party funding. This amount is composed of ureimmbursed disbursements from a litigation fund of over $2 million and law firm-incurred costs of over $300,000. Kohn Decl. ¶ 109. This significant financial burden has been made heavier by the fact that some of DPPs's resources have been diverted from other work while this action was litigated.

Accordingly, this factor strongly supports the requested fee.

G. DPPs Litigated This Case on a Wholly Contingent Basis

"Courts have long recognized that the public interest is served by rewarding attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk that they might be paid nothing at all for their work." *Ching v. Siemens Indus.*, 2014 U.S. Dist. LEXIS 89002, at *25 (N.D. Cal. June 27, 2014). *See also Shelby v. Two Jinns, Inc.*, 2017 U.S. Dist. LEXIS 206930, *28-29 (C.D. Cal. Aug. 2, 2017) (noting "when cases are taken on a contingency basis and litigation is protracted, the risk of non-payment warrants a significant fee award.") (citing *In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555, at *70 (C.D. Cal. June 10, 2005)); *Beaver v. Tarsadia Hotels*, 2017 U.S. Dist. LEXIS 160214, *32 (S.D. Cal. Sept. 28, 2017) ("From the outset, Class Counsel litigated this case in the face of extraordinary risk of non-payment by taking the case on a pure contingency basis and risked receiving zero compensation for their years of work and out-of-pocket costs"). Because contingent representation enables a client to pay only for results achieved, the law recognizes "both sides of the bargain — a significant upside fee for successful contingent representations." *In re NCAA*, 2017 U.S Dist. LEXIS 201108, at *10.

Here, DPPs litigated this case purely on a contingency fee basis — with no up-front retainer fees or allowance for expenses, nor any resort to third-party funding. Consequently, DPPs faced the very real risk that they might ultimately receive nothing for their hard work and long hours, as well as the millions of dollars in cash outlays. *Id.* at *10-11 ("[C]ounsel for the classes have spent more than three years investigating and litigating this case, without receiving any compensation to do so.

Such burdens are significant, even for law firms of the stature of plaintiffs' counsel"). *See also Moyle*, 2018 U.S. Dist. LEXIS 34730, at *31 ("Thus far, Class Counsel have not received any compensation for more than seven years of work on this case"). DPP counsel have lost analogous cases.

Counsel for DPPs' willingness to pursue Hatch-Waxman pharmaceutical cases on a contingent basis in the face of such risk advances the important public policy goal of incentivizing private plaintiffs to enforce this nation's antitrust laws. As the Supreme Court has held, "private suits are an important element of the Nation's antitrust enforcement effort." *Am. Soc'y of Mech. Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 572 n.10 (1982). As such, "it is important to encourage top-tier litigators to pursue challenging antitrust cases…[because] [o]ur antitrust laws address issues that go to the heart of our economy." *In re Credit Default Swaps Antitrust Litig.*, 2016 U.S. Dist. LEXIS 54587, at *55 (S.D.N.Y. Apr. 25, 2016). Adequate compensation ensures that competent counsel are attracted to such work and not deterred by bearing the risk (and sometimes the reality) of loss. *See Fischel v. Equitable Life Assur. Soc'y of U.S.*, 307 F.3d 997, 1008 (9th Cir. 2002) (fee awards provide "the necessary incentive for attorneys to bring actions to protect individual rights and to enforce public policies") (internal citations and quotations omitted).

Accordingly, this factor strongly supports the requested fee.

H. No Class Members Have Objected to the Requested Fees

The existence, or absence, of objections to a requested fee is a factor in determining an appropriate fee award. Although this brief is, by design, being filed and made available to Class members prior to the running of the deadline for objections, the Notice advised class members that DPP counsel would seek a fee of up to one-third of the settlement fund after the deduction of litigation expenses. No objections to the requested fee have been received as of the date of this filing. *See Acosta v. Frito-Lay, Inc.*, 2018 U.S. Dist. LEXIS 75998, at *35 (N.D. Cal. May 4, 2018) (lack of any objections supported fee request); *Boyd*, 2014 U.S. Dist. LEXIS 162880, at *25 ("The lack of any opposition, and the very high opt-in rate of 95%, weighs in favor of an upward modification of the benchmark rate"). If any objections are received, counsel for DPPs will report back to the Court in the brief in support of final settlement approval.

V. A LODESTAR CROSS-CHECK CONFIRMS THE REASONABLENESS OF THE REQUESTED FEE

In assessing the reasonableness of a fee award, a court utilizing the percentage-of-recovery method will typically conduct a lodestar cross-check, which measures counsel's actual time investment in the litigation. *See Vizcaino*, 290 F.3d at 1050; *Bond v. Ferguson Enters.*, 2011 U.S. Dist. LEXIS 70390, *29 (E.D. Cal. June 30, 2011) (finding that "[c]alculation of the lodestar amount may be used as a cross-check to assess the reasonableness of the percentage award").

The lodestar is calculated by multiplying the number of hours counsel expended on the litigation by "a reasonable hourly rate for the region and for the experience of the lawyer." *Boyd*, 2014 U.S. Dist. LEXIS 162880, at *29 (internal quotation omitted). As a first step, a court determines whether counsel's hourly rates are reasonable considering their experience, skill and reputation. *Id.* at *29-30. As a second step, a court determines whether the number of hours worked on the case is reasonable. *Id.* at *30. In performing the cross-check, "a court need not exhaustively catalogue and review counsel's hours, but can instead focus on the general question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys." *Moyle*, 2018 U.S. Dist. LEXIS 34730, at *32-33 (internal quotation omitted).

Here, DPPs's requested percentage-of-recovery fee award is reasonable when analyzed in light of a lodestar crosscheck. *See* Kohn Decl. ¶¶ 105 (lodestar). First, DPPs's rates are well within the range that have been approved as reasonable by courts in this judicial district. DPPs' counsel's rates can be found in Appendix A to each declaration of the firms representing DPPs. *See* Kohn Decl. ¶ 106; *id.* Exs. A-K. *See, e.g.*, *In re NCAA*, 2017 U.S. Dist. LEXIS 201108, at *20-21 (reputable survey of 2015 rates for California attorneys showed range of $200 to $1,080); *In re Animation Workers Antitrust Litig.*, 2016 U.S. Dist. LEXIS 156720, at *20 (N.D. Cal. Nov. 11, 2016) (hourly rates ranging from $275 to $1,200 were "fair, reasonable, and market-based, particularly for the 'relevant community' in which counsel work"). Counsel for DPPs all have nearly two decades of experience litigating complex drug antitrust cases; no other group of lawyers in the country shares the same level of expertise and experience in this highly specialized area. Second, the number of hours DPP counsel worked on this case was reasonable. As detailed in the Kohn Declaration, DPP counsel aggressively litigated this case through the eve of trial. *See Mathein*

v. Pier 1 Imps. (U.S.), Inc., 2018 U.S. Dist. LEXIS 71386, at *30 (E.D. Cal. Apr. 26, 2018) ("[C]ounsels' declarations are sufficient to establish the number of attorney hours worked in this matter"). That the proposed settlements only occurred at this stage of the litigation, despite prior unsuccessful attempts at settlement, demonstrates that it was the hard work and long hours put in by DPPs that positioned the case for the excellent results obtained through settlement.

The requested fee award of 27.5% would equate to a lodestar multiplier of 1.05. Such a multiplier falls in the low range of lodestar multipliers routinely awarded by courts in this Circuit, and thus could not be said to result in "windfall" profits to DPPs. *See, e.g., Vizcaino*, 290 F.3d at 1051 n.6 (approving multiplier of 3.65); *In re NCAA*, 2017 U.S. Dist. LEXIS 201108 at *3 (approving multiplier of 3.66 and noting that "multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied"); *id.* at *16 (noting that "a 3.66 multiplier was well within the range of multipliers awarded in similar cases"); *Parkinson v. Hyundai Motor Am.*, 796 F. Supp.2d 1160, 1170 (C.D. Cal. 2010) ("Where appropriate, multipliers may range from 1.2 to 4 or even higher."); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 298-99 (N.D. Cal. 1995) (holding that a multiplier of 3.6 was "well within the acceptable range for fee awards in complicated class action litigation" and that "[m]ultipliers in the 3-4 range are common"); *Gutierrez v. Wells Fargo Bank, N.A.*, 2015 U.S. Dist. LEXIS 67298, at *25 (N.D. Cal. May 21, 2015) (awarding $18.5 million in fees, noting that "this order allows a multiplier of 5.5 mainly on account of the fine results achieved on behalf of the class, the risk of non-payment they accepted, the superior quality of their efforts, and the delay in payment").

Accordingly, the lodestar cross-check supports the requested fee.

VI. THE ADVANCED EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED

Counsel who have created a common fund for the benefit of a class are entitled to be reimbursed for out-of-pocket expenses reasonably incurred in creating the fund. *See Vincent v. Hughes Air W.*, 557 F.2d 759, 769 (9th Cir. 1977); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1037, 1048 (N.D. Cal. 2008) ("Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingent matters."). As the Ninth Circuit has aptly recognized,

in class actions litigated on a wholly contingent basis, "litigation expenses make the entire action possible." *Online DVD*, 779 F.3d at 953.

Here, DPPs's unreimbursed expenses were reasonably incurred and necessary for the litigation of the case. *See* Kohn Decl. ¶¶ 109-113. These expenses were advanced by DPPs (with no recourse to third-party funding), interest free, and with no assurance that they would ever be reimbursed. They are described in detail in the Kohn Declaration. Kohn Decl. ¶ 109. The largest expenditure was for expert witnesses. Other notable expenses include the creation and maintenance of a electronic document database, shared among the co-plaintiffs, which hosted the voluminous discovery produced in this litigation (which amounted to more than 3.6 million pages), and trial-related vendors.

Accordingly, DPPs respectfully request that the Court approve reimbursement of counsel for DPPs' expenses in full, before calculating the percentage award.

VII. SERVICE AWARDS FOR THE CLASS REPRESENTATIVES ARE APPROPRIATE AND REASONABLE

The purpose of service awards is to reimburse named plaintiffs, who "take on a variety of risks and tasks when they commence representative actions[.]" *In re NCAA*, 2017 U.S. Dist. LEXIS 201108 at *25-26. "[Service] awards are fairly typical in class action cases" as they are intended "to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009). Service awards are determined based on "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefited from those actions . . . [and] the amount of time and effort the plaintiff extended in pursuing the litigation." *Staton*, 327 F.3d at 977.

Here, counsel for DPPs requests that the Court approve service awards to the three Class representatives (Betances, RDC and ASC) in the amount of $100,000 each, in recognition of their commitment to, and participation in, this litigation.[5] The Class representatives each actively pursued the class's interests by filing suit as a named plaintiff on behalf of all direct purchasers and

[5] The total amount equals just 0.18% (0.0018) of the $166 million settlement fund.

undertaking the responsibilities attendant upon them as representative plaintiff. In particular, the Class representatives undertook significant burden in this case in responding to Defendants' extensive discovery and data requests, which required the class representatives to perform repeated search and production and spend significant time preparing and sitting for depositions. *See* Exs. 1-3 hereto (declarations of class representatives). Moreover, courts have recognized the risks inherent in filing suit as a named plaintiff on behalf of a class against an entity with which the named plaintiffs transacts business. *See In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 U.S. Dist. LEXIS 5561, *68 (N.D. Cal. Jan. 13, 2016) ("A Class Representative could reasonably have been concerned about a backlash from Defendants, reducing that Representative's business opportunities with respect to products manufactured, sold, or otherwise controlled by Defendants."). Here, that risk is acute inasmuch as the class members are direct purchasers of defendants' products, and thus transact business with defendants on a regular basis. Finally, the amount of the service awards requested here is in line with both service awards in this district, and awards made to named representatives in other Hatch-Waxman antitrust cases. *See, e.g., In re Asacol Antitrust Litig.*, No. 15-cv-12730-DJC, ECF No. 648 at ¶ 13 (D. Mass. Dec. 7, 2017) (awarding $100,000 to each of four class representatives); *In re K-Dur Antitrust Litig.*, Civil Action No. 01-1652, ECF No. 1057 at ¶ 12 (D.N.J. Oct. 5, 2017) (awarding $100,000 to class representative); *In re Provigil Antitrust Litig.*, Civil Action No. 2:06-cv-01797 (MSG), ECF No. 870 at ¶ 30 (E.D. Pa. Oct. 15, 2015) (awarding $100,000 to each of four class representatives and $50,000 to each of two other class representatives); *In re Neurontin Antitrust Litig.*, Civil Action No. 02-1830 (FSH), ECF No. 114 at ¶ 31 (D.N.J. Aug. 6, 2014) (awarding $100,000 to each of two class representatives).

For all of the foregoing reasons, DPPs respectfully request that the Court approve these appropriate and reasonable service awards to the Class representatives.

VIII. CONCLUSION

For the foregoing reasons, DPPs respectfully request that this Court enter an Order awarding DPPs fees in the amount of $45,000,070.46, *i.e.*, 27.5% of $163,636,619.85, which represents the $166 million settlement less litigation expenses of $2,363,380.15. DPPs also respectfully request reimbursement of those litigation expenses of $2,363,380.15. DPPs also respectfully request that

this Court approve incentive awards of $100,000 for each of the class representatives for their efforts on behalf of the Class in the prosecution of this action. A proposed order to this effect will accompany DPPs' motion for final settlement approval.

DATED: June 11, 2018

Respectfully submitted,

Peter Kohn
Joseph T. Lukens
FARUQI & FARUQI LLP
101 Greenwood Avenue, Suite 600
Jenkintown, PA 19046
Telephone: (215) 277-5770
Facsimile: (215) 277-5771
Email: pkohn@faruqilaw.com

/s/ Bruce E. Gerstein
Bruce E. Gerstein
Noah Silverman
Ephraim R. Gerstein
GARWIN GERSTEIN & FISHER LLP
88 Pine Street, 10th Floor
New York, NY 10005
Telephone: (212) 398-0055
Facsimile: (212) 764-6620
Email: bgerstein@garwingerstein.com
Email: nsilverman@garwingerstein.com
Email: egerstein@garwingerstein.com

/s/ *Thomas M. Sobol*
Thomas M. Sobol
David S. Nalven
Gregory T. Arnold
HAGENS BERMAN SOBOL SHAPIRO LLP
55 Cambridge Parkway, Suite 301
Cambridge, MA 02142
Telephone: (617) 482-3700
Email: tom@hbsslaw.com
Email: davidn@hbsslaw.com
Email: grega@hbsslaw.com

Co-Lead Counsel for the
Direct Purchaser Class

TAB 23A

JKG

713

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARCHBANKS TRUCK SERVICE, INC., *et al.*, on behalf of themselves and all others similarly situated, **Plaintiffs,** **v.** **COMDATA NETWORK, INC., *et al.*,** **Defendants.**	**Civil Action No. 07-1078-JKG** **Consolidated Case**

FILED
JUL 14 2014
MICHAEL E. KUNZ, Clerk
By ____ Dep. Clerk

ORDER FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND PAYMENT OF SERVICE AWARDS TO THE CLASS REPRESENTATIVES

WHEREAS, the Court, having considered: (a) Plaintiffs' Motion for Final Settlement Approval and supporting documents; (b) the Plan of Allocation and Distribution; (c) the Definitive Master Settlement Agreement, dated March 3, 2014, between and among the Plaintiffs, Plaintiffs' Class Counsel, and all Defendants (the "Settlement Agreement"); (d) the Court's March 17, 2014 Preliminary Approval Order (Dkt. No. 705); (e) Plaintiffs' Unopposed Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Payment of Service Awards to the Class Representatives and supporting memorandum and exhibits; and, (f) any supplemental submissions in support thereof, having held a Fairness Hearing on July 14, 2014, and having considered all of the submissions and arguments with respect to the Settlement,[1] and otherwise being fully informed, and good cause appearing therefore;

7-14-14 mailed + e-mailed

[1] Certain capitalized terms used in this Order are defined in Section I of the Settlement Agreement.

IT IS HEREBY ORDERED AS FOLLOWS:

1. The Court has entered a separate order finally approving the Settlement Agreement, finding, among other things, that the Settlement Agreement was the result of extensive *bona fide* arm's-length good faith negotiations, is in all respects fair, reasonable, and adequate, is in the best interest of the Settlement Class, is within a range that responsible and experienced attorneys could accept considering all relevant risks and factors, and is in full compliance with all applicable requirements of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clause), the Class Action Fairness Act, and in light of the factors set forth in *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975).

2. Class Counsel have moved for an award of attorneys' fees and reimbursement of expenses from the Aggregate Settlement Fund. Pursuant to Rules 23(h)(3) and 54(d) of the Federal Rules of Civil Procedure, and pursuant to the factors for assessing the reasonableness of a class action fee request as set forth in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000), and *In re Prudential Ins. Co. of American Sales Practices Litig.*, 148 F.3d 283, 340 (3d Cir. 1998), this Court makes the following findings of fact and conclusions of law:

(a) the Settlement confers an immediate monetary benefit to the Settlement Class of $130 million that is substantial, both in absolute terms, and when assessed in light of the risks of establishing liability and damages in this case;

(b) the Settlement also contains valuable prospective relief in the form of, among other things, (i) meaningful and enforceable commitments by Comdata to modify or not to enforce portions of Comdata's merchant services agreements with Settlement Class Members and the Major Chains that Plaintiffs had challenged in this case as being anticompetitive, and (ii) an agreement by Comdata to engage in a good faith negotiations relating to, *inter alia*, merchant

transaction fees with certain truck stop Buying Groups that are, collectively, composed of hundreds of members of the Settlement Class;

(c) Settlement Class Members were advised of Class Counsel's intention to seek attorneys' fees of one-third of only the cash value of the Settlement Fund, litigation costs of up to $7.5 million and service awards totaling $315,000 ($150,000 for Marchbanks Truck Service, Inc. d/b/a Bear Mountain Travel Stop ("Marchbanks Truck Service"), $75,000 for Gerald F. Krachey d/b/a Krachey's BP South ("Krachey"), $75,000 for Walt Whitman Truck Stop, Inc. ("Walt Whitman"), and $15,000 for Mahwah Fuel Stop ("Mahwah")) in the Long Form Notice, approved by this Court and mailed by the Settlement Administrator to Settlement Class members by the April 14, 2014 deadline established by the Court. Additionally, Settlement Class Members were informed about the fee, costs and service award requests through the Court approved Publication Notice, which was published in the May 2014 issue of NACS (National Association for Convenience and Fuel Retailing) Magazine and NATSO's e-newsletters for the weeks of April 14 through May 5, 2014, and which publications directed Settlement Class Members to the settlement website (www.truckstopantitrustsettlement.com) established by the Settlement Administrator that was launched on April 14, 2014. The settlement website contains copies of, *inter alia*, the Settlement Agreement and the Long Form Notice, both of which notify Settlement Class Members of the fee, costs, and service award requests.

(d) Class Counsel filed a motion for an award of attorneys' fees in the amount of one third of the Aggregate Settlement Fund ($43,333,333) plus interest earned on that amount since the Aggregate Settlement Fund was created, as well as reimbursement of reasonable costs and expenses incurred in the prosecution of this action of $6,696,856.98. Plaintiffs' motion papers have been publicly available since May 5, 2014, on the docket of this

action and on the settlement website;

(e) Representatives of four major Independent Truck Stop Buying Groups, collectively representing hundreds of Settlement Class Members, submitted declarations expressing affirmative support for the fee request, the request for reimbursement of expenses, and the requested service awards;

(f) Class Counsel have effectively and efficiently prosecuted this difficult and complex action on behalf of the members of the Settlement Class for seven years, with no guarantee they would be compensated for their time or reimbursed for their out-of-pocket costs;

(g) Class Counsel undertook numerous and significant risks of nonpayment in connection with the prosecution of this action;

(h) Class Counsel have reasonably expended 85,907.47 hours prosecuting this complex, contingent litigation over the past seven years, resulting in a total lodestar of $49,785.073.74, and reasonably incurred $6,696,856.98 in out-of-pocket expenses, in prosecuting this action, with no guarantee of recovery;

(i) the Settlement achieved for the benefit of the Settlement Class was obtained as a direct result of Class Counsel's skillful advocacy;

(j) the Settlement was reached following negotiations held in good-faith and in the absence of collusion;

(k) the "percentage-of-the-fund" method is the proper method for calculating attorneys' fees in common fund class actions in this Circuit (*see, e.g., In re Rite Aid Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005));

(l) fee awards of one-third of the settlement amount are commonly awarded in this Circuit, while here Class Counsel seek only a fee of one-third of the cash value of the

Settlement, even though the Settlement has valuable prospective relief;

(m) as detailed in Class Counsel's declarations, a fee of one-third of the cash competent of the Settlement would equate to less than Class Counsel's total lodestar and thus result in a multiplier below 1, and therefore no risk premium whatsoever;

(n) Plaintiffs' expert economist, Dr. Hal J. Singer, submitted a Declaration to this Court dated March 4, 2014, detailing an economic analysis of the portion of the prospective relief relating to the enforceable changes in Comdata's merchant services agreements, and valuing that relief at between $260 million and $491 million. Plaintiffs' expert economist has, therefore, opined that the total value of the Settlement to the Settlement Class is between $390 million and $621 million. Thus, if Dr. Singer is correct, the fee Class Counsel is seeking is, at most, slightly more than 11% of the total value of the Settlement;

(o) in light of the factors and findings described above, the requested fee award is within the applicable range of reasonable percentage of the fund awards.

3. Accordingly, Class Counsel are hereby awarded attorneys' fees to be paid from the Aggregate Settlement Fund in the amount of $43,333,333 plus interest in the amount of $19,674, which represents the interest earned on that amount since the Aggregate Settlement Fund was created. The Court finds this award to be fair and reasonable.

4. Further Class Counsel are hereby awarded $6,696,856.98 out of the Aggregate Settlement Fund to reimburse them for the expenses they incurred in the prosecution of this lawsuit, which expenses the Court finds to be fair and reasonably incurred to achieve the benefits to the Settlement Class obtained in the Settlement. The awarded fees and expenses shall be paid to Class Counsel from the Aggregate Settlement Fund in accordance with the terms of the Settlement Agreement.

5. Plaintiffs' Co-Lead Class Counsel[2] shall allocate the fees and expenses among all of Class Counsel in a manner that Plaintiffs' Co-Lead Class Counsel in good faith believes reflects the contributions of each firm working for Plaintiffs and the Settlement Class in the prosecution and settlement of the claims against Defendants in this action.

6. Plaintiffs have requested that the Court approve Class Representatives receiving service awards from the Aggregate Settlement Fund of $150,000 for Marchbanks Truck Service, $75,000 Krachey, $75,000 for Walt Whitman, and $15,000 for Mahwah. In the Third Circuit, service awards may be paid to class representatives to reward efforts that benefit the class. This Court makes the following findings of fact and conclusions of law regarding each of the Class Representatives' service to the Settlement Class in this litigation:

a. Marchbanks Truck Service: (a) through its owner, William Patrick "Pat" Marchbanks, was one of the driving forces behind this lawsuit being filed and prosecuted; (b) submitted its employees, including Mr. Marchbanks twice, to three depositions, requiring many hours of preparation and travel time; (c) dedicated hundreds of hours, mostly by Mr. Marchbanks (i) assisting Class Counsel in the investigation and development of an initial complaint, (ii) overseeing Class Counsel's prosecution of this litigation and settlement negotiations, (iii) traveling to and attending multiple Court hearings, settlement conferences, and mediations, (iv) responding to numerous document requests and interrogatories, (v) producing documents, and (vi) interfacing with Settlement Class members and representatives of the Buying Groups.

b. Krachey: (a) submitted its employee, Douglas Krachey, to two depositions, requiring several hours of preparation and travel time; (b) dedicated numerous hours (i) assisting Class Counsel in the investigation and development of an initial complaint, (ii)

[2] Plaintiffs' Co-Lead Class Counsel are Berger & Montague, P.C., Lieff, Cabraser, Heimann & Bernstein, LLP and Quinn Emanuel Urquhart & Sullivan, LLP. *See* Preliminary Approval Order at ¶ 7 (Dkt. 705).

overseeing Class Counsel's prosecution of this litigation and settlement negotiations, (iii) responding to numerous document requests and interrogatories, and (iv) producing documents.

c. Walt Whitman: (a) diligently represented the interest of the Settlement Class despite having been out of business since before the first complaint was filed and thus having its damages capped at pre-complaint overcharges; (b) submitted David Silverman to two depositions—requiring several hours of preparation and travel time—even though Walt Whitman did not operate as a truck stop between the two depositions; (c) dedicated time (i) assisting Class Counsel in the investigation and development of an initial complaint, (ii) overseeing Class Counsel's prosecution of this litigation and settlement negotiations, (iii) responding to numerous document requests and interrogatories, and (iv) producing documents.

d. Mahwah: (a) submitted an employee for a deposition, requiring several hours of preparation and travel time; (b) dedicated numerous hours (i) assisting Class Counsel in the investigation and development of an initial complaint, (ii) overseeing Class Counsel's prosecution of this litigation and settlement negotiations, (iii) responding to numerous document requests and interrogatories, and (iv) producing documents.

7. In recognition of the above facts regarding the service of the Class Representatives to the Settlement Class, the Class Representatives are hereby awarded service awards in the following amounts as requested by Class Counsel: $150,000 for Marchbanks Truck Service, Inc. d/b/a Bear Mountain Travel Stop, $75,000 for Gerald F. Krachey d/b/a Krachey's BP South, $75,000 for Walt Whitman Truck Stop, Inc., and $15,000 for Mahwah Fuel Stop out of the Aggregate Settlement Fund. The Court finds these awards to be fair and reasonable. These awards are in addition to whatever monetary amounts the Class Representatives may be receiving from the Aggregate Settlement Fund pursuant to the Plan of Distribution.

SO ORDERED this the 14th day of July, 2014.

James Knoll Gardner

Hon. James Knoll Gardner
U.S. District Court
Eastern District of Pennsylvania

TAB 23B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARCHBANKS TRUCK SERVICE, INC., *et al*., on behalf of themselves and all others similarly situated, **Plaintiffs,** **v.** **COMDATA NETWORK, INC., *et al*.,** **Defendants.**	**Civil Action No. 07-1078-JKG** **Consolidated Case**

MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND PAYMENT OF SERVICE AWARDS TO THE CLASS REPRESENTATIVES

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I. INTRODUCTION[1]

After more than seven years of vigorous litigation that was highly contested by Defendants and their ten-highly regarded law firms, Co-Lead Counsel for the Settlement Class ("Plaintiffs' Co-Lead Class Counsel")[2] achieved for the Settlement Class an extraordinary settlement, including: (a) $130 million in cash; (b) prospective relief—in the form of, among other things, meaningful and enforceable commitments by Comdata to modify or not to enforce those portions of Comdata's merchant services agreements that Plaintiffs had challenged in this case as being anticompetitive—that an expert economist has determined to be worth an additional $260 million to $491 million (bringing the total value of the settlement to between $390 and $621 million); and (c) an agreement by Comdata to engage in good faith negotiations relating to, *inter alia*, merchant transaction fees with certain Buying Groups of Independent Truck Stops that are, collectively, composed of hundreds of members of the Settlement Class (collectively, the "Settlement"). *See* Cramer Co-Lead Decl., ¶¶ 7-10, 27.

Plaintiffs' Co-Lead Class Counsel, who handled this matter on a purely contingent basis, and thus to date have received no payment for their services or reimbursement of the millions of dollars in expenses (including expert fees) that they have laid out on behalf of Plaintiffs and the Settlement Class,

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[1] Certain capitalized terms used in this brief are defined in Section I of the Settlement Agreement.

[2] Plaintiffs' Co-Lead Class Counsel are Berger & Montague, P.C., Lieff, Cabraser, Heimann & Bernstein, LLP and Quinn Emanuel Urquhart & Sullivan, LLP. *See* Preliminary Approval Order at ¶ 7 (Dkt. 705). The Court earlier had appointed these same three firms as interim Co-Lead Class Counsel, along with an Executive Committee composed of the interim Co-Leads plus the Law Offices of David Balto, Law Offices of Joshua P. Davis, and McCulley McCluer PLLC. *See* April 26, 2007 Order (Dkt. 12). The following firms also contributed to the prosecution of this case as counsel for the class, and are seeking attorneys' fees and reimbursement of expenses: Barrack Rodos & Bacine, Faruqi & Faruqi, LLP, Gustafson Gluek PLLC, Heins, Mills & Olson P.L.C., Kaplan, Fox & Kilsheimer LLP, NastLaw LLC, Reinhardt Wendorf & Blanchfield, Shepherd Finkelman Miller & Shah LLP, Spector Roseman Kodroff & Willis P.C., Taus Cebulash & Landau LLP, and Wolf Haldenstein Adler Freeman & Herz LLP. These firms and Plaintiffs' Co-Lead Class Counsel are collectively referred to as "Class Counsel." *See* Declaration of Co-Lead Counsel for the Class Eric L. Cramer, Esq. in Support of (1) Plaintiffs' Uncontested Motion for An Award of Attorneys' Fees, Reimbursement of Expenses and Payment of Service Awards to the Class Representatives and (2) Plaintiffs' Motion for Final Approval of Settlement ("Cramer Co-Lead Decl."), at ¶ 2, Exhibits 1-19 to Cramer Co-Lead Decl.

now respectfully submit this memorandum in support of their request for an order: (i) awarding attorneys' fees in the amount of one-third of the $130 million cash value of the Settlement only (plus accrued interest); (ii) reimbursing Class Counsel for reasonably incurred litigation expenses in the amount of $6,696,856.98; and (iii) approving service awards for the Class Representatives of $150,000 for Marchbanks Truck Service, Inc. d/b/a Bear Mountain Travel Stop ("Marchbanks Truck Service"), $75,000 for Gerald F. Krachey d/b/a Krachey's BP South ("Krachey"), $75,000 for Walt Whitman Truck Stop, Inc. ("Walt Whitman"), and $15,000 for Mahwah Fuel Stop ("Mahwah").[3]

Over the seven years of litigating this complex and multifaceted antitrust case (the "Action") against five sets of well-regarded law firms (ten total law firms) representing the five Defendant groups, Plaintiffs' Co-Lead Class Counsel committed their services and resources, collectively devoting 85,907.47 hours to this case, advancing $6,696,856.98 in out-of-pocket costs—including $4,055,986.61 to economic and industry experts and $680,890.35 to maintain a database of millions of pages of documents produced during the course of this litigation—and applying their skill and extensive antitrust experience to prosecuting this case on behalf of the Settlement Class.[4] *See* Cramer Co-Lead Decl., ¶¶ 35-43. As noted, all of Class Counsel's fees, and recovery of all out-of-pocket expenditures, have been fully contingent upon receiving a favorable resolution of the Action on behalf of their clients and the certified Settlement Class.

The settlement that has now been achieved will provide immediate, meaningful, and certain

[3] Marchbanks Truck Service, Krachey, Walt Whitman, and Mahwah are collectively referred to as "Plaintiffs" or the "Class Representatives."

[4] The Settlement Class is defined as "All owners and operators of truck stops or other retail fueling facilities with at least one physical location in the United States that paid Merchant Transaction Fees directly to Comdata on Comdata Proprietary Transactions and that were calculated based on a percentage of the face amount of the transaction during the Settlement Class Period with the exception of Mobile Fuelers, Wilco-Hess locations, the Pilot Defendants, the TA Defendants, and Love's and any of the parents, subsidiaries, affiliates, franchisees or employees of any of the Defendants." *See* Settlement Agreement, ¶ 2; *see also* Preliminary Approval Order at ¶ 4.

benefits to the Settlement Class. Specifically, and as noted above, Plaintiffs and all Defendants[5] have entered into a Definitive Master Settlement Agreement (the "Settlement Agreement") that provides for: (a) immediate payment of $130 million to Plaintiffs and the Settlement Class of over 6,000 independent Truck Stops and other Retail Fueling Facilities; (b) valuable prospective relief in the form of, among other things, meaningful and enforceable commitments by Comdata to modify or not enforce those portions of Comdata's merchant services agreements with Settlement Class Members and the Major Chains that Plaintiffs had challenged in this case as being anticompetitive; and (c) an agreement by Comdata to engage in a good faith negotiations relating to, *inter alia*, merchant transaction fees with certain Buying Groups that are, collectively, composed of hundreds of members of the Settlement Class. *See* Cramer Co-Lead Decl., ¶¶ 7-10, 27.

Class Counsel's request for an attorneys' fee award of one-third of the cash value of the Aggregate Settlement Fund (plus accrued interest)—*i.e.*, an award of $43.33 million (plus interest)—is reasonable and appropriate. First, courts in the Third Circuit frequently award fees to class counsel of one-third of the cash value of class action settlements, including cases involving settlements of well over $100 million.[6] Second, the request is particularly appropriate

[5] The "Defendants" are Comdata Network, Inc. d/b/a Comdata Corporation ("Comdata") n/k/a Comdata Inc., its parent Ceridian Corporation n/k/a Ceridian LLC ("Ceridian") and certain major chain truck stops, namely: (1) Pilot Travel Centers LLC and Pilot Corporation (collectively "Pilot Defendants"); (2) TravelCenters of America LLC and its wholly owned subsidiaries TA Operating LLC f/k/a TA Operating Corporation d/b/a TravelCenters of America, TravelCenters of America Holding Company LLC f/k/a TravelCenters of America, Inc., and Petro Stopping Centers, L.P. (collectively, "TA Defendants"); and (3) Love's Travel Stops & Country Stores, Inc. ("Love's") (collectively the "Major Chains").

[6] *See, e.g.*, *In re Tricor Direct Purchaser Antitrust Litig.*, C.A. No. 05-340-SLR (ECF No. 543) (D. Del. April 23, 2009) (awarding one-third fee on settlement of $250 million); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 748 (E.D. Pa. 2013) (awarding one-third fee on settlement of $150 million); *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-0085, 2005 U.S. Dist. LEXIS 27013 (D.N.J. Nov. 9, 2005) ("*Remeron*") (awarding one-third fee on settlement of $75 million); *In re Wellbutrin SR Antitrust Litig.*, C.A. No. 04-5525 (ECF No. 413) (E.D. Pa. Nov. 21 2011) (awarding one-third fee on settlement of $49 million); *In re Wellbutrin XL Antitrust Litig.*, No. 2: 08-cv-2431 (ECF No. 485) (E.D. Pa. Nov. 7, 2012) (awarding one-third fee on settlement of $37.5 million); *In re Metoprolol Succinate Antitrust Litig.*, No. 06-52-MPT (ECF No. 193) (D. Del. Feb. 21, 2012) (awarding one-third fee on settlement of $20

here where Class Counsel are not seeking a fee of one-third of the actual total value of the Settlement. The Settlement includes prospective relief conservatively valued by economic expert, Dr. Hal J. Singer, at between $260 million and $491 million, bringing the total value of the Settlement to between $390 million and $621 million.[7] Accordingly, the fee Class Counsel are seeking is, at most, 11.1% of the total value of the Settlement—well below the typical fee for a case of this type.

Third, there is overwhelming support amongst members of the Settlement Class not only for the work Class Counsel did on their behalf, but also specifically for the fee Class Counsel are seeking. Leaders of four independent Truck Stop Buying Groups—on behalf of their respective membership, which includes hundreds of Settlement Class members—have each submitted declarations supporting the Settlement *and* the fees sought by Class Counsel.[8] Additionally, each of the Class Representatives has submitted a declaration supporting the settlement *and* Class Counsel's fee request.[9] Finally, the total lodestar for Class Counsel at current rates is $49,785,073.74, and thus the sought fee reflects a "multiplier" of only 0.87, and therefore

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million); *In re Fasteners Antitrust Litig.*, No. 08-md-1912, 2014 WL 296954, at *7 (E.D. Pa. Jan. 27, 2014) (awarding one-third fee on settlement of $17.55 million); and *Rochester Drug Co-Operative, Inc. v. Braintree Laboratories, Inc.*, C.A. No. 07-142-SLR (ECF No. 243) (D. Del. May 31, 2012) (awarding one-third fee on settlement of $17.5 million).

[7] Cramer Co-Lead Decl., ¶ 8 (citing Expert Declaration of Dr. Hal J. Singer, dated March 4, 2014, ¶ 3, 20-29 (the "Singer Decl."); *Id.* ¶ 10. A copy of the Singer Decl. is attached as Exhibit C to Memorandum in Support of Preliminary Approval. (Dkt. 700). The Singer Decl. is also available at www.truckstopantitrustsettlement.com.

[8] Declaration of Kelly Rhinehart of Roady's Truck Stops ("Roady's), dated April 21, 2014 ("Rhinehart Decl.") at ¶¶ 4, 8-9, Declaration of Steven Allen of AMBEST, dated April 21, 2014 ("Allen Decl.") at ¶¶ 4, 8-9, Declaration of Marsha Bird of North American Truck Stop Network ("NATSN"), dated April 15, 2014 ("Bird Decl.") at ¶¶ 4, 8-9, Declaration of Burton Newman, Sr. of Professional Transportation Partners, L.L.C. ("PTP"), dated April 19, 2014 ("Newman Decl.") at ¶¶ 4, 8-9, copies of which are attached as Exhibits 20-23 to the Cramer Co-Lead Decl., respectively.

[9] Declaration of William Patrick Marchbanks, dated April 22, 2014 ("Marchbanks Decl."); Declaration of Douglas Krachey, dated April 28, 2014 ("Krachey Decl."); Declaration of David Silverman, dated April 28, 2014 ("Silverman Decl."); Declaration of Alynne Rosenfarb, dated April 29, 2014 ("Rosenfarb Decl."), copies of which are attached as Exhibits 24-27 to the Cramer Co-Lead Decl., respectively.

includes a negative risk premium despite the wholly contingent nature of the engagement. Typically, courts in the Third Circuit approve multipliers well above 1, and thus well more than what Class Counsel are conservatively seeking here.[10]

Class Counsel's request for reimbursement of expenses is similarly appropriate. All expenses were necessarily incurred in the prosecution of the Action, which lasted seven years, required Class Counsel's retention of three prestigious economic experts, involved over 70 depositions throughout the country and required Class Counsel to store, organize, search, and access millions of pages of documents and huge amounts of data.

Finally, the requested service award for each Class Representative is appropriate. By filing complaints against Comdata the Class Representatives risked being cut off by the dominant supplier of over-the-road ("OTR") Fleet Cards used by their customers, and each significantly contributed to the prosecution of this litigation by, among other things, producing documents, responding to discovery requests, submitting to multiple depositions, providing information to prosecute the case, and overseeing Class Counsel. Cramer Co-Lead Decl., ¶¶ 44-54. These amounts are appropriate given the amount of risk and effort from the Class Representatives.[11] In addition to supporting Class Counsel's fees, the Buying Group

[10] *See, e.g.*, *Remeron*, 2005 U.S. Dist. LEXIS 27013 at * 47-48 (D.N.J. Nov. 9, 2005) (collecting cases awarding multipliers between 1.73 and 9.3 and noting that awarded multiplier of 1.86 is on the "low end of the spectrum"); *see also Infra* at n.64.

[11] *See, e.g.*, *In re: Titanium Dioxide Antitrust Litig.*, No. 10-CV-00318, 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) (awarding service awards totaling $175,000, including $125,000 to one class representative as part of approving a $163.5 million settlement); *Sullivan v. DB Investments, Inc.*, Civ. Action No. 04-2819, 2008 WL 8747721, at *4, *37 (D.N.J. May 22, 2008) (approving $85,000 service awards for certain plaintiffs as part of approving $295 million settlement); *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 338-39 (E.D. Pa. 2007) (approving service award of $75,000 as part of a $39.75 million settlement); *Beck v. The Boeing Company*, No. C00-0301P, at 4 (W.D. Wash. Oct. 8, 2004) (Dkt. 1067) (approving service awards of $100,000 as part of a maximum $72.5 million settlement); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 531 (E.D. Mich. 2003) ($75,000 awarded to two class representatives as part of a $80 million settlement); *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, (N.D. Ga. 2001) (approving $300,000 service award as part of an approximately $157

representatives—speaking on behalf of hundreds of Settlement Class members—also support the requested service awards in recognition of the sacrifices and achievements of the Class Representatives on behalf of the Settlement Class.[12]

II. BACKGROUND

A. Plaintiffs' Claims[13]

This case is an antitrust action brought on behalf of a now certified class of independent Truck Stops and other Retail Fueling Facilities that accept Comdata's specialized payment cards (known as "Fleet Cards" or "OTR Fleet Cards") used by OTR, long-haul fleets ("Fleets") to purchase diesel fuel and other items. Comdata has been the leading OTR Fleet Card issuer for the period relevant to this case. Plaintiffs allege that the challenged conduct allowed Comdata and Ceridian (Comdata's parent) to restructure, and thereby artificially inflate, Comdata's Merchant Transaction Fees to members of the Settlement Class beginning in or about 2000-2001 (the "Fee Restructuring"). Plaintiffs alleged that, as a result of the claimed anticompetitive conduct, Settlement Class Members paid supracompetitive transaction fees to Comdata when processing Comdata Proprietary Transactions.

The challenged conduct here (the "Scheme") had two main facets. First, after acquiring several OTR Fleet Card competitors to obtain market dominance, Comdata (with Ceridian's involvement) entered into what Plaintiffs alleged were illegal agreements that restricted the Majors Chains—Comdata's customers *and* competitors—from competing with Comdata or supporting rival OTR Fleet Cards. Plaintiffs alleged that these Major Chain agreements reflected an overarching agreement

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million settlement); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 203-04 (S.D.N.Y. 1997) (awarding $85,000 to a named plaintiff as part of a $115 million settlement); *In re Revco Sec. Litig.*, 1992 WL 118800, at *7 (N.D. Ohio May 6, 1992) (awarding $200,000 service award as part of a $29.75 million settlement).

[12] Rhinehart Decl., ¶¶ 4, 8-9, Allen Decl., ¶¶ 4, 8-9, Bird Decl., ¶¶ 4, 8-9, Newman Decl., ¶¶ 4, 8-9.

[13] *See generally*, Plaintiffs' Memorandum of Law in Support of their Motion for Class Certification at 2-13. (Dkt. 553).

between Comdata and the Major Chains, in which Comdata agreed to offer the Major Chains low, flat transaction fees while impairing the Major Chains' competitors—the Independents—with much higher fees. Second, Comdata imposed what Plaintiffs alleged were anticompetitive anti-steering restrictions on Independents. Plaintiffs alleged that the agreements and restrictions that constituted the Scheme blocked competitive forces and enabled Comdata to impose artificially inflated fees on the Settlement Class.

B. Procedural Background

After an extensive pre-complaint investigation that included key contributions from the Class Representatives—particularly William Patrick "Pat" Marchbanks on behalf of Marchbanks Truck Service—the first complaints in this litigation were filed in March 2007. *See* Cramer Co-Lead Decl., ¶¶ 14, 45-46. With discovery ongoing (having begun on October 12, 2007), Plaintiffs filed their Second Consolidated Amended Complaint on March 31, 2010. *See* Cramer Co-Lead Decl., ¶ 17.

Each of the Defendants, having consistently denied Plaintiffs' allegations and raised multiple defenses to the merits of the claims, moved to dismiss Plaintiffs' Second Consolidated Amended Complaint, and most moved to dismiss Plaintiffs' Third Consolidated Complaint. Cramer Co-Lead Decl., ¶ 18. The Court mainly denied the first round of motions and entirely denied the second round.[14]

Before, during and after Defendants moved to dismiss, Class Counsel pursued extensive discovery from all five sets of Defendants and third parties from the moment discovery opened in October 2007 until discovery closed on May 24, 2013. *See* Cramer Co-Lead Decl., ¶ 19. During the course of the extended discovery period in this case, the parties took over 70

[14] *Marchbanks Truck Serv. v. Comdata Network, Inc.*, No. 07-cv-1078, 2012 U.S. Dist. LEXIS 189789, 2012 WL 10218913 (E.D. Pa. Mar. 29, 2012); *Marchbanks Truck Serv. v. Comdata Network, Inc.*, No. 07-cv-1078, 2011 U.S. Dist. LEXIS 158011, 2011 WL 11559549 (E.D. Pa. Mar. 24, 2011).

depositions of parties, non-parties, and expert witnesses, and reviewed millions of pages of documents produced by Plaintiffs, Defendants, and third parties. *Id.* ¶ 20. Further, Plaintiffs retained three economic experts, while Defendants retained four experts, all of whom issued reports and were deposed. *Id.* Plaintiffs and Defendants filed and argued motions to exclude or strike all or portions of the opposing experts' opinions. *Id.* ¶¶ 21, 23. The parties settled shortly before the Court's scheduled hearing on Plaintiffs' Class Certification Motion, which entailed extensive briefing detailing Plaintiffs' theories of the case and Defendants' defenses. *Id.* ¶¶ 22, 24. At the time of settlement, Ceridian had moved for summary judgment (which motion was fully brief) and the deadline for the remaining summary judgment motions, March 3, 2014, was fast approaching. *Id.* ¶ 24. Trial was scheduled for August 2014.

C. The Settlement

The protracted settlement negotiations between Plaintiffs' Co-Lead Class Counsel and attorneys for Defendants were hard fought, conducted at arm's length, and guided both by two separate, experienced, independent mediators, and the Court.

The case resolved only after several failed efforts at settlement over several years, including a Court-ordered in-person settlement conference with Magistrate Judge Perkin in 2011, and a July 2012 mediation between Plaintiffs and defendants Comdata and Ceridian with a private mediator. *See* Cramer Co-Lead Decl., ¶ 25. More recently, in late 2013, after the close of fact and expert discovery, with the Court's two-day hearing on the parties' *Daubert* motions having been held, and with a class certification hearing looming, the parties agreed to private mediation with Professor Eric Green, a nationally-recognized mediator experienced with complex and significant antitrust class actions. *Id.* ¶ 26. The parties held a full-day mediation with Professor Green on December 5, 2013 in New York, which initially proved unsuccessful. *Id*.

Following the mediation session, certain of the parties continued to negotiate throughout December 2013, culminating in an agreement under which Comdata and Ceridian would make a combined cash payment of $100 million to Plaintiffs and the Settlement Class, along with Comdata's agreement to certain prospective relief. *See* Cramer Co-Lead Decl., ¶ 26. On December 31, 2013, Plaintiffs, Comdata, and Ceridian entered into a memorandum of understanding ("MOU"), memorializing the settlement between Plaintiffs and the Settlement Class, on the one hand, and Comdata and Ceridian, on the other. *Id*. Contemporaneous with these negotiations, and with Professor Green's assistance, Plaintiffs and Love's negotiated an MOU, signed January 3, 2014, whereby Love's would pay the Settlement Class $10 million. *Id*.

On January 9, 2014, the Court held a settlement conference with Plaintiffs and the then-non-settling TA and Pilot Defendants. *See* Cramer Co-Lead Decl., ¶ 26. During that conference, the Court and counsel for the TA and Pilot Defendants engaged in further settlement discussions. Following that conference, Plaintiffs and the TA and Pilot Defendants entered into a MOU under which the TA and Pilot Defendants each agreed to pay $10 million to the Settlement Class (*i.e.*, $20 million combined). *Id*.

Throughout January and February of this year, Plaintiffs and Defendants exchanged several drafts of the Settlement Agreement—including numerous attachments such as the Long Form Notice, Publication Notice, Proposed Preliminary Approval Order and Claim Form—vigorously negotiating its terms and the wording of the various attachments. *See* Cramer Co-Lead Decl., ¶ 26. On March 3, 2014, all parties entered into the Definitive Master Settlement Agreement that provides for a collective $130 million cash payment to the Settlement Class in addition to valuable prospective relief from Comdata. Subsequent to the Court's certifying the Settlement Class and granting Preliminary Approval of the Settlement (Dkt. 705), Defendants

each deposited the agreed amounts into escrow accounts for the benefit of the Settlement Class, where the monies now sit, earning interest. *Id*. at ¶ 31. The Court-appointed escrow agent, Huntington National Bank, estimates that the interest earned on the escrow funds will amount to $60,616.45 by the July 14, 2014 final fairness hearing. *Id*.

The prospective relief portion of the Settlement includes a series of legally binding commitments from Comdata to refrain from including and enforcing certain provisions in its merchant services agreements. These commitments, which will be in place for five (5) years from certain specified trigger dates, are described in detail in the Settlement Agreement. They include Comdata's commitment:

- not to enforce or include any contractual provisions preventing the Major Chains from actively steering customers to non-Comdata OTR Fleet Cards, including in-house accounts;

- not to enforce or include any contractual provisions preventing Settlement Class Members from actively steering customers to non-Comdata OTR Fleet Cards, including in-house accounts;

- not to enforce or include any provision in any agreement with Settlement Class Members requiring Settlement Class Members to offer Comdata cardholders the same discount offered to customers using other payment methods. For instance, Settlement Class Members will not be precluded from offering across-the-board discounts to customers using non-Comdata OTR Fleet Cards that are not offered to Comdata cardholders;

- not to include or enforce any provision requiring any Major Chain to pay to Comdata a transaction fee that is equal to or greater than the highest transaction fee paid by that Major Chain to any other competing OTR Fleet Card company ("Transaction Fee MFN") in any of its agreements;

- not to include a Transaction Fee MFN provision requiring Settlement Class Members to pay to Comdata a transaction fee that is equal to or greater than the highest transaction fee paid by that merchant to any other competing OTR Fleet Card company in any of its agreements;

- not to prohibit Settlement Class Members from surcharging the portions of its Comdata proprietary transactions in which the fee is calculated on a percentage

basis, under certain conditions set forth in more detail in the Settlement Agreement; and

- to negotiate in good faith with several Buying Groups—NATSN, PTP, AMBEST, and Roady's—with regard to reaching a commercially reasonable agreement on the rates and commercial terms for the processing of Comdata OTR Fleet Cards by merchant members of those Buying Groups, subject to certain conditions detailed in the Settlement Agreement.[15]

Class Counsel asked Dr. Singer—one of Plaintiffs' economists in the case who was very familiar with the extensive record through his work on two reports submitted in the case—to conduct an economic valuation exercise on the portion of the prospective relief pertaining to Comdata's contractual changes. Relying upon the record evidence and standard economic methodologies, Dr. Singer has opined that the value to the Settlement Class of Comdata's contractual changes falls between $260 million and $491 million.[16]

The valuation is an estimate. The Settlement Agreement, which sets forth in full the obligations of the parties under the Settlement, does not require Comdata to lower its fees to Settlement Class Members. Nevertheless, Plaintiffs' Co-Lead Class Counsel believe—based on Dr. Singer's analysis and their own assessment of the importance of the changes Comdata has agreed to make to the competitive landscape—that the combined value of the Settlement to the Settlement Class (*i.e.*, the cash portion plus the prospective relief) is between $390 to $621 million. This sum exceeds the overcharges Plaintiffs' expert estimated that the Settlement Class suffered due to the conduct challenged in the case. *See* Cramer Co-Lead Decl., ¶ 8.

[15] Settlement Agreement, ¶¶ 14-29.

[16] *See* Singer Decl., ¶ 3.

III. THE COURT SHOULD APPROVE CLASS COUNSEL'S REQUEST FOR ATTORNEYS' FEES

A. The Fee Request Satisfies the Legal Standards Governing Awards of Attorneys' Fees in Class Actions

Class Counsel's fee request satisfies all applicable legal requirements. The United States Supreme Court has "recognized consistently that . . . a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."[17] The common fund doctrine is based on the inherent powers of the federal court to "prevent . . . inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." *Boeing Co.*, 444 U.S. at 478.[18] The Third Circuit favors the percentage-of-recovery method of calculating fee awards in common fund cases because it allows courts to reward litigation success and penalize failure. *See In re AT&T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005) (citing *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 333 (3d Cir. 1998)).[19] To that end, courts in the Third Circuit and elsewhere routinely

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[17] *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). *See also Boone v. City of Phila.*, 668 F. Supp. 2d 693, 713 (E.D. Pa. 2009); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 192 (E.D. Pa. 2000) ("[T]here is no doubt that attorneys may properly be given a portion of the settlement fund in recognition of the benefit they have bestowed on class members.").

[18] Unlike in cases in which fees are assessed under a statute, fees in common fund cases "are not assessed against the unsuccessful litigant (fee shifting), but rather are taken from the fund or damage recovery (fee spreading), thereby avoiding the unjust enrichment of those who otherwise would be benefited by the fund without sharing in the expenses incurred by the successful litigant." *Fickinger v. C.I. Planning Corp.*, 646 F. Supp. 622, 632 (E.D. Pa. 1986).

[19] For a history of the Third Circuit's approach to awarding attorneys' fees, including a discussion of the Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 241 (1985) ("1985 Task Force Report") and the transition to the prevailing view that the percentage-of-the-fund method is preferred in common fund cases. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 255-57 (3d Cir. 2001). As noted in *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d at 306 n.16, a second Task Force was convened and issued a follow-up report in 2002, further endorsing use of the percentage-of-the-fund method in common fund cases. *See* Report of the Third Circuit Task Force, *Selection of Class Counsel*, 208 F.R.D. 340 (2002).

employ the percentage-of-the-fund method in antitrust class actions.[20] The Third Circuit urges district courts to perform a lodestar cross-check to ensure that application of the percentage method results in a "sensible" recovery.[21]

Under these standards, Class Counsel's request for a fee of one-third of the $130 million Aggregate Settlement Fund (inclusive of interest)—and no fees for the value of the prospective relief—in light of the successful prosecution of this complex and demanding case is reasonable and appropriate. Class Counsel spent over 85,900 hours through March 31, 2014 on the case. If awarded, the requested fee would amount to a "negative" multiplier of 87% of the total lodestar. Indeed, even if the lowest conservative valuation of the prospective relief is used, the total value of the Settlement is $390 million, which means that the fee request is *not* one-third of the total settlement value, but rather 11.1%. The request, therefore, is conservative.

B. The Fee Requested By Class Counsel Is Fair and Reasonable

The Third Circuit has instructed courts to consider the following seven factors when evaluating the reasonableness of a fee request under the percentage-of-recovery method:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

[20] *See, e.g.*, *In re Fasteners Antitrust Litig.*, 2014 WL 296954, at *3 ("In practice, courts in the Third Circuit assess requests for attorney's fees in antitrust cases using the percentage-of-recovery method, and then cross-check the result with the lodestar method"); *Flonase*, 951 F. Supp. 2d at 746 ("The latter method [i.e., percentage-of-recovery], is 'generally favored in cases involving a common fund . . . .'") (quoting *In re Rite Aid Corp. Sec. Litig*, 396 F.3d at 300); *Remeron*, 2005 U.S. Dist. LEXIS 27013, at *32 (("the percentage of fund method is the proper method for compensating Plaintiffs' Counsel in this common fund case").

[21] *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d at 305-06.

Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000).[22] More recently, the Third Circuit has suggested that it also may be important to consider the following factors from *In re Prudential Ins. Co. of American Sales Practices Litig.*, 148 F.3d 283, 340 (3d Cir. 1998):

> (1) the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such as government agencies conducting investigations; (2) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained; and (3) any "innovative" terms of settlement.

In re AT&T Corp., 455 F.3d 160, 165-66 (3d Cir. 2006) ("In reviewing an attorneys' fees award in a class action settlement, a district court should consider the *Gunter* factors, the *Prudential* factors, and any other factors that are useful and relevant with respect to the particular facts of the case.") (citations omitted). All of the *Gunter* and *Prudential* factors overwhelming support the requested fee.

1. Application of the *Gunter* factors

(a) The complexity and duration of the litigation

The complexity and duration of the litigation is "the first factor a district court can and should consider in awarding fees."[23] An "antitrust class action [is] perhaps the most complex case[] to litigate."[24] Here, Class Counsel diligently and skillfully prosecuted this litigation for seven years in the face of intense opposition from five different Defendant groups each represented by at least two law firms. Those efforts required extensive briefing of complex legal and factual issues and exhaustive discovery efforts, often involving detailed meetings with Defendants' counsel, and requiring counsel to

[22] The Court need not find that all of the *Gunter* factors were satisfied in order to grant Plaintiffs' fee request; satisfaction of some of the factors often outweighs the possible non-satisfaction of other factors. *See, e.g.*, *Meijer, Inc. v. 3M*, No. 04-5871, 2006 WL 2382718, at *21-22 (E.D. Pa. Aug. 14, 2006) (holding that although time devoted to the litigation was relatively low when case settled after one year, other *Gunter* considerations outweighed that fact).

[23] *Gunter*, 223 F.3d at 197.

[24] *Bradburn*, 513 F. Supp. 2d at 338-39; *see also In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003).

travel the country for depositions and to secure document productions from Defendants and third parties. Specifically, Class Counsel's extensive and diligent efforts included the following:

- reviewing, analyzing, summarizing and organizing millions of pages of documents produced by parties and third-parties during the course of this litigation and 2.3 terabytes of transaction data;
- taking and defending over 70 depositions, including nine (9) expert witness depositions, throughout the United States;
- issuing and serving third-party document subpoenas, which required extensive negotiations (particularly with Flying J, Inc., but also with many other third parties), resulting in the production of thousands of pages of documents;
- negotiating with Defendants concerning discovery, including regarding protective orders and the ESI protocol;
- preparing and serving 29 sets of document requests, seven sets of interrogatories and seven sets of requests for admissions on Defendants, many of which were followed by an extensive meet and confer process;
- responding to ten (10) sets for documents requests and four sets of interrogatories directed at the Class Representatives;
- briefing and arguing several discovery motions;
- investigating the underlying factual record and developing the legal theories of the case;
- researching the law pertinent to the claims against Defendants and potential defenses to those claims to, among other things, formulate a discovery strategy;
- drafting the initial complaints and three comprehensive consolidated amended complaints;
- working with three economic experts on eight expert reports and on deposing Defendants' experts and analyzing multiple Defense expert reports;
- opposing and defeating in substantial part two rounds of motions to dismiss;
- fully briefing a motion for class certification;
- preparing for the hearing on Plaintiffs' motion for class certification that had been scheduled for January 28-30, 2014 (fewer than thirty days from when the first MOU was executed in the case);

- briefing and arguing six *Daubert* motions and other related motions to strike;
- opposing Ceridian's summary judgment motion;
- conducting arm's-length settlement negotiations, over many years, with the Defendants collectively and individually with two separate private mediators;
- developing and drafting the Settlement Agreement, Long Form Notice, Publication Notice, and Claim Form and overseeing the notice process;
- communicating with Class Representatives regarding litigation strategy, updates on the litigation and settlement negotiations and the notice process;
- communicating with Settlement Class members throughout the litigation, including during the settlement and notice period; and
- communicating with representatives of the four major Buying Groups throughout the litigation, including during the settlement and notice period.[25]

Even now, the work on this case has not ended. Plaintiffs' Co-Lead Class Counsel will continue to expend many additional hours—which are not included in the lodestar cross-check calculations—in connection with the settlement administration process, responding to Settlement Class Member inquiries, working to secure final approval of the Settlement, preparing for the final approval hearing scheduled for July 14, 2014, and dealing with technical matters involving the Aggregate Settlement Fund and Settlement administration. *Id.* ¶ 32.

This factor weighs heavily in favor of granting Plaintiffs' motion. *Bradburn*, 513 F. Supp. 2d at 339 (four year old antitrust case involving litigation over class certification and collateral estoppel, expert testimony on both class certification and on the merits, and numerous depositions supported fee request).

As the Court is aware, this litigation has been followed closely by the truck stop industry generally and the Buying Groups specifically. As such, Class Counsel's extensive efforts have not gone unnoticed. A representative from each of the Buying Groups has affirmatively voiced

[25] *See* Cramer Co-Lead Decl., ¶¶ 19-24.

their support for Plaintiffs' fee request.[26] In fact, Kelly Rhinehart, the President of Roady's, stated that he believes "that the requested attorneys' fee award of one-third of the total cash settlement amount is appropriate in this case" because he is "well aware of the time and effort put into this case by Class Counsel for over seven years with no guarantee of ever getting compensated."[27] Further, Rhinehardt "recognize[s] and appreciate[s] the skill, persistence, and professionalism with which Class Counsel handled the matter on behalf of the class," concluding that "the case was expensive to litigate and thus that Class Counsel deserve to be reimbursed for their out of pocket expenses."[28] The support of Buying Groups representing hundreds of members of the Settlement Class "strongly supports approval of the requested fee." *Flonase*, 951 F. Supp. 2d at 747 (explaining that support of a settlement by members of the class, "strongly supports approval of the requested fee").[29]

(b) The size of the fund and the number of people that benefit

The size of the fund created by and the number of people who benefit from the Settlement weigh in favor of approving the fee request.[30] The Settlement is an outstanding result for the Settlement Class—a class consisting of over 6,000 entities, most of whom are independent businesses. Namely, the Settlement provides significant, immediate and certain payment of $130 million, plus accrued interest, less attorneys' fees, expenses, administration

[26] Rhinehart Decl., ¶¶ 4, 8-9, Allen Decl., ¶¶ 4, 8-9, Bird Decl., ¶¶ 4, 8-9, Newman Decl., ¶¶ 4, 8-9.

[27] Rhinehart Decl., ¶ 8.

[28] Rhinehart Decl., ¶ 8. *See also*, Allen Decl., ¶¶ 4, 8-9, Bird Decl., ¶¶ 4, 8-9, Newman Decl., ¶¶ 4, 8-9.

[29] *See also, In re Tricor Direct Purchaser Antitrust Litig.*, C.A. No. 05-340-SLR (ECF No. 543 at ¶¶ 6-7, 11) (D. Del. April 23, 2009) (citing approvingly to the explicit support of request for attorneys' fee and service awards by members of the class in awarding one-third fee on settlement of $250 million); *In re Wellbutrin SR Antitrust Litig.*, C.A. No. 04-5525 (ECF No. 413 at ¶¶ 6(b), 10(c)) (E.D. Pa. Nov. 21 2011) (citing approvingly to the support of request for attorneys' fee and service awards by class members in awarding one-third fee on settlement of $49 million); *In re Metoprolol Succinate Antitrust Litig.*, No. 06-52-MPT (ECF No. 193 at ¶¶ 6-7, 11) (D. Del. Feb. 21, 2012) (citing approvingly to the explicit support of request for attorneys' fee and service awards by several members of the class in awarding one-third fee on settlement of $20 million).

[30] *See Gunter*, 223 F.3d at 198 (identifying "[t]he size of the settlement fund created and the number of persons benefitted is another important factor in fee-award cases").

costs, and service awards ("Net Settlement Fund").[31] The Settlement also provides for prospective relief that Dr. Singer has valued at between $260 million and $491 million. As such, the Settlement will provide the Settlement Class with a total benefit of between $390 million and $621 million. This amount is above the range of overcharge damages suffered by the class computed by Dr. Jeffrey Leitzinger, one of Plaintiffs' economic experts.[32]

The significant cash and injunctive value delivered to the Settlement Class as a result of the Settlement weighs heavily in favor of granting Class Counsel's fee request.

(c) The skill and efficiency of counsel

Class Counsel are comprised of some of the preeminent plaintiffs class action and antitrust litigation firms in the country, with decades of experience prosecuting and trying complex antitrust actions.[33] Class Counsel applied their knowledge and experience to obtain a positive result for the Settlement Class.[34] Class Counsel also faced formidable opposition from five sets of defense counsel from nationally recognized law firms and including counsel with decades of antitrust and class action experience who vigorously defended this case. The high "quality of opposing counsel" supports Plaintiffs' attorneys' fee request.[35]

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[31] *Supra* at 1-4, 9-11.

[32] Cramer Co-Lead Decl., ¶ 8.

[33] The background, experience, and qualifications are included in the Cramer Co-Lead Decl. at Exhibits 1-19.

[34] *See Gunter*, 223 F.3d at 195 n.1 (identifying the skill and efficiency of the attorneys involved as one of the factors to consider in evaluating a fee request).

[35] *See In re American Investors Life Ins. Co. Annuity Marketing and Sales Practices Litig.*, 263 F.R.D. 226, 244 (E.D. Pa. 2009) (where class counsel were highly skilled in litigating class actions against insurance companies, the defendants were represented by a leading law firm, and the case was vigorously litigated by both sides, this supported class counsel's fee request); *In re Corel Corp. Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 496 (E.D. Pa. 2003) (where counsel primarily practiced in the field of shareholder securities litigation, had considerable experience, and faced formidable legal opposition, this supported awarding the requested fees).

(d) The risk of non-payment was significant

"A determination of a fair fee must include consideration of the sometimes undesirable characteristics of a contingent antitrust action[], including the uncertain nature of the fee, the wholly contingent outlay of large out of pocket sums by plaintiffs, and the fact that the risk of failure and nonpayment in an antitrust case are extremely high."[36] One court observed in an antitrust action, "[i]t is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced."[37] Indeed, the history of antitrust litigation is replete with cases in which plaintiffs succeeded at trial on liability but recovered no damages or very small damages at trial or after appeal.[38]

Even if Plaintiffs had brought their case to trial and succeeded, they still would have faced certain and lengthy appeals. As Judge Pratter observed, attorneys who undertake the representation of a class are "unable to mitigate any of the risk of nonpayment; instead, they [a]re required to spend or incur obligations to effectively litigate th[e] case."[39] And, as Judge Stengel explained in awarding a one-third fee to class counsel (including, *e.g.*, one of the Co-Lead Counsel here) in *Wellbutrin SR*:

> Class Counsel faced numerous risks in preparing and litigating this case, including the risks associated with the motion to dismiss, class certification, summary judgment, and – had the case continued – ultimately proving liability

[36] *Remeron*, 2005 U.S. Dist. LEXIS 27013, at *39; *see also Gunter*, 223 F.3d at 195 n.1, 199 (explaining that the risk that counsel takes in prosecuting a client's case should also be considered when assessing a fee award).

[37] *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971); *see also Blum v. Stenson*, 465 U.S. 886, 902 (1984) (Brennan, J., concurring) ("the risk of not prevailing and therefore, the risk of not recovering any attorney's fees, is a proper basis on which a district court may award an upward adjustment to an otherwise compensatory fee").

[38] *See, e.g., U.S. Football League v. National Football League*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) ("the jury chose to award plaintiffs only nominal damages, concluding that the USFL had suffered only $1.00 in damages"); *MCI Comm. Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 116-67 (7th Cir. 1983) (antitrust judgment remanded for new trial and damages); *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973) (after two trips to the Second Circuit and one to the Supreme Court, plaintiffs and the proposed class recovered nothing in an antitrust class case).

[39] *Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402, 423 (E.D. Pa. 2010).

> and damages at trial and potentially surviving any appeals. Underlying all of these risks was the enormous one of handling this case for its entire duration on a contingent basis, doing everything necessary to honor Class Counsel's commitment and obligations to the class. . . . The substantial risk of nonpayment that Class Counsel faced throughout this litigation strongly supports their fee request.[40]

And so it is here, where the Plaintiffs' claims involve a complex set of factual and legal issues that significantly increased the odds of nonpayment. Class Counsel had to be prepared to front all of the costs and carry all of the risk that there might not be any recovery while the "the Class itself risked nothing out-of-pocket."[41] The risk faced by Class Counsel was multifaceted, as there was risk involved with: (a) building a case from the ground up without any federal government case for a foundation (in fact, industry efforts to encourage government action had largely failed); (b) defeating two rounds of motions to dismiss (nine total motions); (c) pursuing certification of a litigation class; (d) opposing summary judgment (Ceridian's summary judgment motion was fully briefed; absent settlement, Class Counsel expected four additional motions in March); (e) opposing several *Daubert* motions (which motions had been fully briefed and argued); and—if the case had continued, (f) preparing for trial, including opposing pretrial motions and motions *in limine*; (g) ultimately proving liability and damages at trial; and (h) surviving any appeals.

Having prevailed in the face of the multiple attendant risks, Class Counsel should be rewarded. The substantial "risk factor" of nonpayment strongly supports Class Counsel's fee request.

(e) The amount of time devoted to the litigation

As explained above, this case required a substantial investment of time by Class Counsel.[42] Class Counsel expended more than 85,900 hours over seven years preparing, litigating, and negotiating the settlement of this Action. And Class Counsel's commitment to

[40] *In re Wellbutrin SR Antitrust Litig.*, No. 04-5525, ECF No. 413 at 11-12 (citations omitted).

[41] *Serrano*, 711 F. Supp. 2d at 423.

[42] *Gunter*, 223 F.3d at 195 n.1.

this litigation is not over. Counsel will spend substantial additional time preparing for and participating in the final approval hearing and handling claims administration.[43] The copious amount of time that Class Counsel was required to devote to this action also supports approval of this fee request.[44]

Class Counsel's lodestar calculations (discussed below) do not include any amount for this anticipated future work. *See Remeron*, 2005 U.S. Dist. LEXIS 27013, at *42 (observing that class counsel would "likely incur hundreds of additional hours in connection with administering the settlement, without prospect for further fees"). That Class Counsel's fee request covers not only work that has been done to date, but also any such future work, makes the request that much more reasonable.

(f) Consistency with fee awards in comparable cases

The requested fee is consistent[45] with antitrust class actions in the Third Circuit, where attorneys' fee awards of one-third of the total settlement are commonplace, including cases where settlements exceed $100 million.[46] Other Circuits similarly support fees of one-third of the total value of settlements over $100 million.[47] Here, the fee request is even more reasonable because the request is actually far lower than one-third of the total value of the Settlement.

[43] *See* Cramer Co-Lead Decl., ¶ 32.

[44] *See*, *e.g.*, *Boone*, 668 F. Supp. 2d at 714 (class counsel's expenditure of roughly 2,858 hours of contingent work on the litigation justified their fee request); *Bradburn*, 513 F. Supp. 2d at 339 (class counsel's expenditure of more than four years, including more than 9,000 attorney hours and roughly 2,000 paralegal hours weighed in favor of awarding the requested fees).

[45] *Gunter*, 223 F.3d at 198 (identifying "comparing awards in similar cases" as an "important factor in fee-award cases").

[46] *Supra* at n.6.

[47] *See, e.g.*, *In re Titanium Dioxide Antitrust Litig.*, 2013 WL 6577029 at *1 (awarding one-third fee on settlement of $163.5 million); *In re Relafen Antitrust Litig.*, No. 01-12239-WHY Dkt. No. 511-10 (D. Mass April 9, 2004) (awarding one-third fee on settlement of $175 million); *In re Buspirone Antitrust Litig.*, MDL No. 1413, 2003 U.S. Dist. LEXIS 26538 (S.D.N.Y. April 11, 2003) (awarding one-third fee on settlement of $220 million).

Indeed, even using the lower end of Dr. Singer's estimate of the value of the prospective relief ($260 million), the total value of the Settlement is at least $390 million, and thus the sought fee of $43.33 million is a mere 11.1% of the settlement value—well below the typical fee in analogous cases.

Consistent with the long-line of Third Circuit precedent, and in light of the fact the Plaintiffs are only seeking fees on the cash component of the Settlement, the requested fee here of one-third of the cash value of the Settlement and only 11.1% of the total value of the Settlement is fair, exceedingly reasonable and should be approved.

(g) Presence or absence of objections

As the Third Circuit noted in *Gunter*, the lack of a substantial number of objections is an important consideration in evaluating a fee request because "client's views regarding her attorneys' performance and their request for fees should be considered when determining a fee award."[48] Here, pursuant to the Preliminary Approval Order, on April 14, 2014, the Settlement Administrator mailed the detailed Long Form Notice to each member of the Settlement Class. On April 14, 2014, the Settlement Administrator also posted the Long Form Notice and other pertinent information on a website devoted to this case (truckstopantitrustsettlement.com) and submitted a summary version of the Notice (the Publication Notice) to NACS (National Association for Convenience and Fuel Retailing) Magazine, for its May 2014 issue and to NATSO for its weekly e-newsletters, which will run from April 14 to May 5, 2014. The Class Notice notified all Settlement Class members of: (1) the terms of the Settlement; (2) where additional information could be obtained; (3) Class Counsel's intention to seek attorneys' fees of one-third of the cash value of the Settlement, litigation costs of up to $7.5 million and service

[48] *Gunter*, 223 F.3d at 199.

awards totaling $315,000; and (4) the means by which Settlement Class Members may object to any aspect of the Settlement, including the attorneys' fees motion and supporting papers. *See* Cramer Co-Lead Decl., ¶¶ 28-29. Although the May 27, 2014 deadline for objections has not yet passed, as of April 30, 2014, there have not been any objections, and no entity has opted out. *Id.* ¶ 30. Courts have found that a low number of objectors is particularly telling in cases—such as this one—that involve sophisticated class members.[49] Furthermore, as noted above, representatives of the Buying Groups counting hundreds of Settlement Class members among their membership, affirmatively support the Settlement and the requested fee.[50] This factor thus weighs in favor of Plaintiffs' fee request.

2. Application of the *Prudential* factors

(a) The value of benefits accruing to class members attributable to the efforts of Class Counsel, as opposed to the efforts of others[51]

The development of this case depended entirely on the investigation and efforts of Class Counsel and, unlike many antitrust cases, did not follow on the heels of a government lawsuit or investigation. To the contrary, the federal government rebuffed industry efforts to investigate Comdata's two-tiered pricing strategy following its Fee Restructuring. Notably, Class Counsel did not simply challenge Comdata's two-tiered pricing—which was the main focus of industry complaints. Instead, Class Counsel developed factual and economic evidence of the alleged anticompetitive scheme including agreements by the Major Chains not to compete with Comdata

[49] *See, e.g., Bradburn*, 513 F. Supp. 2d at 338 ("The absence of objections to the requested attorneys' fees in this case is particularly notable given the sophisticated nature of the absent Class Members."); *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *5 (E.D. Pa. June 2, 2004) ("While in some cases a lack of objections may reflect the absence of counsel or unfamiliarity with the legal system, in this case class members are represented by counsel . . . [and] include many of the largest corporations in America—entities that are hardly unfamiliar with civil litigation.").

[50] Rhinehart Decl., ¶¶4-9, Allen Decl., ¶¶4-9, Bird Decl., ¶¶4-9, Newman Decl., ¶¶4-9.

[51] *See Prudential*, 148 F.3d at 340.

and Comdata's imposition of anticompetitive anti-steering provisions on Settlement Class Members.[52] No government entity had prosecuted the claims Plaintiffs developed against Defendants in this matter.

That Plaintiffs survived two rounds of motions to dismiss and were positioned to oppose summary judgment based on a theory of liability developed by Class Counsel weighs heavily in favor of Class Counsel's fee request.[53]

(b) The percentage fee that would have been privately negotiated[54]

A one-third contingency fee is standard in individual litigation, could be more in an antitrust case, given the complexities and risks,[55] and represents the market rate for fee awards in large antitrust class actions,[56] thus would likely be the benchmark by which the parties would have privately negotiated a fee. This factor weighs in favor of granting Plaintiffs' motion—especially given that the sought fee is a mere 11.1% of the Settlement's value.

(c) Innovative terms[57]

Class Counsel expertly negotiated the details of an innovative Settlement Agreement, involving five years of prospective relief and Comdata's commitment to negotiate with each of the Buying Groups. As discussed above, a central aspect of Plaintiffs' claims included allegations that Comdata's agreements with both the Major Chains and members of the Settlement Class insulated Comdata from competition, allowing it to charge members of the Settlement Class supracompetitive transaction

[52] *Supra* at 6-7.

[53] *See AT&T Corp.*, 455 F.3d at 173 (where class counsel was not aided by the efforts of any governmental group, this strengthened the district court's conclusion that the fee award was fair and reasonable).

[54] *See Prudential*, 148 F.3d at 340.

[55] *See Remeron*, 2005 U.S. Dist. LEXIS 27013, at *46 ("[a]ttorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation").

[56] *Supra* at n.6, n.29, n.47.

[57] *See Prudential*, 148 F.3d at 340.

fees.[58] The prospective relief included as part of the Settlement creates a legally binding commitment by Comdata not to include or enforce the very provisions in Comdata's merchant services agreements with both the Major Chains and Settlement Class Members that Plaintiffs had challenged in this case.[59] As such, the prospective relief will better allow for competition to reduce merchant fees to Settlement Class Members by removing the contractual prohibitions on steering that Plaintiffs had alleged insulated Comdata from competition. Dr. Singer has valued that innovative relief at between $260 million and $491 million. Cramer Co-Lead Decl., ¶¶ 8 (citing Singer Decl., ¶ 3, 20-29); *Id.* ¶ 10.

C. A Lodestar Cross-Check Confirms the Reasonableness of the Fee Request.

The Third Circuit has held that it is "sensible" for district courts to perform a lodestar cross-check to ensure that application of the percentage-of-recovery method does not result in a recovery that is too great.[60] Once the lodestar is calculated,[61] "[t]he total lodestar estimate is then divided into the proposed fee calculated under the percentage method. The resulting figure represents the lodestar multiplier to compare to multipliers in other cases."[62]

Using Class Counsel's current rates, the lodestar totals $49,785,073.74, which is greater than the $43,333,333 (plus interest) that Class Counsel seeks to recover here.[63] Thus, Plaintiffs are not requesting to receive ***any*** risk premium at all for their efforts in this contingent litigation as the lodestar multiplier is below 1. Typically, Class Counsel in cases of this type recover

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[58] *Supra* at 6-7.

[59] *Supra* at 10-11.

[60] *Rite Aid*, 396 F. 3d at 305-06; *see also In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 263 (D. Del. 2002) ("The Third Circuit suggests that the district court cross-check the percentage award against the "lodestar" award to help ensure the reasonableness of the fee.").

[61] The lodestar is determined by multiplying the number of hours counsel reasonably expended by a reasonable billing rate for such services. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Maldonado v. Houstoun*, 256 F.3d 181, 184 (3d Cir. 2001).

[62] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14.122.

[63] Cramer Co-Lead Decl., ¶ 35.

multipliers ranging from the 2-4, or higher.[64] That Class Counsel here would, if their request were granted, recover no multiplier at all despite the outstanding results for the Settlement Class, the length of the litigation, and the risks involved confirms and bolsters the reasonableness of the fee request.

IV. THE COURT SHOULD APPROVE CLASS COUNSEL'S REQUEST FOR REIMBURSEMENT OF EXPENSES

Attorneys who create a common fund for the benefit of a class are entitled to reimbursement from that fund of the reasonable litigation expenses they advanced on behalf of the class.[65] Accordingly, Class Counsel request reimbursement of out-of-pocket expenses incurred litigating the case.

Class Counsel expended $6,696,856.98 in out-of-pocket expenses, without any assurance of repayment, in litigating this case on behalf of the Settlement Class. By far the largest component of such expenses comprised of substantial and necessary payments to economic experts, who were essential to the prosecution of this case. Other significant expenses included costs associated with the storage of millions of pages of documents on a secure database and

[64] *See Segen v. OptionsXpress Holdings Inc.*, 631 F. Supp. 2d 465 (D. Del. 2009) (multiplier of 2.06); *In re Tricor Direct Purchaser Antitrust Litig.*, C.A. No. 05-340-SLR (ECF No. 543 at 9) (D. Del. April 23, 2009) (multiplier of 3.93); *Warfarin*, 212 F.R.D. at 263 (multiplier of 1.33) *Remeron*, 2005 U.S. Dist. LEXIS 27013 at *47-48 (D.N.J. Nov. 9, 2005) (noting that awarded multiplier of 1.86 is on the "low end of the spectrum"); *Nichols v. SmithKline Beecham Corp.*, No. 00-6222, 2005 WL 950616, *24 (E.D. Pa. Apr. 22, 2005) (approving multiplier of 3.15); *Linerboard*, 2004 WL 1221350, *4 (approving a 2.66 multiplier); *Weiss v. Mercedes-Benz of N. Am., Inc.*, 899 F. Supp. 1297, 1304 (D. N.J. 1995), aff'd, 66 F.3d 314 (3d Cir. 1995) (approving a 9.3 multiplier); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 736 (E.D. Pa. 2001) (multiplier of over 6).

[65] *See In re: Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 732 n.12 (3d Cir. 2001) (quoting the 1985 Task Force Report for the conclusion that the "common-fund doctrine . . . allows a person who maintains a lawsuit that results in the creation, preservation, or increase of a fund in which others have a common interest, to be reimbursed from that fund for litigation expenses incurred."); *see also AT&T Corp.*, 455 F.3d at 172 n.8 ("[e]xpenses are generally considered and reimbursed separately from attorneys' fees"); *Warfarin*, 212 F.R.D. at 263 (approving costs and expenses reimbursements out of litigation fund as reasonable).

costs associated with travel to depositions, Court hearings and mediations around the country.[66] These expenses, as well as others routinely charged to hourly-fee-paying clients, such as court reporting expenses, photo and data copying charges, and computerized legal research costs, were reasonable and appropriate.[67]

Given that the expenses were incurred without guarantee of reimbursement, Class Counsel had strong incentive to keep them reasonable, and did so. Plaintiffs' request for reimbursement is supported by representatives of the four Buying Groups[68] and the Class Representatives.[69] Moreover, as of April 30, 2014, there had not been any objections filed by any Settlement Class Member.[70] Class Counsel should be reimbursed for their reasonably incurred expenses.[71]

V. THE REQUESTED SERVICE AWARD TO EACH CLASS REPRESENTATIVE IS REASONABLE

Plaintiffs request that the Court approve service awards to the Class Representative of $150,000 for Marchbanks Truck Service, $75,000 for Krachey, $75,000 for Walt Whitman and

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[66] *See* Cramer Co-Lead Decl., ¶ 35. Breakdowns of the litigation expenses paid directly by Class Counsel in support of the prosecution of this litigation as well as the expenses paid out of the litigation fund are included in the Cramer Co-Lead Decl. (¶¶ 40-42).

[67] *See, e.g.*, *Heekin v. Anthem, Inc.*, No. 05-cv-01908, 2012 WL 5878032 (S.D. Ind. Nov. 20, 2012) (approving expenses of over $6.2 million on $30 million settlement).

[68] Rhinehart Decl., ¶¶ 4, 8-9; Allen Decl., ¶¶ 4, 8-9; Bird Decl., ¶¶ 4, 8-9; Newman Decl., ¶¶ 4, 8-9.

[69] Marchbanks Decl., ¶¶3, 15-16; Krachey Decl., ¶¶ 3, 11-12, Silverman Decl., ¶¶ 3, 11-12, and Rosenfarb Decl., ¶¶ 4, 13-14.

[70] Cramer Co-Lead Decl., ¶ 30.

[71] *See In re OSB Antitrust Litig.*, No. 06-826, (E.D. Pa. 2006) (ECF No. 947) at 9 (approving class counsel's fee request because "[t]his complex lengthy matter involved some eighty depositions, the creation and maintenance of a huge case database, and the preparation and review of expert economic analysis and reports"); *Remeron*, 2005 U.S. Dist. LEXIS 27013, at *49 (finding the following expenses to be reasonable: "(1) travel and lodging, (2) local meetings and transportation, (3) depositions, (4) photocopies, (5) messengers and express services, (6) telephone and fax, (7) Lexis/Westlaw legal research, (8) filing, court and witness fees, (9) overtime and temp work, (10) postage, (11) the cost of hiring a mediator, and (12) NJ Client Protection Fund-pro-hac vice")). A breakdown of the litigation expenses incurred, by category is provided. *See* Cramer Co-Lead Decl., ¶¶ 40-42.

$15,000 for Mahwah. In the Third Circuit, service awards may be paid to class representatives to reward efforts that benefit the class.[72] In evaluating the appropriateness of such awards, courts consider: (i) the financial, reputational and personal risks to the plaintiff; (ii) the degree of plaintiffs' litigation responsibilities; (iii) the length of litigation; and, (iv) the degree to which the plaintiffs benefited as class members.[73]

The awards requested here are well deserved. As described more fully below, each of the Class Representatives has performed a "public service of contributing to the enforcement of mandatory laws."[74] Without the efforts of the Class Representatives, the Settlement Class would have recovered nothing. Furthermore, the amounts requested, while on the higher end, are appropriate in light of the risks and sacrifices made by the Class Representatives during the seven years this litigation was prosecuted and in light of the Class Representatives receiving relatively modest *pro rata* recoveries under the plan of allocation.[75]

As of April 30, 2014, no Settlement Class Member has objected to the requested service awards, which further confirms their reasonableness. Indeed, far from giving rise to objections, the requested service awards have garnered the affirmative support of the Buying Groups, representing hundreds of Settlement Class members. A representative of each Buying Group,

[72] *See Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 220 (E.D. Pa. 2011); *Bradburn*, 513 F. Supp. 2d at 342 ("It is particularly appropriate to compensate named representative plaintiffs with service awards when they have actively assisted plaintiffs' counsel in their prosecution of the litigation for the benefit of the class.").

[73] *See Chakejian*, 275 F.R.D. at 220; *see also Bradburn*, 513 F. Supp. 2d at 342.

[74] *Chakejian*, 275 F.R.D. at 220.

[75] Cramer Co-Lead Decl., ¶ 44, n.25 (listing the following estimated *pro rata* shares for the Class Representatives: $39,344.82 for Marchbanks Truck Service, $21,917.37 for Mahwah, $8,357.89 for Walt Whitman, and $5,138.15 for Krachey).

each of whom has first-hand knowledge of the long struggle against Defendants in this case, has praised the work of the Class Representatives and has supported the requested service awards.[76]

Marchbanks Truck Service,[77] located in Bakersfield, California, served as a named plaintiff since this case was initially filed in March 2007, and has been appointed by the Court to serve as a Class Representative in this litigation. (Dkt. 705). Marchbanks Truck Service not only served without any guarantee of payment or compensation, it risked being cut off by Comdata, the dominant OTR Fleet Card provider.[78] That, combined with Marchbanks Truck Service's significant discovery obligations over the course of this seven-year litigation, justifies a substantial service award. As discussed below, the contributions of Marchbanks Truck Service—primarily through its owner Pat Marchbanks—go above and beyond the typical contributions of class representatives, warranting a large service award.

Since 2001, Pat Marchbanks has spearheaded efforts to ameliorate what he saw as unfair conduct by Defendants that was harming Independent truck stop operators. Mr. Marchbanks' efforts over many years ultimately led to the retention of Class Counsel and the bringing of this lawsuit.

As Class Representative in this case, Mr. Marchbanks spent hundreds of hours, often for days at a time, away from running his business: (1) assisting Class Counsel in the investigation and development of the initial complaint; (2) discussing case strategy with Class Counsel; (3) overseeing Class Counsel's prosecution of this litigation and settlement negotiations; (4) traveling to and attending nearly all Court hearings in the case; (5) traveling to and attending

[76] Rhinehart Decl., ¶¶ 4, 8-9; Allen Decl., ¶¶ 4, 8-9; Bird Decl., ¶¶ 4, 8-9; Newman Decl., ¶¶ 4, 8-9.

[77] For a detailed recitation of Marchbanks Truck Service's efforts on behalf of the Settlement Class, *see* the Marchbanks Decl.

[78] Cramer Co-Lead Decl., ¶ 44.

multiple settlement conferences and mediations; (6) communicating with Settlement Class members about the status of the litigation and answering countless questions from Settlement Class members and representatives of the Buying Groups; (7) reviewing and producing thousands of pages of documents; and (8) diligently preparing for, traveling to, and sitting for two depositions of himself. Marchbanks Truck Service was actually deposed three times in the case, including two depositions of Mr. Marchbanks and one of employee Kathy Simmons. In addition to diverting his attention away from his business to participate actively in and oversee this litigation, Mr. Marchbanks incurred over $15,000 in out-of-pocket expenses (for traveling to Court hearings and settlement conferences, for instance) without any guarantee of reimbursement. Co-Lead Counsel, Eric L. Cramer, summed up Mr. Marchbanks's incredible contributions to this litigation in his declaration as follows:

> In my almost twenty years representing classes of antitrust direct purchasers, Pat Marchbanks stands out as a superlative class representative. Mr. Marchbanks has been intimately involved and provided invaluable insight into almost every aspect of this litigation from the pre-complaint investigation through the negotiation of the Settlement. Mr. Marchbanks' unwavering support of this litigation for over seven years, willingness to travel across the country and away from his business to attend Court hearings, two rounds of depositions and several settlement conferences/mediations along with the irreplaceable industry insight and knowledge he was willing and able to share with Class Counsel are unmatched amongst class representatives in typical antitrust class actions. Mr. Marchbanks' dedication to serving the Settlement Class is not limited to his time and effort, he also incurred over $15,000 in expenses serving as a Class Representative. Despite having only a modest recovery to gain, Mr. Marchbanks remained ever vigilant in overseeing the prosecution of this case. It is my opinion that Mr. Marchbanks is deserving of a service award of at least $150,000.[79]

The exemplary efforts of Pat Marchbanks on behalf of the Settlement Class without any promise of remuneration or repayment of his expenses, supports the $150,000 service award sought by Class Counsel.

[79] *See* Cramer Co-Lead Decl., ¶ 46.

Krachey,[80] located in Prairie do Chien, Wisconsin, served as a named plaintiff since April 2007, and has been appointed by the Court to serve as a Class Representative in this litigation. (Dkt. 705). In doing so without any guarantee of recovery, Krachey risked being cut off by Comdata, the dominant OTR Fleet Card provider. In addition to putting business at risk, Krachey, primarily through Douglas Krachey (Krachey's Manager), dedicated a significant amount of time, energy and resources to assisting counsel in the prosecution of this litigation. For instance, Mr. Krachey was (a) actively involved in reviewing and assisting in the development of the initial complaint filed by Krachey in this action, (b) spent several hours meeting with Class Counsel regarding the allegations in this litigation and the OTR Fleet Card and Truck Stop industries generally, (c) expended at least 40 hours reviewing pleadings and other documents, (d) worked for several hours responding to eight sets of document requests, including approximately 173 separate documents requests served over a period of four years, and (e) spent approximately 55 hours associated with gathering documents for production responsive to multiple rounds of Defendants' document requests. In addition to the many hours spent reviewing pleadings and participating in discovery, Mr. Krachey spent six days away from his business to prepare and sit for two rounds of depositions and was involved in several phone calls regarding the settlement negotiations and approving the terms of the Settlement Agreement.

Krachey's unwavering support of this litigation on behalf of the Settlement Class without any promise of compensation for seven years more than supports the $75,000 service award for Krachey sought by Class Counsel.

[80] For a detailed recitation of Krachey's efforts on behalf of the Settlement Class, *see* the Krachey Decl.

Walt Whitman,[81] formerly located in Philadelphia, Pennsylvania, served as a named plaintiff since July 2007, and has been appointed by the Court to serve as a Class Representative in this litigation. (Dkt. 705). Walt Whitman is unique among the Class Representatives in that it was forced out of business[82] before the first complaint was filed in this case due, in part, to the conduct challenged as anticompetitive in this Action. Walt Whitman's efforts on behalf of the Settlement Class were undertaken without any promise of compensation, and without regard for Walt Whitman's damages being capped at the overcharges paid before it ceased operation in 2006. David Silverman, Walt Whitman's President, diligently and doggedly fulfilled Walt Whitman's duties as a Class Representative at significant personal expense. For instance, Mr. Silverman spent (a) approximately ten hours of his own time—he was no longer in the truck stop business—meeting with Class Counsel in advance of filing a complaint in this litigation, and (b) several hours discussing the settlement negotiations and Settlement Agreement with Class Counsel. Mr. Silverman also took time away from his employment and other business ventures to prepare and sit for two rounds of depositions. Notably, Mr. Silverman did so even though Walt Whitman was not in business between his first and second depositions. Additionally, Mr. Silverman spent 35 hours reviewing pleadings and other relevant legal documents, including discovery requests; responded to eight sets of document requests, including approximately 173 separate documents requests served over a period of four years, and spent at least 15 hours gathering documents for production.

[81] For a detailed recitation of Walt Whitman's efforts on behalf of the Settlement Class, *see* the Silverman Decl.

[82] Walt Whitman, continues to exist as a corporate entity, but no longer operates as a truck stop. Silverman Decl., ¶ 2.

Walt Whitman's efforts on behalf of the Settlement Class—particularly David Silverman's dedication of time and effort long after he left the truck stop business—warrant the $75,000 service award requested by Class Counsel.

Mahwah,[83] located in Mahwah, New Jersey, served as a named plaintiff since April 2007, and has been appointed by the Court to serve as a Class Representative in this litigation. (Dkt. 705). Mahwah risked being cut off by Comdata, the dominant OTR Fleet Card provider. In addition to putting its business at risk, representatives of Mahwah sat for two depositions, and Mahwah has produced thousands of pages of documents pursuant to numerous document requests from Defendants. Similarly, Mahwah has responded to several sets of interrogatory requests propounded by Defendants. Mahwah did so without any guarantee of compensation or repayment for the time its employees spent preparing for and sitting a deposition, responding to discovery requests and meeting with Class Counsel regarding the claims in this litigation. Mahwah's efforts in this litigation support the relatively modest $15,000 service award that Class Counsel seek here on behalf of Mahwah.

VI. CONCLUSION

Plaintiffs' Co-Lead Class Counsel respectfully request that the Court approve the attorneys' fee and expense application and enter an order awarding counsel fees of $43,333,333 (plus a proportionate share of the interest thereon through the date of the award), and reimbursement of reasonably incurred expenses as they appear on the books and records of all of the firms acting as Class Counsel in this case in the amount of $6,696,856.98. Plaintiffs' Co-Lead Class Counsel also request the following service awards for the Class Representatives: $150,000 for Marchbanks Truck Service, $75,000 for Krachey, $75,000 for Walt Whitman and $15,000 for Mahwah.

[83] For a detailed recitation of Mahwah's efforts on behalf of the Settlement Class, *see* the Rosenfarb Decl.

TAB 24A

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: PLASMA-DERIVATIVE PROTEIN THERAPIES ANTITRUST LITIGATION This Document Relates To All Actions	Case No. 09 C 7666 MDL No. 2109 Judge Joan B. Gottschall Magistrate Judge Arlander Keys

[PROPOSED] ORDER GRANTING CLASS PLAINTIFFS' MOTION FOR INTERIM AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

The Court, having considered Class Plaintiffs' Motion for Award of Attorneys' Fees and Reimbursement of Expenses (the "Motion"), and the memorandum and declarations in support thereof, and after a duly noticed hearing, hereby finds that:

1. The Motion seeks an award of attorneys' fees of 33 1/3% of the $64,000,000 Settlement Fund created by the settlement payments from CSL Limited, CSL Behring LLC, CSL Plasma Inc. (collectively, "CSL") and the Plasma Protein Therapeutics Association ("PPTA") (collectively with CSL, "Settling Defendants"). Class Counsel Richard A. Koffman and Charles E. Tompkins, of Cohen Milstein Sellers & Toll PLLC and Williams Montgomery & John Ltd., respectively, also seek an order awarding reimbursement of $4,095,879.19 in expenses incurred in connection with the prosecution of this action.

2. The amount of attorneys' fees requested is fair and reasonable under the "percentage-of-the-fund" method. This is confirmed by a lodestar "cross-check," which reveals a negative multiplier, based upon 92,281.66 hours of work and a collective lodestar of $37,033,138.22.

3. The attorneys' fees requested were entirely contingent upon success. Class Counsel risked time and effort, and advanced significant costs and expenses with no ultimate

guarantee of compensation. The award of 33 1/3% is warranted for reasons set out in Class Counsel's moving papers.

4. Given the risks involved in this case, the effort put forth by Plaintiffs' Counsel, the level of sophistication of the work done, and the extraordinary results achieved for the Class, an award of 33 1/3% is justified.

5. The expenses sought, as detailed in the Joint Declaration attached to Plaintiffs' brief, were incurred in connection with the prosecution of the litigation for the benefit of the Class, and were reasonable and necessary.

6. Therefore, upon consideration of the Motion and accompanying declarations, and based upon all matters of record including the pleadings and papers filed in this action and oral argument given at the hearing on this matter, the Court hereby finds the following: (1) the attorneys' fees requested are reasonable and proper; and (2) the expenses requested were necessary, reasonable and proper.

7. IT IS HEREBY ORDERED AND DECREED:

(a) Class Counsel are awarded attorneys' fees for distribution to Plaintiffs' Counsel in the amount of $21,333,333 equal to 33 1/3% of the $64,000,000 added to the Settlement Fund. Class Counsel may be paid 33 1/3% of $64,000,000 immediately upon entry of this Order.

(b) Plaintiffs' Counsel are awarded $4,095,879.19 in reimbursement of expenses incurred in connection with the prosecution of this action.

(c) The attorneys' fees and reimbursement of expenses shall be paid from the Settlement Fund.

(d) The attorneys' fees and expenses shall be allocated amongst Plaintiffs' Counsel by Class Counsel Richard A. Koffman and Charles E. Tompkins in a manner which, in Class Counsel's good-faith judgment, accurately reflects each of such Plaintiffs' Counsel's contributions to the establishment, prosecution, and resolution of this litigation.

IT IS SO ORDERED this 22 day of January, 2014

Honorable Joan B. Gottschall
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6,1
Eastern Division

In Re: Plasma−Derivative Protein Therapies Antitrust Litigation, et al.

Plaintiff,

v.

Case No.: 1:09−cv−07666
Honorable Joan B. Gottschall

CSL Limited, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Wednesday, April 16, 2014:

MINUTE entry before the Honorable Joan B. Gottschall: Motion hearing held. Plaintiff's Unopposed Motion for Final Approval of Class Settlement with Baxter [696] and Motion for Final Award of Attorneys' Fees, Reimbursement of Expenses, and Approval of Incentive Awards for Class Representatives [697] are granted. Judgment is entered dismissing with prejudice from this action Defendants Baxter International, Inc. and Baxter Healthcare Corporation. Enter Order and Judgment. Civil case terminated. This order relates to all member cases associated with MDL 2109. MDL 2109 terminated. Mailed notice(ef,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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TAB 24B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: PLASMA-DERIVATIVE PROTEIN THERAPIES ANTITRUST LITIGATION This Document Relates To All Actions	Case No. 09 C 7666 MDL No. 2109 Judge Joan B. Gottschall Magistrate Judge Arlander Keys

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR AN INTERIM AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

COHEN MILSTEIN SELLERS & TOLL PLLC
Richard A. Koffman
Benjamin D. Brown
Christopher J. Cormier
Emmy L. Levens
1100 New York Avenue, NW
Suite 500 West
Washington, DC 20005

Plaintiffs' Steering Committee

WILLIAMS MONTGOMERY & JOHN LTD.
Charles E. Tompkins
Anthony J. O'Neill
Bethany C. Teska
233 S. Wacker Drive
Suite 6100
Chicago, Il 60606

Plaintiffs' Steering Committee

FREEBORN & PETERS LLP
Deborah H. Bornstein
David Gustman
311 S. Wacker Drive
Suite 3000
Chicago, IL 60606

Plaintiffs' Liaison Counsel

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Class Counsel – Richard A. Koffman and Charles E. Tompkins, and their respective law firms[1] – initiated their investigation into the alleged conspiracy to restrict the supply of certain life-sustaining biologic therapies that are the subject of this antitrust suit nearly five years ago. In the intervening time, Class Counsel and their legal team have successfully filed a detailed Consolidated Amended Complaint, defeated two motions to dismiss, engaged in extensive discovery-related motion practice, reviewed more than 11 million pages of documents, taken and defended more than sixty depositions on three separate continents, retained and consulted two preeminent economists (and defended their depositions), submitted several hundred pages of briefing and other materials in support of Plaintiff's motion for class certification, and engaged in protracted, arm's length settlement negotiations lasting more than a year. This extraordinary effort paid off: on October 5, 2013, Class Counsel reached a $64 million settlement with Defendants CSL and the Plasma Protein Therapeutics Association ("PPTA"). As explained more fully in the concurrently filed Plaintiffs' Memorandum in Support of Final Approval of the Settlement, this is an excellent result for the Class.

Pursuant to the terms of the Settlement and Rule 23(h) of the Federal Rules of Civil Procedure, Class Counsel respectfully submit this memorandum in support of their Motion for an Interim Award of Attorneys' Fees and Reimbursement of Litigation Expenses from the Settlement Fund. As compensation for their considerable work on behalf of the Class, Class

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[1] Class Counsel have been ably assisted throughout by a team of experienced attorneys from many of the nation's top plaintiffs' firms, including Liaison Counsel from Freeborn & Peters LLP.

Counsel seek an award of one-third of the Settlement fund, $21,333,333.33.[2] Counsel respectfully submit that this fee is eminently fair and reasonable given that Plaintiffs' counsel have invested over 92,000 professional hours, valued at more than $37 million, and invested $4,095,879.19, all without any guarantee of payment.[3] This extraordinary investment apparently mirrors Defendants': CSL publicly acknowledged that it had spent more than $20 million in legal fees related to settling this suit, and expected to spend $20 million more if the case were litigated to conclusion. The three Defendants' total legal fees to date are likely in excess of $50 million.

To date, no Class Member has objected to either the proposed Settlement or to Class Counsel's request for fees or reimbursement of expenses.[4] Additionally, not a single class member opted out of the settlement before the December 9, 2013 opt-out deadline. Given the

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[2] Attached as Exhibit 1 to Plaintiffs' concurrently filed Motion for Final Approval of the CSL/PPTA Settlement is the Joint Declaration of Richard A. Koffman and Charles E. Tompkins in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation and Class Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Joint Declaration" or "Joint Decl."), which contains a description of the history of the litigation, the claims asserted, the investigation and discovery undertaken, the negotiation and substance of the Settlement, and the substantial risks and uncertainties presented by and overcome in this litigation.

Class Counsel will submit shortly the detailed declarations and time entries for each Firm requesting attorneys' fees in this case for the Court's review *in camera*.

[3] Class Counsel recently notified the Court that a Settlement has been reached with the remaining Defendant, Baxter. Class Counsel intend to request a similar award of attorneys' fees from that settlement. The total fee award sought will be one-third of the combined settlements, and will be approximately equal to plaintiffs' counsel's fee lodestar in this matter. In light of the significant challenges and risks posed by this litigation, Class Counsel believe the overall fee requested to be eminently reasonable.

[4] The deadline for receipt of exclusions and objections is January 3, 2014. If any objections are received, they will be addressed in Class Counsel's reply submission, which will be filed on January 17, 2014.

sophisticated nature of most members of the Settlement Class, which include hospitals and national drug distributors with legal counsel of their own, the fact that *none* of them has opted out speaks volumes about the quality of the settlement and underscores the excellent result achieved by Class Counsel on behalf of the Class.

Taking into consideration the magnitude of Class Counsel's investment in this action, the risks and challenges posed by the litigation, and the outstanding result achieved for the Class, the requested fee is fair and reasonable whether measured as a percentage of the common fund or with respect to Class Counsel's lodestar, and is amply supported by the relevant case law.

ARGUMENT

I. THE REQUESTED ATTORNEYS' FEES ARE FAIR AND REASONABLE.

It is well-settled that attorneys who, by their efforts, create a common fund for the benefit of a class are entitled to reasonable compensation for their services. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole"); *Florin v. Nationsbank of Ga., N.A. ("Florin I")*, 34 F.3d 560, 563 (7th Cir. 1994) ("When a case results in the creation of a common fund for the benefit of the plaintiff class, the common fund doctrine allows plaintiffs' attorneys to petition the court to recover its fees out of the fund."). Courts have recognized that, in addition to providing just compensation, substantial counsel fees encourage forceful prosecution of cases. *See Halverson v. Convenient Food Mart, Inc.*, 458 F.2d 927, 931 n.5 (7th Cir. 1972). Moreover, providing reasonable attorneys' fees in successful private antitrust actions promotes "[p]rivate antitrust litigation [which] is widely recognized as an effective supplement to government enforcement of the antitrust laws and

contributes to the maintenance of a competitive economy." *In re Clark Oil & Refining Corp. Antitrust Litig.*, 422 F.Supp. 503, 510 (E.D. Wis. 1976) citing *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 262 (1972).

In making the determination regarding the appropriate amount of attorneys' fees to be awarded to counsel who have successfully prosecuted litigation on behalf of a class, the Seventh Circuit has instructed:

> when deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.

Taubenfeld v. Aon Corp. 415 F.3d 597, 599 (7th Cir. 2005); s*ee also In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) (same). In affirming an award of fees equal to nearly one third of the settlement fund plus expenses, the Seventh Circuit considered, among others, the following factors: (1) "awards made by courts in other class actions" which "amount[ed] to 30-39% of the settlement fund"; (2) "the quality of legal services rendered"; and (3) "the contingent nature of the case." *Taubenfeld*, 415 F.3d at 600. An examination of these three factors demonstrates that an award of attorneys' fees equal to one-third the settlement amount is both fair and reasonable.

A. The Requested Fees are Fair and Reasonable as a Percentage of the Fund.

The Seventh Circuit has strongly endorsed the percentage of the fund method, pursuant to which fees are awarded as a percentage of the total recovery, because it most closely approximates the manner in which attorneys are compensated in the marketplace for contingent work. *See Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998) ("When a class suit produces a fund for the class, it is commonplace to award the lawyers for the class a percentage of the fund

... in recognition of the fact that most suits for damages in this country are handled on the plaintiff's side on a contingent-fee basis").[5] The Seventh Circuit has also recognized "that there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration." *Florin I*, 34 F.3d at 566; *In re Trans Union Corp. Privacy Litig.*, No. 00 C 4729, 2009 U.S. Dist. LEXIS 116934, at *13 (N.D. Ill. Oct. 1, 2009), *modified and remanded by*, 629 F.3d 741 (7th Cir. 2011) (same); *see also In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992) (noting it is easier to award a percentage "than it would be to hassle over every item or category of hours and expenses and what multiple to fix and so forth").[6]

The fee award requested here, amounting to one-third of the recovery, is reasonable and well justified in light of the significant risks faced in the litigation, the obstacles overcome, and the quality of Class Counsel's work. Moreover, the requested fee is also plainly consistent with fee awards made by courts in other, similar cases. In complex class action cases like this one, percentages in the range of 33% to 40% of the recovery have been held appropriate within the Seventh Circuit. *See Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97 C 7694, 2001 U.S. Dist. LEXIS 20397, at *10 (N.D. Ill. Dec. 6, 2001) ("A customary contingency fee would range from 33 1/3% to 40% of the amount recovered."); *Goldsmith v. Tech. Solutions Co.*, No.

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[5] *Cooper v. IBM Pers. Pension Plan*, No. 99 -829-GPM, 2005 U.S. Dist. LEXIS 17071, at *13 (S.D. Ill. Aug. 16, 2005) ("'[T]he approach favored in the Seventh Circuit is to compute attorney's fees as a percentage of the benefit conferred on the class,' particularly where that percentage of the benefit approach replicates the market").

[6] Although the Seventh Circuit has strongly endorsed the percentage method, district courts retain discretion to choose either the percentage or lodestar method of calculating fees. *In re Trans Union*, 2009 U.S. Dist. LEXIS 116934, at *13.

92 C 4374, 1995 U.S. Dist. LEXIS 15093, at *27 (N.D. Ill. Oct. 10, 1995) ("Thus, where the percentage method is utilized, courts in this District commonly award attorneys' fees equal to approximately one-third or more of the recovery.").[7] Moreover, an award of one-third the Settlement is consistent with other complex antitrust actions involving the pharmaceutical industry. *See, e.g., In re Remeron Direct Purchaser Antitrust Litig.*, No. Civ.03-0085 FSH, 2005 WL 3008808, at *12 - *14 (D. N.J. Nov. 9, 2005) (33.3% in direct-purchaser antitrust suit in pharmaceutical industry).[8] Accordingly, Class Counsel request that the court adopt the

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[7] *See also, e.g., Campbell v. Advantage Sales & Mktg. LLC*, No. 09–01430, 2012 WL 1424417, at *2 (S.D. Ind. Apr. 24, 2012)(awarding one-third of recovery as attorneys' fees); *In re Ready–Mixed Concrete Antitrust Litig.*, No. 05–00979, 2010 WL 3282591, at *3 (S.D. Ind. Aug. 17, 2010) (awarding 33.3% of the common fund as fees in direct-purchaser antitrust action); *Taubenfeld*, 415 F.3d at 598 (affirming award of 30%); *McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 816 (E.D. Wis. 2009) (awarding 30% of common fund); *Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers*, 212 F.R.D. 400, 417 (E.D. Wis. 2002) (approving 30% fee award); *Retsky*, 2001 U.S. Dist. LEXIS 20397, at *10 (awarding 33 1/3% of fund); *Goldsmith*, 1995 U.S. Dist. LEXIS 15093, at *27 (awarding fee of 33 1/3%); *Long v. Trans World Airlines, Inc.*, No. 86 C 7521, 1993 U.S. Dist. LEXIS 5063, at *1 (N.D. Ill. Apr. 15, 1993) (32% of settlement or $1.3 million); *see also In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (33.3% of $586 million settlement); *In re Bisys Sec. Litig.*, No. 04 Civ. 3840(JSR), 2007 U.S. Dist. LEXIS 51087, at *8-9 (S.D.N.Y. July 16, 2007) (30% of $65.87 million settlement); *In re Priceline.com, Inc Sec. Litig.*, No. 3:00-CV-1884(AVC), 2007 U.S. Dist. LEXIS 5962, at *2 (D. Conn. Jan. 26, 2007) (30% of $80 million settlement); *Nichols v. SmithKline Beecham Corp.,* No. Civ.A.00–6222, 2005 WL 950616 (E.D. Pa. Apr. 22, 2005) (approving 30% fee); *In re Linerboard Antitrust Litig.,* No. MDL 1261, Civ.A. 98–5055, Civ.A. 99–1000, Civ.A. 99–1341, 2004 WL 1221350 (E.D. Pa. June 2, 2004) (approving 30% fee of a $202 million settlement in an antitrust class action); *In re Kurzweil v. Philip Morris Co., Inc.*, Nos. 94 Civ. 2373(MBM), 94 Civ. 2546(BMB), 1999 U.S. Dist. LEXIS 18378, at *1 (S.D.N.Y. Nov. 24, 1999) (30% of $123 million settlement).

[8] *See also See* Order and Final Judgment at 12, *In re Relafen Antitrust Litig.*, No. 01-12239-WGY (D. Mass. Apr. 9, 2004) (awarding 33.3% fee of a $175 million settlement); Minute Order and Final Judgment, *In re Buspirone Antitrust Litig.*, No. 01-CV-07951 (JGK) (S.D.N.Y. Apr. 17, 2003) (awarding a 33% fee of a $220 million settlement); Final Order and Judgment Approving Settlement Between Class Plaintiff and Defendant Bristol-Myers Squibb Co. at 14,

percentage of the fund approach and award one-third the fund as attorneys' fees.

B. The Lodestar/Multiplier Method Confirms the Requested Attorneys' Fees are Fair and Reasonable

Using the lodestar/multiplier method as a cross-check confirms the appropriateness of the requested fees. *See, e.g., In re Trans Union*, 2009 U.S. Dist. LEXIS 116934, at *6. The lodestar/multiplier method entails multiplying the number of hours each attorney or other professional expended on the case by his or her hourly rate to derive the lodestar figure. *See,e.g.*, *Great Neck*, 212 F.R.D. at 411. The court then typically adjusts the lodestar, by applying a multiplier, to reflect factors such as the contingent nature of the case, the consequent risk of non-payment (or under-payment), and the quality of work performed.

"[A] risk multiplier is not merely available in a common fund case but mandated, if the court finds that counsel 'had no sure source of compensation for the services.'" *Florin I*, 34 F.3d at 565 (quoting *In re Continental Ill. Sec. Litig.,* 962 F.2d 566, 569 (7th Cir. 1992)) ("the need for such an adjustment is particularly acute in class action suits").[9] There are numerous class actions in which plaintiffs' counsel expended thousands of hours and advanced significant

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North Shore Hematology-Oncology Assoc., P.C. v. Bristol Myers Squibb Co., No. 1:04cv248 (EGS) (D.D.C. Nov. 30, 2004) (awarding a 33.3% fee of a $50 million settlement); Order and Final Judgment at 24, *In re Terazosin Hydrocholride Antitrust Litig.*, No. 99-MDL-1317 (S.D. Fla. Apr. 19, 2005); (awarding a 33% fee of a $72.5 million settlement).

[9] *See also*; *In re Prudential Sec. Ltd. P'ship Litig.*, 985 F. Supp. 410, 414 (S.D.N.Y. 1997) ("Because counsel who rendered services were not being compensated for their work as it was being performed and because of the significant risk that they might never receive any compensation if the action was unsuccessful, courts have, when warranted, applied a multiplier to the lodestar to arrive at a fair contingent fee.").

litigation expenses and yet received no remuneration whatsoever, despite their hard work and expertise.

As the Seventh Circuit has emphasized, "court[s] must also be careful to sustain the incentive for attorneys to continue to represent such clients on an 'inescapably contingent' basis." *Florin v. Nationsbank of Ga., N.A. ("Florin II")*, 60 F.3d 1245, 1247 (7th Cir. 1995). *See also Gaskill*, 160 F.3d at 363 (recognizing contingent-fee contracts "shift part of the risk of loss from client to lawyer"). This is particularly true in complex antitrust matters, which are notoriously complex and risky, and frequently involve unpredictable "battles of experts." *See In re Linerboard Antitrust Litig.*, No. MDL 1261, 2004 WL 1221350, at *16 (E.D. Pa. June 2, 2004) (using a multiplier to "reflect the risks of nonpayment facing counsel, to serve as an incentive for counsel to undertake socially beneficial litigation, or as a reward to counsel for an extraordinary result" in a complex antitrust matter); *see also Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 253 (7th Cir. 1988) ("The stronger the defense, the higher the risk involved in bringing the suit and the greater the multiplier necessary to compensate plaintiff's attorney for bringing the action.").

From the very outset, no matter how strong Class Counsel believed the case to be, there existed the significant possibility Defendants might prevail on motion, at trial, or on appeal – and hence Class Counsel would receive no compensation for their work on behalf of the Class. Plainly, Class Counsel here were not "assured of a paycheck." *See Florin II*, 60 F.3d at 1247. Nonetheless, they collectively risked significant amounts of time and money to achieve a recovery for the Class.

Here, Plaintiffs' counsel collectively expended approximately 92,000 hours of

professional time[10] prosecuting the Class's claims. Joint Decl. ¶ 23. Counsel's total lodestar, derived by multiplying the number of hours by each firm's historical[11] hourly rates, amounts to more than $37 million. *Id.* The requested fee of $21,333,333.33 reflects only a .58% multiplier. *Id.* ¶ 26. In other words, Class Counsel have at this time requested an interim award that is significantly *less* than the lodestar to date.[12] Given the risks Class Counsel embraced in bringing this case, and the overwhelming case law supporting the use of risk multipliers, the fees requested are plainly conservative and reasonable. As discussed in greater detail in the Joint Declaration, during the course of this litigation Class Counsel have, among other things:

- Researched the law pertinent to the claims against Defendants and the potential defenses thereto;
- Prepared a detailed and comprehensive amended complaint based on the extensive factual and expert information Class Counsel collected;
- Researched and drafted comprehensive briefs (and assembled supporting materials) in opposition to Defendants' motion to dismiss;
- Prepared and served numerous discovery requests on Defendants;

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[10] Since it is customary to bill paralegals at hourly rates, it is appropriate to include their time in the lodestar. *In re Cont'l*, 962 F.2d at 569. Courts have recognized the economic value of using paralegals to do work that otherwise would be performed by attorneys. *See id.*; *United States Football League v. Nat'l Football League*, 887 F.2d 408, 416 (2d Cir. 1989).

[11] Courts have held use of *current* rates is appropriate to compensate counsel for the loss of use of funds. *See Smith v. Vill. of Maywood*, 17 F.3d 219, 221 (7th Cir. 1994) ("A court may elect to use … current rates … as acceptable compensation for the delay in payment of fees."); *Heder v. City of Two Rivers*, 255 F. Supp. 2d 947, 958 (E.D. Wis. 2003) ("awarding fees at the current rate … is an accepted method"). Class Counsel's use here of historical rates, in lieu of current rates, results in a smaller lodestar and a more conservative fee request.

[12] If the Court awards both the requested interim fee and the fee counsel will request on the Baxter settlement executed today, the total fee will approximately equal Plaintiffs' counsel's lodestar.

- Briefed and argued numerous discovery disputes before Magistrate Judge Keys (and resolved numerous other discovery disputes amicably without involving the Court);

- Prepared and served subpoenas for the production of documents on seventeen third parties;

- Filed FOIA requests with the United Stated Department of Health and Human Services and the Food and Drug Administration Center for Biologics Evaluation and Research for documents relevant to a shortage of Ig or albumin, and reviewed those documents.

- Engaged in protracted negotiation of discovery issues with Defendants and third parties including the negotiation of an ESI protocol and protective order as well as extensive briefing regarding the adequacy of Defendant PPTA's document production;

- Reviewed and analyzed over 11 million pages of documents produced in this litigation;

- Reviewed tens of thousands of pages of other information concerning the Plasma industry, including: (a) Market Research Bureau Reports; (b) transcripts from the Advisory Committee on Blood Safety and Availability; (c) the Defendants' press releases; (d) transcripts of CSL's and Baxter's quarterly analyst conference calls; (e) news articles regarding consolidation in the plasma industry and alleged shortages of products; and (f) materials from the Federal Trade Commission's investigation and complaint challenging CSL's proposed acquisition of Talecris;

- Defended the Class Representatives' depositions;

- Deposed more than sixty witnesses on three continents;

- Located and interviewed dozens of former employees of Defendants and leaders from relevant patient populations;

- Retained and consulted with two preeminent economists – Dr. Richard Frank and Dr. Raymond Hartman – to analyze the Class's claims, to examine whether the economics of the industry support the Class's theory of conspiracy, to estimate damages, and to assess various issues relating to proving damages;

- Prepared and filed the motions, briefs, and Declarations – totaling several hundred pages – in support of Class Certification;

- Conducted arm's-length settlement negotiations with Defendants' counsel;
- Prepared and negotiated the Settlement Agreement and relevant exhibits;
- Prepared the motions and briefs in support of Preliminary Approval and Final Approval of the proposed Settlement;
- Coordinated issuance of Notice and various settlement administration-related matters with the Claims Administrator and with the escrow agent that is presently holding the Settlement Fund assets in an interest-bearing account for the benefit of the Class; and
- Communicated with the Class Representatives with updates on litigation status throughout.

See Joint Decl. ¶¶ 5, 6, 15.

Class Counsel have made every effort to be efficient in litigating this Action. As much as possible, Class Counsel managed the assignment of work in this case to avoid unnecessarily duplicative or overlapping work. Where appropriate, work was assigned to junior lawyers, paralegals, and others with lower hourly rates.

Courts have held the hourly rates to be applied in calculating the lodestar are those normally charged for similar work by attorneys of comparable skill and experience in the community where the attorney practices. *See In re Synthroid*, 264 F.3d at 718 ("when deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time").[13] "The attorney's actual billing rate for comparable

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[13] *See also Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) ("[w]hen the 'prevailing' method of compensating lawyers for 'similar services' is the contingent fee, then the contingent fee is the 'market rate'"); *Luciano v. Olsten Corp.*, 109 F.3d 111, 115 (2d Cir. 1997) ("[t]he 'lodestar' figure should be 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation'"); *In re NASDAQ Mkt.-*

work is 'presumptively appropriate' to use as the market rate." *Aspacher v. Rosenthal Collins Group*, No. 00 C 7520, 2001 U.S. Dist. LEXIS 19464, at *5 (N.D. Ill. Nov. 6, 2001) (quoting *People Who Care v. Rockford Bd. of Educ.*, 90 F.3d 1307, 1310 (7th Cir. 1996)). *See also In re Cont'l*, 962 F.2d at 569 ("lawyers…are entitled to be compensated at market rates").

The hourly fee rates claimed by Plaintiffs' Counsel are the same as the regular rates historically charged for their services and which have been approved in other complex class action litigation. Joint Decl. ¶ 25. In short, the hours expended by Plaintiffs' Counsel, which produced the Settlement now before the Court, were reasonable in view of the work performed, the stage of the proceedings reached, and the complexity of the claims and defenses asserted.

C. The Quality of Legal Services Rendered Supports the Fee Request

Class Counsel respectfully submit that they rendered superior representation to the Class through their efforts and persistence in litigating the Action. The "prosecution and management of a complex national class action requires unique legal skills and abilities." *Edmonds v. United States*, 658 F. Supp. 1126, 1137 (D.S.C. 1987). Class Counsel practice extensively in the highly challenging field of antitrust litigation and have skillfully litigated these types of actions in courts across the country. *See* Joint Decl. ¶ 27. This expertise proved essential in litigating the Class's claims.

Throughout the course of this case, Class Counsel were confronted with a number of legal and factual obstacles to establishing, among other things, an illegal conspiracy among

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Makers Antitrust Litig., 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (appropriate rate in performing lodestar analysis is "the rate 'normally charged for similar work by attorneys of like skill in the area,' taking into account factors such as the experience of the attorney performing the work and the type of work performed").

Defendants, antitrust impact, and damages. Defendants have consistently argued that Plaintiffs would not be able to prove Defendants *agreed* to reduce the supply of plasma-derivative protein therapies as opposed to merely acting interdependently in an oligopolistic market.

However, despite the complexity of the issues and the substantial difficulties of establishing liability and damages, Class Counsel helped the Class achieve an excellent recovery. It was only through the extensive efforts of Class Counsel in preparing a detailed amended complaint following a comprehensive investigation,[14] successfully opposing Defendants' motions to dismiss, and developing the claims with evidence derived from fact and expert discovery that Class Counsel were able to secure $64 million for the Class in this initial settlement (and more in connection with the Baxter settlement executed today).

D. To Date, No Class Member Has Objected to the Fee and Expense Request

In accordance with the Court's Order for Notice and Hearing, dated October 18, 2013, over 3000 copies of the Notice of (i) Pendency and Proposed Settlement of Class Action; (ii) Settlement Fairness Hearing; and (iii) Motion for Attorneys' Fees and Reimbursement of Litigation Expenses (the "Notice"), and the Proof of Claim and Release form were distributed to potential Class Members. *See* Declaration of David Garcia of Epiq, the Settlement

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[14] Because Class Counsel are requesting fees only for the period post-dating the Court's appointment of the Plaintiffs' Steering Committee, Class Counsel have not included in this fee request the substantial time expended in investigating the Class's claims and drafting the Amended Complaint. Additionally, because counsel seek fees for their work on the case only through October 18, 2013, Class Counsel have ensured that no time spent preparing this fee request will be compensated. These facts once again underscore the conservative nature of Counsel's fee request.

Administrator in the Action, Regarding Mailing of the Notice and Proof of Claim; Publication of the Internet Ads; and Report on Requests for Exclusion, attached to Plaintiffs' Motion for Final Approval of the CSL/PPTA Settlement as Exhibit 2, at ¶ 6. In addition, information regarding the settlement was posted on several websites[15] identified as regularly visited by class members. *See id.*

The Notice advised Class Members that Class Counsel would be seeking fees of up to 33 1/3% of the Settlement Fund and reimbursement of expenses. *See* Long-Form Notice at 7, attached as Exhibit A to Garcia Declaration. The Notice further apprised Class Members of their right to object to the motion for fees and expenses. The Court-established deadline for filing objections is January 3, 2014, and if any objections are received, they will be addressed in Class Counsel's reply submission to be filed on January 17, 2014. To date, no Class Member has objected. That not a single Class Member has objected to the motion for fees and expenses to date underscores the reasonableness of the fee and expense award sought, especially where, as here, the Class is comprised of many sophisticated hospitals and national distributors more than capable of objecting should they believe the requested fees to be unreasonable.[16] *See In re Remeron*, 2005 WL 3008808, at *13 ("The lack of objections from the Class supports the reasonableness of the fee request.").

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[15] These websites included Hospital and Health Networks, HEM/ONC Today, Medical Economics, and Modern Healthcare

[16] As noted above, the fact that no class members opted out of the settlement by the December 9 deadline (or since) is a testament to the quality of the settlement achieved.

II. THE REQUEST FOR REIMBURSEMENT OF COSTS AND EXPENSES IS FAIR AND REASONABLE.

Class Counsel seek reimbursement from the Settlement Fund of $4,095,879.19 in litigation expenses reasonably and actually incurred by Class Counsel in connection with commencing and prosecuting the claims against the Defendants. Courts regularly award reimbursement of the expenses counsel incurred in prosecuting the litigation. *See Spicer v. Chicago Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1256 (N.D. Ill. 1993) (detailing and awarding expenses incurred during litigation); *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they 'were incidental and necessary to the representation' of those clients.").[17] In prosecuting this complex antitrust action, Class Counsel collectively have incurred litigation costs and expenses in the total amount of $4,095,879. Joint Decl. ¶ 32.

These costs and expenses were incidental and necessary to the prosecution of the Class's claims, and are detailed in the Joint Declaration (¶¶ 32-38) and the declarations in the Compendium. Two significant components of these expenses were (1) the retention of expert economists and (2) the maintenance of an electronic document database and review platform for electronic discovery. Indeed, these costs amount to 56% and 24% of the total expenses in the case, respectively. *Id.* ¶¶ 35-36. As these expenses were critical to achieving the excellent result obtained for the Class, and fully reasonable in light of the demands of complex antitrust litigation

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[17] *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 192 (E.D. Pa. 2000) ("Counsel for each firm has submitted an affidavit attesting to the unreimbursed expenses paid out, and the court sees no reason to disallow any particular category or claim.").

and the market for these types of litigation support services, Class Counsel ask that their expenses be reimbursed.

CONCLUSION

Class Counsel respectfully request that the Court approve their motion for an award of attorneys' fees equal to one third of the Settlement Fund to be paid out of the Settlement Fund (approximately $21.33 million). In addition, Class Counsel requests an award of $4,095,879.19 from the Settlement Fund for reimbursement of their actual costs and expenses incurred in connection with their representation of the Class in this Action.

Dated: December 16, 2013

Respectfully submitted,

/s/ Richard A. Koffman
COHEN MILSTEIN SELLERS & TOLL PLLC
Richard A. Koffman
Emmy L. Levens
Benjamin D. Brown
Christopher J. Cormier
1100 New York Ave, NW, Suite 500 West
Washington DC 20005
Plaintiffs' Steering Committee

FREEBORN & PETERS LLP
Deborah H. Bornstein
Kathryn C. Thomas
Garry L. Wills
311 S. Wacker Dr., Suite 3000
Chicago, IL 60606
Plaintiffs' Liaison Counsel

/s/ Charles E. Tompkins
WILLIAMS MONTGOMERY & JOHN LTD.
Charles E. Tompkins
Anthony J. O'Neill
Bethany C. Teska
233 S. Wacker Dr., Suite 6100
Chicago, Il 60606
Plaintiffs' Steering Committee

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served upon All Counsel of Record by e-mail on this 16th day of December, 2013.

Charles E. Tompkins

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: PLASMA-DERIVATIVE PROTEIN THERAPIES ANTITRUST LITIGATION This Document Relates To All Actions	Case No. 09 C 7666 MDL No. 2109 Judge Joan B. Gottschall Magistrate Judge Arlander Keys

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A FINAL AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND APPROVAL OF INCENTIVE AWARDS FOR CLASS REPRESENTATIVES

COHEN MILSTEIN SELLERS & TOLL PLLC
Richard A. Koffman
Benjamin D. Brown
Christopher J. Cormier
Emmy L. Levens
1100 New York Avenue, NW
Suite 500 West
Washington, DC 20005

Plaintiffs' Steering Committee

WILLIAMS MONTGOMERY & JOHN LTD.
Charles E. Tompkins
Anthony J. O'Neill
Bethany C. Teska
233 S. Wacker Drive
Suite 6100
Chicago, Il 60606

Plaintiffs' Steering Committee

FREEBORN & PETERS LLP
David Gustman
Deborah H. Bornstein
311 S. Wacker Drive
Suite 3000
Chicago, IL 60606

Plaintiffs' Liaison Counsel

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OTHER AUTHORITIES

Rule 23(h) of the Federal Rules of Civil Procedure 1

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This case involves allegations that the two largest manufacturers of life-sustaining biologic therapies conspired to restrict the supply and increase the prices of those therapies in violation of the antitrust laws. Following a lengthy pre-filing investigation, Class Counsel and their legal team have engaged in nearly five years of intensive litigation, during which they have: successfully filed a detailed Consolidated Amended Complaint; defeated two motions to dismiss; engaged in extensive discovery-related motion practice; reviewed more than 11 million pages of documents; taken and defended more than sixty depositions on three separate continents; retained and consulted two preeminent economists (and defended their depositions); submitted several hundred pages of briefing and other materials in support of Plaintiff's motion for class certification; and engaged in protracted, arm's length settlement negotiations with all three Defendants. All of these efforts have now come to fruition, as Class Counsel have reached a Settlement with the final remaining defendant, Baxter, for $64 million. This brings the total relief to the Class to $128 million. As explained more fully in the simultaneously filed Motion for Final Approval of the Baxter Settlement, this is a truly excellent result for the Class.

Class Counsel – Richard A. Koffman and Charles E. Tompkins, and their respective law firms[1] – hereby submit this memorandum in support of their Motion for a Final Award of Attorneys' Fees and Reimbursement of Litigation Expenses pursuant to Rule 23(h) of the Federal Rules of Civil Procedure. As compensation for their considerable work on behalf of the

[1] Class Counsel have been ably assisted throughout by a team of experienced attorneys from many of the nation's top plaintiffs' firms, including Liaison Counsel from Freeborn & Peters LLP.

Class, Class Counsel seek an award of one-third of the Settlement fund, $21,333,333.33.[2] Counsel respectfully submit that this fee is eminently fair and reasonable given that Plaintiffs' counsel have invested over 94,000 professional hours, valued at more than $37.75 million, and invested $5 million in out-of-pocket expenses, all without any guarantee of payment or reimbursement. This extraordinary investment apparently mirrors Defendants': Baxter stated in open Court that it had engaged one hundred contract attorneys to work on this matter[3] and CSL publicly acknowledged that it had spent more than $20 million in legal fees related to this suit, and expected to spend $20 million more if the case were litigated to conclusion. Applying simple mathematics and logic to these facts, the three Defendants' total legal fees to date are likely in excess of $50 million.

Counsel also asks that the Court approve an incentive award of $50,000 for each of the Class Representatives in this matter. The Class Representatives have collectively spent thousands of hours prosecuting this matter on behalf of the Class, and their efforts have been critical to the successful result achieved for the Class. The Class Representatives devoted significant resources to the case despite the fact that each of the Class Representatives'

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[2] Attached as Exhibit 1 is the Joint Declaration of Richard A. Koffman and Charles E. Tompkins in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation and Class Counsel's Motion for an Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Approval of Incentive Awards for Class Representatives (the "Joint Declaration" or "Joint Decl."), which contains a description of the history of the litigation, the claims asserted, the investigation and discovery undertaken, the negotiation and substance of the Settlement, and the substantial risks and uncertainties presented by and overcome in this litigation.

Class Counsel will submit shortly the detailed declarations and time entries for each Firm requesting attorneys' fees in this case for the Court's review *in camera*.

[3] Tr. of Hearing held on Feb. 15, 2012 at 6, ECF No. 456.

respective recoveries from the Settlement is comparatively small. The Class Representatives took seriously their responsibilities as "private attorneys general" enforcing the antitrust laws, and each took significant risks and made enormous sacrifices to that end. As the requested incentive awards collectively amount to only .1% of the total recovery to the Class and individually are de minimus in relation to the recovery obtained by other members of the Class, the requested payments are both justified and reasonable.

To date, no Class Member has objected to either the proposed Settlement, to Class Counsel's request for fees and expenses, or to the award of $50,000 to each of the Class Representatives.[4] Additionally, not a single class member opted out of the settlement before the March 3, 2014 opt-out deadline. Given the sophisticated nature of most members of the Settlement Class, which include hospitals and national drug distributors with legal counsel of their own, the fact that *none* of them has opted out speaks volumes about the quality of the settlement and underscores the excellent result achieved by Class Counsel and the Class Representatives.

Both Class Counsel and the Class Representatives devoted tremendous time and effort to the prosecution of the Class's claims, and their efforts paid off. The requested attorneys' fees and incentive awards are both conservative and amply justified in light of the investment, risks, and excellent results obtained for the Class.

[4] The deadline for objections is March 31, 2014. If any objections are received, they will be addressed in Class Counsel's reply submission, which will be filed on April 14, 2014.

ARGUMENT

I. THE REQUESTED ATTORNEYS' FEES ARE FAIR AND REASONABLE.

It is well-settled that attorneys who, by their efforts, create a common fund for the benefit of a class are entitled to reasonable compensation for their services. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole"); *Florin v. Nationsbank of Ga., N.A. ("Florin I")*, 34 F.3d 560, 563 (7th Cir. 1994) ("When a case results in the creation of a common fund for the benefit of the plaintiff class, the common fund doctrine allows plaintiffs' attorneys to petition the court to recover its fees out of the fund."). Courts have recognized that, in addition to providing just compensation, substantial counsel fees encourage forceful prosecution of cases. *See Halverson v. Convenient Food Mart, Inc.*, 458 F.2d 927, 931 n.5 (7th Cir. 1972). Moreover, providing reasonable attorneys' fees in successful private antitrust actions promotes "[p]rivate antitrust litigation [which] is widely recognized as an effective supplement to government enforcement of the antitrust laws and contributes to the maintenance of a competitive economy." *In re Clark Oil & Refining Corp. Antitrust Litig.*, 422 F. Supp. 503, 510 (E.D. Wis. 1976), citing *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1972).

In making the determination regarding the appropriate amount of attorneys' fees to be awarded to counsel who have successfully prosecuted litigation on behalf of a class, the Seventh Circuit has instructed: "[W]hen deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Taubenfeld v. Aon*

Corp., 415 F.3d 597, 599 (7th Cir. 2005); s*ee also In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) (same). In affirming an award of fees equal to nearly one-third of the settlement fund plus expenses, the Seventh Circuit considered, among others, the following factors: (1) "awards made by courts in other class actions" which "amount[ed] to 30-39% of the settlement fund"; (2) "the quality of legal services rendered"; and (3) "the contingent nature of the case." *Taubenfeld*, 415 F.3d at 600. An examination of these three factors demonstrates that an award of attorneys' fees equal to one-third the settlement amount is both fair and reasonable.

A. The Requested Fees are Fair and Reasonable as a Percentage of the Fund.

The Seventh Circuit has strongly endorsed the percentage of the fund method, pursuant to which fees are awarded as a percentage of the total recovery, because it most closely approximates the manner in which attorneys are compensated in the marketplace for contingent fee work. *See Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998) ("When a class suit produces a fund for the class, it is commonplace to award the lawyers for the class a percentage of the fund . . . in recognition of the fact that most suits for damages in this country are handled on the plaintiff's side on a contingent-fee basis").[5] The Seventh Circuit has also recognized "that there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration." *Florin I*, 34 F.3d at 566; *In re Trans Union Corp. Privacy Litig.,* No. 00 C 4729, 2009 U.S. Dist. LEXIS 116934, at *13 (N.D. Ill. Oct. 1, 2009), *modified and*

[5] *Cooper v. IBM Pers. Pension Plan*, No. 99 -829-GPM, 2005 U.S. Dist. LEXIS 17071, at *13 (S.D. Ill. Aug. 16, 2005) ("'[T]he approach favored in the Seventh Circuit is to compute attorney's fees as a percentage of the benefit conferred on the class,' particularly where that percentage of the benefit approach replicates the market").

remanded by, 629 F.3d 741 (7th Cir. 2011) (same); *see also In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992) (noting it is easier to award a percentage "than it would be to hassle over every item or category of hours and expense and what multiple to fix and so forth").[6]

The fee award requested here, amounting to one-third of the recovery, is reasonable and well justified in light of the significant risks faced in the litigation, the obstacles overcome, and the quality of Class Counsel's work. Moreover, the requested fee is also plainly consistent with fee awards made by courts in other, similar cases. In complex class action cases like this one, percentages in the range of 33% to 40% of the recovery have been held appropriate within the Seventh Circuit. *See Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97 C 7694, 2001 U.S. Dist. LEXIS 20397, at *10 (N.D. Ill. Dec. 6, 2001) ("A customary contingency fee would range from 33 1/3% to 40% of the amount recovered."); *Goldsmith v. Tech. Solutions Co*., No. 92 C 4374, 1995 U.S. Dist. LEXIS 15093, at *27 (N.D. Ill. Oct. 10, 1995) ("Thus, where the percentage method is utilized, courts in this District commonly award attorneys' fees equal to approximately one-third or more of the recovery.").[7] Moreover, an award of one-third the

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[6] Although the Seventh Circuit has strongly endorsed the percentage method, district courts retain discretion to choose either the percentage or lodestar method of calculating fees. *In re Trans Union*, 2009 U.S. Dist. LEXIS 116934, at *13.

[7] *See also, e.g., Campbell v. Advantage Sales & Mktg. LLC*, No. 09–01430-LJM-MJD, 2012 WL 1424417, at *2 (S.D. Ind. Apr. 24, 2012) (awarding one-third of recovery as attorneys' fees); *In re Ready–Mixed Concrete Antitrust Litig.*, No. 1:05-cv-00979-SEB-TAB, 2010 WL 3282591, at *3 (S.D. Ind. Aug. 17, 2010) (awarding 33.3% of the common fund as fees in direct-purchaser antitrust action); *Taubenfeld*, 415 F.3d at 598 (affirming award of 30%); *McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 816 (E.D. Wis. 2009) (awarding 30% of common fund); *Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 417 (E.D. Wis. 2002) (approving 30% fee award); *Retsky*, 2001 U.S. Dist. LEXIS 20397, at *10 - *11 (awarding 33 1/3% of fund); *Goldsmith*, 1995 U.S. Dist. LEXIS

Settlement is consistent with other complex antitrust actions involving the pharmaceutical industry. *See*, *e.g.*, *In re Remeron Direct Purchaser Antitrust Litig.*, No. Civ. 03-0085 FSH, 2005 WL 3008808, at *12 - *14 (D. N.J. Nov. 9, 2005) (33.3% in direct-purchaser antitrust suit in pharmaceutical industry).[8] Finally, "Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." William B. Rubenstein, Newberg on Class Actions § 14:6 (4th ed.). Accordingly, Class Counsel request that the court adopt the percentage of the fund approach – as it did with respect to the prior Settlement with CSL and PPTA – and award one-third of the Settlement fund as attorneys' fees.

B. The Lodestar/Multiplier Method Confirms the Requested Attorneys' Fees are Fair and Reasonable

Using the lodestar/multiplier method as a cross-check confirms the appropriateness of the requested fees. *See, e.g., In re Trans Union*, 2009 U.S. Dist. LEXIS 116934, at *6. The lodestar/multiplier method entails multiplying the number of hours each attorney or other

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15093, at *27 - *28 (awarding fee of 33 1/3%); *Long v. Trans World Airlines, Inc.*, No. 86 C 7521, 1993 U.S. Dist. LEXIS 5063, at *6 (N.D. Ill. Apr. 15, 1993) (32% of settlement or $1.3 million); *see also In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (33.3% of $586 million settlement).

[8] *See also* Order and Final Judgment at §12, *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, No. 01-12239-WGY (D. Mass. Apr. 9, 2004), ECF No. 297 (awarding 33.3% fee of a $175 million settlement); Minute Order and Final Judgment, *In re Buspirone Antitrust Litig.*, 211 F.R.D. 249, No. 01-CV-07951 (JGK) (S.D.N.Y. Apr. 17, 2003) (awarding a 33.3% fee of a $220 million settlement); Final Order and Judgment Approving Settlement Between Class Plaintiff and Defendant Bristol-Myers Squibb Company at §14, *North Shore Hematology-Oncology Assoc., P.C. v. Bristol Myers Squibb Co.*, No. 1:04-cv-248 (EGS) (D.D.C. Nov. 30, 2004), ECF No. 30 (awarding a 33.3% fee of a $50 million settlement); Order and Final Judgment at §24, *In re Terazosin Hydrocholride Antitrust Litig.*, 352 F. Supp. 2d 1279, No. 99-MD-1317 (S.D. Fla. Apr. 19, 2005), ECF No. 1557; (awarding a 33.3% fee of a $72.5 million settlement).

professional expended on the case by his or her hourly rate to derive the lodestar figure. *See, e.g.*, *Great Neck*, 212 F.R.D. at 411. The court then typically adjusts the lodestar, by applying a multiplier, to reflect factors such as the contingent nature of the case, the consequent risk of non-payment (or under-payment), and the quality of work performed.

"[A] risk multiplier is not merely available in a common fund case but mandated, if the court finds that counsel 'had no sure source of compensation for the services.'" *Florin I*, 34 F.3d at 565 (quoting *In re Continental Ill. Sec. Litig.,* 962 F.2d 566, 569 (7th Cir. 1992)) ("the need for such an adjustment is particularly acute in class action suits").[9] There are numerous class actions in which plaintiffs' counsel expended thousands of hours and advanced significant litigation expenses and yet received no remuneration whatsoever, despite their hard work and expertise. At the outset of this litigation, there was no guarantee this would not be one of those class actions.

As the Seventh Circuit has emphasized, "court[s] must also be careful to sustain the incentive for attorneys to continue to represent such clients on an 'inescapably contingent' basis." *Florin v. Nationsbank of Ga., N.A. ("Florin II")*, 60 F.3d 1245, 1247 (7th Cir. 1995) (quoting *In re Continental Ill. Sec. Litig.*, 962 F.2d at 569). *See also Gaskill*, 160 F.3d at 363 (recognizing contingent-fee contracts "shift part of the risk of loss from client to lawyer"). This

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[9] *See also In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 985 F. Supp. 410, 414 (S.D.N.Y. 1997) ("Because counsel who rendered services were not being compensated for their work as it was being performed and because of the significant risk that they might never receive any compensation if the action was unsuccessful, courts have, when warranted, applied a multiplier to the lodestar to arrive at a fair contingent fee.").

is particularly true in complex antitrust matters, which are notoriously complex and risky, and frequently involve unpredictable "battles of experts." *See*, *e.g.*, *In re Linerboard Antitrust Litig.,* No. MDL 1261, 2004 WL 1221350, at *16 (E.D. Pa. June 2, 2004) (using a multiplier to "reflect the risks of nonpayment facing counsel, to serve as an incentive for counsel to undertake socially beneficial litigation, or as a reward to counsel for an extraordinary result" in a complex antitrust matter); *see also Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 253 (7th Cir. 1988) ("The stronger the defense, the higher the risk involved in bringing the suit and the greater the multiplier necessary to compensate plaintiff's attorney for bringing the action.").

From the very outset, no matter how strong Class Counsel believed the case to be, there existed the significant possibility Defendants might prevail on motion, at trial, or on appeal – and hence Class Counsel would receive no compensation for their work on behalf of the Class. Plainly, Class Counsel here were not "assured of a paycheck." *See Florin II*, 60 F.3d at 1247. Nonetheless, they collectively risked significant amounts of time and money to achieve a recovery for the Class.

Here, Plaintiffs' counsel collectively expended approximately 94,000 hours of professional time[10] prosecuting the Class's claims. Joint Decl. ¶ 24. Counsel's total lodestar, derived by multiplying the number of hours by each firm's historical hourly rates, amounts to approximately $39 million. *Id*. The requested fee of $21,333,333.33 reflects only a .56%

[10] Since it is customary to bill paralegals at hourly rates, it is appropriate to include their time in the lodestar. *In re Cont'l*, 962 F.2d at 569. Courts have recognized the economic value of using paralegals to do work that otherwise would have to be performed by attorneys. *See id.*; *United States Football League v. Nat'l Football League*, 887 F.2d 408, 416 (2d Cir. 1989).

multiplier. *Id*. ¶ 26. However, this Court approved an identical award from the CSL/PPTA Settlement. *See* Dkt. No. 693. Taking that award, along with the award requested here, into consideration, Class Counsel have requested a total fee only slightly larger than their total lodestar in the case – a multiplier of approximately 1.13. This is particularly conservative given that Class Counsel's lodestar was calculated using historical rates and includes only time invested since this Court's appointment of Plaintiffs' Steering Committee.[11] Courts have held use of *current* rates is appropriate to compensate counsel for the loss of use of funds. *See Smith v. Vill. of Maywood*, 17 F.3d 219, 221 (7th Cir. 1994) ("A court may elect to use . . . current rates . . . as acceptable compensation for the delay in payment of fees."); *Heder v. City of Two Rivers*, 255 F. Supp. 2d 947, 958 (E.D. Wis. 2003) ("awarding fees at the current rate . . . . is an accepted method"). Using current rates rather than historical rates, and including time spent on pre-filing investigations, the total fees sought from both settlements would likely be less than Class Counsel's lodestar.

Given the risks Class Counsel embraced in bringing this case, and the overwhelming case law supporting the use of risk multipliers, the fees requested are plainly conservative and reasonable. As discussed in greater detail in the Joint Declaration, during the course of this litigation Class Counsel have, among other things:

- Researched the law pertinent to the claims against Defendants and the potential

[11] Class Counsel, in an effort to be conservative in their billing, have included in their fee applications only time spent since this Court's appointment of Plaintiffs' Steering Committee, thereby excluding significant time spent on counsel's pre-filing investigations and briefing of leadership issues. Additionally, Class Counsel have not sought compensation for time spent preparing this and their previous application for attorneys' fees and reimbursement of expenses.

defenses thereto;

- Prepared a detailed and comprehensive amended complaint based on the extensive factual and expert information Class Counsel collected;
- Researched and drafted comprehensive briefs (and assembled supporting materials) in opposition to Defendants' motion to dismiss;
- Prepared and served numerous discovery requests on Defendants;
- Briefed and argued numerous discovery disputes before Magistrate Judge Keys (and resolved numerous other discovery disputes amicably without involving the Court);
- Prepared and served subpoenas for the production of documents on seventeen third parties;
- Filed FOIA requests with the United Stated Department of Health and Human Services and the Food and Drug Administration Center for Biologics Evaluation and Research for documents relevant to a shortage of Ig or albumin, and reviewed those documents.
- Engaged in protracted negotiation of discovery issues with Defendants and third parties including the negotiation of an ESI protocol and protective order as well as extensive briefing regarding the adequacy of Defendant PPTA's document production;
- Reviewed and analyzed over 11 million pages of documents produced in this litigation;
- Reviewed tens of thousands of pages of other information concerning the Plasma industry, including: (a) Market Research Bureau Reports; (b) transcripts from the Advisory Committee on Blood Safety and Availability; (c) the Defendants' press releases; (d) transcripts of CSL's and Baxter's quarterly analyst conference calls; (e) news articles regarding consolidation in the plasma industry and alleged shortages of products; and (f) materials from the Federal Trade Commission's investigation and complaint challenging CSL's proposed acquisition of Talecris;
- Defended the Class Representatives' depositions;
- Deposed more than sixty witnesses on three continents;
- Located and interviewed former employees of Defendants and leaders from relevant patient populations;

- Retained and consulted two preeminent economists – Dr. Richard Frank and Dr. Raymond Hartman – to analyze the Class's claims, to examine whether the economics of the industry support the Class's theory of conspiracy, to estimate damages, and to assess various issues relating to proving damages;
- Prepared and filed the motions, briefs, and Declarations – totaling several hundred pages – in support of Class Certification;
- Conducted arm's-length settlement negotiations with Defendants' counsel;
- Prepared and negotiated the Settlement Agreements and relevant exhibits;
- Prepared the motions and briefs in support of Preliminary Approval and Final Approval of the proposed Settlements;
- Coordinated issuance of Notice and various settlement administration-related matters with the Claims Administrator and with the escrow agent that is presently holding the Settlement Fund assets in an interest-bearing account for the benefit of the Class; and
- Communicated with the Class Representatives with updates on litigation status throughout.

See Joint Decl. ¶ 7.

Class Counsel have made every effort to be efficient in litigating this Action. As much as possible, Class Counsel managed the assignment of work in this case to avoid unnecessarily duplicative or overlapping work. Where appropriate, work was assigned to junior lawyers, paralegals, and others with lower hourly rates, and hourly rates for first-level document review were capped at $400/hr., even for senior attorneys who typically bill at higher hourly rates.

Courts have held the hourly rates to be applied in calculating the lodestar are those normally charged for similar work by attorneys of comparable skill and experience in the community where the attorney practices. *See In re Synthroid*, 264 F.3d at 718 ("when deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of

compensation in the market at the time").[12] "The attorney's actual billing rate for comparable work is 'presumptively appropriate' to use as the market rate." *Aspacher v. Rosenthal Collins Grp.*, No. 00 C 7520, 2001 U.S. Dist. LEXIS 19464, at *5 (N.D. Ill. Nov. 6, 2001) (quoting *People Who Care v. Rockford Bd. of Educ.*, 90 F.3d 1307, 1310 (7th Cir. 1996)). *See also In re Cont'l*, 962 F.2d at 569 ("lawyers . . . are entitled to be compensated at market rates").

The hourly fee rates claimed by Plaintiffs' Counsel are the same as the regular rates historically charged for their services and which have been approved in other complex class action litigation. Joint Decl. ¶ 26. In short, the hours expended by Plaintiffs' Counsel, which produced the Settlement now before the Court, were reasonable in view of the work performed, the stage of the proceedings reached, and the complexity of the claims and defenses asserted.

C. The Quality of Legal Services Rendered Supports the Fee Request

Class Counsel respectfully submit that they rendered superior representation to the Class through their efforts and persistence in litigating the Action. The "prosecution and management of a complex national class action requires unique legal skills and abilities." *Edmonds v. United States*, 658 F. Supp. 1126, 1137 (D.S.C. 1987). Class Counsel practice extensively in the highly

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[12] *See also Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) ("[w]hen the 'prevailing' method of compensating lawyers for 'similar services' is the contingent fee, then the contingent fee is the 'market rate'") (internal citations not included); *Luciano v. Olsten Corp.*, 109 F.3d 111, 115 (2d Cir. 1997) ("[t]he 'lodestar' figure should be 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation'") (quoting *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984)); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (appropriate rate in performing lodestar analysis is "the rate 'normally charged for similar work by attorneys of like skill in the area,' taking into account factors such as the experience of the attorney performing the work and the type of work performed") (quoting *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1098 (2d Cir. 1977)) .

challenging field of antitrust litigation and have skillfully litigated these types of actions in courts across the country. *See* Joint Decl. ¶ 28. This expertise proved essential in litigating the Class's claims.

Throughout the course of this case, Class Counsel were confronted with a number of legal and factual obstacles to establishing, among other things, an illegal conspiracy among Defendants, class-wide antitrust impact, and damages. Defendants have consistently argued that Plaintiffs would not be able to prove Defendants *agreed* to reduce the supply of plasma-derivative protein therapies, as opposed to merely acting interdependently in an oligopolistic market. Had the case not settled, Defendants undoubtedly would have contested class-wide impact and damages, as well.

However, despite the complexity of the issues and the substantial difficulties of establishing liability and damages, Class Counsel helped the Class achieve an excellent recovery. Only the skillful and persistent efforts of Class Counsel enabled the Class to secure $64 million in this final settlement and $128 million in total.

D. To Date, No Class Member Has Objected to the Fee and Expense Request

In accordance with the Court's Order for Notice and Hearing, dated January 8, 2014, more than 2000 copies of the Notice of (i) Pendency and Proposed Settlement of Class Action; (ii) Settlement Fairness Hearing; and (iii) Motion for Attorneys' Fees, Reimbursement of Litigation Expenses and Approval of Incentive Awards for the Class Representatives (the "Notice"), and the Proof of Claim and Release form were distributed to potential Class Members. *See* Declaration of Lauren Edwardson of Epiq, the Settlement Administrator in the Action, Regarding Mailing of the Notice and Proof of Claim; Publication of the Internet Ads; and Report

on Requests for Exclusion, attached to Plaintiffs' Motion for Final Approval of the Baxter Settlement as Exhibit 2, at ¶¶ 5-6. In addition, information regarding the settlement was posted on several websites[13] identified as regularly visited by class members. *See id* ¶¶ 12-15.

The Notice advised Class Members that Class Counsel would be seeking fees of up to 33 1/3% of the Settlement Fund and reimbursement of expenses, along with $50,000 incentive awards for each Class Representatives. *See* Long-Form Notice at 7, attached as Exhibit A to Garcia Declaration. The Notice further apprised Class Members of their right to object to the motion for fees and expenses. The Court-established deadline for filing objections is March 31, 2014, and if any objections are received, they will be addressed in Class Counsel's reply submission to be filed on April 14, 2014. To date, no Class Member has objected. That not a single Class Member has objected to the motion for fees and expenses to date underscores the reasonableness of the fee and expense award sought, especially where, as here, the Class is comprised of many sophisticated hospitals and national distributors more than capable of objecting should they believe the requested fees to be unreasonable.[14] *See In re Remeron*, 2005 WL 3008808, at *13 ("The lack of objections from the Class supports the reasonableness of the fee request.").

II. THE REQUEST FOR REIMBURSEMENT OF COSTS AND EXPENSES IS FAIR AND REASONABLE.

Class Counsel seek reimbursement from the Settlement Fund of $280,971.12 in litigation

[13] These websites included Hospital and Health Networks, HEM/ONC Today, Medical Economics, and Modern Healthcare.

[14] As noted above, the fact that no class members opted out of the settlement by the March 3 deadline (or since) is a testament to the quality of the settlement achieved.

expenses reasonably and actually incurred by Class Counsel in connection with commencing and prosecuting the claims against the Defendants. Courts regularly award reimbursement of the expenses counsel incurred in prosecuting the litigation. *See Spicer v. Chicago Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1256 (N.D. Ill. 1993) (detailing and awarding expenses incurred during litigation); *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they 'were incidental and necessary to the representation' of those clients.") (quoting *Reichman v. Bonsignore, Brignati & Mazzotta, P.C.*, 818 F.2d 278, 283 (2d Cir. 1987)).[15] The vast majority of Class Counsel's expenses (more than $4.5 million) were reimbursed out of the prior CSL/PPTA Settlement. The remaining expenses, detailed more fully in the Joint Declaration and declarations attached to the compendium, reflect primarily: (1) the maintenance of Plaintiffs' document database, (2) conferences with Plaintiffs' experts to resolve Settlement notice and administration matters, and (3) travel for Court-ordered hearings, and (4) copying and mailing expenses related to court filings. Joint Decl. ¶¶ 36-39. As these expenses were critical to achieving the excellent result obtained for the Class, and fully reasonable in light of the demands of complex antitrust litigation and the market for these types of litigation support services, Class Counsel ask that their remaining unreimbursed expenses be reimbursed from the Settlement fund.

[15] *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 192 (E.D. Pa. 2000) ("Counsel for each firm has submitted an affidavit attesting to the unreimbursed expenses paid out, and the court sees no reason to disallow any particular category or claim.").

III. INCENTIVE AWARDS FOR THE CLASS REPRESENTATIVES ARE WARRANTED AND THE AMOUNT REQUESTED IS REASONABLE.

"Incentive awards are justified when necessary to induce individuals to become named representatives." *Synthroid* , 264 F.3d at 722–23. In determining whether incentive awards are appropriate, "relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998); *Spicer v. Chicago Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1267 (N.D. Ill.1993).

Here, incentive payments of $50,000 to each of the Class Representatives are reasonable and appropriate. To begin, simply by agreeing to serve as a named plaintiff the Class Representatives opened themselves up to scrutiny and attention which, in and of itself, has been found worthy of some type of remuneration. *See Schulte v. Fifth Third Bank*, 805 F.Supp. 2d 560, 600-01 (N.D. Ill. 2011). But the efforts of the Class Representatives in this matter went much further than this. All three Class Representatives provided essential assistance in the litigation by locating and producing responsive documents and information, participating in teleconferences and meetings with counsel, making employees available to counsel, preparing for and sitting for depositions, maintaining expensive legacy document systems, and participating in a quarterly review of their document retention policies to ensure compliance with the Court-ordered litigation hold. Decl. of Linda S. Tyler in Support of Petition for Incentive Award to Named Plaintiff University of Utah (attached hereto as Exhibit 3); Decl. of Giteshchandra Patel in Support of Petition for Incentive Award to Named Plaintiff Ravi Patel,

M.D., Inc. d/b/a Comprehensive Blood and Cancer Center (attached hereto as Exhibit 4); Decl. of LCDA. Moraima Torres Toro in Support of Petition for Incentive Award to Named Plaintiff Hospital Damas, Inc. (attached hereto as Exhibit 5). This substantial effort was time-consuming: each of the three named plaintiffs spent hundreds of hours in the prosecution of this case. *Id*.

Not only did the Class Representatives exert this tremendous effort despite the understanding that their individual recovery was likely to be small, they did so knowing that such an effort would require them to invest significant time and resources to benefit the Class as a whole. It additionally bears mention that the Class Representatives undertook this effort despite a risk that the Defendants, who the Class Representatives remained dependent upon for the purchase of medication and therapies throughout the litigation, would retaliate against them in some manner.[16] Given the substantial efforts involved in serving as a Class Representative in this litigation and the risks of retaliation, it is not surprising that there is no evidence that any member of the Class was willing to serve as a named plaintiff absent the possibility of an incentive award. Joint Decl. ¶¶ 40-41. As such, this is precisely the type of case in which the Seventh Circuit has found incentive payments to be appropriate. *See Synthroid* , 264 F.3d at 722–23

Notably, the incentive awards requested here collectively amount to only .1% of the total recovery to the Class – an almost negligible percentage. Reducing each class member's recovery by 0.1% to compensate the Class Representatives for the risks and efforts they undertook to

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[16] To Defendants' credit, there is no evidence of such retaliation in this matter, but each Class Representative ran the risk of retaliation by stepping forward to prosecute these claims on behalf of the Class.

benefit the Class as a whole is more than reasonable under the circumstances of this case. *See Cook*, 142 F.3d at 1016 (7th Cir. 1998) (approving settlement that amounted to .19% of Settlement Fund); *In re Lawnmower Engine Horsepower Marketing & Sales Practices Litig.*, 733 F. Supp. 2d 997, 1016 (E.D. Wis. 2010) (approving incentive payments to class representatives where the total award "is only a tiny percentage (0.12%) of the class's overall recovery"). Moreover, it bears mention that the requested incentive awards amount to a small fraction of the recoveries obtained by many of the larger Class members. Here, the recovery for some members of the Class is measured in the millions of dollars. Thus, there is no concern that the Class Representatives will be disproportionately compensated. *Kaufman v. Am. Express Travel Related Servs. Co., Inc.*, 264 F.R.D. 438, 448 (N.D. Ill. 2009) (refusing to award incentive payments 125 times greater than the maximum recovery of any similar Class member). Indeed, as discussed previously, were the requested incentive award unfair or unreasonable in any way, it is highly likely that absent class members would have objected. That they did not serves only to reinforce the appropriateness of the requested award.

Finally, $50,000 incentive awards are reasonable in light of the efforts required and the recovery obtained for the Class. *See Cook*, 142 F.3d at 1016 (affirming incentive award of $25,000 of $13 million Settlement fund); *Lucken Family Ltd. P'ship, LLLP, v. Ultra Res., Inc.*, 09-cv-01543-REB-KMT, 2010 U.S. Dist. LEXIS 144366, at *16-*17 (D. Colo. Dec. 22, 2010) (noting *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251 (S.D. Ohio 1991) (approving incentive awards of $50,000 for each of 6 class representatives, for a total of $300,000 out of a settlement fund of $56.6 million, which was 0.56% of the common fund) and *In re Mego Financial Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (approving

$5,000 incentive award to each plaintiff where settlement was valued at $1.75 million)).[17]

The efforts of the Class Representatives were absolutely essential to the Class's recovery, *see* Joint Decl. ¶¶ 40-41, and the Class Representatives should be rewarded accordingly. *See Cook*, 142 F.3d at 1016 (7th Cir. 1998).

CONCLUSION

Class Counsel respectfully request that the Court approve their motion for an award of attorneys' fees equal to one third of the Settlement Fund (approximately $21.33 million). In addition, Class Counsel requests an award of $280,971.12 from the Settlement Fund for reimbursement of their actual costs and expenses incurred in connection with their representation of the Class in this Action and not previously reimbursed. Finally, Counsel asks that the Court grant their request to award each of the three Class Representatives $50,000 in recognition of their significant efforts on behalf the Settlement Classes.

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[17] *See also Been v. O.K. Indus., Inc.*, No. CIV-02-285-RAW, 2011 U.S. Dist. LEXIS 115151, at *33-36 (E.D. Okla. Aug. 16, 2011) (approving incentive awards of $100,000 for each of five class representatives for a total of $500,000); *Hershey v. ExxonMobil Oil Corp.*, No. 07-1300-JTM, 2012 U.S. Dist. LEXIS 153803, at *43 (D. Kan. Oct. 26, 2012) (approving an incentive award of $60,500 plus accrued interest); *Ingram v. The Coca-Cola Co*., 200 F.R.D. 685, 694 (N.D. Ga. 2001) (approving awards of $300,000 to each of four class representatives); *In re Vitamin C Antitrust Litig.*, No. 06-MD-1738 (BMC) (JO), 2012 U.S. Dist. LEXIS 152275, at *35-36 (E.D.N.Y. Oct. 22, 2012) (approving incentive awards of $50,000 to each of two class representatives); *cf. Ryskamp v. Looney*, No. 10-cv-00842-WJM-KLM, 2012 U.S. Dist. LEXIS 114190, at *18-19 (D. Colo. Aug. 14, 2012) (approving a $50,000 incentive award to the lead plaintiff in a derivative action, not a class action, and citing *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 373-74 (S.D. Ohio 1990) (approving incentive awards of either $55,000 or $35,000 to each of 5 representative plaintiffs)).

Dated: March 10, 2014

Respectfully submitted,

/s/ Richard A. Koffman
COHEN MILSTEIN SELLERS & TOLL PLLC
Richard A. Koffman
Benjamin D. Brown
Christopher J. Cormier
Emmy L. Levens
1100 New York Ave, NW, Suite 500 West
Washington DC 20005
Plaintiffs' Steering Committee

FREEBORN & PETERS LLP
David C. Gustman
Deborah H. Bornstein
311 S. Wacker Dr., Suite 3000
Chicago, IL 60606
Plaintiffs' Liaison Counsel

/s/ Charles E. Tompkins
WILLIAMS MONTGOMERY & JOHN LTD.
Charles E. Tompkins
Anthony J. O'Neill
Bethany C. Teska
233 S. Wacker Dr., Suite 6100
Chicago, Il 60606
Plaintiffs' Steering Committee

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served upon All Counsel of Record by e-mail on this 10th day of March, 2014.

Emmy L. Levens

TAB 25A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ONLINE PUBLICATION ONLY

PRECISION ASSOCIATES, INC., *et al.*, on behalf of themselves and all others similarly situated,

Plaintiffs,

- versus -

PANALPINA WORLD TRANSPORT (HOLDING) LTD., *et al.*,

Defendants.

MEMORANDUM
AND ORDER
08-cv-42 (JG) (VVP)

JOHN GLEESON, United States District Judge:

This putative class action alleges a conspiracy to fix prices in the international commercial freight forwarding industry.[1] Plaintiffs are various businesses who purchased freight forwarding services from defendants. Defendants are domestic and foreign providers of freight forwarding services and freight forwarding trade associations.[2] Plaintiffs allege that beginning in

[1] This case is related to a Multi District Litigation ("MDL") pending in this district, *In Re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-md-1775 (JG) (VVP) ("*Air Cargo MDL*"). The *Air Cargo MDL* is a putative antitrust class action brought in the wake of an investigation by governmental authorities of international price-fixing activity in the air cargo industry. Plaintiffs in that case are domestic and foreign purchasers of allegedly price-fixed air freight shipping services, and they include freight forwarders who are among the defendants in this action.

[2] Defendants named in the Fourth Amended Complaint, ECF No. 1311, are Panalpina World Transport (Holding) Ltd.; Panalpina, Inc.; Kühne + Nagel International AG; Kuehne + Nagel, Inc.; Expeditors International of Washington, Inc.; EGL, Inc.; EGL Eagle Global Logistics, LP; Deutsche Bahn AG; Schenker AG; Schenker, Inc.; BAX Global, Inc.; DB Schenker; Deutsche Post AG; Danzas Corporation d/b/a DHL Global Forwarding; DHL Express (USA), Inc.; DHL Global Forwarding Japan K.K.; DHL Japan, Inc.; Exel Global Logistics, Inc.; Air Express International USA, Inc.; Uti Worldwide Inc.; United Parcel Service, Inc., UPS Supply Chain Solutions, Inc.; ABX Logistics Worldwide NV/SA; DSV A/S; DSV Solutions Holding A/S; DSV Air & Sea Ltd.; SDV Logistique Internationale; Dachser Intelligent Logistics; Dachser Transport of America, Inc.; Geo-Logistics Corporation; Agility Logistics Corporation; Geologistics International Management (Bermuda) Ltd.; Baltrans Logistics, Inc.; Toll Global Forwarding (USA), Inc.; Hellmann Worldwide Logistics, Inc.; Hellmann Worldwide Logistics GmbH & Co. KG; Hellmann Worldwide Logistics Ltd. Hong Kong; Geodis Group; Geodis Wilson USA, Inc.; Jet Speed Logistics, Ltd.; Jet Speed Air Cargo Forwarders (USA), Inc.; Jet Speed Logistics (USA), LLC; Morrison Express Logistics PTE Ltd.; Morrison Express Corporation (USA); Nippon Express Co., Ltd.; Nippon Express USA, Inc.; Yusen Air & Sea Service Co., Ltd.; Yusen Air & Sea Service (U.S.A.), Inc.;

at least January 1, 2001 and continuing until October 11, 2007, defendants conspired to fix prices through the concerted imposition of surcharges and other anti-competitive behaviors. *See* Fourth Am. Compl. ¶¶ 1, 10.

This is the second installment of proposed settlements ("*Panalpina 2*").[3] Plaintiffs seek final approval of 11 settlement agreements that would establish a $197,623,497.87 guaranteed settlement fund and award additional settlement payments based upon a percentage of settling defendants' future recovery in the *Air Cargo MDL*. The 11 settling defendants, or groups of defendants, are: (1) SDV Logistique Internationale ("SDV"); (2) Panalpina World Transport (Holding) Ltd. and Panalpina, Inc. (collectively "Panalpina"); (3) Geodis S.A. and Geodis Wilson USA, Inc. (collectively "Geodis"); (4) DSV A/S; DSV Solutions Holding A/S; and DSV Air & Sea Ltd. (together, "DSV"); (5) Jet Speed Logistics, Ltd. also known as Jet Speed Air Cargo Forwarders (HK), Ltd; Jet Speed Logistics (USA), LLC; and Jet-Speed Air Cargo Forwarders, Inc. (USA) (collectively "Jet Speed"); (6) Toll Global Forwarding (USA), Inc.; and Baltrans Logistics, Inc. (collectively "Toll"); (7) Agility Holdings, Inc.; Agility

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Kintetsu World Express, Inc.; Kintetsu World Express (U.S.A.), Inc.; Nishi–Nippon Railroad Co., Ltd.; Hankyu Hanshin Express Holdings Corporation; Hankyu Hanshin Express Co. Ltd.; Hanshin Air Cargo Co., Ltd.; Hanshin Air Cargo USA, Inc.; Nissin Corporation; Nissin International Transport U.S.A., Inc.; Vantec Corporation; Vantec World Transport (USA), Inc.; "K" Line Logistics, Ltd.; "K" Line Logistics (U.S.A.), Inc.; Yamato Global Logistics Japan Co.; Yamato Transport U.S.A., Inc.; MOL Logistics (Japan) Co., Ltd.; MOL Logistics (U.S.A.), Inc.; United Aircargo Consolidators, Inc.; Japan Aircargo Forwarders Association; Shanghai International Freight Forwarders Association; and Spedlogswiss, aka the Association of Swiss Forwarders (collectively "defendants"). The Complaint also names unspecified "John Doe Defendants 1–10."

[3] I have previously approved settlements with 10 groups of settling defendants in this case. *See Precision Assocs., Inc. v. Panalpina World Transport (Holding) Ltd.*, No. 08-cv-42 (JG)(VVP), 2013 WL 4525323 (E.D.N.Y. Aug. 27, 2013) ("*Panalpina 1*") (describing settlement agreements for $112 million with the following 10 defendants or groups of defendants: (1) Schenker Deutsche Bahn AG, Schenker AG, Schenker, Inc., Bax Global Inc. and DB Schenker (collectively "Schenker"); (2) Vantec Corporation and Vantec World Transport (USA), Inc. (collectively "Vantec"); (3) EGL, Inc. and EGL Eagle Global Logistics, LP, Inc. (collectively "EGL"); (4) Expeditors International of Washington, Inc. ("Expeditors"); (5) Nishi-Nippon Railroad Co., Ltd. ("Nishi-Nippon"); (6) United Aircargo Consolidators, Inc. ("UAC"); (7) Kuehne + Nagel International and Kuehne + Nagel, Inc. (collectively "Kuehne + Nagel"); (8) Morrison Express Logistics Pte. Ltd (Singapore) and Morrison Express Corporation (U.S.A.) (collectively "Morrison"); (9) UTi Worldwide, Inc. ("UTi"); and (10) ABX Logistics Worldwide NV/SA ("ABX")). In connection with the first round of settlements, I awarded plaintiff's counsel an interim fee award of 15% of the then-available settlement funds, or $16,853,536.74. *See* Order, Dec. 27, 2013, ECF No. 984.

Logistics Corp.; Geologistics Corp.; and Geologistics International Management (Bermuda) Limited (collectively "Agility"); (8) United Parcel Service, Inc. and UPS Supply Chain Solutions, Inc. (collectively "UPS"); (9) Dachser GmbH & Co., KG, doing business as Dachser Intelligent Logistics, and Dachser Transport of America, Inc. (collectively "Dachser"); (10) Hankyu Hanshin Express Holding Corporation; Hankyu Hanshin Express Co., Ltd.; Hanshin Air Cargo USA, Inc.; Japan Aircargo Forwarders Association; Kintetsu World Express, Inc.; Kintetsu World Express (U.S.A.) Inc.; "K" Line Logistics, Ltd.; "K" Line Logistics (U.S.A.), Inc.; MOL Logistics (Japan) Co., Ltd.; MOL Logistics (U.S.A.) Inc.; Nippon Express Co., Ltd.; Nippon Express USA, Inc.; Nissin Corporation; Nissin International Transport U.S.A., Inc.; Yamato Global Logistics Japan Co., Ltd.; Yamato Transport U.S.A. Inc.; Yusen Air & Sea Service Co., Ltd.; and Yusen Air & Sea Service (U.S.A.), Inc. (collectively "the Japanese Defendants"); and (11) Deutsche Post AG; Danzas Corporation, doing business as DHL Global Forwarding; DHL Express (USA) Inc.; DHL Global Forwarding Japan K.K.; DHL Japan Inc.; Exel Global Logistics, Inc.; Air Express International USA, Inc. (collectively "DHL"), for the Japanese, severed-claims only (the "DHL Japanese agreement").

Plaintiffs' counsel ("Class Counsel") also seek approval of their proposed plan of allocation, as well as an interim fee award of 25% of the total available settlement fund and reimbursement of expenses. I held a final fairness hearing on November 2, 2015, at which there was oral argument in support of the proposed settlement, allocation plan, and the requested attorneys' fees. No one objected at the hearing and there have not been any written objections filed.

For the reasons discussed below, I approve the 11 settlement agreements and allocation plan, and I grant the request for attorneys' fees.

BACKGROUND

I assume familiarity with the facts of the case as set forth in *Panalpina 1*. As noted above, I have granted final approval to 10 settlements and have awarded $16,853,536.74 in interim fee awards.[4] The 11 new settlements for which plaintiffs seek approval are briefly summarized below.

A. *The Settlement Agreements*

1. *The SDV Settlement Agreement*

SDV has agreed to pay $350,000.00 into the settlement fund, and has agreed to provide substantial cooperation. SDV Settlement §§ II.B.1.a, II.B.2.[5] SDV has also agreed to pay 75% of the proceeds it has received or may receive from the *Air Cargo MDL*. *Id.* § II.B.1.b. Thus far, SDV has paid approximately $1,955,573.19, and the amount "is likely to grow" based on SDV's continued receipt of proceeds from the *Air Cargo MDL*. *See* Pls.' Mem. in Supp. Mot. Final Approval, ECF No. 1307, at 9.

2. *The Panalpina Settlement Agreement*

Panalpina has agreed to pay $35,000,000.00 and 100% of its future proceeds from the *Air Cargo MDL*. Panalpina Settlement § II.A.1.[6] Thus far, plaintiffs have received approximately $39,158,324.45 from the Panalpina settlement, and that amount is expected to grow based on future receipt of proceeds from the *Air Cargo MDL*. Pls.' Mem. in Supp. Mot. Final Approval at 9-10. In addition, Panalpina agreed to provide substantial cooperation to plaintiffs in their ongoing prosecution of the case. Panalpina Settlement § II.A.2.

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[4] *See supra* note 3.

[5] The SDV settlement agreement was filed as Ex. 3 to the Pls.' Mem. in Supp. Mot. Final Approval, ECF No. 1307-3.

[6] The Panalpina settlement agreement was filed as Ex. 4 to the Pls.' Mem. in Supp. Mot. Final Approval, ECF No. 1307-4.

3. *The Geodis Settlement Agreement*

Geodis agreed to pay $3,000,000.00, as well as to cooperate. Geodis Settlement § II.A.[7]

4. *The DSV Settlement Agreement*

DSV agreed to pay $1,500,000.00 to the settlement class, as well as 100% of any future proceeds from the *Air Cargo MDL*. DSV Settlement § II.A.1.[8] DSV has also agreed to cooperate with the plaintiffs' ongoing prosecution of the case. *Id.* § II.A.2.

5. *The Jet Speed Settlement Agreement*

Jet Speed agreed to pay $750,000.00 and 100% of any future proceeds from the *Air Cargo MDL* into the settlement fund. Jet Speed Settlement § II.A.1.[9] In addition, Jet Speed agreed to cooperate with plaintiffs in their ongoing prosecution of the case. *Id*. § II.A.2.

6. *The Toll Settlement Agreement*

Toll agreed to pay $900,000.00 and 100% of any future proceeds from the *Air Cargo MDL* into the settlement fund. Toll Settlement § II.A.1.[10] Toll has also agreed to cooperate with the plaintiffs' ongoing efforts against other defendants. *Id.* § II.A.2.

7. *The Agility Settlement Agreement*

Agility agreed to pay $16,000,000.00 and 100% of its proceeds from the *Air Cargo MDL* into the settlement fund. Agility Settlement § II.A.2.[11] The Agility settlement thus

[7] The Geodis settlement agreement was filed as Ex. 5 to the Pls.' Mem. in Supp. Mot. Final Approval, ECF No. 1307-5.

[8] The DSV settlement agreement was filed as Ex. 6 to the Pls.' Mem. in Supp. Mot. Final Approval, ECF No. 1307-6.

[9] The Jet Speed settlement agreement was filed as Ex. 7 to the Pls.' Mem. in Supp. Mot. Final Approval, ECF No. 1307-7.

[10] The Toll settlement agreement was filed as Ex. 8 to the Pls.' Mem. in Supp. Mot. Final Approval, ECF No. 1307-8.

[11] The Agility settlement agreement was filed as Ex. 9 to the Pls.' Mem. in Supp. Mot. Final Approval, ECF No. 1307-9.

far amounts to $17,859,499.23, and plaintiffs expect the amount to grow based on Agility's receipt of future proceeds from the *Air Cargo MDL*. Pls.' Mem. in Supp. Mot. Final Approval at 11. Agility has also agreed to cooperate. Agility Settlement § II.A.3.

8. *The UPS Settlement Agreement*

UPS agreed to pay 100% of its proceeds from the *Air Cargo MDL* received from June 18, 2014 forward, in an amount not to exceed $25,000,000.00. UPS Settlement § II.A.1.[12] If the proceeds from the *Air Cargo MDL* are less than $25,000,000.00, UPS will pay the difference up to $7,000,000.00. *Id.* Class Counsel estimates that UPS will receive $18,000,000.00 from the *Air Cargo MDL*, and thus the Class will receive $25,000,000.00 from the UPS settlement. Pls.' Mem. in Supp. Mot. Final Approval at 11. UPS has also agreed to cooperate with the plaintiffs. UPS Settlement § II.A.2.

9. *The Dachser Settlement Agreement*

Dachser agreed to pay $2,500,000.00 and assign 100% of its rights to proceeds from the *Air Cargo MDL* into the settlement fund. Dachser Settlement § II.A.1.[13] Dachser has also agreed to cooperate. *Id.* § II.A.2.

[12] The UPS settlement agreement was filed as Ex. 10 to the Pls.' Mem. in Supp. Mot. Final Approval, ECF No. 1307-10.

[13] The Dascher settlement agreement was filed as Ex. 11 to the Pls.' Mem. in Supp. Mot. Final Approval, ECF No. 1307-11.

10. *The Japanese Settlement Agreement*

The Japanese Defendants agreed to settle all claims on a collective basis by paying $100,000,000.00 into the settlement fund.[14] Japanese Settlement § II.A.1.[15] They also agreed to cooperate. *Id.* § II.A.2.[16]

11. *The DHL Japanese Settlement Agreement*

DHL has agreed to settle the severed claims affecting the Japanese-only routes as defined in the settlement agreement by paying $5,000,000.00 into the settlement fund. DHL Japanese Settlement § II.A.1.[17] Plaintiffs continue to litigate against DHL on the non-severed claims. *See* Pls.' Mem. in Supp. Mot. Final Approval at 13.

B. *Preliminary Approval of the Settlement Agreements and the Notice Program*

1. *Preliminary Approval of the Settlement Agreements*

On October 7, 2013, I entered an order preliminarily approving the SDV settlement agreement and certifying the settlement class. Order, ECF No. 894. On August 22, 2014, I entered an order preliminarily approving the Panalpina, Geodis, DSV, and Jet Speed

[14] The $100,000,000.00 payment is subject to a pro-rata opt-out reduction provision that authorizes up to a $10 million reduction "based on the total dollar amount of qualifying surcharges paid for by an Opt-Out Class member to the Japanese Defendants" between October 16, 2002 and November 12, 2007. Pls.' Mem. in Supp. Mot. Final Approval at 12; *accord* Japanese Settlement § II.E. However, Class Counsel represent that there is no reduction to the settlement amount "[b]ecause there were so few opt-outs." Letter, Nov. 5, 2015, ECF No. 1328.

[15] The Japanese Defendants' settlement agreement was filed as Ex. 12 to the Pls.' Mem. in Supp. Mot. Final Approval, ECF No. 1307-12.

[16] This settlement implicates the Most Favored Nations ("MFN") clauses in the Vantec and Nishi-Nippon settlement agreements, which I approved on September 23, 2013. *See* Vantec Settlement, Ex. C to the W. Joseph Bruckner Decl., ECF No. 527-4; and Nishi-Nippon Settlement, Ex. A to the Christopher Lovell Decl., ECF No. 590-2; Order, Sept. 25, 2013, ECF No. 879 (approving the Vantec settlement); Order, Sept. 25, 2013, ECF No. 883 (approving the Nishi-Nippon settlement). Those MFN provisions establish a "Settlement Ratio" of 88.35%, which represents "the ratio of the settlement amount to the fuel, AMS, and security and explosives surcharge revenues for air cargo shipments from Japan to the United States from October 2002 to November 2007." *Panalpina 1*, 2013 WL 4525323, at *2; *see also* Vantec Settlement § II.D; Nishi-Nippon Settlement § II.D. If the settlement ratio is less than 88.35%, Vantec and Nishi-Nippon are entitled to receive the amount necessary to reduce the 88.35% settlement ratio to that used by the subsequent settling defendant. *Id.* This provision as implicated here results in a $14,729,135.52 total repayment to Nishi-Nippon and Vantec. *See* Pls.' Mem. in Supp. Mot. Final Approval at 13.

[17] The DHL settlement agreement was filed as Ex. 13 to the Pls.' Mem. in Supp. Mot. Final Approval, ECF No. 1307-13.

settlement agreements and certifying the settlement classes. Order, ECF No. 1102. Also on August 22, 2014, I entered an order preliminarily approving the Toll settlement agreement and certifying the settlement class. Order, ECF No. 1103.

On December 18, 2014, I entered an order preliminarily approving the Agility and UPS settlement agreements and certifying the settlement classes. Order, ECF No. 1124. On February 20, 2015, I entered an order preliminarily approving the Dachser settlement agreement and certifying the settlement class. Order, ECF No. 1147. On April 27, 2015, I entered an order preliminarily approving the settlement agreements as to the Japanese Defendants and as to DHL for the Japanese-only claims, as well as certifying the settlement class. Order, ECF No. 1189.

2. *The Notice Program*

On May 21, 2015, plaintiffs moved for approval of their class notice program. Mot. to Approve Class Notice Program, ECF No. 1201. On May 29, 2015, I entered an order approving the program.[18] Order, May 29, 2015, ECF No. 1216. Proof of the implementation of the notice program has been filed with the Court. *See* Katherine Kinsella Decl., ECF No. 1309; Julie Redell Decl., ECF No. 1308. It consisted of four components: (1) direct mail notice to 1.67 million potential class members identified in customer lists provided by the defendants between July 7, 2015 and July 10, 2015; (2) publication notice in magazines, domestic and international newspapers, trade publications, and Internet ads; (3) an "earned media" program consisting of a press release distributed on PR Newswire's Premier Global Service on July 20, 2015, which reaches more than 35,000 global points; and (4) a settlement website, which as of October 1, 2015 had been visited by over 6,000,000 unique visitors. Kinsella Decl. ¶¶ 6, 10-11, 22, 41-43.

[18] I also approved a subsequent request to revise the notice program to permit a ministerial change to the notice papers. *See* Order, June 9, 2015, ECF No. 1229.

The notice papers provided a deadline of September 18, 2015 for class members to opt out of or object to any settlement. Redell Decl. ¶¶ 9-10. Only six class members have opted out, and no class members have objected to final approval of any of the 11 settlement agreements. Pls.' Mem. in Supp. Mot. Final Approval at 18-19; Redell Decl. ¶¶ 9-10.

C. *The Plan of Allocation*

The Plan of Allocation is the same as that for the first round of settlements, which I previously approved. *See* Pls.' Mem. in Supp. Mot. Final Approval at 25 & Ex. 14; *Panalpina 1*, 2013 WL 4525323, at *13. As I described in *Panalpina 1*: "10% of the net settlement funds will be allocated pro rata based on the total worldwide freight forwarding charges paid for shipments to, from, or within the United States during the [relevant time period]. Second, 90% of the net settlement funds will be allocated pro rata based on the surcharges paid on the shipping routes of all defendants that conspired on that particular surcharge for which a particular Class Member paid surcharges on freight forwarding services during the same period." *Panalpina 1*, 2013 WL 4525323, at *13 (internal quotation marks and citations omitted); *accord* Pls.' Mem. in Supp. Mot. Final Approval at 25 & Ex. 14.

D. *Fee Award Request*

Counsel for plaintiffs seek a total interim fee award of $42,246,681.08 payable in the following installments: (1) $40,684,181.08, representing 25% of the settlement proceeds currently paid into the settlement fund, payable now; (2) $250,000.00, representing 25% of the settlement proceeds scheduled to be paid by Geodis upon final approval of its settlement agreement, payable at the time of final approval of that agreement; (3) $1,250,000.00, representing 25% of the settlement proceeds scheduled to be paid by Agility on the later of 15 days after final approval of that agreement or on January 4, 2016, payable on the same date; and

(4) $62,500.00, representing 25% of the settlement proceeds scheduled to be paid by Jet Speed on May 8, 2016, payable on the same date. Pls.' Mem. in Supp. Mot. Final Approval at 24. In addition, Class Counsel seek reimbursement of $4,046,323.05 for interim litigation expenses. *Id.*

DISCUSSION

A. *The Standard for Approving a Proposed Settlement*

Pursuant to Federal Rule of Civil Procedure 23(e), any settlement of a class action requires court approval. A court may grant approval of a proposed settlement of a class action if it is "fair, adequate, and reasonable, and not a product of collusion." *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000). In so doing, the court must "eschew any rubber stamp approval" yet simultaneously "stop short of the detailed and thorough investigation that it would take if it were actually trying the case." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000). Judicial discretion is informed by a general policy favoring settlement. *See Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982); *see also Denney v. Jenkins & Gilchrist*, 230 F.R.D. 317, 328 (S.D.N.Y. 2005) ("There is a strong judicial policy in favor of settlements, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy." (citations and internal quotation marks omitted), *aff'd in part and vacated in part*, 443 F.3d 253 (2d Cir. 2006)).

To evaluate whether a class settlement is fair, I examine (1) the negotiations that led up to it, and (2) the substantive terms of the settlement. *See In re Holocaust Victims Assets Litig.*, 105 F. Supp. 2d 139, 145 (E.D.N.Y. 2000). In evaluating procedural fairness, "[t]he [negotiation] process must be examined 'in light of the experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred the

negotiations themselves.'" *Id*. at 145-46 (quoting *Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir. 1983)). Factors relevant to the substantive fairness of a proposed settlement include: "(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *See Grinnell*, 495 F.2d at 463 (internal citations omitted).

B. *The Proposed Settlements*

1. *Procedural Fairness*

I find that the 11 settlement agreements are procedurally fair. Plaintiffs represent that the settlements were each "entered into in good faith, after extensive arms' length negotiations between experienced and informed counsel on both sides." Pls.' Mem. in Supp. Mot. Final Approval at 14. Nine of the settlement agreements—the Panalpina, Geodis, Jet Speed, Toll, Agility, UPS, Dachser, DHL and Japanese Settlement Agreements—were aided by a "nationally recognized mediator." *Id*. at 15. Further, plaintiffs represent that Class Counsel "zealously represented the interests of the Class during all settlement negotiations," that extensive discovery had occurred, and that Class Counsel "were well informed as to the facts of the case and the strengths of the claims asserted" in negotiating the settlement terms. *Id.* There is nothing in the record to indicate otherwise. Rather, the record supports that each settlement agreement was the product of numerous meetings, resolutions of "disputed terms," and the

assessment of relevant data, including revenue data and other information about settling defendants' operations. *See* Joint Decl. of Co-Lead Counsel, ECF No. 1282, ¶¶ 278-312.

I have no reason to believe that the parties entered into the settlement agreements through collusive behavior or that any preferential treatment was improperly conferred upon the class representative or any portion of the class. *See, e.g., In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997). Accordingly, I conclude that the settlement agreements were reached by good-faith negotiations that were "fair, adequate, and reasonable, and not a product of collusion." *Joel A.*, 218 F.3d at 138.

2. *Substantive Fairness*

I also find that the settlement agreements are substantively fair. My findings here borrow from those set forth in my previous opinion approving settlements in this case.

First, the complexity of federal antitrust cases is well known. *See, e.g.*, *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 263 (2d Cir. 2001) (noting the "factual complexities of antitrust cases"); *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989) (Nickerson, J.) (antitrust class actions "are notoriously complex, protracted, and bitterly fought"). As I noted in *Panalpina 1*, "the potential for this complex litigation to consume considerable time and resources has been great. Complex factual and legal issues abound." *Panalpina 1*, 2013 WL 4525323, at *7. Continued proceedings would likely involve some or all of the following necessities to present proof and litigate a case: voluminous discovery, dueling experts, trial preparation, damages calculations, and appeals of any adverse jury verdicts. Each of these stages involve risk. As I wrote in *Panalpina 1*, "[i]t is undisputed that developing cases against any of the settling defendants would have required significant time and expense. In addition, as a result of many of these defendants' bargained-for cooperation,

these settlement agreements may facilitate a more expeditious outcome of the remaining claims, and may advance the final resolution of this litigation." *Id.* The same conclusions remain undisputed here.

Due process requires that class members be given notice of a proposed settlement and opportunity to be heard. Notice papers were mailed to over 1.67 million potential class members, Kinsella Decl. ¶ 11, and plaintiffs estimate the class size to number in the hundreds of thousands. Pls.' Mem. in Supp. Mot. Final Approval at 18. Only six members of the class have opted out, and there was not a single objection. *Id.* at 18-19. That the overwhelming—almost unanimous—majority of the class members have elected to remain in the settlement class supports a finding that the settlement is fair, reasonable, and adequate. *See, e.g.*, *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 527 (E.D. Mich. 2003).

I also find that the settlement amounts presented here are within the range of reasonableness. In the aggregate, the settlement proceeds from the 11 agreements presently establish a guaranteed settlement fund worth approximately $197,623,497.87. In addition, the defendants have agreed to cooperate to help the plaintiffs pursue their claims. "[T]hough the agreement[s] to cooperate with Plaintiffs ha[ve] not been factored in to the overall value of these settlements, [they] add[] significant value." *See In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 (JG)(VVP), 2011 WL 2909162, at *4 (E.D.N.Y. July 15, 2011). Finally, the settlement proceeds from the agreements will continue to grow as settling defendants receive payments from the *Air Cargo MDL*.[19] I find that the reasonableness of the settlements in light of

[19] The *Air Cargo MDL* remains ongoing, rendering uncertain the exact amount of settling defendants' recovery from that litigation. However, plaintiffs anticipate growing amounts from the various settlement agreements based on future receipt of payments from the *Air Cargo MDL*. Pls.' Mem. in Supp. Final Approval at 9-11.

the best possible recovery and all attendant litigation risks weighs in favor of approving the settlements.

In sum, I conclude that the 11 proposed settlement agreements are both procedurally and substantively fair, and I therefore approve them.

C. *Plan of Allocation*

"As a general rule, the adequacy of an allocation plan turns on . . . whether the proposed apportionment is fair and reasonable" under the particular circumstances of the case. *In re Painewebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997). "An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *In re American Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001) (internal quotation marks omitted). Whether the allocation plan is equitable is "squarely within the discretion of the district court." *In re PaineWebber*, 171 F.R.D. at 132.

I find that the plan is both fair and reasonable, and thus I approve it. The plan is the same as the one I approved in *Panalpina 1*, and I see no reason to reach a different result here. Moreover, no class member has objected to the plan, strongly suggesting it is fair, reasonable and adequate to the class.

D. *Attorneys' Fees*

I may award attorneys' fees using either a percentage of the fund or the lodestar method.[20] *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014)*; see also Wal-Mart*, 396 F.3d at 121. Regardless of which

[20] The lodestar method multiplies hours reasonably expended against a reasonable hourly rate. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) ("*Wal-Mart*"). In determining appropriate attorneys' fees, courts have the discretion to increase the lodestar by applying a multiplier based on factors such as the risk of the litigation and the quality of work performed by the attorneys. *Id.*

method of calculation is employed, class action fee awards are evaluated for reasonableness based on the six-factor standard set forth in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). Under that standard, I must weigh "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Id.* at 50 (alterations in original).

Class Counsel seek an interim fee award of $42,246,681.08, which represents 25% of the total available settlement fund ($168,986,724.33, payable in four installments).[21] Pls.' Mem. in Supp. Mot. Interim Attorneys' Fees, ECF No. 1281, at 24. They assert that the amount is fair and reasonable when examined under the *Goldberger* factors and when "cross-checked" against that lodestar. They assert that the total lodestar from inception of the case through August 15, 2015 is $69,869,851.59. *Id.* at 21. No objections to the requested fees have been filed. With respect to comparing the requested fee to the lodestar, Class Counsel assert that because 25% of the total available settlement fund is less than the lodestar, the recommended fee represents a deflator, not a multiplier.[22]

I find the requested attorneys' fees are fair and reasonable, and satisfy the *Goldberger* factors. This litigation is almost eight years old, and Class Counsel represent that they have "spent a total of 153,782.18 hours prosecuting the litigation." Pls.' Mem. in Supp.

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[21] Class Counsel calculated the $168,986,724.33 representing the total available settlement fund as follows: $21,092,361.98, representing proceeds obtained from the *Air Cargo MDL* based on provisions in the *Panalpina 1* settlements; less $14,729,135.52, representing the refund due to Vantec and Nishi-Nippon based on the most favored nation clauses in their respective settlement agreements, *see supra* note 16; plus $179,623,497.87, representing the guaranteed payments and proceeds already received from the *Air Cargo MDL* from the instant 11 settlement agreements; less the $7 million UPS guaranteed minimum payment not yet due; less the $10 million maximum refund to the Japanese Defendants under the opt-out ratchet-down provision discussed *supra* note 14. Pls.' Mem. in Supp. Mot. Interim Attorneys' Fees at 6.

[22] Class Counsel assert that this is true even looking at the aggregate fees awarded so far in the case—$59,100,217.82 (the $16,853,536.74 awarded in connection with *Panalpina 1*, plus the $42,246,681.08 currently sought). Pls.' Mem. in Supp. Mot. Interim Attorneys' Fees at 6.

Mot. Interim Attorneys' Fees at 12. The amount of time and energy spent on the litigation is directly related to the factual and legal complexity of this action. "[A]ntitrust cases, by their nature, are highly complex," and this case is no different. *Wal-Mart*, 396 F.3d at 122; *see also Weseley*, 711 F. Supp. at 719 (antitrust class actions "are notoriously complex, protracted, and bitterly fought"). As I have already discussed, this litigation was obviously risky and complex.

As I stated in *Panalpina 1*, 2013 WL 4525323, at *16: "Class Counsel are highly experienced practitioners in complex litigation generally and antitrust litigation specifically. The settlement agreements [are] the result of hard fought arms'-length negotiation with settlement defendants' respective counsel." The settlement amounts proposed here attest to Class Counsel's abilities. In sum, I find the proposed attorneys' fees reasonable and thus grant the request.

CONCLUSION

For the reasons stated above, the SDV, Geodis, Jet Speed, DSV, Toll and Japanese Defendants' settlement agreements are approved, and all claims against those defendants by those members of the settlement class who have not timely exercised their right to be excluded from the settlement agreements are dismissed with prejudice. My grant of final approval to the Agility, UPS, and DHL Japanese settlement agreements will be held in abeyance until January 7, 2016.[23] My grant of final approval to the Panalpina and Dachser settlement agreements will be held in abeyance until January 11, 2016.[24] The plan of allocation is approved. Class Counsel are awarded $42,246,681.08 in fees and expenses of $4,046,323.05.

[23] On October 26, 2015 and October 27, 2015, plaintiff's counsel informed the Court by letter that settling defendants had not served notices for these settlements 90 days prior to the fairness hearing as required under the Class Action Fairness Act ("CAFA"). *See* Letter, Oct. 26, 2015, ECF No. 1317; Letter, Oct. 27, 2015, ECF No. 1318. These CAFA notices for the settling Agility, UPS, and DHL Defendants were served on October 9, 2015. *Id.* Accordingly, under CAFA, I may not enter final approval of these settlement agreements until the 90-day CAFA notice period expires on January 7, 2015.

[24] On October 26, 2015, plaintiff's counsel informed the Court by letter that settling defendants had not served notices for these settlements 90 days prior to the fairness hearing as required under CAFA. *See* Letter, Oct. 26, 2015. These CAFA notices for the settling Daschser and Panalpina Defendants were served on October 12,

So ordered.

John Gleeson, U.S.D.J.

Dated: November 10, 2015
Brooklyn, New York

2015 and October 13, 2015, respectively. *Id.* Accordingly, under CAFA, the Court may not enter final approval of these settlement agreements until the 90-day CAFA notice period expires on January 10, 2016 and January 11, 2016. Because January 10, 2016 falls on a Sunday, I will enter final approval of both settlement agreements on January 11, 2016.

TAB 25B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PRECISION ASSOCIATES, INC., et al., on behalf of themselves and all others similarly situated, Plaintiffs, *vs.* PANALPINA WORLD TRANSPORT (HOLDING) LTD., et al., Defendants.	Case No.: 08-CV-00042 (JG) (VVP)

MEMORANDUM IN SUPPORT OF CO-LEAD COUNSEL'S PETITION FOR A SECOND INTERIM AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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I. INTRODUCTION

Co-Lead Counsel and other Class Counsel (collectively "Class Counsel") submit this memorandum in support of their Petition For A Second Interim Award Of Attorneys' Fees And Reimbursement Of Expenses. Settling Defendants have made (or soon will make) payments pursuant to their settlement agreements yielding a Total Available Settlement Fund of $168,986,724.33, from which no attorneys' fees or litigation expenses have been awarded. Class Counsel now respectfully request the Court to award from those funds a second interim fee award of 25% of that amount, for a total second interim fee award of $42,246,681.08, and further seek an award of unreimbursed litigation expenses totaling $4,046,323.05.

In the more than seven years this case has been pending, Class Counsel have worked tirelessly on behalf of the Class to litigate these complex international claims. As summarized below and described in more detail in the Joint Declaration,[1] Class Counsel:

- Have reached favorable and complete settlements with 27 of the 29 Defendant groups named in the Corrected Third Amended Class Action Complaint ("CTAC");
- Have reached a partial settlement with DHL, one of the two remaining Defendants; and
- Have completely resolved four of Plaintiffs' 11 claims.

The settlements reached to date cumulatively have resulted in a recovery by the Class of approximately $317.6 million. That amount likely will grow as settling Defendants make additional payments due under their settlement agreements. The settlements also have afforded Plaintiffs valuable cooperation that will assist them in prosecuting their claims against the two

[1] References to the "Joint Decl." or "Joint Declaration" are to the Joint Declaration Of Co-Lead Counsel In Support Of Co-Lead Counsel's Petition For A Second Interim Award of Attorneys' Fees And Reimbursement of Expenses, filed herewith.

remaining Defendant families, DHL and Hellmann.

As the Court previously recognized in this case, "[f]rom the outset, the potential for this complex litigation to consume considerable time and resources has been great. Complex legal and factual issues abound." *Precision Assocs., Inc. v. Panalpina World Transport (Holding) Ltd.*, No. 08-cv-42 (JG)(VVP), 2013 WL 4515323, at *7 (E.D.N.Y. Aug. 27, 2013). The Court's observation two years ago remains undoubtedly correct. The Joint Declaration briefly summarizes the motion practice, discovery, depositions, interviews, appearances, conferences, negotiations, settlements, stipulations, and other work Class Counsel have done thus far in this case and for which no fees have yet been recovered. The Joint Declaration's description of those seven-plus years of litigation comprises more than 100 pages. Class Counsel's zealous and extensive work directly resulted in the settlement funds from which Class Counsel now seek this second interim award.

II. FEES AND EXPENSES REQUESTED

A. Background Regarding First Interim Fee Award

On December 27, 2013, the Court ordered a first interim award of attorneys' fees, and awarded Class Counsel 15% of the recoveries they had then obtained under settlement agreements with 10 groups of settling Defendants ("First Round Settlements").[2] *See* Electronic Order dated Oct. 3, 2013 (awarding fees and expenses); ECF No. 984 (granting Plaintiffs'

[2] First Round Settlements were reached with Deutsche Bahn AG, Schenker AG, Schenker, Inc., Bax Global Inc. and DB Schenker (collectively, "**Schenker**"); EGL, Inc. and EGL Eagle Global Logistics, LP, Inc. (collectively, "**EGL**"); Vantec Corporation and Vantec World Transport (USA), Inc. (collectively, "**Vantec**"); Expeditors International of Washington, Inc. (**"Expeditors**"); Nishi-Nippon Railroad Co., Ltd. (**"Nishi-Nippon**"); United Aircargo Consolidators, Inc. ("**UAC**"); Kuehne + Nagel International and Kuehne + Nagel, Inc. (collectively, "**Kuehne + Nagel**"); Morrison Express Logistics Pte. Ltd (Singapore) and Morrison Express Corporation (U.S.A.) (collectively, "**Morrison Express**"); UTi Worldwide, Inc. ("**UTi**"); and ABX Logistics Worldwide NV/SA ("**ABX**"). The Court entered final approval as to each. ECF Nos. 879-88.

motion for reconsideration of October 3 order regarding fees and increasing Class Counsel's first interim fee award to 15%). That first interim award used as a lodestar cross-check only those attorneys' fees and expenses accrued directly in obtaining the First Round Settlements; the Court specifically directed Class Counsel not to submit any attorney lodestar or expenses that did not directly relate to the First Round Settlements. The first interim fee award also did not cover any work performed after January 28, 2013.

B. Additional Payments Made And Refunds Due Under The First Round Settlements

Most of the First Round Settlements required settling Defendants to pay for the benefit of the Class some or all future proceeds they were then and are yet to recover in *In re: Air Cargo Shipping Services Antitrust Litigation*, MDL No. 1775 (E.D.N.Y.) ("*Air Cargo*"). Thus, in addition to the First Round Settlement recoveries on which the Court calculated the first interim fee award, some of those First Round Settlement Defendants now also have received supplemental payments from the second *Air Cargo* distribution, and also have received a third round of *Air Cargo* distributions. Those additional funds, totaling $21,092,361.98 have now been deposited into the First Round Settlement escrow accounts.[3]

In addition, Vantec and Nishi-Nippon will receive refunds totaling $14,729,135.52 from their respective escrowed settlement funds due to the "most favored nation" clauses in their settlement agreements. *See* Joint Decl. ¶ 7 n.1.

C. Second Round Settlements

Since the First Round Settlements, Plaintiffs have reached, and the Court has preliminarily approved, 11 settlements covering 19 additional corporate families of Defendants[4]

[3] As this Court is aware, the *Air Cargo* litigation is ongoing.

[4] These settling Defendants are: SDV Logistique Internationale ("**SDV**"); Panalpina World Transport (Holding) Ltd. and Panalpina, Inc. (collectively "**Panalpina**"); Geodis S.A. and

(the "Second Round Settlements"). Those Second Round Settlements provide for cash payments totaling a minimum of $179,623,497.87, nearly all of which has been received and deposited in interest-bearing escrow accounts. *See generally* Joint Decl. ¶ 8. The amount ultimately recovered under the Second Round Settlements will likely exceed that amount as a result of certain settling Defendants' agreement to pay to the Class in this case the proceeds the settling Defendants will receive in *Air Cargo*. Each settlement agreement in the Second Round Settlements includes specified funds reserved to pay the cost of notice to the Class of these

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Geodis Wilson USA, Inc. (collectively "**Geodis**"); Jet Speed Logistics, Ltd. also known as Jet Speed Air Cargo Forwarders (HK), Ltd; Jet Speed Logistics (USA), LLC; and Jet-Speed Air Cargo Forwarders, Inc. (USA) (collectively "**Jet Speed**"); DSV A/S; DSV Solutions Holding A/S; and DSV Air & Sea Ltd. formerly known as DFDS Transport (HK) Ltd. (collectively "**DSV**"); Toll Global Forwarding (USA), Inc.; Baltrans Logistics, Inc.; and Toll Holdings, Ltd. (collectively "**Toll**"); Agility Holdings, Inc.; Agility Logistics Corp.; Geologistics Corp.; and Geologistics International Management (Bermuda) Limited (collectively "**Agility**"); United Parcel Service, Inc. and UPS Supply Chain Solutions, Inc. (collectively "**UPS**"); Dachser GmbH & Co., KG, doing business as Dachser Intelligent Logistics and Dachser Transport of America, Inc. (collectively "**Dachser**"); Hankyu Hanshin Express Holding Corporation, formerly known as Hankyu Express International Co., Ltd.; its subsidiary, Hankyu Hanshin Express Co., Ltd.; and its U.S. subsidiary, Hanshin Air Cargo USA, Inc. (collectively "**Hankyu Hanshin**"); Japan Aircargo Forwarders Association ("**JAFA**"); Kintetsu World Express, Inc. and its U.S. subsidiary, Kintetsu World Express (U.S.A.), Inc. (collectively "**Kintetsu**"); "K" Line Logistics, Ltd., and its U.S. subsidiary "K" Line Logistics (U.S.A.), Inc. (collectively "**'K Line'**"); MOL Logistics (Japan) Co., Ltd., and its U.S. subsidiary, MOL Logistics (USA) Inc. (collectively "**MOL Logistics**"); Nippon Express Co., Ltd. and its U.S. subsidiary, Nippon Express USA, Inc. (collectively "**Nippon Express**"); Nissin Corporation and its U.S. subsidiary, Nissin International Transport U.S.A., Inc. (collectively "**Nissin**"); Yamato Global Logistics Japan Co., Ltd., and its U.S. affiliate, Yamato Transport U.S.A. Inc. (collectively "**Yamato**"); Yusen Air & Sea Service Co., Ltd. and its U.S. subsidiary, Yusen Air & Sea Service (U.S.A.) Inc. (collectively "**Yusen**"), and with Hankyu Hanshin, JAFA, Kintetsu, "K" Line, MOL Logistics, Nippon Express, Nissin, and Yamato, the "**Japanese Defendants**"); and, for the severed Japanese Claims only, Deutsche Post AG; Danzas Corporation (doing business as DHL Global Forwarding); DHL Express (USA) Inc.; DHL Forwarding Japan K.K.; DHL Japan Inc.; Exel Global Logistics, Inc.; Air Express International USA, Inc. (collectively "**DHL**"). The Court has preliminarily approved each of those settlements. ECF Nos. 894, 1102, 1103, 1124, 1147, and 1189.

The Second Round Settlements are individually summarized in paragraphs 279 through 312 of the Joint Declaration, in Plaintiffs' preliminary approval briefs filed at ECF Nos. 870, 1081, 1096, 1119, 1120, 1140, and 1175, and in the forthcoming final approval brief.

proposed settlements and for other related expenses, and most settlement agreements require the settling Defendant to provide substantial cooperation that will continue to assist Plaintiffs in prosecuting their claims against DHL and Hellmann, the two remaining Defendant groups.

Class Counsel specifically exclude two portions of the Second Round Settlements' $179.6 million guaranteed minimum recovery from this fee petition, and instead reserve the right to seek fees on those portions at an appropriate future time:[5]

First, the settlement agreement with the nine Defendant families named in the Japanese Claims (the "Japanese Defendants") contains a ratchet-down provision providing that, under certain circumstances, up to $10 million of the total $100 payment may be returned to the Japanese Defendants based on any opt-outs from that settlement. Because the opt-outs are not yet known, it cannot currently be determined whether and how much of that $10 million must be refunded to the Japanese Defendants. Accordingly, Class Counsel seek fees based only on the $90 million not subject to refund. At an appropriate time after any ratchet-down has materialized, Class Counsel will seek the Court's award of fees on whatever portion of the $10 million ultimately is not refunded to the Japanese Defendants.

Second, UPS's settlement agreement provides that it will pay 100% of all future *Air Cargo* recoveries, with a minimum payment of $7 million and a cap of $25 million. Because UPS's total payment is for an amount and date not yet certain, and because to date UPS has not

[5] Although three settling Defendants (Geodis, Jet Speed, and Agility) have not yet deposited all of the funds due under their respective settlement agreements, those three Defendants' remaining payments are for an amount certain and, under the deadlines set by their settlements agreements, will be made before any distributions from the Second Round Settlements can be made to qualified Class members. *See generally* Joint Decl. ¶ 9 and notes 2-4. For those reasons, Class Counsel now seek fees on the full amounts due under the Geodis, Jet Speed, and Agility settlements. If the Court grants Class Counsel's fee petition, Class Counsel will not deduct any fees from either of those Defendants' final payments until such funds are actually paid, in the escrow account, and available for distribution to qualified class member claimants.

paid (and has not been required to pay) anything to the Class under its settlement agreement, at this time Class Counsel are not seeking the Court's award of fees on any amounts to be received in the future under the UPS settlement. Rather, Class Counsel intend to do so at an appropriate time after those funds are deposited in the escrow account.[6]

D. Calculation Of Total Available Settlement Fund And Requested Fees And Expenses

At this time, Class Counsel request that the Court order a fee award of 25% of the Total Available Settlement Fund, calculated as follows:

$21,092,361.98	New *Air Cargo* proceeds from First Round Settlements
- $14,729,135.52	MFN refund due to Vantec and Nishi-Nippon
+ $179,623,497.87	Second Round Settlements' guaranteed payments and *Air Cargo* proceeds received from Second Round Settlements
-$7,000,000.00	UPS guaranteed minimum payment not yet due
-$10,000,000.00	Maximum refund to Japanese Defendants under ratchet-down
= $168,986,724.33	Total Available Settlement Fund
x 25%	Fee award percentage requested by Class Counsel
= $42,246,681.08	Total second interim fee award requested

The Court previously ordered a first interim fee award of 15% of the then-available settlement funds, or $16,853,536.74. Joint Decl. ¶ 5; ECF No. 984. If the Court now awards the second interim fee request of $42,246,681.08, then the aggregate fees awarded thus far in this case of $59,100,217.82 will represent not a multiplier, but a deflator with respect to the value of Class Counsel's time spent from the inception of the case through August 15, 2015. Joint Decl. ¶ 325. Class Counsel will continue to vigorously litigate the case against the two remaining

[6] Although the UPS settlement does not directly affect the amount sought in this fee petition, Class Counsel describe the settlement here to provide the Court with a full and accurate picture of the work performed on behalf of, and the benefit obtained for, the Class.

Defendants to a resolution, through trial, if necessary. If additional settlements are reached or a judgment obtained after trial, the Court can consider then what future fee award to Class Counsel is appropriate, including any overall multiplier for the results achieved.

In addition, Class Counsel request unreimbursed expenses incurred from the inception of the case through August 15, 2015.[7] (To the extent that expenses were incurred in connection with the First Round Settlements, and thus were reimbursed in the first interim award, those expenses are not included in this fee petition.) The unreimbursed expenses for this period total $4,046,323.05 and are set forth in the Joint Declaration at ¶¶ 327-31 and in each of the law firm declarations (Exhibits A-N) and the summaries of unreimbursed expenses (Exhibits P and Q) filed therewith.

III. ARGUMENT

A. The Court Should Award Attorneys' Fees And Expenses Under The Common Fund Doctrine.

The equitable fund doctrine provides that plaintiffs' attorneys in a class action may petition the court for compensation from any benefits to the class that resulted from counsel's efforts. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The Second Circuit permits either the "percentage of the fund" approach or the lodestar approach when calculating fees in a common fund case. *See, e.g.*, *McDaniel v. Cnty. of Schenectady*, 595 F.3d 411, 419 (2d Cir. 2010) (holding that a district court may, in its discretion, chose either approach). But the "trend in this Circuit is toward the percentage method, which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir.

[7] As described more fully in the Joint Declaration at ¶ 333 and note 42, expenses paid from the Litigation Fund are described through August 27, 2015. Co-Lead Counsel's contributions to the Litigation Fund therefore are also described, and reimbursement for such contributions is also sought, through that date.

2005) (citation omitted); *accord In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 128 (S.D.N.Y. 2009).

The use of the percentage method dispenses with the "cumbersome, enervating, and often surrealistic process of lodestar computation." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) (quotation marks and citations omitted). However, the Court of Appeals recommends considering the hours submitted by counsel as a "cross-check" on the reasonableness of the requested percentage. *Id.* Accordingly, Class Counsel's lodestar in this case and the cross-check it provides are discussed in Sections III.B. and III.D. below.

Regardless of which method of calculation a court uses, the key consideration in awarding fees is what is reasonable under the circumstances. *Goldberger*, 209 F.3d at 47; *see also* Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees . . . ."). In addition, the fee award should be based on the entire settlement fund, not a portion of the fund. *See Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007) ("The entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class. An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not.").

An interim award of attorneys' fees and expenses is warranted at this time, even though the litigation continues. Since the Court's first interim award, Class Counsel have continued their tireless litigation efforts. This Court has implicitly recognized the appropriateness of an interim fee based on the settlements achieved up to that point. *See Precision Assocs., Inc. v. Panalpina World Transport (Holding) Ltd.*, No. 08-cv-42 (JG)(VVP), 2013 WL 4525323, at *13-17 (ordering first interim award); *In re Air Cargo Shipping Serv. Litig.*, No. 06-MD-1775 (JG)(VVP), 2011 WL 2909162, at *5-7 (E.D.N.Y. July 15, 2011) ("*Air Cargo 2*"); *In re Air*

Cargo Shipping Serv. Litig., No. 06-MD-1775 (JG)(VVP), 2012 WL 3138596, at *1 (E.D.N.Y. Aug. 2, 2012) ("*Air Cargo* 3"). Now that Class Counsel's continued work has resulted in even greater recoveries for the Class, consideration of another interim fee award is appropriate.

B. Co-Lead Counsel Seek A Reasonable Percentage Of The Total Available Settlement Fund.

In calculating the lodestar cross-check to assess the reasonableness of Class Counsel's current fee request, Class Counsel respectfully submit that the Court should compare the total of all fees awarded in the first petition and fees requested in this second petition, to the lodestar reflecting all work done in this case from inception until August 15, 2015, including work that related to the First Round Settlements and which was covered by the first interim fee award. The Joint Declaration describes the work Class Counsel have performed since the inception of this case through August 15, 2015, because the reasonableness of Class Counsel's current fee request is most appropriately measured over the life of the entire case thus far. All of this work is directly related to Class Counsel's efforts to prove participation by all Defendants in the conspiracies at issue, and to prosecute the claims of a proposed class consisting of purchasers from all settling and non-settling Defendants.

For instance, discovery from one Defendant directly bears on the participation of other Defendants in the same conspiracy. Thus, the documents reviewed, witnesses interviewed, and depositions taken of settling Defendants were all directed toward the goals of negotiating incrementally more favorable settlements with Defendants and proving the liability of non-settling Defendants. *See, e.g., In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 681 F. Supp. 2d 141, 160-61 (D. Conn. 2009) (evidence found in competitor's files was considered important evidence against another defendant); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662-63 (7th Cir. 2002) (evidence of statements from competitor

employees' documents used to defeat ADM's motion for summary judgment). Indeed, it is for this reason that nearly every settlement agreement in this case to date has required the settling Defendant to provide substantial cooperation to Plaintiffs through discovery and trial.

The work Class Counsel have performed from inception also has been necessary for upcoming class certification proceedings, dispositive motions, and trial. The work performed to date also has cumulatively enabled Co-Lead Counsel to negotiate in an informed manner with any Defendant who was willing to discuss settlement.

For these reasons, it is appropriate for the Court to consider the lodestar amount for all work performed in the case from inception through August 15, 2015 in assessing the reasonableness of the requested fee. *See Air Cargo 2*, 2011 WL 2909162, at *6-7 (awarding 25% and applying a lodestar cross-check based on counsel's "tireless work over the course of four years," *i.e.*, since co-lead counsel was first appointed).

Class Counsel are mindful of this Court's fee decisions in *In re Visa Check/Mastermoney Antitrust Litigation*, 297 F. Supp. 2d 503, 520 (E.D.N.Y. 2003), *aff'd sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005), in which the Court not only considered the appropriate percentage that should be applied in a "mega-case" such as *Visa Check*, but also scrutinized the multiplier that would result if plaintiffs' counsel's request was granted. *See Visa Check*, 297 F. Supp. 2d at 424-25 & n.33. This Court concluded that a multiplier of almost 10 was not warranted, but a multiplier of 3.5 was reasonable. *See id.* at 522, 524.

The nature of this litigation — a case with relatively small government fines for many Defendants and no fines for others, 68 Defendants from 29 Defendant families, and eleven distinct international conspiracies alleged — make it easily distinguishable from a typical monolithic two-defendant mega-conspiracy such as in *Visa Check*. Unlike *Visa Check*, where

class counsel obtained a $3,383,400,000 settlement (a large fund by any measure) against two defendants for domestic conduct, in this case there are 68 Defendants from 29 Defendant families alleged to have engaged in widespread international conduct, with Class Counsel achieving full or partial settlements as to 28 different corporate families so far. Although the large number of settling Defendants magnifies the total amount of the settlements here, each of the individual settlement agreements is well below megafund amounts. In this case, as discussed in more detail below, the lodestar crosscheck shows that Class Counsel's request for 25% of the Total Available Settlement Fund — which results in a deflator — is very reasonable given the risks, complexities and work involved to prosecute these multiple international conspiracies against many Defendants.

Class Counsel respectfully suggest that, depending on the outcome of this case through future settlements or a favorable judgment at trial, a multiplier could be appropriate. However, that determination should be made after the extent of additional recoveries is quantified and the amount and quality of work is assessed taking into consideration all of the relevant factors. At the present time, it is well within the Court's discretion to award the request of 25%. *See, e. g.*, *Air Cargo 3*, 2012 WL 3138596, at *5 (E.D.N.Y. Aug. 2, 2012) ("*Air Cargo 3*") (granting class counsel's requested interim fee of 25% of the gross amount of the settlement fund when such a request represented a modest 1.11 multiplier); *In re Checking Account Overdraft Litig.*, Case No. 09-MD-02036-JLK, 2011 WL 5873389 at *28 (S.D. Fla. Nov. 22, 2011) (approving fee award of 30% of $410 million settlement fund); *In re Linerboard Antitrust Litig.*, No. MDL 1261, Civ. A. 98-5055, Civ. A. 99-1000, Civ. A. 99-1341, 2004 WL 1221350, at *17 (E.D. Pa. June 2, 2004) (approving fee award of 30% of $202,572,489 fund); *In re Vitamins Antitrust Litig.*, No. Misc. 99-197 (TFH), MDL No. 1285, 2001 WL 34312839, at *10 (D.D.C. July 16, 2001)

(approving fee award of 34.6% of $365 million fund); *see also Visa Check*, 297 F. Supp. 2d at 525 & n.33 (distinguishing large size of $3 billion fund in that case and the size of the multiplier; and stating that if the fund was not as large, "a larger percentage might be appropriate").

C. Class Counsel's Request Is Consistent With The *Goldberger* Factors.

"Generally, the factor given the greatest emphasis [when awarding a percentage of a fund] is the size of the fund created, because 'a common fund is itself the measure of success. . . [and] represents the benchmark from which a reasonable fee will be awarded.'" *Manual for Complex Litigation (Fourth)* § 14.121 (2004) (quoting Alba Conte & Herbert B. Newberg, 4 *Newberg on Class Actions* § 14.6, at 547, 550 (4th ed. 2002)). Courts in this Circuit have repeatedly held that "a fee award should be assessed based on scrutiny of the unique circumstances of each case . . . [with] a jealous regard to the rights of those who are interested in the fund." *Goldberger*, 209 F.3d at 53; *see McDaniel*, 595 F.3d at 426. In determining the reasonableness of a fee request, the Court should consider: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. *Goldberger*, 209 F.3d at 50 (citation omitted); *Precision Assocs.*, 2103 WL 4525323, at *14 (applying *Goldberger*). Application of the *Goldberger* factors shows that Class Counsel's request for 25% of the Total Available Settlement Fund is reasonable.

1. The Time And Labor Expended By Counsel Supports The Requested Fee.

The large international scale of this litigation, the sheer number of Defendants, the enormous amount of discovery, and the contentious motion practice have required an intensive effort by Class Counsel. Since the inception of this case, Class Counsel have spent a total of 153,782.18 hours prosecuting the litigation, and to date have received no compensation for 120,722.14 of that time, either because it was performed in service of the litigation as a whole

(and not specifically in connection with the First Round Settlements) and thus was specifically excluded from the Court's first interim award, or because it was performed after January 28, 2013. *See* Joint Decl. ¶ 325.

The Joint Declaration describes the uncompensated work Class Counsel have performed since the case's inception, which is briefly summarized as follows:

- Prepared a First Amended Class Action Complaint consisting of 326 numbered paragraphs containing specific and detailed allegations against Defendants, including names, dates, places and subject matters of conspiratorial meetings and other communications;
- Responded to 18 motions to dismiss the First Amended Complaint and 11 objections on Magistrate Judge Pohorelsky's resulting Report & Recommendation;
- Prepared a Corrected Third Amended Class Action Complaint, comprising 593 numbered paragraphs and additional detailed and specific allegations;
- Responded to 15 motions to dismiss the Corrected Third Amended Complaint (including the 13 initial motions and two later-filed motions by Hellmann and JAFA, respectively), one motion to sever certain claims, and 11 objections on Magistrate Judge Pohorelsky's resulting Report & Recommendation;
- Filed 22 non-ministerial motions (including 12 motions to compel) and 2 objections;
- Made 14 appearances before Magistrate Judge Pohorelsky and 4 appearances before Judge Gleeson;
- Attempted to negotiate a confidentiality order with Defendants concerning confidential material to be produced in discovery and, when Defendants refused to agree, successfully moved the Court for a confidentiality order;
- Participated in lengthy briefing and motion practice to obtain customer lists from non-settling Defendants to assist in providing Class notice;
- Participated in Rule 26(f) conferences, negotiating multiple disputed provisions;
- In addition to the motions described above, responded to a total of 3 pre-motions and submitted briefing in response to 4 motions;

- Reviewed 84,842 Plaintiff documents, and ultimately produced 46,064 of those documents, to Defendants;

- Utilized advanced analytical search tools, as well as keyword searches, to identify the most relevant documents of the more than 5.1 million documents produced by Defendants;

- Ultimately reviewed 1,062,552 million Defendant documents (including translating and reviewing several documents in Japanese, German, and Italian);

- Engaged in innumerable meetings and conferences with Defendants to obtain and understand Defendants' transactional data;

- Prepared witness and Defendant factual summaries to assist in depositions, discovery responses, work by experts engaged by Plaintiffs, and trial;

- Prepared for and conducted 50 depositions in 4 countries spread across three continents;

- Prepared and served 16 sets of discovery requests;

- Responded to 20 sets of document requests propounded by Defendants;

- Interviewed 43 witnesses and prepared for and participated in approximately 18 attorney proffers;

- Prepared for and engaged in arms-length settlement negotiations and several mediations that led to the 10 First Round Settlements and the 11 Second Round Settlements;

- Prepared and supervised an extensive program to provide notice to potential claimants of the First Round Settlements and engaged in extensive communications with Class Members relating to the claims-administration process;

- Prepared and supervised an extensive program to provide notice to potential claimants of the Second Round Settlements and engaged in extensive communications with Class Members relating to the claims-administration process;

- Conducted legal research and factual research regarding pertinent issues; and

- Worked with industry and economic consultants and experts to develop pleadings, evaluate transactional data, guide discovery, formulate

settlement strategies, assess damages, and prepare for Plaintiffs' class certification motion.

See Joint Decl. generally and ¶ 15 specifically.

2. The Magnitude And Complexities Of The Litigation Support The Requested Fee.

Antitrust class actions "are notoriously complex, protracted, and bitterly fought." *Wesely v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989); *see In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. at 129 ("antitrust cases are typically complex"). Indeed, as this Court has recognized, this litigation is "irrefutably complex." *Precision Assoc.*, 2013 WL 4525323, at *15. It involves international conspiratorial conduct across the globe with 68 different Defendants, 28 Defendant families, and 11 conspiracies.

Because of the large number of Defendants, the complexity of the legal issues, and the extensive motion practice, this litigation is over seven years old. Indeed, Plaintiffs filed the first complaint in this case in January 2008, but formal discovery in the case was stayed for nearly five years from its initial filing,[8] and the various motions to dismiss were not, for the most part, finally resolved until January 28, 2014.

The Joint Declaration also describes the manner in which the time reported by Class Counsel was scrutinized to eliminate time entries that did not comply with the guidelines set by Co-Lead Counsel. Joint Decl. ¶¶ 319-20.

3. The Risk Of Litigation Supports The Requested Fee.

The risk of litigation is "perhaps the foremost factor to be considered in determining whether to award an enhancement." *Goldberger*, 209 F.3d at 54 (quotation omitted); *accord In*

[8] During the discovery stay, Plaintiffs continued to gather information and evidence that would help them prosecute their claims, including by conducting additional research, monitoring the status of government investigations around the world, and through cooperation received from settling Defendants.

re Currency Conversion Fee Antitrust Litig., 263 F.R.D. at 129. The litigation risk "must be measured as of when the case is filed." *Goldberger*, 209 F.3d at 55 (citing *DiFilippo v. Morizio*, 759 F.2d 231, 234 (2d Cir. 1985)). Courts in this Circuit have repeatedly recognized that the risk associated with a case undertaken on a contingent basis is an important factor in determining an appropriate fee award. *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010); *In re NASDAQ Mkt. Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998). And this Court has acknowledged that this action "is obviously risky." *Precision Assoc.*, 2013 WL 4525323, at *15.

To establish a price-fixing violation, a plaintiff must demonstrate not only that a conspiracy existed, but also that the conspiracy caused antitrust impact and damages, measurable by reference to prices that would have existed but for the conspiracy. Here, even if Plaintiffs prevail through class certification and other pre-trial proceedings and obtain a judgment of liability, such a judgment could be overturned on appeal. *See, e.g., Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1218-19 (10th Cir. 1996) (overturning plaintiffs' verdict obtained after two decades of litigation); *Backman v. Polaroid Corp.*, 910 F.2d 10, 12 (1st Cir. 1990) (en banc) (reversing plaintiffs' verdict and ordering entry of judgment for defendants).

Moreover, risk must be measured at the outset of the litigation. When Plaintiffs filed their original complaint in January 2008, no government complaints had been filed, and no guilty pleas had been entered. The first fines related to government investigations did not occur until the JFTC issued fines in March 2009, over a year after the inception of the case. And the DOJ did not announce any guilty pleas until 2010 — more than two and one-half years after Plaintiffs' case began. The EC did not impose fines until 2012. As such, the case faced significant initial risks with respect to showing liability. Plaintiffs have also vigorously pursued

claims and alleged conspirators where no DOJ guilty pleas or EC fines exist, all of which have been sustained under Fed. R. Civ. P. 12 (*i.e.*, Count 1: Security Surcharge; Count 9: Ocean AMS; Count 10: Global Agreement).

Plaintiffs have faced, and will continue to face, other risks. All Defendants sought dismissal under one or more provisions of Fed. R. Civ. P. 12, each making multiple of arguments, and often in multiple motions. Plaintiffs have already defeated a total of 33 motions to dismiss under Rules 12(b)(1) and (6).[9]

Even if Plaintiffs succeed on liability at trial and through appeal, remaining Defendant DHL has made clear that, as the amnesty applicant to the Department of Justice, it will seek an order that it is not subject to treble damages or joint and several liability pursuant to the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"), Pub. L. No. 108-237, § 213(a)-(b), 118 Stat. 661, 666-668 (June 22, 2004). Plaintiffs will vigorously contest any such motion and argue that DHL's limited cooperation has not earned it ACPERA's benefit, but the question ultimately is for the Court to decide, and a ruling in DHL's favor would significantly reduce Plaintiffs' potential recovery.

Due to the significant international dimension of the case, Plaintiffs have encountered difficulties obtaining necessary discovery, and the collection of any judgments against foreign Defendants would be frustrated.

In addition, Defendants have made clear they intend to argue that Plaintiffs lack standing, that no class can be certified, and that no damages exist because the surcharges and rates at issue would have been passed through to Plaintiffs even absent any conspiracy. Plaintiffs will

[9] The fact that the remaining Defendants DHL and Hellmann have recently prevailed on much narrower motions, *see* ECF Nos. 1236, 1269, does not detract from Plaintiffs' nearly total success in sustaining their complaint against an onslaught of challenges by these and the other Defendants .

vigorously contest such challenges, as they have each challenge to date, and believe they will prevail on each of those issues, but those arguments also pose risks to any eventual recovery by the Class.

In this instance, the risks Class Counsel undertook in advancing this litigation justify the requested fee. In the seven-and-a-half years Class Counsel have spent litigating this case, they have committed 153,782.18 hours of their time — amounting to over $69.8 million in lodestar — and incurred $4,659,708.89 in expenses, all of which were and are at risk of never being recovered. Joint Decl. ¶¶ 13, 325; Electronic Order dated Oct. 3, 2013 (making first interim expense award of $613,385.84).

4. The Quality Of Counsel's Representation Supports The Requested Fee Award.

As the Court has recognized, Class Counsel in this case "are highly experienced practitioners in complex litigation generally and antitrust litigation specifically." *Precision Assoc.*, 2013 WL 4525323, at *16. Notwithstanding Defendants' ongoing efforts to defeat this case, Co-Lead Counsel has managed to obtain eleven new and substantial settlements — for a total of 21 settlement agreements to date — which in nearly every applicable instance exceeded the fines paid by settling Defendants in the United States,[10] and in many other instances involved settlements with Defendants who were never criminally charged in the United States.[11] Such a recovery is consistent with Co-Lead Counsel's extensive experience successfully litigating antitrust class actions, and supports the fee request. *See* ECF No. 101 (outlining Co-Lead

[10] The only settlement that did not exceed the fines paid to the Department of Justice was the "ice-breaker" settlement with Schenker, which in addition to cash provided extensive and early cooperation. That cooperation enabled Plaintiffs and the Class to survive Defendants' first barrage of motions to dismiss and facilitated future settlements that in many instances far exceeded the settling Defendants' fines paid to the Department of Justice.

[11] The following settling Defendant groups were never charged in the United States: Expeditors, UAC, Morrison Express, UTi, ABX, SDV, DSV, Geodis, Jet Speed, Toll, Dachser, and UPS.

Counsel's extensive experience and success in the class action field).

Similarly, in addition to the collective wealth represented by Defendants themselves, they are represented by top antitrust legal practitioners; the law firms representing Defendants are some of the largest and most skilled law firms in the world. *See* Joint Decl. ¶ 18. Throughout this litigation, Defendants' counsel have worked tirelessly to protect their clients' interests, and Co-Lead Counsel's ability to obtain these significant settlements at this stage of the litigation further underscores the adequacy of the requested fee award. *See In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156, 174 (S.D.N.Y. 2007) ("The quality of opposing counsel is also important in evaluating the quality of Class Counsels' work."); *In re NASDAQ Market Makers Antitrust Litig.*, 187 F.R.D. 465, 488 (S.D.N.Y. 1998).

5. The Requested Fee Is Supported By The Size And The Scope Of The Settlement.

The requested fee represents 25% of the Total Available Settlement Fund, which represents a deflator. Class Counsel respectfully suggest the requested award is fair given the extensive effort that was required to achieve these excellent results.

The fee requested is consistent with fee awards in other class action litigations with settlements of this size. *See, e.g., Air Cargo 2*, 2011 WL 2909162, at *6-7 (awarding 25% fee recovery in related antitrust case); *In re Initial Public Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding one-third fee in a securities fraud case)*; In re Priceline.com, Inc. Sec. Litig.*, 2007 WL 2115592, at *4 (awarding 30% of $80 million settlement); *see also In re Prudential Sec., Inc. Ltd. P'ships Litig.*, 912 F. Supp. 97, 103 (S.D.N.Y. 1996) ("Many courts have approved and awarded fees in class actions of one-third of the settlement fund in recognition of the substantial services performed by counsel and the risks undertaken.").

6. Public Policy Considerations Support the Award of the Requested Fee.

The award of the percentage of fee requested by Class Counsel will encourage the private enforcement of antitrust laws and support attorneys who decide to take such cases on a contingent fee basis. The Supreme Court has held repeatedly that private enforcement of U.S. antitrust laws is essential to effective antitrust enforcement, *e.g.*, *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969), and a market-rate fee award such as is requested here incentivizes competent, experienced counsel to undertake such high-risk, complex class action litigation. This Circuit has noted that "[i]n the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation." *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2d Cir. 1973). In determining whether public policy supports the requested fee request, the court should balance providing lawyers with a "sufficient incentive to bring common fund cases" against preventing an "unwarranted windfall" to counsel. *Air Cargo 2*, 2011 WL 2909162, at *6 (E.D.N.Y. July 15, 2011). In light of the time and effort Co-Lead Counsel have dedicated to this litigation, the requested fee of 25% fairly compensates Co-Lead Counsel, helps to perpetuate the availability of skilled counsel in future antitrust class actions, and does not result in a windfall to counsel.

D. Co-Lead Counsel's Request For Attorneys' Fees Is Reasonable Under A Lodestar Crosscheck.

The use of the lodestar crosscheck on the reasonableness of a percentage fee award is encouraged. *Farinella v. Paypal, Inc.*, 611 F. Supp. 2d 250, 269 (E.D.N.Y. 2009). Courts may award fees higher than the lodestar by applying a multiplier based on factors such as the riskiness of litigation. *See In re Nortel Networks Corp. Secs. Litig.*, 539 F.3d at 132 n.4. Courts

commonly award multipliers from two to six times the lodestar. *See Monserrate v. Tequipment, Inc.*, No. 11 CV 6090, 2012 WL 5830557, at *3 (E.D.N.Y. Nov. 16, 2012) (collecting cases).

The total lodestar in this case, from inception, is $69,869,851.59. Joint Decl. ¶ 325. This Court has implicitly recognized that, in long-lasting, hard-fought litigation such as this, it is appropriate to calculate the lodestar cross-check over the duration of the entire case, rather than piecemeal, from interim fee award to interim fee award. *See Air Cargo 2*, 2011 WL 2909162, at *6-7 (making a second interim award of 25% of settlement proceeds and applying a lodestar cross-check period from the appointment of co-lead counsel through the conclusion of counsel's requested cross-check period). A lodestar cross-check against the award Class Counsel seek in this petition yields a deflator, which this Court has deemed reasonable under analogous circumstances. *Air Cargo 2*, 2011 WL 2909162, at *6 (granting an interim attorneys' fee request of 25% where the requested fee was less than the lodestar and thus represented a deflator).

The lodestar in this case is based on rates currently charged by counsel, Joint Decl. ¶ 325, an approach which courts have considered reasonable. *Velez v. Novartis Pharm. Corp.*, 04 CIV 09194 CM, 2010 WL 4877852, at *23 (S.D.N.Y. Nov. 30, 2010) ("The use of current rates to calculate the lodestar figure has been repeatedly endorsed by courts as a means of accounting for the delay in payment inherent in class actions and for inflation. . . .") (citation omitted). These rates are well within the normal range for counsel litigating similar antitrust class actions.

E. Class Counsel's Request For An Award Of Expenses Incurred Is Reasonable.

Class Counsel's request for an award of $4,046,323.05 for payment of expenses is reasonable. "Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients." *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993). Within the Second Circuit, courts "normally grant expense requests in common fund cases as a matter of course." *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514,

at *11 (E.D.N.Y. Oct. 23, 2012); *In re Arakis Energy Corp. Sec. Litig.*, No. 95CV3421, 2001 WL 1590512, at *17 n.12 (E.D.N.Y. Oct. 31, 2001). Co-Lead Counsel seek reimbursement of reasonable litigation expenses including economic and industry experts, deposition transcription, class notice and claims administration, data hosting, online legal research, travel expenses, document imaging and copying, and an online document repository. *See* Joint Decl. ¶¶ 327-31. The expenses incurred by Class Counsel were reasonably necessary to advance the interests of the Class and to obtain an excellent result on their behalf. Due to the risk that they might never be recovered, Class Counsel endeavored to keep expenses to a minimum. Accordingly, Class Counsel respectfully request reimbursement of expenses in the amount of $4,046,323.05.[12]

F. In The Future, Co-Lead Counsel Will Make Subsequent Applications For The Court's Consideration For Fees and Expenses Related To Claims Settlement, Administration, And Processing.

The processing and administration of Class Members' claims for the Second Round Settlements will begin in earnest following the March 31, 2016 deadline to submit claims. The Claims Administrator has mailed direct notice to potential Class members in accordance with the Court-approved notice plan. Class Members have been submitting claims and will continue to do so through the March 31, 2016 deadline. Before payment of such claims can be

[12] In addition to the expenses described here and in greater detail in the Joint Declaration, payments totaling $5,142,299.00 have been made from the settlement escrow accounts for class notice as directed by the Court, related expenses regarding preliminary or final approval, and related bank fees. In addition, invoices related to notice totaling $494,000.00 are outstanding and in the process of review. To the extent appropriate, they will be paid from the settlement escrow accounts. These payments were, or will be, made pursuant to language in each of the Settling Defendant's Settlement Agreements reserving a specific amount of such Settling Defendant's payment that may be used for payment of notice and related costs (and which would be non-refundable to the settling Defendant in the event the settlement was not finally approved), and have already been authorized by the Court. While these payments are not included in the requested reimbursement in this petition, and have already been paid or have been authorized by the Court to be paid from those escrow accounts, we describe those expenditures here to fully describe all litigation-related expenses incurred in this case.

recommended to the Court for its approval, each claim will have to be verified and in some cases audited, to ensure that the Class Member is qualified and that its claimed purchases are allowable.

Expenditures for escrow fees, taxes on the escrowed funds, and preparation of those tax forms, also will be necessary in the foreseeable future. In addition, as described in the long-form Class Notice, *see* ECF No. 1204-6 at 12, at the end of the litigation Co-Lead Counsel intend to ask the Court to allow service awards to the Plaintiffs who have served as Class Representatives.

Accordingly, in the future and as appropriate Co-Lead Counsel will apply to the Court for approval to pay expenses related to the escrow accounts, claims administration and processing, and Class Representative service awards. These items may be considered by the Court in due course before any such expense payments are made.

G. Class Members Have Received Notice and Will Have an Opportunity to Object.

The Class Notice approved by this Court informed potential Class members that Class Counsel would seek a fee award of up to 33% of the settlement fund, and would also seek reimbursement for expenses. ECF No. 1204-6 at 12. That Notice has been distributed to potential Class members in accordance with the Court's order approving notice. Joint Decl. ¶ 314. Likewise, this fee petition and all papers filed in connection with it will be posted to the settlement website within 24 hours of filing, as directed by the Court. ECF No. 1229. Any objections from Class Members, if any, are to be filed by September 18, 2015. If there are any such objections, Class Counsel will respond before the November 2, 2015 final approval hearing.

IV. CONCLUSION

For all of the reasons set forth above, Co-Lead Counsel respectfully requests that the Court enter an Order awarding a second interim award of attorneys' fees and expenses as

follows:

(1) Class Counsel is awarded 25% of the Total Available Settlement Fund of $168,986,724.33 as interim attorneys' fees, for a total second interim fee award of $42,246,681.08, to be paid as follows:

a. $40,684,181.08, to be paid immediately from funds currently paid into the Settlement Fund;

b. $250,000.00, to be paid upon Final Approval of the Geodis settlement from the final portion of the settlement proceeds ($1,000,000.00) scheduled to be paid into the Settlement Fund by Geodis at that time;

c. $1,250,000.00, to be paid fifteen days after Final Approval of the Agility settlement, or on January 4, 2016, whichever is later, from the final portion of the settlement proceeds ($5,000,000.00) scheduled to be paid into the Settlement Fund by Agility at that time; and

d. $62,500.00, to be paid on May 8, 2016, from the final portion of the settlement proceeds ($250,000) scheduled to be paid into the Settlement Fund by Jet Speed at that time; and

(2) Class Counsel is awarded $4,046,323.05 as reimbursement for interim litigation expenses.

Dated: September 3, 2015

s/ W. Joseph Bruckner

W. Joseph Bruckner
Heidi M. Silton
Anna M. Horning Nygren
Craig S. Davis
Kristen G. Marttila
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401
T: (612) 339-6900
F: (612) 339-0981
E-mail: wjbruckner@locklaw.com
hsilton@locklaw.com
amhorningnygren@locklaw.com
csdavis@locklaw.com
kgmarttila@locklaw.com

Christopher Lovell
Gary S. Jacobson
Ian T. Stoll
Merrick S. Rayle
Benjamin M. Jaccarino
LOVELL STEWART HALEBIAN JACOBSON LLP
61 Broadway, Suite 501
New York, NY 10006
T: (212) 608-1900
F: (212) 719-4775
E-mail: clovell@lshllp.com
GSJacobson@lshllp.com
istoll@lshllp.com
msrayle@sbcglobal.net
bjaccarino@lshllp.com

Daniel E. Gustafson
Daniel C. Hedlund
Michelle J. Looby
Joshua J. Rissman
GUSTAFSON GLUEK PLLC
Canadian Pacific Plaza
120 South 6th Street, Suite 2600
Minneapolis, MN 55402
T: (612) 333-8844
F: (612) 339-6622
E-mail: dgustafson@gustafsongluek.com
dhedlund@gustafsongluek.com
mlooby@gustafsongluek.com
jrissman@gustafsongluek.com

Steven N. Williams
Adam J. Zapala
COTCHETT, PITRE & MCCARTHY, LLP
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
Burlingame, CA 94010
T: (650) 697-6000
F: (650) 697-0577
E-mail: swilliams@cpmlegal.com
azapala@cpmlegal.com

Interim Co-Lead Counsel for Plaintiffs

TAB 26A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: NOVARTIS AND PAR ANTITRUST LITIGATION **THIS DOCUMENT RELATES TO:** **All Direct Purchaser Class Actions**	**Case No. 1:18-cv-04361 (AKH)**

~~[PROPOSED]~~ ORDER GRANTING FINAL JUDGMENT AND ORDER OF DISMISSAL APPROVING DIRECT PURCHASER CLASS SETTLEMENT AND DISMISSING DIRECT PURCHASER CLASS CLAIMS

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, and in accordance with the terms of the Settlement Agreement dated December 23, 2022, between plaintiffs Drogueria Betances, LLC ("Betances"), Rochester Drug Co-Operative, Inc. ("RDC"), FWK Holdings, LLC ("FWK") and KPH Healthcare Services, Inc., a/k/a Kinney Drugs, Inc. ("KPH") (collectively, the "Class Representatives"), and on behalf of the Class defined below (together with the Class Representatives, the "Plaintiffs"), and Defendants Novartis Pharmaceuticals Corporation and Novartis AG (collectively "Novartis"), it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. This Final Judgment and Order of Dismissal hereby incorporates by reference the definitions in the Settlement Agreement among Plaintiffs and Novartis, and all capitalized terms used and not otherwise defined herein shall have the meanings set forth in the Settlement Agreement.

2. The following class (the "Class" or "Direct Purchaser Class") has been certified under Fed. R. Civ. P. 23(b)(3):

> All persons or entities in the United States, including its territories, possessions, and the Commonwealth of Puerto Rico, who purchased

> Exforge directly from Novartis, or who purchased a generic version of Exforge directly from Par, at any time during the Class Period from September 21, 2012, until March 30, 2015 ("Exforge Direct Purchasers"). Excluded from the Class are Novartis and Par and their officers, directors, management and employees, predecessors, subsidiaries and affiliates, and all federal governmental entities.
>
> Also excluded from the Class for purposes of this Settlement Agreement are the following entities: CVS Pharmacy, Inc. (which includes Omnicare), Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Walgreen Co., The Kroger Co. (which includes Peytons), and H-E-B L.P. ("Retailer Plaintiffs").

3. The Court previously appointed the Class Representatives Betances, RDC, FWK and KPH. The Court previously appointed Garwin Gerstein & Fisher, LLP as Lead Counsel for the Class ("Class Counsel"). The Class Representatives and Class Counsel have fairly and adequately represented the interests of the Class and satisfied the requirements of Fed. R. Civ. P. 23(g).

4. The Court has jurisdiction over these actions, each of the parties, and all members of the Class for all manifestations of this case, including this Settlement.

5. The notice of settlement (substantially in the form presented to this Court as Exhibit B to the Settlement Agreement) (the "Notice") directed to the members of the Class via First Class Mail, constituted the best notice practicable under the circumstances. In making this determination, the Court finds that the Notice provided for individual notice to all members of the Class who were identified through reasonable efforts. Pursuant to, and in accordance with, Rule 23 of the Federal Rules of Civil Procedure, the Court hereby finds that the Notice provided Class Members due and adequate notice of the Settlement, the Settlement Agreement, these proceedings, and the rights of Class Members to object to the Settlement.

6. Due and adequate notice of the proceedings having been given to the Class and a full opportunity having been offered to the Class to participate in the May 16, 2023 Fairness

Hearing, it is hereby determined that all Class Members are bound by this Order and Final Judgment.

7. The Settlement of this Direct Purchaser Class Action was not the product of collusion between the Class Representatives and Novartis or their respective counsel, but rather was the result of *bona fide* and extensive arm's-length negotiations conducted in good faith between Class Counsel and counsel for Novartis, with the assistance of a mediator, Eric D. Green.

8. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court hereby approves the Settlement, and finds that the Settlement is, in all respects, fair, reasonable and adequate to Class members and in their best interests. Accordingly, the Settlement shall be consummated in accordance with the terms and provisions of the Settlement Agreement.

9. The Court hereby approves the Plan of Allocation of the Settlement Fund as proposed by Class Counsel (the "Plan of Allocation"), which was summarized in the Notice of Proposed Settlement and is attached to Plaintiffs' Motion for Final Approval of Settlement, and directs RG/2 Claims Administration, the firm retained by Class Counsel and previously appointed by the Court as the Claims Administrator, to distribute the net Settlement Fund as provided in the Plan of Allocation.

10. All claims brought by the Direct Purchaser Class Plaintiffs against Novartis in *In re: Novartis and Par Antitrust Litigation*, 18-cv-04361-AKH (S.D.N.Y.) (the "Direct Purchaser Class Action") are hereby dismissed with prejudice, and without costs (other than as provided herein).

11. Upon the Settlement Agreement becoming final in accordance with Paragraph 6 of the Settlement Agreement, Novartis and its past, present, and future parents, subsidiaries,

divisions, affiliates, joint ventures, stockholders, officers, directors, management, supervisory boards, insurers, general or limited partners, employees, agents, attorneys, servants, representatives (and the parents', subsidiaries', and affiliates' past, present, and future officers, directors, employees, agents, attorneys, servants, and representatives), and predecessors, successors, heirs, executors, administrators, representatives, and assigns of each of the foregoing (collectively, the "Releasees") from all manner of claims, rights, debts, obligations, demands, actions, suits, causes of action, damages whenever incurred, liabilities of any nature whatsoever, including costs, expenses, penalties and attorneys' fees, under federal or state laws, whether known or unknown, foreseen or unforeseen, suspected or unsuspected, contingent or non-contingent, in law or equity, that arise out of or relate, in whole or in part in any manner to the Direct Purchaser Class Action that accrued prior to the date of this Settlement Agreement, (collectively, this entire paragraph represents the "Released Claims").

12. In addition, Plaintiffs and each Class member, on behalf of themselves and all other Releasors, hereby expressly waive, release and forever discharge, upon the Settlement becoming final, any and all provisions, rights and/or benefits conferred by § 1542 of the California Civil Code, which reads:

> Section 1542. General Release; extent. A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor;

or by any law of any state or territory of the United States, or principle of common law, which is similar, comparable or equivalent to § 1542 of the California Civil Code. Each Releasor may hereafter discover facts other than or different from those which he, she or it knows or believes to be true with respect to the claims which are the subject matter of Paragraph 11 of the Settlement Agreement, but each Releasor hereby expressly waives and fully, finally and forever settles,

releases, and discharges, upon this Settlement becoming final, any known or unknown, foreseen or unforeseen, suspected or unsuspected, asserted or unasserted, contingent or non-contingent claim that would otherwise fall within the definition of Released Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts. Each Plaintiff and member of the Class also hereby expressly waives and fully, finally and forever settles, releases, and discharges any and all claims that are the subject matter of Paragraph 11 of the Settlement Agreement that it may have against any Releasees under § 17200, et seq., of the California Business and Professions Code or any similar comparable or equivalent provision of the law of any other state or territory of the United States or other jurisdiction.

13. As set forth in Paragraph 12 of the Settlement Agreement (with subheading "Reservation of Claims"), the release set forth in Paragraph 11 of the Settlement Agreement (and in Paragraphs 11 and 12 of this Order) shall not release any claims between Plaintiffs, members of the Class, and the Releasors, on the one hand, and Novartis and the Releasees, on the other (a) arising in the ordinary course of business between Releasors and Releasees under Article 2 of the Uniform Commercial Code (pertaining to sales), the laws of negligence or product liability or implied warranty, breach of contract, breach of express warranty, or personal injury; (b) arising out of or in any way relating to any alleged price-fixing agreement between or among manufacturers of generic pharmaceutical products, including but not limited to Novartis or Sandoz Inc., including claims alleged in *In re: Generic Pharmaceuticals Pricing Antitrust Litig.*, MDL No. 2724, Case No. 16-MD-2724 (E.D. Pa.); and/or (c) of any sort that do not relate specifically to brand or generic Exforge.

14. Upon consideration of Class Counsel's petition for fees, costs and expenses, Class Counsel are hereby awarded attorneys' fees totaling $42,150,000.00 (representing 33 1/3 % of

the Settlement Fund net of service awards awarded pursuant to paragraph 15, below), to be paid solely from the Settlement Fund and only if and after the Settlement becomes final in accordance with Paragraph 6 of the Settlement Agreement.

15. Upon consideration of Class Counsel's petition for service awards for Class Representatives, Betances, RDC, FWK and KPH are each hereby awarded $100,000, to be paid solely from the Settlement Fund and only if and after the Settlement becomes final in accordance with Paragraph 6 of the Settlement Agreement. Class Counsel Bruce E. Gerstein of Garwin Gerstein & Fisher LLP shall allocate and distribute such attorneys' fees among the various Class Counsel which have participated in this litigation. The Releasees shall have no responsibility for, and no liability whatsoever with respect to, any payment or disbursement of attorneys' fees, expenses, costs or service awards among Class Counsel and/or Class Representatives, nor with respect to any allocation of attorneys' fees, expenses, costs or service awards to any other person or entity who may assert any claim thereto. The attorneys' fees and service awards authorized and approved by this Final Judgment and Order shall be paid to Garwin Gerstein & Fisher LLP within five (5) business days after the first distributions of the Settlement Fund are made to Class Members or as soon thereafter as is practical and in accordance with the terms of the Settlement Agreement and the Escrow Agreement. The attorneys' fees and service awards authorized and approved by this Final Judgment and Order shall constitute full and final satisfaction of any and all claims that Plaintiffs and any Class member, and their respective counsel, may have or assert for reimbursement of fees, costs, and expenses, and service awards, and Plaintiffs and members of the Class shall not seek or demand payment of any fees and/or costs and/or expenses and/or service awards from Novartis other than from the Settlement Fund.

16. The Court retains exclusive jurisdiction over the Settlement and the Settlement Agreement as described therein, including the administration and consummation of the Settlement, and over this Final Judgment and Order.

17. The Court finds that this Final Judgment and Order adjudicates all of the claims, rights and liabilities of the parties to the Settlement Agreement (including the members of the Class), and is final and shall be immediately appealable. Neither this Order nor the Settlement Agreement nor any other Settlement-related document shall constitute any evidence, admission, or concession by Novartis or any other Releasee, in this or any other matter or proceeding of any kind whatsoever, civil, criminal or otherwise, before any court, administrative agency, regulatory body, or any other body or authority, present or future, nor shall either the Settlement Agreement, this Order, or any other Settlement-related document be offered in evidence or used for any other purpose in this or any other matter or proceeding except as may be necessary to consummate or enforce the Settlement Agreement, the terms of this Order, or if offered by any Releasee in responding to any action purporting to assert Released Claims, or if offered by any Releasor in asserting that a claim is not a Released Claim, including because such claim is covered by Paragraph 12 of the Settlement Agreement ("Reservation of Claims").

SO ORDERED this 25 day of July, 2023

The Honorable Alvin K. Hellerstein
United States District Judge

TAB 26B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re Novartis and Par Antitrust Litigation	**1:18-cv-04361-AKH**
This Document Relates to: **All Direct Purchaser Class Actions**	

DIRECT PURCHASER CLASS PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND SERVICE AWARDS FOR THE CLASS REPRESENTATIVES

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I. INTRODUCTION

Class Counsel representing Direct Purchaser Class Plaintiffs Drogueria Betances, LLC ("Betances"), Rochester Drug Co-Operative, Inc. ("RDC"), FWK Holdings, LLC ("FWK") and KPH Healthcare Services, Inc., a/k/a Kinney Drugs, Inc. ("KPH"), and the Direct Purchaser Class[1] respectfully submit this memorandum in support of their Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Service Awards for the Class Representatives.

After nearly five years of hard-fought litigation, Class Counsel has secured a $126,850,000 cash payment from Defendants Novartis Pharmaceuticals Corporation and Novartis AG (collectively, "Novartis")[2] for the benefit of the Class (the "Settlement"), which Novartis already has funded into an escrow account. If approved by the Court, the proposed Settlement would be "an exceedingly good settlement." Jan. 6, 2023 Hearing Tr. 7:4-5. Moreover, efficiency was paramount in Class Counsel's efforts. As the Court observed, "given what's at stake with this case, the number of times that you needed judicial intervention to resolve the dispute was very few. And I think it says something about the professionalism of both plaintiffs' and defendants' lawyers." *Id*. 23:20-25. The Settlement was a result of the skill, creativity, perseverance, and hard work of

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[1] The "Class" or "Direct Purchaser Class" is defined in the Court's preliminary approval order (ECF No. 595) as:

> All persons or entities in the United States, including its territories, possessions, and the Commonwealth of Puerto Rico, who purchased brand Exforge directly from Novartis, or who purchased a generic version of Exforge directly from Par, at any time during the period from September 21, 2012 until March 30, 2015 ("Exforge Direct Purchasers"). Excluded from the Class are Novartis and Par and their officers, directors, management and employees, predecessors, subsidiaries and affiliates, and all federal governmental entities.
>
> Also excluded from the Class for purposes of this Settlement Agreement are the following entities: CVS Pharmacy, Inc. (which includes Omnicare), Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Walgreen Co., The Kroger Co. (which includes Peytons), and H-E-B L.P. ("Retailer Plaintiffs").

[2] Prior to being dismissed with prejudice on January 6, 2023 (ECF No. 594), Par Pharmaceutical, Inc. ("Par") was also a Defendant in this litigation. Novartis and Par may be collectedly referred to as "Defendants" herein.

Class Counsel, who shepherded this case from the outset through briefing class certification, summary judgment and *Daubert* motions, and intensive preparations for imminent trial. The extensive efforts of Class Counsel in achieving this excellent result are described below and in more detail in the Declaration of Bruce E. Gerstein (the "Gerstein Decl.") and individual law firm declarations, filed contemporaneously herewith (Gerstein Decl. Exs. A-J).

On behalf of Betances, Class Counsel filed the first complaint challenging the December 2, 2011 Novartis-Par License Agreement (the "NPLA") in May 2018. Gerstein Decl. ¶ 1. That complaint challenged the NPLA as a "pay for delay" agreement in violation of Sections 1 and 2 of the Sherman Act under the standards set forth in *FTC v. Actavis*, *Inc.*, 570 U.S. 136 (2013). Class Counsel unearthed this case on behalf of the class without the aid of a preceding government action or investigation. Gerstein Decl. ¶¶ 2-3.

Class Counsel pursued this case on a wholly contingent basis without any guarantee of success or compensation. The exceptional outcome was the result of their unique skill and experience gained from a 25-year history (and collectively decades of experience) handling similar cases, and perseverance in the face of vigorous defenses from some of the most distinguished defense firms in the country with commensurate experience and skill.

From case investigation through preliminary approval and notice of the Settlement, Class Counsel expended over 43,000 hours of uncompensated professional time equating to approximately $28 million in lodestar based on 2022 rates, and incurred nearly $2.5 million in unreimbursed out-of-pocket expenses. *Id*. ¶¶ 61, 63-64. As compensation for their efforts, Class Counsel seek an award of attorneys' fees in the amount of 1/3 (or 33 ⅓%) of the settlement fund, net of expenses, reimbursement of incurred expenses, and service awards for the class

representatives, *i.e.*, $41,325,497.58, plus a proportionate amount of accrued interest.[3] In support of this request Class Counsel submit their contemporaneous time records as Exhibits K-T to the Gerstein. Decl. Class Counsel also seek reimbursement of expenses in the amount of $2,473,507.26. *Id*. ¶¶ 61, 63-64. Finally, Class Counsel also seek service awards in the amount of $100,000 each for class representatives Betances, RDC, FWK and KPH. These requests are justified for several reasons.

First, the size of the settlement—$126,850,000—is substantial. As the Court observed, the settlement recovery of $126.85 million, or approximately 85% of Plaintiffs' conservative damages estimates, is "an exceedingly good settlement." Jan. 6, 2023 Hearing Tr. 3:17 - 7:5; Gerstein Decl. ¶ 46.[4]

Second, the sought fee is consistent with "a baseline reasonable fee by reference to other common fund settlements of a similar size, complexity and subject matter." *Moreno v. Deutsche Bank Ams. Holding Corp.*, 2019 U.S. Dist. LEXIS 36942, at *4 (S.D.N.Y. Mar. 7, 2019). *See also Christine Asia Co. v. Jack Yun Ma*, 2019 U.S. Dist. LEXIS 179836, at *61 (S.D.N.Y. Oct. 16, 2019) (to determine reasonableness, courts compare "fee application to fees awarded in similar . . . class-action settlements of comparable value.") (quotation omitted). Here, Class Counsel's requested fee is in line with numerous prior pay-for-delay antitrust cases:

Case	Settlement	Fee	Multiplier
La. Wholesale Drug Co. v. Pfizer, Inc. (In re Neurontin Antitrust Litig.), No. 02-1830, 2014 U.S. Dist. LEXIS 206338, at *17 (D.N.J. Aug. 6, 2014)	$191MM	33 ⅓%	1.99

[3] This amount is derived by subtracting the total requested service awards ($400,000) and expenses ($2,473,507.26) from the settlement amount of $126,850,000.00 and multiplying the result by 1/3. [($126,850,000 - $400,000 - $2,473,507.26) * 1/3 = $41,325,497.58].

[4] Other damages estimates depend on Plaintiffs being able to prove, *inter alia*, that the NPLA was fraudulently concealed from Plaintiffs, which was the subject of one of Defendants' summary judgment motions and about which the Court expressed skepticism. Jan. 6, 2023 Hearing Tr. 3:25 - 4:5.

Case	Settlement	Fee	Multiplier
In re Relafen Antitrust Litig., No. 01-12239, 2004 U.S. Dist. LEXIS 28801 (D. Mass. April 9, 2004)	$175MM	33 ⅓%	4.87
In re Lidoderm Antitrust Litig., No. 14-md-02521 (N.D. Cal. Sept. 20, 2018)	$166MM	27 ½%	1.05
In re Flonase Antitrust Litig., 951 F. Supp. 2d 739, 750-51 (E.D. Pa. 2013)	$150MM	33 ⅓%	2.99
In re Opana ER Antitrust Litigation, MDL No. 2580, (N.D. Ill. Nov. 3, 2022) ECF Nos. 1081, 1085	$145MM	36%	1.21
In re Cardizem CD Antitrust Litig., 218 F.R.D. 508, 533 (E.D. Mich. 2003)	$110MM	30%	1.2
In re Prograf Antitrust Litig., No. MDL No. 2242, 2015 U.S. Dist. LEXIS 199792, at *15 (D. Mass. May 20, 2015)	$98MM	33 ⅓%	2.35
In re Celebrex (Celecoxib) Antitrust Litig., No. 2:14-cv-00361, 2018 U.S. Dist. LEXIS 85125, at *18 (E.D. Va. Apr. 18, 2018)	$94MM	33 ⅓%	1.94
In re Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013 (D.N.J. Nov. 9, 2005)	$75MM	33 ⅓%	1.8

Third, as a general matter, "[d]istrict courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater." *Velez v. Novartis Pharms. Corp.*, 2010 U.S. Dist. LEXIS 125945, at *59 (S.D.N.Y. Nov. 30, 2010) (collecting cases); *N.J. Carpenters Health Fund v. Royal Bank of Scot. Grp., PLC*, 2019 U.S. Dist. LEXIS 39807, at *22 (S.D.N.Y. Mar. 8, 2019) ("In this Circuit, courts routinely award attorneys' fees that run to 30% and even a little more.") (quoting *In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 U.S. Dist. LEXIS 177175, at *31 (S.D.N.Y. Dec. 19, 2014)).

Fourth, the fee sought equates to a 1.48 multiplier[5] of Class Counsel's total lodestar, which is reasonable and within the range of multipliers approved by courts in similar cases. *See infra* III.C. This modest multiplier is justified by the unusually high risk, length, and complexities of

[5] The multiplier of 1.48 is calculated by dividing the requested fee $41,325,497.58 by the Class Counsel's lodestar of $27,929,118.25.

this case, coupled with Class Counsel's high-quality performance. A simple investment of hours alone would not have sufficed to achieve what this Court described as an "exceedingly good settlement," as Class Counsel were faced with novel substantive, procedural and expert-related issues requiring Class Counsel to make use of all of their decades of experience litigating delayed generic entry cases. Jan. 6, 2023 Hearing Tr. 7:11-15. Indeed, only a small number of law firms have the experience and resources to prosecute and finance direct purchaser Hatch-Waxman antitrust cases like this one. Class Counsel have worked in this area of the law for decades and have developed the field. *See* Gerstein Decl. Exs. A-J. (counsel declarations).

Fifth, while most antitrust cases are complex and involve risk, delayed generic entry cases such as this are inherently risky. And this case presented even more challenges and risks than the typical case. Class Counsel faced a thicket of complex facts involving multiple contracts in the context of the intersection of antitrust law, patent law, drug manufacturing, and Hatch-Waxman drug approval regulations. Layered atop these complex questions of fact and law, Class Counsel also had to prove, among other things, (1) what would have occurred in the absence of the challenged reverse payment (*i.e.*, whether and when Par, and other generics, would have won a patent challenge, launched generic Exforge without a license, or entered the market under a lawful license, and whether Novartis would have been willing and able to launch authorized generic Exforge simultaneously with Par's launch); and (2) the damages to the Class from the reverse payment. If not addressed properly, the Class's potential recovery could have been curtailed or eliminated.

Class Counsel were undeterred by these unique complications and risks, resulting in an excellent settlement for the Class.

The risks Class Counsel faced here were real. Previous reverse-payment cases were dismissed after significant outlays of time and expenses by Class Counsel because of intervening judicial decisions, successful summary judgment motions, or adverse jury verdicts. Gerstein Decl. ¶¶ 51-54. For instance, in 2010, over the Honorable Rosemary Pooler's dissent, the Second Circuit, *en banc*, affirmed a district court's grant of summary judgment in a case alleging a $400 million cash reverse payment concerning the drug Cipro, because of the then-emerging "scope-of-the-patent" test. *See Ark. Carpenters Health & Welfare Fund v. Bayer AG*, 604 F.3d 98 (2d Cir. 2010), *reh'g denied*, 625 F.3d 779 (2d Cir. 2010). Three years later, after denying certiorari in *Cipro*, the Supreme Court issued *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013), enabling a later-filing group of Cipro indirect purchasers to reach settlements in California state court worth hundreds of millions of dollars. *See In re Cipro Cases I & II*, 348 P.3d 845 (Cal. 2015), *on remand*, 2018 Cal. App. Unpub. LEXIS 3258, at *3 (Cal. Ct. App. May 14, 2018) (settlement described). The direct purchaser class in that case made no recovery despite significant expenditures of time and money by Class Counsel.

Even after *Actavis* was decided, dismissals of other cases at the Rule 12 and Rule 56 stages quickly revealed that *Actavis* was not a panacea for the risk these cases present. *See In re Wellbutrin XL Antitrust Litig.*, 133 F. Supp. 3d 734 (E.D. Pa. 2015) (granting the defendants' summary judgment motion in reverse payment case), *aff'd*, *In re Wellbutrin XL Antitrust Litig.*, 868 F.3d 132 (3d Cir. 2017); *In re Actos End Payor Antitrust Litig.*, 2015 U.S. Dist. LEXIS 127748 (S.D.N.Y. Sep. 22, 2015) (pre-answer dismissal in reverse payment case); *In re Effexor XR Antitrust Litig.*, 2014 U.S. Dist. LEXIS 142206 (D.N.J. Oct. 6, 2014) (same); *In re Lipitor Antitrust Litig.*, 46 F. Supp. 3d 523 (D.N.J. 2014) (same); *In re Loestrin 24 Fe Antitrust Litig.*, 45 F. Supp. 3d 180 (D.R.I. 2014) (same); *In re Lamictal Direct Purchaser Antitrust Litig.*, 18 F. Supp. 3d 560

(D.N.J. 2014) (same). *Wellbutrin XL* was affirmed on appeal while the others were reversed, but the legal landscape was plainly challenging (and unpredictable) after *Actavis*. Even getting to a jury was no guarantee of success for the plaintiffs. *E.g.,* Second Amended Judgment in a Civil Case, *In re Opana ER Antitrust Litig.*, No. 1:14-cv-10150 (N.D. Ill. Aug. 22, 2022), ECF No. 1067 (granting judgment after trial following jury verdict for defendant in a reverse payment case); *In re Nexium (Esomeprazole) Antitrust Litig.*, 842 F.3d 34, 39 (1st Cir. 2016) (upholding jury verdict for defendant where plaintiff proved an antitrust violation but not causation or damages). *See also La. Wholesale Drug Co. v. Sanofi-Aventis*, 2009 U.S. Dist. LEXIS 77206, at *3 (S.D.N.Y. Aug. 28, 2009) (reflecting jury verdict for defendant in generic delay case).

Sixth, this case was settled at a very advanced stage, with nothing left but trial and with intense preparations for same under way. Class Counsel took this case through exhaustive fact and expert discovery, significant motion practice (under Rules 12, 23, 56, 702/*Daubert*, privilege-related proceedings, and the preparation of numerous motions *in limine*), trial preparation (including preparation and exchange of a joint pretrial order and jury instructions), and mediation proceedings. The volume of work and level of commitment from Class Counsel required to reach that late stage in the litigation and ability, against the backdrop of numerous variables that could have diminished or eliminated the chance of any recovery by the Class, to secure such a favorable settlement for the Class further supports Class Counsel's fee request.

In short, these factors strongly support the requested fee—equaling a modest multiplier of 1.48—requested herein.

II. SUMMARY OF CLASS COUNSEL'S LITIGATION EFFORTS

A. Pre-Filing Investigation

Class Counsel began investigating this case in the spring of 2018. Gerstein Decl. ¶ 1. Class

Counsel analyzed the sequencing of entry of brand, generic and authorized generic ("AG") Exforge and discovered that Novartis's authorized generic Exforge launched on March 31, 2015, just over 180 days after Par's September 30, 2014 generic Exforge launch. Other companies' generic versions of Exforge launched at the same time as Novartis's AG.

Class Counsel determined through independent research and analysis that Par's launch date was the result of a negotiated license agreement between Novartis and Par. ECF No. 1 ¶¶ 106, 131. Class Counsel then analyzed Novartis's licensed patents: the 5,399,578, 6,294,197 and 6,395,728 patents. As to the 5,399,578 patent, Class Counsel determined that it expired on September 21, 2012, and could not have prevented Par's entry after that date. Class Counsel next analyzed Novartis's 6,294,197 and 6,395,728 patents, as well as Par's generic product, and determined that it was unlikely that Par's product infringed those patents. *Id*. ¶¶ 75-90. Based on FDA documents, Class Counsel also determined that there appeared to be no regulatory impediment to Par launching generic Exforge earlier than it did.

Based on these facts, *i.e.*, the existence of an agreement, the timing of Novartis's AG launch about 181 days after Par's generic launch, and the apparent non-infringing nature of Par's generic, Class Counsel concluded that the NPLA was likely a "No-AG" reverse payment agreement that was unlawful under *Actavis* and caused the Class to suffer overcharges.

On May 16, 2018, Class Counsel filed the first case under Section 4 of the Clayton Act, with four claims challenging Novartis's reverse payment to Par under Sections 1 and 2 of the Sherman Act. Gerstein Decl. ¶ 1. Other direct purchasers, retailers and end-payors followed with complaints of their own. *Id*. ¶¶ 1, 5.

B. Prosecution of the Case

1. The Motion to Dismiss

On September 17, 2018, Novartis and Par filed a motion to dismiss. ECF No. 86. Reflecting the strength of Plaintiffs' allegations, Defendants did not seek to dismiss the core allegation that the NPLA constituted an unlawful reverse payment under *Actavis* and therefore did not seek complete dismissal of Plaintiffs' case. Gerstein Decl. ¶ 7. Instead, the motion centered on whether agreeing to a No-AG period of September 30, 2014 through March 1, 2015, during which Par, but not Novartis, competed in the generic market, was *per se* unlawful under the antitrust laws or subject to analysis under the rule of reason. Because the core of Plaintiffs' allegations were not dismissed, Class Counsel turned to discovery next.

2. Discovery

(a) Fact Discovery

Even though, as the Court observed,[6] Class Counsel avoided significant judicial intervention in discovery, Plaintiffs mostly prevailed when intervention was necessary. For example, by Order dated June 6, 2019, the Court granted Plaintiffs' motion to compel Novartis to produce documents reflecting prior instances it launched an AG, because those prior instances were benchmarks against which to weigh the timing of the Exforge AG launch. ECF No. 165. Similarly, on June 18, 2019, the Court granted Plaintiffs' motion to compel the production of Defendants' sales data through December 2017, an important input to Plaintiffs' expert's damages model. ECF No. 167. The Court also granted Plaintiffs' motion to compel non-party Lupin Limited and Lupin Pharmaceuticals, Inc.'s responses to a document subpoena, which were important for causation purposes. ECF No. 253. Gerstein Decl. ¶ 23. Class Counsel also were largely successful

[6] Jan. 6, 2023 Hearing Tr. 23:20-25 ("The Court: . . . given what's at stake with this case, the number of times that you needed judicial intervention to resolve the dispute was very few. And I think it says something about the professionalism of both plaintiffs' and defendants' lawyers.").

in enforcing a subpoena in the United States District Court for the Eastern District of Pennsylvania against non-party Alembic for sales data. *Id.* ¶ 22.

Class Counsel analyzed millions of pages of documents and lines of transaction data from Defendants and third parties for use in depositions, expert reports, seeking class certification, opposing summary judgment and in anticipation of trial. *Id.* ¶¶ 12-15. Class Counsel also served two sets of document requests and two sets of interrogatories, twenty subpoenas on third parties, took nineteen fact and five expert depositions, and defended four fact and ten expert depositions (38 depositions overall). *Id.* ¶¶ 12-18. Class Counsel did so efficiently, limiting the participation of counsel for the direct purchaser class to one attendee during the five depositions during which counsel for another plaintiff group was the primary questioner. October 8, 2020 Hearing Tr. 8:9-15.

As discussed below, Class Counsel's diligent pursuit of evidence armed Plaintiffs with documentary evidence and testimony to support their class certification motion, to oppose Defendants' summary judgment and *Daubert* motions, and to prepare for trial.

(b) Privilege Disputes

Class Counsel materially advanced the case by doggedly pursuing privilege related disputes. Gerstein Decl. ¶¶ 24-25. At the Court's suggestion (Aug. 4, 2021 Hearing Tr. at 63:25-64:2), Plaintiffs submitted a privilege waiver/evidence preclusion motion, arguing that Novartis placed legal advice "at issue" by asserting defenses that impliedly invoked legal advice. ECF No. 359. These issues included Defendants' subjective beliefs concerning patent strength, interpretation of the NPLA, and whether Defendants could have reached an alternative procompetitive license agreement providing for an earlier generic entry date instead of the NPLA. *Id*. This motion, which was fully briefed at the time of settlement, had the potential to substantially

narrow Novartis's available defenses. Plaintiffs continued to press the waiver argument in connection with Defendants' *Daubert* and summary judgment arguments. Gerstein Decl. ¶ 25.

3. Class Certification

Class Counsel developed the evidence necessary to support their motion for class certification, which was filed on March 15, 2022. ECF No. 497. While that motion was pending, Plaintiffs and Novartis settled and Plaintiffs again sought certification in the settlement context. During a hearing on January 6, 2023, the Court determined that the requirements for class certification had been met. Jan. 6, 2023 Hearing Tr. 18:11-26:13. The Court certified the Class by Order dated January 6, 2023. ECF No. 595.

4. Experts

At their sole risk and expense (totaling $2 million), Class Counsel retained ten experts who each issued at least one report, and who sat for at least one deposition. Gerstein Decl. ¶¶ 27-28. Plaintiffs also deposed each of Defendants' five experts. *Id.* ¶¶ 29-30. This effort required Class Counsel to master exceptionally complex material. Class Counsel ensured that each expert was fully prepared to provide comprehensible testimony at trial had this action not settled. Plaintiffs' experts provided crucial reports and testimony on the subject matter listed below:

Expert	Subject Matter
Donald S. Allen	Whether Novartis, or a reasonable company in Novartis's position, would have been ready and able to launch Exforge AG earlier and to satisfy demand for both the brand and the AG.
Glen P. Belvis	How a reasonable and experienced patent litigator would assess Novartis's chances of success in patent litigation.
Stephen R. Byrn	Noninfringement and invalidity of certain Novartis's patents.
Einer Elhauge	Whether the NPLA was anticompetitive and whether there existed an economically rational entry date absent the challenged reverse payment.

Jeffrey J. Leitzinger	Class certification, including class wide antitrust impact and damages, and aggregate damages for the Class.
Luis A. Molina	Whether Novartis, or a reasonable company in Novartis's position, would have been willing and financially incentivized to launch AG Exforge simultaneously with Par's generic launch.
Arthur Schwartzbard	Clinical differentiation of Exforge from other hypertension treatments.
Martha A. Starr	Relevant market and market power.
Bernice Tao	Whether there were regulatory impediments to Par and other generic companies receiving earlier FDA final approval to sell generic Exforge.
Jay R. Thomas	FDA drug approval framework established by the Hatch-Waxman Act and the Patent Act.

5. Summary Judgment and *Daubert* Motions

After expert discovery ended, Defendants filed two summary judgment motions. Gerstein Decl. ¶¶ 33-34. Defendants' first motion argued that the statute of limitations either mandated dismissal of Plaintiffs' claims, or significantly diminished their value. *Id*. ¶ 34. Specifically, they argued that the "continuing violation" doctrine did not apply because the NPLA's 2012 execution was the allegedly unlawful conduct, and Plaintiffs did not sue until 2018. *Id*. While Defendants' motion was pending, the issue of the application of the continuing violation doctrine to purchasers was presented to the Court of Appeals for the Second Circuit in *Litovich v. Bank of America*, case No. 21-2905. The outcome of the appeal in *Litovich*, which is pending a decision, introduced significant risk for Plaintiffs. *Id*. Defendants also argued that even if the continuing violation doctrine applied, Plaintiffs could not satisfy the elements of fraudulent concealment to toll the running of the statute of limitations and thus Plaintiffs' claims were time barred as to damages incurred before May 2014. *Id*. While Class Counsel believe that Plaintiffs had good responsive

arguments, the Court expressed skepticism. *See* Jan. 6, 2023 Hearing Tr. 3:19-4:5 (expressing skepticism about fraudulent concealment).

Defendants' second motion for summary judgment argued that Plaintiffs could not prove causation or damages. Defendants argued that Plaintiffs' theory — that Defendants would have entered into a lawful agreement without a reverse payment and with earlier Par entry — was speculative and unsupported. Gerstein Decl. ¶ 34. Although Class Counsel believe that their causation theories were well-supported, a victory was not certain.

Including their reply, Defendants supported their 99 pages of summary judgment arguments with a 273-paragraph fact statement and 108 exhibits. *Id*. ¶ 34. Defendants also filed six *Daubert* motions, totaling an additional 122 pages of briefing (including replies) and 33 exhibits. *Id.* ¶¶ 33, 35.

Class Counsel opposed Defendants' summary judgment and *Daubert* motions with extensive filings. *Id.* ¶¶ 37-38. Defendants sought to strike some of Plaintiffs' factual responses to their summary judgment motions from the record. *Id.* ¶ 34. Plaintiffs opposed, but there was a risk that certain key responses would be stricken.

Settlement discussions in this case came against the backdrop of these pending summary judgment and *Daubert* motions, and the pending class motion.

6. Trial Preparation

Following summary judgment briefing, Class Counsel began preparing for trial scheduled for January 9, 2023. ECF No. 379. Class Counsel exchanged with Novartis a proposed pretrial order, jury instructions, stipulations of fact and *voir dire* questions. Gerstein Decl. ¶ 40. Class Counsel also prepared drafts of exhibit lists, deposition designations, and multiple motions *in limine* and were generally preparing for trial. *Id*.

7. Mediation and Settlement

The parties reached an agreement in principle on October 6, 2022, following a full-day mediation in Boston before Eric D. Green of Resolutions, LLC, a prominent mediator. *Id*. ¶ 42. As part of that process, Class Counsel provided Mr. Green with voluminous submissions. *Id.* ¶ 43. During the mediation, counsel for each side presented their views of the merits of each other's positions and proceeded to an intense period of arm's-length negotiations. *Id*.

III. ARGUMENT

A. Class Counsel Should Be Awarded Reasonable Attorneys' Fees

As the Court acknowledged, the $126,850,000 settlement with Novartis on behalf of the Class is an "exceedingly good settlement." Jan. 6, 2023 Hearing Tr. 7:11-15. As explained below, the indisputable value and benefit conferred on the Class by this settlement is a testament to Class Counsel's determined pursuit of victory at every stage of this litigation and warrants the reasonable attorneys' fees sought here of 33 ⅓% of the net settlement amount, constituting a modest multiplier of 1.48.

Under the "equitable fund" doctrine, attorneys for the plaintiffs in a class action may petition the court for compensation from the settlement fund. *Boeing v. Van Gemert*, 444 U.S. 472, 478 (1980); Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees . . . that are authorized by law or by the parties' agreement."). "[R]egardless of whether a case is brought pursuant to a statute with a fee-shifting provision, if the parties settle the case by creating a common fund, common-fund principles control class counsel's fee recovery." *Fresno County Emps. Ret. Ass'n v. Isaacson*, 925 F.3d 63, 67 (2d Cir. 2019). The reasonableness of a fee is determined from the "plaintiff's perspective" and "can account for contingency risk where such risk exists." *Id*. at 70.

In common fund cases, to determine a fee, courts may use both the "percentage of the fund" or the "lodestar" methods. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 369 F.3d 96, 121 (2d Cir. 2005). However, "[t]he trend in this Circuit is toward the percentage method." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2019 U.S. Dist. LEXIS 216796, at *25 (E.D.N.Y. Dec. 16, 2019). This is because "once the parties have agreed to settle, the percentage-of-the-fund methodology serves as an important motivation for counsel to maximize the class's recovery, and, *a fortiori*, counsel's fee." *Fresno County Employees*, 925 F.3d at 71. *See also* Fitzpatrick, Brian T., *A Fiduciary Judge's Guide to Awarding Fees In Class Actions*, 89 Fordham Law Review 1151, at 1170 (2021) (observing that where a court can monitor against premature settlement—which clearly is not an issue here where the parties were preparing for trial—then the percentage of recovery, not lodestar, is the best method for determining appropriate attorneys' fees). The percentage method also dispenses with the burden of a lodestar computation, but courts generally assess the hours submitted by counsel as a "cross-check" on the reasonableness of the requested percentage. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) (quotation omitted). *See also In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 586 (S.D.N.Y. 2008) ("[T]he administrative problems associated with the lodestar method, and the advantages presented by the percentage of recovery approach, [have] led most district courts in this Circuit to adopt the percentage of recovery methodology.").

Guided by the following factors, this Court has discretion to determine a reasonable fee: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation …; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger*, 209 F.3d at 50; *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 480 (S.D.N.Y. 2009). At bottom, a fee award should be

based on what is reasonable under the circumstances. *Goldberger*, 209 F.3d at 47.

Where, as here, the contingency risk is significant, a reasonable fee should include compensation for such risk. The Second Circuit explained this:

> The plaintiff class is therefore appropriately charged for contingency risk where such risk is appreciable because the class has benefited from class counsel's decision to devote resources to the class's cause at the expense of taking other cases. That is, because class counsel has decided to represent the plaintiff class, class counsel's ability to freely represent other clients is limited by the risk she has assumed that the class's cause will be unsuccessful. The class, having been enriched by counsel's acceptance of its cause at the expense of other clients' causes, may be charged for counsel's assumption of risk on its behalf.

Fresno County Emps., 925 F.3d at 70. In *In re Initial Public Offering Securities Litigation*, the district court awarded a 33 ⅓% fee on a $586 million settlement, concluding that "[i]t is precisely the promise of a reasonable fee that encourages plaintiffs' attorneys to accept cases such as these and risk spending their own financial resources and personal efforts for years until recovery can be obtained for the class." 671 F. Supp. 2d at 502; *id.* at 516 ("[t]his fee takes into account the risks counsel undertook to represent class members and the hard work that was put into resolving this litigation.").

Here, Class Counsel's request for a fee of 33 ⅓% of the settlement fund is supported by the *Goldberger* factors and consistent with the law and awards in similar cases.

B. The *Goldberger* Factors Support Class Counsel's Fee Request

1. The Time and Labor Counsel Expended

Class Counsel expended 43,348.60 hours in prosecuting this case starting from its investigation in early 2018 through the end of January 2023 (excluding time relating to this motion). Gerstein Decl. ¶ 61. As detailed above and in the Gerstein Declaration, Class Counsel: (a) survived a motion to dismiss (*id.* ¶¶ 7-10); (b) reviewed and analyzed millions of pages of documents and lines of transaction data from Defendants and third parties (*id.* ¶¶ 12-17); (c) took

or defended 38 fact and expert depositions (*id.* ¶ 18); (d) consulted with and retained 10 experts in wide-ranging disciplines (*id.* ¶ 27); (e) engaged in substantial discovery motion practice, including on the issue of privilege (*id.* ¶¶ 19-26); (f) fully briefed class certification (*id.* ¶ 32); (g) opposed Defendants' comprehensive summary judgment and *Daubert* motions (*id.* ¶¶ 33-38); (h) substantially prepared for trial that was scheduled for January 2023(*id.* ¶ 40); and (i) prepared for and participated in successful mediation (*id.* ¶¶ 42-43).

This was a large amount of work, performed efficiently, rapidly and creatively in the heart of the pandemic. Moreover, Class Counsel will be expending a significant number of hours in connection with administering the Settlement. *See Garcia v. Pancho Villa's of Huntington Vill., Inc.*, 2012 U.S. Dist. LEXIS 144446, at *22-23 (E.D.N.Y. Oct. 4, 2012) (acknowledging that class counsel would perform more work on behalf of the class after final approval, including "assisting with the administration of the settlement, and answering Class Member questions, which further supports their fee request"). The significant time and labor that has been (and will be) expended by Class Counsel support the reasonableness of the fee request.

2. The Magnitude and Complexities of the Litigation

"An antitrust class action is arguably the most complex action to prosecute." *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000). *See also In re Air Cargo Shipping Servs. Antitrust Litig.*, 2015 U.S. Dist. LEXIS 138479, at *148-49 (E.D.N.Y. Oct. 9, 2015) (price-fixing conspiracy required "complex expert analysis and review of mountains of documents"); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 743 (E.D. Pa. 2013) ("Antitrust class actions are particularly complex to litigate and therefore quite expensive."). This lawsuit in particular featured unique wrinkles. For instance, this case uniquely required Class Counsel to master various complexities of patent law to show the likelihood that Par would have prevailed on

infringement and validity challenges. Contrary to other generic delay cases, Class Counsel would have to show this without the benefit of an underlying patent litigation record, since Novartis opted never to sue Par for infringement before the NPLA was executed. Gerstein Decl. ¶ 31. As a prerequisite, Class Counsel had to master the biopharmaceutical aspects of hypertension. *Id.* This case also required Class Counsel to master several challenging and interwoven areas of FDA generic drug approval, pharmaceutical manufacturing procedures and timing, as well as Novartis and Par's internal forecasting and manufacturing planning documents. *Id.* Class Counsel used their learning to construct a but-for world absent the challenged conduct with robust earlier generic competition, including from non-party generic manufacturers.

It is hard to overstate the complexities that this massive litigation presented, and the challenge Class Counsel faced in making them comprehensible to a lay jury.

3. The Risk of the Litigation

"[R]isk of the litigation is one of the most important factors, if not the foremost factor, to consider when determining the reasonableness of fee." *Woburn Ret. Sys. v. Salix Pharms., Ltd.*, 2017 U.S. Dist. LEXIS 132515, at *17 (S.D.N.Y. Aug. 18, 2017). *See also Christine Asia Co.*, 2019 U.S. Dist. LEXIS 179836, at *62 (similar). When lawyers undertake litigation on a contingency basis, they face the risk of non-payment. *See id.* at *63 ("might never have been recovered."). *See also Woburn Ret. Sys.*, 2017 U.S. Dist. LEXIS 132515 at *17 (lawyers on contingency "assume a great deal of risk").

This litigation presented substantial risks. When Class Counsel filed this case five years ago, no government agency had taken any action to prosecute the challenged conduct. Class Counsel did not have the advantage of "piggy backing" on pre-existing litigation or the reassurance of liability associated with a coinciding government indictment or guilty plea when it initiated the

case. Class Counsel then spent years, thousands of hours, and millions of dollars, on a purely contingent basis, facing off against some of the most highly regarded law firms in the country with attorneys who, like Class Counsel, have extensive experience litigating delayed generic entry cases and filed two summary judgment motions which were pending at the time of settlement.

Further, even if unsuccessful at summary judgment, Novartis still could have persuaded the jury that the NPLA did not contain a "No-AG" clause but rather a mere "notice provision" that provided Par sufficient lead time to manufacture generic Exforge. Novartis also could have persuaded the jury that even if the NPLA did contain a reverse payment, it was not "large" or "unjustified" under *Actavis*. Novartis would have also pursued before the jury their aggressive argument that the NPLA did not actually cause any generic delay, nor Plaintiffs' injuries, because Par would not have launched generic Exforge without a license and no alternative license with an earlier entry date was possible. Moreover, assuming Plaintiffs' fraudulent concealment allegations survived summary judgment, Plaintiffs would have to convince the jury that Plaintiffs' evidence met the elements of fraudulent concealment, including lack of actual or constructive knowledge, in the face of Novartis's purportedly contrary evidence.

While Plaintiffs would have to satisfy every element and sub-element of an antitrust cause of action, including violation of the Sherman Act under the rule of reason, causation, and damages, Novartis would have to prevail on just one to defeat or substantially devalue Plaintiffs' claims. The risk from this imbalance is demonstrated by the recent defense verdict in the *Opana ER* litigation in the Northern District of Illinois, where the jury found an antitrust violation, but returned a verdict for the brand defendant Endo due to perceived procompetitive justifications. *In re Opana ER Antitrust Litig.*, 1:14-cv-10150 (N.D. Ill. Aug. 22, 2022), ECF No. 1067.

These risks would present themselves yet again during the inevitable appeal to the Second Circuit, and conceivably the Supreme Court. Viewed against these risks, the $126.85 million Settlement that, as the Court observed, is "exceedingly good" and equal to approximately 85% of Plaintiffs' conservative damages estimate, as described above. *See also* Gerstein Decl. ¶ 46. These risks "of establishing liability and proving damages [], further support the granting of the application for fees." *Christine Asia Co.*, 2019 U.S. Dist. LEXIS 179836, at *64.

4. The Quality of Representation

Class Counsel have decades of experience pursuing and trying delayed generic antitrust cases. *See* Gerstein Decl. ¶ 49. No group of firms has litigated more such cases. And each firm, or its members, specialize and focus on certain aspects of the case (*e.g.*, antitrust liability, market power, pharmaceutical patents, regulatory approval and manufacturing processes, damages, etc.), while working collaboratively on overall case strategy to ensure the team efficiently litigates the case and utilizes its vast sophisticated litigation experience to benefit the Class and evaluate the appropriateness of settlement. The results speak for themselves: Class Counsel have recovered billions of dollars on behalf of substantially similar classes.

Here, Class Counsel vigorously litigated this unusually complicated case from initial investigation in early-2018 into trial preparation and settlement with both skill and faithful adherence to the Class's best interests at every stage. As the Court recognized, among Class Counsel are "the leading attorneys in this field representing plaintiffs, and you showed your competence in the way you handled this case." Jan. 6, 2023 Hearing Tr. 23:16-19. *See also id.* 19:7-14 (this was "a five-year litigation. It was hard fought. There were a lot of procedural issues that had to be surmounted. There were motions that had to be surmounted. There were discovery

issues that had to be taken care of. And you saw it through all these in a very fine fashion and brought this case to the point where it was ready for trial.").

Class Counsel's skill and experience was demonstrated by the leading role they took overall. Specifically, while this case was coordinated between multiple plaintiff groups, Class Counsel handled most of the discovery, deposed most of the witnesses in this case, presented the coordinated plaintiffs' joint positions at hearings, drafted most of the briefing, and led trial preparations.

Perhaps most importantly, the extraordinary results achieved by Class Counsel in this case fully support the requested award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("critical factor is the degree of success obtained"); *Goldberger*, 209 F.3d at 55 ("the quality of representation is best measured by results"); *In re Lloyd's Am. Tr. Fund Litig.*, 2002 U.S. Dist. LEXIS 22663, at *82 (S.D.N.Y. Nov. 26, 2002) ("The quality of work performed in a case that settles before trial is best measured by the benefit obtained.") (quoting *Behrens v. Wometco Enters. Inc.*, 118 F.R.D. 534, 547-48 (S.D. Fla. 1988)). Here, as the Court recognized, "85 percent of damage is an exceedingly good settlement. No matter how strong your case, the vagaries of a trial and an appeal and the time factor and the expense factor make an 85 percent settlement exceedingly good." Jan. 6, 2023 Hearing Tr. 7:11-15. This percentage of monetary relief is far greater than in other class actions of comparable complexity. For example, in *Fleisher v. Phx. Life Ins. Co.*, the Court held that a settlement with a cash award amount equal to 68.5% of COI overcharges was "one of the most remunerative settlements this court has ever been asked to approve." 2015 U.S. Dist. LEXIS 121574, at *37 (S.D.N.Y. Sept. 9, 2015).

And Class Counsel achieved this result in an efficient manner, without overburdening the Court, which recognized that "given what's at stake with this case, the number of times that [Class

Counsel] needed judicial intervention to resolve the dispute was very few. And I think it says something about the professionalism of both plaintiffs' and defendants' lawyers." Jan. 6, 2023 Hearing Tr. 23:20-24; *id*. 24:3-5 ("I noticed the high degree of professionalism in this case and both sides should be commended for that.").

Finally, "the quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004). Novartis was represented by Cravath Swaine & Moore LLP. As the Court recognized, "taking on a litigation like this against one of the most powerful drug companies represented by one of the most outstanding law firms in the country is not an easy task." Jan. 6, 2023 Hearing Tr. 18:21-24. "That Plaintiffs' Counsel was able to obtain a substantial settlement from these Defendants confirms the quality of Plaintiffs' Counsel's representation in this matter, and is a factor in determining the reasonableness of the fee request." *In re Veeco Instruments Sec. Litig.*, 2007 U.S. Dist. LEXIS 85554, at *23 (S.D.N.Y. Nov. 7, 2007).

5. The Requested Fee in Relation to the Settlement

As discussed in the Introduction, a 33 ⅓% fee is both well within the range of fee awards within this Circuit and for delayed generic entry antitrust cases like this one. *Velez*, 2010 U.S. Dist. LEXIS 125945, at *59 (collecting cases); *N.J. Carpenters Health Fund*, 2019 U.S. Dist. LEXIS 39807, at *22 (S.D.N.Y. Mar. 8, 2019) (quoting *In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 U.S. Dist. LEXIS 177175, at *31 (S.D.N.Y. Dec. 19, 2014)); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d at 480 (awarding 33 ⅓% of $510 million settlement). *See also In re Urethane Antitrust Litig.*, 2016 U.S. Dist. LEXIS 99839, at *77 & n.5 (D. Kan. July 29, 2016) (33 ⅓% fee on $835 million settlement fund); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330

(S.D. Fla. 2011) (30% of $410 million settlement); *In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25067, at *55 (D.D.C. July 16, 2001) (33.7% of $365 million settlement).

Thus, in *In re Buspirone Patent Litigation*, No. 01-MD-1410 (S.D.N.Y. Apr. 17, 2003) (Ex. A), another delayed generic entry antitrust case on behalf of a class of direct purchasers, Judge Koeltl, applying the *Goldberger* factors, approved a requested fee of 33 ⅓% of a settlement fund of $220 million, reasoning that:

> The fee of one third falls within the range of rates that have been approved in other class actions. Determining then whether the percentage fee is a reasonable in this case applying the traditional standards it's clear . . . that this is a very large and complex litigation. There is always risk involved in the litigation. The fee that's being sought is a completely contingent fee. The case was taken . . . on a contingent basis and that is entitled to greater weight than simply an hourly rate because the lawyers could have walked away having done substantial work with no recovery.

Id. at 41-43. Judge Koeltl's reasoning is equally applicable in this case and supports the requested fee of 33 ⅓% of the net Settlement amount. Class Counsel's effective hourly rate for attorneys for this case was approximately $690. This is well within the range of reasonableness (the multiplier is discussed in Part III.C., *infra*.). For instance, a 2014 National Law Journal survey, which contained information for 159 of the largest law firms in the U.S., found a median rate for the highest partner billing rate category of $775 and a median hourly rate for the highest billing associates of $510. *See* Ex. B, hereto. Rates have increased dramatically in the decade since. *See* Ex. C, hereto.

Reductions to the percentage award should not be considered because to do so would disincentivize class action lawyers from holding out for incremental benefits on behalf of the class. *See In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71, 80 (S.D.N.Y. 2000) ("[A]djusting downward the percentage of the recovery awarded to counsel as plaintiffs' recovery increases . . . may give rise to an attorney incentive problem by creating declining marginal returns to effort for

counsel . . . Again, this method can create an incentive to settle quickly and cheaply, when the returns to effort are highest, rather than investing additional time and maximizing plaintiffs' recovery."). *See also In re Syngenta AG MIR 162 Corn Litig.*, 2018 U.S. Dist. LEXIS 206840, at *101 (D. Kan. Dec. 7, 2018) (articulating same "incentive problem" observations and therefore awarding 33 ⅓% fee on a $1.5 billion settlement). As Judge Sofaer explained:

> It unquestionably is true that without able lawyers handling these matters not only do some of them go unprosecuted, but the big difference in my experience is in the amount obtained and you don't get the highest recovery and when you are paying at the low end of the scale of fee recovery in contingent actions, it seems to me that I as the protector of the class, can fairly say, and honestly say, that I believe it is in the class' best interests – of this class and of future classes yet unknown – to pay this kind of money for these kinds of benefits.

In re Pepsico Secs. Litig., Civ. A. No. 82-Civ-8403 (S.D.N.Y. Apr. 26, 1985), Tr. of April 26, 1985 hearing at 17-18 (as quoted in *In re M.D.C. Holdings Sec. Litig.*, 1990 U.S. Dist. LEXIS 15488, at *30-31 (S.D. Cal. Aug. 30, 1990) (awarding 30%)).

6. Public Policy Considerations

"Private suits are an important element of the Nation's antitrust enforcement effort." *Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 572 n.10 (1982). In service of that rationale, courts recognize that "it is important to encourage top-tier litigators to pursue challenging antitrust cases…[because] [o]ur antitrust laws address issues that go to the heart of our economy." *In re Credit Default Swaps Antitrust Litig.*, 2016 U.S. Dist. LEXIS 54587, at *55 (S.D.N.Y. Apr. 25, 2016). This case presents an excellent example of these principles. No government agency pursued the antitrust implications of Novartis's reverse payment even though the settlement was reported to the Federal Trade Commission and the Department of Justice. ECF No. 552 ¶¶ 66-68. Perhaps no government agency even detected the reverse payment or the delay

in generic competition it caused. But Class Counsel did, pursuing this case despite its many challenges, and recovering nearly all of the Class's overcharges.

Moreover, in recent years, the pharmaceutical industry has drawn a significant amount of attention (and criticism) due to the increasing prices of prescription drugs. This litigation, and the amount of money that Novartis will pay to the Class, send a clear message that purchasers of pharmaceutical products will not tolerate anticompetitive behavior that raises the prices of pharmaceutical products. It is hoped that the payment of $126.85 million will deter pharmaceutical companies from engaging in similar types of unlawful conduct in the future. The end result of this hoped-for deterrence is increased competition.

C. A Lodestar Cross-Check Confirms the Reasonableness of the Requested Fee

Class Counsel's fee request is reasonable under the lodestar method as well. As detailed in the Gerstein Decl., Class Counsel worked 43,348.60 hours on this case thus far, amounting to $27,929,118.25 in lodestar based on 2022 rates. Gerstein Decl. ¶ 61. Class Counsel expended these hours at reasonable rates. In determining whether the rates are reasonable, the Court should consider the attorneys' professional reputation, experience, and status. Here, Class Counsel are amongst the most accomplished antitrust practitioners in the pharmaceutical antitrust field, as the Court recognized. *See supra* § III.B.4. Moreover the average rate for attorneys (excluding staff and paralegals) of approximately $690 per hour is objectively reasonable compared to prevailing rates. Specifically, "[p]artners in New York, for example, billed about $958 per hour in 2019; $1,000 in 2020 and $1,034 [in 2021] . . . Associates in the Big Apple billed an average of $633 per hour in 2019; $678 in 2020 and $712 [in 2021]." Ex. C, *Associate Billing Rates Are Growing Faster Than Partner Rates*, ALM, February 3, 2022. Therefore, the hourly rates are reasonable

here.[7] *See In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 2007 U.S. Dist. LEXIS 9450, at *73 (S.D.N.Y. Jan. 31, 2007) (approving counsel's hourly rates).

A 33 ⅓% fee award equals a lodestar multiplier (net of expenses and service awards) of 1.48. "[C]ounsel may be entitled to a 'multiplier' of their lodestar rate to compensate them for the risk they assumed, the quality of their work and the result achieved for the class." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d at 590. *See also Christine Asia Co.*, 2019 U.S. Dist. LEXIS 179836, at *62 ("No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success.") (*quoting City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974)). Although lodestar multipliers naturally tend to increase in direct proportion to the size of a recovery, "when the fee is less than double the lodestar, even in a megafund settlement, a one-third-of-fund fee may be endorsed as reasonable." *In re Loestrin 24 Fe Antitrust Litig.*, 2020 U.S. Dist. LEXIS 125745, at *43 (D.R.I. July 17, 2020).

Here, a lodestar "cross-check" shows that the fee requested in this case is commensurate with the fee awarded in comparable class action settlements. Such a multiplier falls within the range routinely awarded by courts in this Circuit and elsewhere. This is certainly true in Hatch-Waxman antitrust cases brought under Section 4 of the Clayton Act. Judge Koeltl awarded class counsel a 33 ⅓% fee in the *Buspirone* case which translated into an 8.46 multiplier. Ex. A, at 42:12-45:18. *See also Loestrin 24 Fe*, 2020 U.S. Dist. LEXIS 125745, at *45-47 (awarding 33 ⅓% equating to a 1.31 multiplier); *In re Lidoderm Antitrust Litig.*, 2018 U.S. Dist. LEXIS 162425, at *31-34 (N.D. Cal. Sep. 20, 2018) (awarding 33 ⅓% equating to a 1.37 multiplier); *In re Flonase*

[7] The Supreme Court and other courts have held that the use of current rates is proper since such rates compensate for inflation and the loss of use of funds. *See Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989).

Antitrust Litig., 951 F. Supp. 2d 739, 751 (E.D. Pa. 2013) (awarding 33 ⅓% equating to a 2.99 multiplier); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-340 (SLR), 2009 U.S. Dist. LEXIS 133251, at *16 (D. Del. Apr. 23, 2009) (awarding 33 ⅓% equating to a 3.93 multiplier); *In re Terazosin Hydrochloride Antitrust Litig.*, 2005 U.S. Dist. LEXIS 43082, at *21 (S.D. Fla. Apr. 19, 2005) (awarding 33 ⅓% equating to a 1.27 multiplier); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 400 (S.D.N.Y. 1999) (awarding 27.5% equating to a 2.5 multiplier). Given the risk Class Counsel assumed and the amount of time, labor, and expense dedicated to litigating this case through to preparation for trial, the requested fee is reasonable. *See* Newberg on Class Actions §15:87 (5th ed. 2015) (substantial multiplier is appropriate where case was risky, time-consuming, involved wrongdoing uncovered by counsel in the first instance, and delivered exceptional results).

The lodestar cross-check in this case supports the requested fee.

D. Class Counsel's Costs and Expenses Are Reasonable and Were Necessary to the Result

It is well-settled that counsel who have created a common fund for the benefit of a class are entitled to be reimbursed for out-of-pocket expenses reasonably incurred in creating the fund. *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 150 (S.D.N.Y. 2010). Here, Class Counsel's unreimbursed expenses were reasonably incurred and necessary to the representation of the Class. These expenses have been itemized by category for the Court's convenience. *See* Gerstein Decl. ¶¶ 63-64. These expenses include costs for computerized legal research, the creation and maintenance of an electronic document database, experts, travel and lodging expenses, copying, court reporters, deposition transcripts, and mediation. *Id*. These are the typical kinds of expenses that are routinely deemed reasonable and necessary. *Marsh*, 265 F.R.D. at 150 (such expenses are "ordinary and necessary"). Accordingly, Class Counsel respectfully request that the Court approve reimbursement of Class Counsel's expenses in full.

E. Service Awards for the Class Representatives Are Appropriate and Reasonable

The purpose of service awards is to reimburse named plaintiffs, who "take on a variety of risks and tasks when they commence representative actions[.]" *Id*. Here, Class Counsel believes that awards of $100,000 each to class representatives Betances, RDC, FWK and KPH are appropriate, in recognition of the hours they spent participating in this litigation, filing suit, collecting discovery, sitting for depositions, and defending their adequacy in motions. *See* Gerstein Decl. ¶¶ 67-71. Moreover, courts have recognized the risks inherent in filing suit as a named plaintiff on behalf of a class against an entity with which all class members transact business. *See Dial Corp. v. News Corp.*, 317 F.R.D. 426, 439 (S.D.N.Y. 2016) ("[T]he decision to fire the first shot on behalf of the Class was fraught with risks. Notably, the named Plaintiffs in this case assumed a substantial risk in antagonizing a longstanding, powerful business partner[.]").

The amount requested here is in line with awards made to named representatives in other Hatch-Waxman antitrust cases. *E.g., In re Opana ER Antitrust Litig.*, MDL No. 2580, ECF No. 1085 at ¶ 16 (N.D. Ill. Nov. 3, 2022) ($150,000); *In re Lidoderm Antitrust Litig.*, No. 3:14-md-02521-WHO, ECF No. 1054 at ¶ 15 (N.D. Cal. Sept. 20, 2018) ($100,000); *In re K-Dur Antitrust Litig.,* Civ. A. No. 01-1652, ECF No. 1057 at ¶ 12 (D.N.J. Oct. 5, 2017) ($100,000); *In re Modafinil Antitrust Litig.*, Civ. A. No. 2:06-cv-01797 (MSG), ECF No. 870 at ¶ 30 (E.D. Pa. Oct. 15, 2015) ($100,000 to certain representatives); *In re Neurontin Antitrust Litig.,* Civ. A. No. 02-1830 (FSH), ECF No. 114 at ¶ 31 (D.N.J. Aug. 6, 2014) ($100,000).

IV. CONCLUSION

For the reasons set forth above and in the Gerstein Declaration, Class Counsel respectfully request that this Court enter an Order awarding Class Counsel fees in the amount of $41,325,497.58 million, *i.e.,* 33 ⅓% of the Settlement (net of expenses and service awards) plus a

pro rata share of the accrued interest, and reimbursement of incurred expenses in the amount of $2,473,507.26. Class Counsel also respectfully request that this Court approve service awards of $100,000 to each of the four class representatives for their efforts on behalf of the Class.

Dated: February 23, 2023

Respectfully submitted,

/s/ Bruce E. Gerstein

Bruce E. Gerstein
Dan Litvin
Deborah A. Elman
GARWIN GERSTEIN & FISHER LLP
88 Pine Street Fl. 10
New York, NY 10005
212-398-0055
Email: bgerstein@garwingerstein.com
dlitvin@garwingerstein.com
delman@garwingerstein.com

Attorneys for Plaintiff Drogueria Betances, LLC Lead Counsel for the Direct Purchaser Class

TAB 27A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE: LITHIUM ION BATTERIES ANTITRUST LITIGATION	Case No. 13-md-02420-YGR MDL No. 2420
This Document Relates to: ALL DIRECT PURCHASER ACTIONS	**ORDER GRANTING CO-LEAD COUNSEL FOR DIRECT PURCHASER PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES AND SERVICE AWARDS**

The Court, having reviewed Direct Purchaser Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Class Representative Service Awards (February 8, 2018) ("Motion," Dkt. No. 2171), the pleadings and other papers on file in this action, the objections filed, and the statements of counsel and the parties, hereby finds that:

1. The Motion requests an award of attorneys' fees in the amount of $41,790,000.00 or 30% of the $139,300,000.00 Settlement Fund.[1] Further, Co-Lead Counsel request payment from the Settlement Fund of a total of $3,354,573.35 in expenses ("Total Expenses").

2. Of the Total Expenses, the amount of $2,501,352.52 is unreimbursed, out-of-pocket expenses, which includes Litigation Fund expenditures of $2,247,198.62 and Plaintiffs' Counsel's total out-of-pocket firm expenses of $445,068.46, less $190,914.56 in travel, meals and lodging expenses for which reimbursement is not requested.

3. Co-Lead Counsel request that the Court approve payment from the Settlement Fund for $212,030.00 in outstanding invoices for professional economists' services rendered.

4. In addition, Co-Lead Counsel request that the Court approve payment from the Settlement Fund for the charge of $641,190.83 for document hosting services rendered.

5. Lastly, Co-Lead Counsel request service awards for the nine Class Representatives as follows: Ritz Camera, Circuit City, and Univisions ($30,000 each); Automation Engineering, Stereo Shop and First Choice Marketing ($10,000 each); and Charles Carte, Terri Walner, and James O'Neil ($5,000 each) for a total of $135,000.

6. The Court finds that the requested fee award of $41,790,000.00, 30% of the Settlement Fund, is fair and reasonable under the percentage-of-the-recovery method based upon the following factors: (i) the results obtained by Plaintiffs' Counsel in this case; (ii) the risks and complex issues involved in this case, which were significant and required a high level of skill and high-quality work to overcome; (iii) that the attorneys' fees requested were reasonable and entirely contingent upon success—Plaintiffs' Counsel risked time and effort and advanced costs with no

[1] The "Settlement Fund" consists of the total proceeds of the following settlements: Sony ($19 million); NEC Corp. ($1 million); Hitachi Maxell ($3.45 million); Panasonic/Sanyo ($42.5 million); Toshiba ($2.9 million); LG Chem ($41 million); Samsung SDI ($24.5 million); NEC Tokin ($4.95 million).

ultimate guarantee of compensation; (iv) that the range of awards made in similar cases justifies an award of 30% here; and (v) that Plaintiffs' Counsel's reasonable lodestar means the requested attorneys' fee results in a negative, 0.58 multiplier, which obviates concern about any windfall given the size of the settlement recovery. These factors justify an upward adjustment of the Ninth Circuit's usual 25% benchmark.

Despite the size of the settlement fund at issue here, the Court does not find that fees should be reduced based upon the settlement being a "megafund" or the fee percentage giving a "windfall" to counsel for plaintiffs. The megafund concern arises when a percentage of the recovery would result in excessive profits for class counsel in light of the hours actually spent. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011). The lodestar cross-check is meant to "confirm that a percentage of [the] recovery amount does not award counsel an exorbitant hourly rate." *Online DVD*, 779 F.3d at 949 (citation and internal quotation marks omitted). Here, lodestar cross-check results in an effective hourly rate far below the market rate for the hours devoted to the case by class counsel. Consequently, the Court finds that the requested fee award is reasonable and is justified by the circumstances of this case.

7. Only two objections to the attorneys' fee request were submitted. Of those two objections, Rinis Travel Service ("RTS") withdrew its objection prior to the hearing, with a pending an order to show cause re: sanctions against it for its failure to comply with an order for discovery regarding its objection. (Dkt. No. 2300.)[2] The other objection, by Mr. Kenneth M. McInelly, President of Agency Software, Inc. ("ASI"), was filed prior to the instant attorneys' fees motion. (Dkt. No. 2161, dated January 19, 2018, filed January 24, 2018.) The objection letter simply states a concern about the requested fees being 30% of the settlement fund, without the benefit of any information about the lodestar in this matter or the effective hourly rate given the great number of hours devoted to the case. The Court finds ASI's objection insubstantial and overrules it.

[2] RTS's objection (Dkt. No. 2196) raised the issue of the attorneys' fees being excessive because the settlement fund constituted a "megafund," an objection the Court rejects herein at paragraph 6.

8. The Court has confirmed the reasonableness of DPPs' fee request by conducting a lodestar cross-check. The Court finds that Class Counsel's reasonable lodestar was $72,489,066.75 based on 173,863.20 hours of work billed at historic hourly rates for the period from the appointment of lead counsel until August 31, 2017, which is an average rate of $417/hr. Co-Lead Counsel's requested fee award represents 58% of their reasonable lodestar, and an effective rate of $241.82/hr. This further supports the reasonableness of Class Counsel's fee request here.

9. The Court finds that Plaintiffs' Counsel incurred a total of $3,354,573.35 in total unreimbursed out-of-pocket litigation costs and other expenses in prosecuting this litigation. The Court finds that these costs and expenses were reasonably incurred in prosecuting this case and were necessary given the complex nature and nationwide scope of the case.

10. Pursuant to *Radcliffe v. Experian Information Solutions, Inc.*, 715 F.3d 1157 (9th Cir. 2013), the Court has carefully considered the requested incentive awards. The Court deems the application for incentive awards to the nine Class Representatives reasonable and justified given: (i) their willingness to serve as private attorneys general; and (ii) their work performed and the active participation in the litigation on behalf of the DPP Class.

11. In sum, upon consideration of the Motion and accompanying Declarations, and based upon all matters of record including the pleadings and papers filed in this action, the Court hereby finds that the attorneys' fee requested is reasonable and proper; the costs and expenses incurred by Plaintiffs' Counsel were necessary, reasonable, and proper; and that incentive awards are appropriate given the time and effort expended by the Class Representatives in the prosecution of this case.

Based upon the foregoing, the Court **ORDERS** that:

1. Plaintiffs' Counsel are awarded attorneys' fees of **$41,790,000.00** (30% of the $139,300,000.00 Settlement Fund), together with a proportional share of interest earned on the Settlement Fund for the same time period until dispersed to Class Counsel.

2. Plaintiffs' Counsel are awarded reimbursement of their litigation costs and expenses in the amount of **$3,354,573.35**. This amount does not include Plaintiffs' Counsel's travel, meals, and lodging expenses related to the litigation of this action.

3. Class Representatives Ritz Camera, Circuit City, and Univisions shall each receive an incentive award in the amount of **$30,000.00** each.

4. Class Representatives Automation Engineering, Stereo Shop and First Choice Marketing shall each receive an incentive award in the amount of **$10,000.00** each.

5. Charles Carte, Terri Walner, and James O'Neil shall each receive an incentive award in the amount of **$5,000.00** each.

6. The attorneys' fees awarded, reimbursement of litigation costs and expenses, and incentive awards shall be paid from the Settlement Fund and the interest earned thereon.

7. Co-Lead Counsel will allocate the fees and expenses among Co-Lead Counsel and all Plaintiffs' Counsel in a fair and equitable manner that, in Co-Lead Counsel's good-faith judgment, reflects each firm's contribution to the institution, prosecution, and resolution of the litigation.

IT IS SO ORDERED.

Dated: May 16, 2018

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT JUDGE

TAB 27B

R. Alexander Saveri (Bar No. 173102)
Geoffrey C. Rushing (Bar No. 126910)
SAVERI & SAVERI, INC.
706 Sansome Street
San Francisco, CA 94111
Telephone: (415) 217-6810
Facsimile: (415) 217-6813

Bruce L. Simon (Bar No. 96241)
Benjamin E. Shiftan (Bar No. 265767)
PEARSON, SIMON & WARSHAW, LLP
44 Montgomery Street, Suite 2450
San Francisco, CA 94104
Telephone: (415) 433-9000
Facsimile: (415) 433-9008

Joseph J. Tabacco, Jr. (Bar No. 75484)
Todd A. Seaver (Bar No. 271067)
Jessica Moy (Bar No. 272941)
BERMAN TABACCO
44 Montgomery Street, Suite 650
San Francisco, CA 94104
Telephone: (415) 433-3200
Facsimile: (415) 433-6382

Interim Co-Lead Counsel for Direct Purchaser Plaintiffs
[Additional Counsel on Signature Page]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE: LITHIUM ION BATTERIES ANTITRUST LITIGATION	Case No. 13-md-02420-YGR MDL No. 2420
This Document Relates To: ALL DIRECT PURCHASER ACTIONS	**CO-LEAD COUNSEL FOR DIRECT PURCHASER PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES AND SERVICE AWARDS** Date: Time: Judge: Hon. Yvonne Gonzalez Rogers Location: Courtroom 1

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GLOSSARY OF DEFINED TERMS

ACPERA	Antitrust Criminal Penalty Enhancement and Reform Act
CAC	DPPs' Consolidated Amended Complaint (July 11, 2013), ECF No. 234
Cell or cell	Lithium Ion Battery Cells as defined in SCAC, as defined below, ¶3
Class Period	January 1, 2000 through May 31, 2011
Class Representatives	Named plaintiffs in the SCAC: Automation Engineering LLC; Charles Carte; Alfred H. Siegel, not individually, but acting solely in capacity as the Liquidating Trustee of Circuit City Stores, Inc. Liquidating Trust ("Circuit City"); First Choice Marketing, Inc.; James O'Neil; Alfred T. Giuliano, as the Chapter 7 Trustee of Ritz Camera & Image, LLC ("Ritz Camera & Image, LLC" or "Ritz"); The Stereo Shop; Univisions-Crimson Holding, Inc.; and Terri Walner
Co-Lead Counsel	R. Alexander Saveri of the firm Saveri & Saveri, Inc.; Bruce L. Simon of the firm Pearson, Simon & Warshaw LLP; and Joseph J. Tabacco, Jr. of the firm Berman Tabacco
Compendium or Comp.	Compendium of Plaintiffs' Counsel Declarations in Support of Co-Lead Counsel for Direct Purchaser Plaintiffs' Motion For An Award of Attorneys' Fees, Reimbursement of Expenses and Service Awards, filed herewith
DPP or DPPs	Direct Purchaser Plaintiffs (also referred to as "Class Representatives," defined above) and the named plaintiffs in the SCAC (defined below) and proposed Settlement Class Representatives, and were the proposed Class Representatives on DPPs' Motion for Class Certification
DPP Class	Settlement Class of direct purchasers defined as: All persons and entities that purchased a Lithium Ion Battery or Lithium Ion Battery Product from any Defendant, or any division, subsidiary or affiliate thereof, or any co-conspirator in the United States during the Class Period, from January 1, 2000 through May 31, 2011. Excluded from the Class are Defendants, their parent companies, subsidiaries and affiliates, any Co-Conspirators, federal governmental entities and instrumentalities of the federal government, states and their subdivisions, agencies and instrumentalities, and any judge or jurors assigned to this case.
Defendants	Defendants which have settled the DPP action: LG Chem, Ltd.; LG Chem America, Inc.; Samsung SDI Co., Ltd.; Samsung SDI America, Inc.; Panasonic Corporation; Panasonic Corporation of North America; Sanyo Electric Co., Ltd.; Sanyo North America Corporation; Sony Corporation; Sony Energy Devices Corporation; Sony Electronics, Inc.; Hitachi Maxell, Ltd.; Maxell Corporation of America; NEC Corporation; NEC TOKIN Corporation; and Toshiba Corporation
ESI	Electronically Stored Information
Hitachi Maxell	Hitachi Maxell Ltd. and Maxell Corporation of America, or either of them
IPPs	Indirect Purchaser Plaintiffs

LG Chem	LG Chem, Ltd. and LG Chem America, Inc., or either of them
LiB	Cylindrical, prismatic, or polymer batteries that are rechargeable and use lithium ion technology.
LiB Products	Products manufactured, marketed, and/or sold by Defendants, their divisions, subsidiaries or affiliates, or their co-conspirators that contain one or more LiB cells manufactured by Defendants or their co-conspirators. LiB Finished Products include notebook computers, cellular (mobile) phones, digital cameras, camcorders, power tools, and other devices.
NEC Corp.	NEC Corporation
NEC Tokin	Tokin Corporation (f/k/a NEC TOKIN Corporation)
OSKR	OSKR, LLC (f/k/a C&A Economics), an economics analysis firm that Co-Lead Counsel retained to provide supporting economic services to Dr. Roger Noll, DPPs' economic expert
Panasonic	Panasonic Corporation (f/k/a Matsushita Electric Industrial Co., Ltd.), and Panasonic Corporation of North America (f/k/a Matsushita Electric Corporation of America), or either of them
Plaintiffs' Counsel	Co-Lead Counsel and all counsel listed in DPPs' accompanying Compendium, defined above
Samsung SDI	Samsung SDI Co., Ltd. and Samsung SDI America, Inc., or either of them
Sanyo	Sanyo Electric Co., Ltd., Sanyo North America Corporation, or any of them
Saveri Decl. or Declaration	Declaration of R. Alexander Saveri in Support of Direct Purchaser Plaintiffs' Motion For An Award of Attorneys' Fees, Reimbursement of Expenses, and Incentive Awards, **attached as Exhibit C to the Compendium**
SCAC or SCAC ¶	DPPs' Second Consolidated Amended Complaint (Apr. 8, 2014), ECF No. 415
Settlements	Settlement Agreements reached with Defendants: Sony ($19 million); NEC Corp. ($1 million); Hitachi Maxell ($3.45 million); Panasonic/Sanyo ($42.5 million); Toshiba ($2.9 million); LG Chem ($41 million); Samsung SDI ($24.5 million); NEC Tokin ($4.95 million)
Settlement Fund	Total cash recovery of all the settlements combined in the amount of $139,300,000
Simon Decl. or Declaration	Declaration of Bruce L. Simon in Support of Co-Lead Counsel for Direct Purchaser Plaintiffs Motion For An Award of Attorneys' Fees, Reimbursement of Expenses and Service Awards, **attached as Exhibit B to the Compendium**
Sony	Sony Corporation, Sony Electronics, Inc., Sony Energy Devices Corporation, or any of them

Tabacco Decl. or Declaration	Declaration of Joseph J. Tabacco, Jr. In Support of Co-Lead Counsel For Direct Purchaser Plaintiffs' Notice of Motion And Motion For An Award of Attorneys' Fees, Reimbursement of Expenses and Service Awards, **attached as Exhibit A to the Compendium**
Toshiba	Toshiba Corporation, including its wholly-owned subsidiaries
Zahid Decl. or Declaration	Declaration of Judith A. Zahid In Support of Co-Lead Counsel For Direct Purchaser Plaintiffs' Notice of Motion And Motion For An Award of Attorneys' Fees, Reimbursement of Expenses and Service Awards, **attached as Exhibit D to the Compendium**

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that at 2:00 p.m. on May 8, 2018, DPPs and their counsel will, and hereby do move before the Honorable Yvonne Gonzalez Rogers, United States District Judge, at the United States Courthouse, 1301 Clay Street, Courtroom 1 – 4th Floor, Oakland, California, pursuant to Fed. R. Civ. P. 23(h) and 54(d) for the following:

- an award of attorneys' fees in the amount of $41,790,000 (30% of the $139,300,000 Settlement Fund) plus interest;
- reimbursement of litigation expenses in the amount of $3,354,573.35, which includes (i) unreimbursed litigation expenses of $2,501,352.52 (including litigation fund expenditures in the amount of $2,247,198.62); (ii) outstanding unpaid invoices of retained experts in the amount of $212,030.00; and (iii) $641,190.83 for uncompensated document hosting services; and
- service awards for the nine Class Representatives in various amounts totaling $135,000 (0.09% of the Settlement Fund).

This motion is made on the grounds that (a) such fees are fair and reasonable in light of Plaintiffs' Counsel's efforts in creating the Settlement Fund; (b) the requested fees comport with the Ninth Circuit case law in common fund cases; (c) the expenses for which reimbursement is sought were reasonably and necessarily incurred in connection with the prosecution of this action; and (d) service awards to each Class Representative is warranted for bringing the case, assisting in extensive electronic document productions, responding to written discovery, and sitting for depositions regarding their LiB Product purchases and participation in this case.

This Motion is based upon this Memorandum of Points and Authorities, the Tabacco Declaration, the Saveri Declaration, the Simon Declaration, the Zahid Declaration, the declarations of Plaintiffs' Counsel, the proposed order submitted herewith, and all other records, pleadings, and papers filed in this action; and upon such argument and further pleadings as may be presented to the Court at the hearing on this Motion.

This Motion will be available today on the settlement website established for this case, www.batteriesdirectpurchaserantitrustsettlement.com for review by class members.

STATEMENT OF THE ISSUES TO BE DECIDED

Whether the Court should (1) award the requested attorneys' fees in the amount of $41,790,000, representing 30% of the Settlement Fund of $139,300,000; (2) order payment from the Settlement Fund for Plaintiffs' Counsels' expenses totaling $3,354,573.35; and (3) approve service awards to nine Class Representatives in varying amounts totaling $135,000.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Plaintiffs' Counsel brought this antirust class action nearly six years ago on a purely contingent-fee basis to recover overcharge damages from sophisticated foreign actors preying on United States victims. At its outset, the nature of the case promised that Plaintiffs' Counsel would have to carry millions of dollars in out-of-pocket costs at risk of total loss. Success meant overcoming difficult questions of proof at every stage leading up to trial, with no guarantee of any recovery for the DPP Class, much less one totaling $139.3 million, and no guarantee of any payment whatsoever for Plaintiffs' Counsel.

The requested attorneys' fee award is $41,790,000, representing 30% of the Settlement Fund. Based on Plaintiffs' Counsel's lodestar of $72.5 million, if awarded the requested fee will result in a negative multiplier of 0.58.

The result for the DPP Class is exceptional. The Settlement Fund of $139.3 million in cash represents a 39% recovery of the single damages the DPP Class could have hoped to obtain through total success on the merits at trial. Tabacco Decl. ¶66. This recovery was the result of Plaintiffs' Counsel's devotion of 173,863 hours of attorney and para-professional labor, matching the skill and tenacity of some of the finest defense counsel in the world at every stage of the five-plus year litigation. *Id.*, ¶92 & Ex. 5. Plaintiffs' Counsel further committed $3,354,573.35 to fund the litigation expenses, making no resort to any third-party litigation funding to mitigate the risk of total loss. Zahid Decl. ¶2 & Ex. A.

The Settlements here are the only ones that will return money to the DPP Class, victims of the foreign cartel's alleged misconduct. The two guilty pleas secured by the U.S. Government from Sanyo Electric Co., Ltd. and LG Chem. Ltd., came well over a year into this action and resulted in $10.731 million and $1.056 million in criminal fines, respectively, based on narrow pleas for price-fixing only cylindrical lithium ion battery cells used in notebook computers from April 2007 until September 2008.[1] The pleas identified no additional conspirators aside from Sanyo's parent company, Panasonic, and the government sought no restitution for victims.

Far from piggy-backing off the government prosecution, Plaintiffs' Counsel developed evidence of a conspiracy far broader than the one targeted by the government, and indeed had to overcome the obstacle that the two narrow guilty pleas became in the hands of defense counsel. Plaintiffs' Counsel sought to prove a nine-year conspiracy from May 1, 2002 until May 31, 2011 against nine Japanese and Korean electronics manufacturers and their United States subsidiaries and affiliates. Plaintiffs' Counsel developed evidence of a price-fixing conspiracy on lithium ion battery cylindrical cells *and* prismatic cells and, combined with sophisticated work by industry and economic experts, developed proof of an overcharge not just on *cells* but on cylindrical and prismatic *battery packs* and *finished products* (notebook PCs, mobile phones, digital cameras, etc.) that contained the price-fixed cells. Only the skill and experience of Plaintiffs' Counsel, and in particular Co-Lead Counsel, made this possible. *See generally* Tabacco Decl. ¶¶4-81; Simon Decl. ¶¶9-42; Saveri Decl. ¶¶6-37.

The requested award is commensurate with Plaintiffs' Counsel's efforts, the risk they undertook, the results they achieved, and is consistent with the fees awarded by Judges Illston, Wilken, Seeborg, and Tigar in other foreign electronics cartel class actions over the past decade in this District. In light of these and other factors addressed herein, the requested fee award is reasonable.[2]

[1] *United States v. Sanyo Electric Co., Ltd.*, No. 13-cr-0472 YGR (N.D. Cal.), Plea Agreement, at ¶9 (ECF No. 15-1) (Sept. 3, 2013); *United States v. LG Chem, Ltd.*, No. 13-cr-0473 YGR (N.D. Cal.), Plea Agreement, at ¶9 (ECF No. 13-1) (Sept. 3, 2013).

[2] The notice informed the DPP Class that Plaintiffs' Counsel would apply for an award of attorneys' fees of no more than 30% of the Settlement Fund and reimbursement of litigation expenses of no more than $3.9 million. Aspects of the notice, claims administration and the grounds

II. SUMMARY OF WORK BY PLAINTIFFS' COUNSEL

Plaintiffs' Counsel invested substantial time and money in the prosecution of the DPP action. The work included pre- and post-complaint investigation into the industry, working with industry experts, drafting highly detailed complaints, defeating a multitude of motions to dismiss those complaints, propounding discovery, deploying a multi-lingual team to analyze defendants' documents in Japanese, Korean, Chinese, and English, extracting usable information from a recalcitrant ACPERA amnesty applicant, negotiating an ice-breaker settlement with defendant Sony for cash and valuable cooperation and then obtaining that cooperation to benefit the case, working with expert economists, collecting, reviewing and producing a massive set of documents from the larger Class Representatives, taking 34 party-opponent depositions of mostly foreign witnesses, defending 12 Class Representative depositions, moving for class certification and opposing *Daubert* motions, and negotiating the Settlements. *See generally* Tabacco Decl. ¶¶4-81. Measured by hours, the breakdown of the most significant labor is as follows:

TASK	% OF TOTAL HOURS
Document review	48%
Discovery *(excluding doc review and depositions)*	24%
Pleadings and briefing *(including class certification)*	12%
Depositions	8%
Misc. (*including court appearances, settlement, strategy, case management*)	8%

See Tabacco Decl. ¶69.

A. Pre-filing investigation

Co-Lead Counsel began investigating this case years before filing the first DPP complaint in late 2012. *See, e.g.*, Tabacco Decl. ¶5; Saveri Decl. ¶6; Simon Decl. ¶¶10-11. The investigation entailed retaining consultants to perform an economic analysis of the relevant market and researching the nature of purchases by various potential direct purchasers.[3] *See* Simon Decl. ¶11.

for final approval of the three settlements not yet finally approved by the Court will be addressed in DPPs' forthcoming settlement final approval papers scheduled to be filed March 29, 2018.

[3] None of the attorney and professional time generated before the Court's appointment of Co-Lead Counsel in May 2013, which is not insubstantial, is included in the lodestar presented on this Motion.

B. Consolidated Amended Complaints, Two Rounds of Motions to Dismiss, Answers

On May 17, 2013, the Court appointed R. Alexander Saveri of the firm Saveri & Saveri, Inc., Bruce L. Simon of the firm Pearson, Simon & Warshaw LLP, and Joseph J. Tabacco, Jr. of the firm BT as Interim Lead Counsel for the DPP Class (referred to herein as "Co-Lead Counsel"). Tabacco Decl. ¶2; Simon Decl. ¶3; Saveri Decl. ¶10; ECF No. 194. Subsequently, the DPPs, over Defendants' objections and in conjunction with the IPPs, obtained certain documents produced to government investigators, nearly all of them in Korean and Japanese. Tabacco Decl. ¶10. In a compressed time period, Co-Lead Counsel organized a team of Korean and Japanese-speaking attorneys and translators to analyze the documents for potential use in the CAC. Led by Co-Lead Counsel, a team of Plaintiffs' Counsel synthesized the new evidence and strategized regarding the nature and scope of the conspiracy which would be alleged. *Id.*

In July 2013, DPPs filed their CAC alleging an over-arching horizontal conspiracy among the Defendants and their co-conspirators to fix prices, restrict production, and to allocate markets and customers for the sale of Lib Products in the United States during the Class Period. Tabacco Decl. ¶¶11-12; Simon Decl. ¶16; Saveri Decl. ¶26; ECF No. 234.

After submitting Court-ordered pre-motion letters, Defendants filed a joint motion to dismiss and five more individual motions to dismiss, arguing, *inter alia*, that the CAC did not allege a plausible conspiracy for the entire alleged conspiracy period, that the DPPs lacked standing for lack of a lithium ion battery cell purchaser. DPPs opposed. The Court granted the joint motion to dismiss with leave to amend, for lack of antitrust standing. Tabacco Decl. ¶¶13-14, 72; Simon Decl. ¶17; Saveri Decl. ¶26.

DPPs amended the complaint to add further facts support a finding of antitrust standing, and Defendants moved to dismiss again, with both a joint motion and seven individual motions. DPPs prevailed on all the motions, with the Court sustaining the SCAC. Tabacco Decl. ¶¶15-17, 73-74; Simon Decl. ¶¶18-23; Saveri Decl. ¶26.

To oppose the veritable mountain of defense briefing, Co-Lead Counsel assigned teams of Plaintiffs' Counsel to work on various issues and discrete topics presented in the motions. *Id.*, ¶¶15-17, 73-74; Simon Decl. ¶¶20-23; Saveri Decl. ¶26.

Defendants moved to certify the Court's order denying the motions to dismiss for interlocutory appeal. DPPs opposed, and the Court denied the motion. Tabacco Decl. ¶16.

When Defendants each answered the operative complaint, Co-Lead Counsel led a small team of Plaintiffs' Counsel to analyze the dozens of affirmative defenses and draft a motion to strike most of them. Through laborious meeting-and-conferring with a team of defense counsel counterparts, Plaintiffs' Counsel succeeded in causing substantial amendment of the answers by the Defendants. *Id.*, ¶18. Had this action not settled, this work would have translated into more streamlined summary judgment and trial phases.

C. Discovery Efforts

Discovery in this case was a massive undertaking. It required DPPs to obtain, from nine large, Defendant corporate families, comprehensive information about their battery business over a twelve-year period. Moreover, the lion's share of the critical documents, data and witnesses were located in Japan and Korea, and were written in or spoke a foreign language. *Id.*, ¶¶23, 77.

1. Coordination with IPPs and Discovery Protocols

Co-Lead Counsel created teams of Plaintiffs' Counsel and assigned a team to each Defendant family for discovery purposes. *Id.*, ¶23. The DPPs and IPPs coordinated closely on discovery, working together and with defense counsel to fashion various proposed orders and protocols for coordinated discovery, depositions, translation, and discovery of electronically-stored information (ESI). *Id.*, ¶¶23-24, 26-30, 77. DPPs and IPPs obtained relief from the Court to mandate that Defendants create and maintain "watch lists" of extraterritorial current employees, so that in the event such an employee departed the defendant, DPPs and IPPs would have notice and an opportunity to depose the witness. *Id.*, ¶29.

2. Document productions and review

The document production from Defendants was massive. To obtain it, Plaintiffs' Counsel negotiated search terms in three languages and negotiated with each defendant regarding custodians and other aspects of ESI searches. Tabacco Decl. ¶¶27, 29-30, 67.

Ultimately, Plaintiffs' Counsel analyzed 2.4 million documents, equaling 8.9 million printed pages. *Id.*, ¶27. Of these, 73% were primarily in Japanese or Korean, and others were a mix of

Japanese, Korean, and/or English. *Id.* To maximize the value of the review, Plaintiffs' Counsel created thousands of pages of work product, including memoranda, summaries, and spreadsheets organizing the evidence by element of the claim, and by witnesses. Deposition binders were later created based on this work product. *Id.*, ¶28. In an effort to reduce the amount of "hands-on, eyes on" review by attorneys, paralegals, and translators, Co-Lead Counsel engaged a provider of Technology Assisted Review ("TAR"). However, owing largely to the foreign-languages present in most of the documents and the quality of the digitized document images, the TAR was only partially effective at reducing the need to rely on attorney and professional review. *Id.*

With regard to document production by the DPPs, the document searches, collection, review, and ultimate production from several of the larger Class Representatives was a significant undertaking, demanding substantial hours of labor.

For example, production of plaintiff Circuit City's paper documents presented a challenge because of the enormous quantity of paper documents in storage for the class period, the minimal indexing of those documents, and the near-complete absence of the bankrupt retailer's employees to assist in identification of responsive documents. Tabacco Decl. ¶38; Simon Decl. ¶55; Comp. Ex. AA (Decl. of Daniel D. Owen in Supp. of DPPs Mot. for an Award of Attorneys' Fees, Reimb. of Expenses, and Incentive Awards ("Owen Fee Decl.")), ¶4(l). The Circuit City review yielded over 500 boxes that were produced for inspection by defendants. *Id.*

The production of plaintiff Ritz Camera's documents was similarly time-consuming, as the retailer was in liquidation and consequently manual searches through approximately 300,000 pages of paper files from the bankruptcy trustee's document warehouse was necessary. In addition, purchase data came from searches of over 3.8 million pages of scanned accounting files from offline legacy systems, and disaster backup tapes had to be resurrected and searched to capture responsive discovery material. Tabacco Decl. ¶39; Saveri Decl. ¶¶48-50; Comp. Ex. T (Decl. of Steven F. Benz in Supp. of DPPs Mot. for an Award of Attorneys' Fees, Reimb. of Expenses, and Incentive Awards ("Benz Decl.")), ¶4.

Finally, Plaintiffs' Counsel expended substantial time obtaining Defendants' transaction data and other information needed to understand the data, without which the scope of the conspiracy and damages period, and the amount of damages, if any, could not be ascertained. Tabacco Decl. ¶25.

3. Written Discovery

Plaintiffs' Counsel, largely in coordination with IPPs, propounded ten sets of requests for production (RFPs), six sets of interrogatories, nine sets of requests for admission (RFAs) totaling 1,526 individual requests, as well as seven subpoenas to third parties. Tabacco Decl. ¶¶26, 31 & Table No. 1, cited therein.

For their part, Defendants propounded comprehensive document requests, interrogatories and requests for admission on the DPPs. *See id.*, ¶¶36-37 & Table No. 2, cited therein.

4. Depositions

Plaintiffs' Counsel marshaled the evidence from the document review and written discovery to take depositions, where the videotaped deposition testimony was in all likelihood going to have to be the testimony presented at trial. Depositions of witnesses like the ones here, involving former employees living abroad who are likely not subject to trial subpoenas, have the added necessity of extracting useful, if not critical, trial testimony in the first go. Thorough preparation and sound examination techniques and experience are essential. *Id.*, ¶¶32-34.

Coordinating with the IPPs, Plaintiffs' Counsel deposed 34 percipient defense witnesses. *Id.*, ¶32. All but one of the depositions required translation, stretching the depositions to a total of 81 days. *Id.* That some Defendants settled with the DPP Class did not reduce the scope of deposition discovery. *Id.*, ¶35. The DPP Class still needed to prove a conspiracy among all Defendants in order to tie any non-settling Defendant to the conspiracy. *Id.*

Plaintiffs' Counsel prepared and defended all 12 of the Class Representatives' depositions, conducted across the country. Tabacco Decl. ¶40. Including the 34 merits depositions, 50 total depositions were taken in the DPP case over 100 days of testimony. *Id.*, ¶34.

5. Discovery disputes

Discovery was hard-fought. Defendants frequently opposed reasonable discovery requests, with the result that the DPPs and IPPs coordinated to bring 14 motions to compel on various

disputes before Magistrate Ryu. The DPPs and IPPs succeeded in obtaining the relief sought in all 14 motions. Tabacco Decl. ¶¶41-44 & Table Nos. 3(a) & 3(b), cited therein. For example, motions to compel were necessary before Defendants produced worldwide, transaction-level sales and cost data for lithium ion battery cells and packs. *Id*., ¶¶43-44 & Table No. 3(b), cited therein. There were successful motions to compel deposition testimony, supplemental interrogatory responses, and identification of documents used to refresh a deponent's recollection. *Id*., Table No. 3(b), cited therein.

Plaintiffs' Counsel also successfully defeated Defendants' motions to compel, including a motion to compel DPP Class Representatives to produce downstream transaction data. *Id.*, ¶¶45-46 & Table No. 4, cited therein.

D. Toshiba's Summary Judgment Motion

Toshiba moved for early summary judgment against the DPPs and IPPs in mid-2015 as all discovery was in full swing. Toshiba sought judgment on the grounds that it had withdrawn from the conspiracy by exiting the lithium ion battery business, and that the DPPs' claims were time-barred. Tabacco Decl. ¶¶19-20, 76. DPPs, in coordination with the IPPs, conducted targeted discovery of Toshiba on an expedited basis in order to oppose summary judgement. After full briefing and oral argument, the Court denied Toshiba's motion. *Id.*, ¶¶21-22, 76.

E. Motion for Class Certification

DPPs moved for class certification in 2016, supported by DPPs' expert economist, Dr. Roger Noll of Stanford University, industry expert James L. Kaschmitter, and a declaration of counsel which offered 195 exhibits drawn from the developing evidentiary record. *Id.*, ¶¶47-48, 78. Defendants opposed the motion, contesting nearly every part of DPPs' Rule 23 showing and offering the opinion of their own expert economist, who opined that it is impossible to prove impact and damages in this action with common evidence. Tabacco Decl. ¶¶47-49. Defendants also sought to exclude opinion testimony of both of DPPs' experts. *Id.*, ¶¶47-48, 78-80.

The effort on class certification required Co-Lead Counsel to expend significant time and money on the legal briefing, testifying experts, and the consulting economists charged with working the transactional data into shape for use in the sophisticated econometric modeling performed by

Dr. Noll, as well as assisting Co-Lead Counsel with examining the Defendants' expert economist at deposition and with defending the two depositions of Dr. Noll. Tabacco Decl. ¶¶48, 78,80. Additionally, Co-Lead Counsel also led efforts to identify, translate, and organize documents and Defendants' discovery responses to support DPPs' class certification motion. In addition to conspiracy evidence, Co-Lead Counsel drafted legal and factual analysis to support DPPs' class certification motion and worked with Class Representatives to collect information relevant to the class certification motion and prepare them for deposition. *Id.*, ¶80.

F. Obtaining Cooperation From Amnesty Applicant Defendant

From the pleading stage, Co-Lead Counsel in conjunction with the IPPs engaged counsel for an ACPERA amnesty applicant defendant, Samsung SDI, to obtain the cooperation in the civil litigation that an amnesty applicant is obligated to give. The cooperation came out over the course of the case and was at all times limited to narrow attorney proffers regarding anticompetitive conduct related to cylindrical cells only from April 2007 to September 2008. *Id.*, ¶¶10, 64, 77. The amnesty applicant fought every stage of the litigation and was one of the last defendants to settle with DPPs. *Id.*, ¶64.

G. Settlements

Substantial effort, skill and experience of Co-Lead Counsel were required to negotiate the Settlements. Multiple mediation sessions before Judge Vaughn Walker (ret.) and attendant briefing and preparation were required before most of the Settlements could be reached. *Id.*, ¶52.

DPPs first settled with Sony in an ice-breaker settlement after six months of negotiation for $19.5 million in cash and cooperation with the prosecution of the case against all the remaining defendants. *Id.*, ¶54. The Sony cooperation proved highly useful with respect to class certification where Sony could confirm aspects of DPPs' expert economist's analysis and cost assumptions, as well as aspects of conspiracy proof. Tabacco Decl. ¶81.

Next, after filing their class certification motion, Plaintiffs' Counsel reached settlements with NEC Corp. ($1 million plus cooperation), Hitachi Maxell ($3.45 million plus cooperation), Panasonic/Sanyo ($42.5 million plus cooperation), Toshiba ($2.9 million plus cooperation), LG

Chem ($41 million plus cooperation), Samsung SDI ($24.5 million), and finally NEC Tokin ($4.95 million). *Id.*, ¶¶50, 55-58, 60-63.

Co-Lead Counsel did the necessary work to effectuate each settlement, including negotiating and drafting the settlement agreements, negotiating and drafting the attendant escrow agreements and establishing escrow accounts, providing notice to class members, and preparing the motions for preliminary approval and final approval necessary to finalize the settlements. Tabacco Decl. ¶¶52, 59, 65; Saveri Decl. ¶¶33-37.

III. THE REQUESTED FEE AWARD IS REASONABLE

A. The Common Fund Doctrine Applies and the Percentage-of-the-Fund Method For Calculating Fees is Appropriate Here

Plaintiffs' Counsel have produced a benefit for the DPP Class in the form of a common fund and are entitled to payment of reasonable attorneys' fees from the common fund. The Supreme Court has explained that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003) (same). The purpose of this doctrine is that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994).

Here, the DPP Class will be eligible to receive distributions from the $139.3 million common fund generated by the labor of Plaintiffs' Counsel. The conduct could not practicably have been challenged without the commitment of time and money by Plaintiffs' Counsel.

Paying reasonable attorneys' fees from the common fund compensates Plaintiffs' Counsel for bringing and prosecuting the action, which is critical to the enforcement of the antitrust laws, a point repeatedly emphasized by the Supreme Court. *See, e.g.*, *Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 331 (1979); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972).

In the Ninth Circuit, the court has discretion in a common fund case to choose either the "percentage-of-the-fund" or the "lodestar" method to determine fees. *Vizcaino v. Microsoft Corp.*,

290 F.3d 1043, 1047 (9th Cir. 2002); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015). Most courts have exhibited a clear preference for the percentage-of-the-fund method, as it "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation. In contrast, the lodestar create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in a gimlet-eyed review of line-item fee audits." *Wal-Mart Stores, Inc. v Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (alterations in original) (citations and internal quotation marks omitted).

The Ninth Circuit instructs that when the percentage-of-the-fund method is used to calculate fees, conducting a lodestar cross-check will "confirm that a percentage of [the] recovery amount does not award counsel an exorbitant hourly rate." *Online DVD*, 779 F.3d at 949 (citation and internal quotation marks omitted).

Here, Class Counsel's efforts have created a common fund of $139.3 million. Plaintiffs seek 30% of the common fund as an award of fees, which will make an award of $41,790,000, an amount representing just 58% of Plaintiffs' Counsel's lodestar of $72.5 million. Tabacco Decl. ¶94, Ex. 5. Consequently, under either a "percentage-of-the-fund" or "lodestar" method, Plaintiffs' Counsel's requested fee is deserved in light of the value of the extensive work performed, result achieved for the DPP Class, and the risk and expense of the contingent-fee representation.

B. An Upward Adjustment of the Benchmark Is Justified

"[I]n this circuit, the benchmark percentage is 25%," *Online DVD*, 779 F.3d at 949, with the 25% fee a "starting point" for analysis, *id* at 955. A District Court must show why the percentage award is appropriate based on the circumstances of the case. *Vizcaino*, 290 F.3d at 1048. *See also Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993) ("This benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." (citation and internal quotation marks omitted)).

When considering a percentage-of-the-fund request for attorneys' fees, the Ninth Circuit requires consideration of the following factors: (1) whether counsel "achieved exceptional results

for the class"; (2) "whether the case was risky for class counsel"; (3) "whether counsel's performance 'generated benefits beyond the cash settlement fund'"; (4) "the market rate for the particular field of law"; (5) "the burdens class counsel experienced while litigating the case (*e.g.*, cost, duration, foregoing other work)"; and (6) "whether the case was handled on a contingency basis." *Online DVD*, 779 F.3d at 954-55.

1. Plaintiffs' Counsel achieved an exceptional result

The Settlement Fund of $139.3 million in cash represents a 39% recovery of the single damages the DPP Class could have achieved through total victory at a trial on the merits. Tabacco Decl. ¶66.

A recovery of 39% of single damages is double the average recovery in similar cases. *See In re Cathode Ray Tube (CRT) Antitrust Litig. (CRT II)*, No. C-07-5944 JST, 2016 WL 3648478, at *7 n.19 (N.D. Cal. July 7, 2016) (describing survey of 71 settled cartel cases where weighted mean settlement recovery was 19% of single damages). The result here is one factor that justifies an increase over the 25% benchmark. *In re Cathode Ray Tube (CRT) Antitrust Litig. (CRT III)*, No. C-07-5944 JST, 2016 WL 4126533, at *5 (N.D. Cal. Aug. 3, 2016) (finding settlement recovery of 20% of single damages supports "modest increase over the Ninth Circuit benchmark").

Net of opt-outs, the single damages for cylindrical cells and packs—the narrow price-fixing conduct targeted by the Government criminal investigation—amounted to only $35.5 million. Tabacco Decl. ¶66. This means that the Settlements recovered nearly four times (3.9x) the single damages that would have been achievable had this action against these Defendants matched the narrower contours of the Sanyo and LG Chem guilty pleas. Plaintiffs' Counsel's skill in developing the evidence on which to base an expanded case that includes prismatic batteries and finished products for both cylindrical and prismatic is what created the value in the $139.3 million common fund.

The Sanyo and LG Chem guilty pleas proved to be an obstacle in the hands of defense counsel, which built a defense, beginning with motions to dismiss, around the theme that the only unlawful conspiracy was the one that was described in the guilty pleas as a narrow 18-month conspiracy affecting only cylindrical cells. To succeed through trial, Plaintiffs' Counsel would have

to prove a conspiracy among all the Defendants for a *nine-year* period for cylindrical *and* prismatic cells, causing an overcharge on cylindrical and prismatic *battery packs* and the *finished products* containing the price-fixed cells.

The $139.3 million common fund is an exceptional result that results in an immediate and substantial benefit to the DPP Class.[4]

2. Plaintiffs' Counsel undertook enormous risk on a contingent fee

The contingent nature of the representation meant that, from the outset of the case, the risk of nonpayment was high because the risk of non-recovery was high. Plaintiffs' Counsel represented the DPP Class on a purely contingent basis, investing considerable time and money in the prosecution of the action without any guarantee that the investments would ever be repaid. Tabacco Decl. ¶84.

Antitrust price-fixing conspiracy cases are notoriously complex and difficult to litigate. *See, e.g.*, *In re Linerboard Antitrust Litig.*, No. CIV.A. 98-5055, 2004 WL 1221350, at *10 (E.D. Pa. June 2, 2004) ("antitrust class action is arguably the most complex action to prosecute").

"Antitrust litigation in general, and class action litigation in particular, is unpredictable." *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 475 (S.D.N.Y. 1998). "The 'best' case can be lost and the 'worst' case can be won, and juries may find liability but no damages. None of these risks should be underestimated." *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 127 (N.D. Ill. 1990).

Here, there was risk of failing to prove liability at trial. The fundamental fact that documents and witness testimony were nearly all in Japanese and Korean made developing the evidentiary record difficult and time-consuming, and made the prospect of presenting a cogent case-in-chief daunting. Proving to a jury that there was a nine-year conspiracy in which all the Defendants participated would be a challenge. Had they not settled, Defendants would have likely argued that there was no over-arching conspiracy, but instead episodic, bi-lateral communications and

[4] The Settlements each provided for cooperation in the form of witnesses at trial and other assistance, a valuable form of non-cash benefit that the DPP Class already enjoyed. The first Sony settlement in particular resulted in valuable cooperation from Sony which was used to advance the case against the remaining defendants. Tabacco Decl. ¶¶54, 63, 81.

information exchanges that involved some but not all Defendants, and the smaller Defendants would have argued they did not participate in any unlawful agreement. Defendants likely would have argued that the periods before and after the short guilty-plea period were not infected by price-fixing, and that impact on prices from episodic information-sharing could not be shown and would not be unlawful even if they could be shown. There is a risk that the Court or a jury would credit such defense arguments.

There was also a risk that a class would not be certified or would not remain certified through trial.[5] Indeed, class certification risk manifested itself in this case when the Court denied DPPs' motion for class certification with leave to renew the motion. Tabacco Decl. ¶51. Co-Lead Counsel believe the Court would have certified the proposed DPP class on a renewed motion, as the areas in need of buttressing that were identified by the Court were curable with further work, and the retained experts had performed that work. *Id.* Certification likely would have led to a 23(f) appeal with all the attendant risks therein.

However, even with the class certified before trial, either a successful *Daubert* challenge or an effective cross-examination at trial could have resulted in a defense judgment or a significantly reduced verdict. Defendants litigated their position that DPPs were entitled to no recovery for finished products—*e.g.*, camcorders and notebook PCs—which account for the vast majority of DPPs' damages. DPPs' experts estimate that finished products constitute 75% of class members' purchases. Tabacco Decl. ¶49. Consequently, the risk of proving liability but not recovering most of the damages was real. "[T]he history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal." *NASDAQ Mkt-Makers*, 187 F.R.D. at 476. Indeed, the risk of proving liability but having the jury not award most of the damages occurred in the *LCD* direct purchaser class

[5] Several large antitrust class actions have been denied certification in recent years. *See, e.g.*, *In re Optical Disk Drive Antitrust Litig.*, 303 F.R.D. 311, 325 (N.D. Cal. 2014); *In re Flash Memory Antitrust Litig.*, No. C 07-0086 SBA, 2010 WL 2332081, at *19 (N.D. Cal. June 9, 2010); *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 508 (N.D. Cal. 2008) (denying certification of indirect purchaser class and certifying a direct purchaser class that was much smaller than requested). *See also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 255 (D.C. Cir. 2013).

action, which went to trial against Toshiba. There, the jury found Toshiba liable as a conspirator but awarded a level of damages that would ostensibly be set-off entirely by earlier settlement recoveries from other defendants. *See* Tabacco Decl. Ex. 13 (Special Verdict dated July 3, 2012).

When Judge Hochberg (ret.) described the risk of nonpayment in actions like this one, she remarked on "the sometimes undesirable characteristics" of contingent-fee antitrust class actions. *In re Remeron Direct Purchaser Antitrust Litig.*, No. Civ. 03-0085 (FSH), 2005 WL 3008808, at *14 (D.N.J. Nov. 9, 2005). Those include "the uncertain nature of the fee, the wholly contingent outlay of large out-of-pocket sums by plaintiffs, and the fact that the risk of failure and nonpayment in an antitrust case are extremely high." *Id*.

3. Plaintiffs' Counsel undertook a financial burden to prosecute the action for the DPP Class

The litigation is now in its sixth year. Plaintiffs' Counsel have spent $3,354,573.35 out-of-pocket on necessary litigation costs, and Co-Lead Counsel have not requested any interim reimbursement from the settlements as they have presented those agreements to the Court for approval.

The advancement of all the litigation expenses has been at risk of total loss. No third-party litigation funding was sought or used, which might otherwise have mitigated the risk of loss. For all of the services for which Plaintiffs' Counsel seek payment now, they have waited years for payment.

The financial burden is made heavier by the fact that Plaintiffs' Counsel have necessarily foregone some other work during the six-year pendency of this action, as many team members have been almost exclusively assigned to this action for long periods. Tabacco Decl. ¶84.

4. Awards in similar complex antitrust cases confirm the request here is reasonable

The requested 30% fee award is consistent with the fee award in similar antitrust class actions in this District, especially as the requested fee here amounts to a negative, 0.58 multiplier of the lodestar. Moreover, a respected, recent study collecting empirical data on fee awards in class actions confirms that for an antitrust class action with this size common fund recovery, a 30% fee award is typical.

In other large electronics antitrust class actions in this District, the court has awarded a fee of 30% or near 30%. *See, e.g.*, *In re Cathode Ray Tube (CRT) Antitrust Litig. (CRT IV)*, No. 07-cv-05944-JST, slip op. at 3, 8, ECF No. 5169 (N.D. Cal. June 8, 2017) (**30%**) (attached as Ex. 10 to Tabacco Decl.); *In re Optical Disk Drive Antitrust Litig.*, No. 10-md-2143 RS, slip op. at 2, ECF No. 1658 (N.D. Cal. July 23, 2015) (**30%**) (attached as Ex. 11 to Tabacco Decl.); *In re TFT-LCD (Flat Panel) Antitrust Litig. (LCD II)*, No. 07-MD-1827 SI, 2013 WL 149692, at *2 (N.D. Cal. Jan. 14, 2013) (**30%**); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. 4:07-MD-01819-CW, slip op. at 2, ECF No. 1370 (N.D. Cal. June 30, 2012) (**30%**) (attached as Ex. 12 to Tabacco Decl.); *In re TFT-LCD (Flat Panel) Antitrust Litig. (LCD I)*, No. 07-MD-1827 SI, 2011 WL 7575003, at *2 (N.D. Cal. Dec. 27, 2011) (**30%**); *In re TFT-LCD (Flat Panel) Antitrust Litig. (LCD III)*, No. 07-MD-1827 SI, 2013 WL 1365900, at *20 (N.D. Cal. Apr. 3, 2013) (**28.6%**); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig. (DRAM)*, No. M-02-1486-PJH, 2007 WL 2416513, at *1 (N.D. Cal. Aug. 16, 2007) (**25%**).

When a fee award is less than 30%, unlike this case, it typically involves a positive multiplier—*i.e.*, counsel receive a multiple of their hourly rate. *See, e.g.*, *In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730, at *10-11 (N.D. Cal. Sept. 2, 2015) (awarding multiplier of 2.5).

The award DPPs seek is consistent with recoveries awarded in other major class action cases. Indeed, a 30% fee award is the market rate for an antitrust class action like this one. *See Vizcaino*, 290 F.3d at 1050 ("market rates" are a question of "lawyers' reasonable expectations [for recovery of contingent fees], which are based on the circumstances of the case and the range of fee awards out of common funds of comparable size").

A recent study collecting empirical evidence of attorneys' fees in class action settlements likewise supports the requested fee.[6] The authors found that, of the 19 antitrust settlements between 2009 and 2013 with a mean recovery of $501.09 million and a median recovery of $37.3 million, the mean and median fee percentages were 27% and 30%. Eisenberg, Miller & Germano, *Attorneys'*

[6] This Court has previously consulted such studies, which can serve as an "unbiased and useful reference for comparing fee[] cases of similar magnitude." *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 349 (S.D.N.Y. 2014).

Fees in Class Actions: 2009-2013, 92 N.Y.U. L. Rev. 937, 952 (2017) (attached as Ex. 6 to the Tabacco Declaration). *See also In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig. (NCAA)*, No. 14-cv-2758-CW, 2017 WL 6040065, at *2 (N.D. Cal. Dec. 6, 2017) (relying on same empirical finding), *appeal docketed*, No. 18-15054 (9th Cir. Jan. 11, 2018).

5. The negative lodestar multiplier means a 30% fee award cannot result in a "windfall'

Finally, a cross-check of the requested fee with Plaintiffs' Counsel's lodestar shows that the requested fee is reasonable.[7] A lodestar cross-check may be used to ensure that class counsel has done the work necessary to justify the fee sought. *Vizcaino*, 290 F.3d at 1050. *See also In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-07 (3d Cir. 2005) ("[T]he lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records." (footnote omitted)).

The Ninth Circuit has acknowledged the existence of the so-called "megafund" approach to attorneys' fees which dictates that courts should consider awarding lower fee percentages in actions where the recovery is greater than $100 million—but simultaneously referenced the lodestar cross-check as indispensable. *In re Bluetooth*, 654 F.3d at 942. The bedrock principle is that a "windfall" exists only if a percentage award results in a high, positive multiplier of the lodestar. Indeed, the "windfall" that courts guard against is the situation "where awarding 25% of a 'megafund' would yield windfall profits for class counsel ***in light of the hours spent on the case***." *Id.* (emphasis added). *See also* 5 W. Rubinstein, Newberg on Class Actions, § 15:81 (5th ed. Dec. 2017 update); *CRT III*, 2016 WL 4126533, at *6 ("[T]he best way to guard against a windfall is first to examine whether a given percentage represents too high a multiplier of counsel's lodestar.").

Here, while the recovery of $139.3 million could technically be viewed as a "megafund" raising the possibility of a windfall, the concept of the $100 million threshold to qualify as a

[7] The lodestar method requires that the Court determine the number of hours reasonably spent by counsel on a matter, multiply it by counsel's reasonable hourly rates, and then adjust the lodestar up or down based on various factors similar to those relevant to the percentage method. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941-42 (9th Cir. 2011).

"megafund" is misplaced in this circumstance. *See* 5 Newberg on Class Actions, § 15:81 ("[T]he mega-fund approach is an odd idea in that it implies that everything is rational until $100 million, but irrational thereafter, creating a cliff-like effect rather than a gradually-reducing percentage along the lines of a hill [known as the 'sliding scale' approach].") In any case, as Judge Wilken recently explained, "[F]ederal district courts across the country have, in the class action settlement context, routinely awarded class counsel fees in excess of the 25% 'benchmark,' even in so-called 'mega-fund' cases." *NCAA*, 2017 WL 6040065, at *9.

Here, a lodestar cross-check "confirm[s] that a percentage of recovery amount does not award counsel an exorbitant hourly rate." *Online DVD*, 779 F.3d at 949 (citation and internal quotation marks omitted). Plaintiffs' Counsel here have devoted 173,863 hours, resulting in a total lodestar of $72.5 million. Tabacco Decl. ¶92 & Ex. 5. This results in an average hourly rate of $417 per hour. The resulting multiplier, moreover, is negative at 0.58, so if the requested fee is awarded, the effective average hourly rate is $241.82 per hour. *Id.*, ¶94.

There is no windfall.

The 173,863 hours that Plaintiffs' Counsel devoted to the litigation is the result of the complexity and labor-intensive nature of the legal work. Tabacco Decl. ¶¶67, 77, 92-93. Co-Lead Counsel maintained control over the work and carefully monitored the work Plaintiffs' Counsel performed to avoid duplication of effort. *Id.*, ¶70. Co-Lead Counsel required every law firm representing the DPP Class to commit in writing to a time and expense protocol as a precondition to receiving any assignments. *Id.*, ¶71 & Ex. 4. The protocol mandated billable hour caps for the various types of attorney and para-professional work,[8] reporting requirements of contemporaneously-kept time records, and strict rules on what is and what is not compensable time. *Id.* After the final settlement agreement was reached, Co-Lead Counsel halted all ongoing work by Plaintiffs' Counsel and performed an audit of all the detailed time records of every firm.[9] *Id.*

[8] For example, the protocol enforces caps of $350/hr for attorneys' document review, $400/hr for foreign language document review, $175/hr. for paralegals and investigators. Tabacco Decl. Ex. 4, at 2. With nearly half of all the billable hours dedicated to document review, these rate caps had a major effect.

[9] The lodestar includes zero time billed for the time and expense audit, nor, for that matter, the work to prepare this Motion. Moreover, Co-Lead Counsel will likely incur hundreds of

Indeed, the total lodestar would be higher if Co-Lead Counsel had not capped billing rates but charged what large defense firms charge for hourly rates.

Accordingly, a lodestar cross-check confirms the requested 30% fee should be awarded.

C. Plaintiffs' Counsel's Expenses Are Reasonable and Necessarily Incurred

Plaintiffs' Counsel seek payment from the Settlement Fund of $3,354,573.35 in expenses necessarily incurred in the prosecution of this action, an amount representing 2.4% of the Settlement Fund. Tabacco Decl. ¶¶96-101 & Ex. 7.

Attorneys who create a common fund for the benefit of a class are entitled to be reimbursed out-of-pocket expenses incurred in creating the fund so long as the submitted expenses are reasonable, necessary and directly related to the prosecution of the action. *Vincent v. Hughes Air West*, 557 F.2d 759, 769 (9th Cir. 1977); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1048 (N.D. Cal. 2008) ("Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters.").

With this Motion, the Tabacco Declaration (regarding expenses generally) together with the Zahid Declaration (providing the Litigation Fund accounting) provide an accounting for expenses incurred by Plaintiffs' Counsel. Tabacco Decl. ¶¶96-101, Ex. 7; Zahid Decl. ¶¶2-16 & Exs. A-B. Of the $3,354,573.35 in expenses, $2,501,352.52 are out-of-pocket, *i.e.*, already expended for the DPP Class' benefit.[10] *See* Tabacco Decl. Ex. 7. The remaining amount consists of an unpaid invoice for economic consulting work ($212,030) and unpaid charges for document hosting ($641,190.83). *Id.*

The primary out-of-pocket expense in this case was for economic expert fees, which at $1,623,777 (expenses for experts Noll and OSKR) account for 48% of all expenses. *See* Zahid Decl.

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additional hours in connection with their continuing responsibilities of administering the settlements and any post-judgment proceedings and appeals, without prospect for further fees.

[10] Co-Lead Counsel have elected not to seek any reimbursement for money spent by any Plaintiffs' Counsel on travel, meals and lodging expenses, which totaled $190,914.56. *See* Tabacco Decl. Exs. 7 & 9. Restaurant receipts, hotel bills, and airfare charges are frequently targeted for scrutiny, both fair and unfair. District courts can be lured into a time-consuming review of such charges as part of a dutiful exercise to ensure class counsel enjoyed no frills at the class' expense. Here, there is nothing untoward about these expenses, but not seeking them spares the Court's time and resources.

Ex. B. Absent the investment in the economic expert fees, there would be no Settlement Fund at all. The expert economists sorted and scrubbed massive quantities of transaction data to arrive at an econometrically-sound impact and damages methodologies for trial. Without the expert economists working hand-in-glove with Co-Lead Counsel to arrive at workable impact and damage proof, the Defendants never would have been wrestled to the settlement table, let alone persuaded to part with $139.3 million.

The second-largest item is the charge of $641,190.83 from Polsinelli LLP which hosted millions of pages of documents on a Relativity-based platform to facilitate document review. The charge is for services rendered which have not been compensated. Information on the charge for the document hosting is found in the Tabacco Declaration at ¶99 as well as the Declaration of Daniel D. Owen Regarding Document Hosting Expenses ("Owen Document Hosting Decl."), Comp., Ex. BB. The document hosting was necessary to the prosecution of the case and consequently it is requested that payment be made from the Settlement Fund to satisfy it.

Other major categories of expenses—such as the out-of-pocket expenses for Technology-Assisted Review and related data analytics ($97,336.29), trial consultants ($50,203.79), and foreign language translators ($209,942.91)—were likewise reasonable and necessary, and should be reimbursed. *See* Zahid Decl. Ex. B.

As the Ninth Circuit recognizes, in contingency fee class actions "litigation expenses make the entire action possible." *Online DVD*, 779 F.3d at 953. Plaintiffs' Counsel advanced these expenses, interest free, with no assurance they would ever be recouped. The request for reimbursement is reasonable.

D. Payment of Service Awards to the Class Representatives is Appropriate

Plaintiffs' Counsel request that the Court approve service awards to the nine Class Representatives in the following amounts: Ritz Camera, Circuit City, and Univisions ($30,000 each); Automation Engineering, Stereo Shop and First Choice Marketing ($10,000 each); and Charles Carte, Terri Walner, and James O'Neil ($5,000 each). If awarded, the total is $135,000 to be deducted from the Settlement Fund, an amount equal to 0.09% of the Settlement Fund.

Service awards, *a.k.a.*, "incentive awards," encourage victims of antitrust and other harms to undertake the responsibilities and risks of representing classes and to recognize the time and effort spent in the case. *NCAA*, 2017 WL 6040065, at *11. "Incentive awards are fairly typical in class action cases" as they are intended "to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009). Service awards are evaluated in light of "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions … [and] the amount of time and effort the plaintiff expended in pursuing the litigation." *Staton*, 327 F.3d at 977 (citation and internal quotation marks omitted).

Here, the Class Representatives spent significant time and effort litigating this case for over five years for the benefit of the DPP Class. *See generally* Simon Decl. ¶¶53-59; Saveri Decl. ¶¶38-51; Tabacco Decl. ¶¶102-07. Each reviewed draft versions of complaints and other pleadings. *See, e.g.*, Saveri Decl. ¶42. Each spent time reviewing and responding to three sets of document requests containing a total of 74 separate requests, assisted and participated in the collection of responsive hard copy documents, and in the cases of Ritz Camera, Circuit City and Univisions, identified ESI sources likely to contain responsive transaction data and other relevant information. Simon Decl. ¶54; Saveri Decl. ¶43; Tabacco Decl. ¶¶37-39, 67, 104.

Each Class Representative reviewed and responded to three sets of interrogatories totaling 27 separate interrogatories, requiring sworn certifications on multiple occasions. Simon Decl. ¶56; Saveri Decl. ¶44; Tabacco Decl. ¶¶36-37, 67, 105. They each kept abreast of the major filings in the case. Simon Decl. ¶57; Saveri Decl. ¶45; Tabacco Decl. ¶¶104, 106. Finally, each Class Representative spent significant time preparing for deposition and then sitting for examination. Simon Decl. ¶58; Saveri Decl. ¶46; Tabacco Decl. ¶107.

The total requested amount for service awards, $135,000 (Tabacco Decl. ¶¶108-17) is only 0.09% of the Settlement Fund, a fact supporting the request. *See CRT I,* No. C-07-5944 JST, 2016 WL 153265, at *3 (N.D. Cal. Jan. 13, 2016) (service awards representing 0.196% of settlement is "very small percentage"). The requested awards to the three larger corporate Class Representatives

of $30,000 each, to the three small businesses of $10,000 each, and the three individuals of $5,000 each are reasonable. *See id* (awarding $25,000 each to ten businesses for service as class representatives. For the individuals, $5,000 is presumptively reasonable. *Id* at *2.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Counsel for the DPP Class respectfully submit that their requests for fees, expenses and service awards are reasonable and should be granted.

DATED: February 8, 2018

BERMAN TABACCO

/s/ Todd A. Seaver
Todd A. Seaver

Joseph J. Tabacco, Jr.
Jessica Moy
44 Montgomery Street, Suite 650
San Francisco, CA 94104
Telephone: (415) 433-3200
Facsimile: (415) 433-6382
jtabacco@bermantabacco.com
tseaver@bermantabacco.com
jmoy@bermantabacco.com

Interim Co-Lead Counsel for Direct Purchaser Plaintiffs

PEARSON SIMON & WARSHAW, LLP

/s/ Bruce L. Simon
Bruce L. Simon

Benjamin E. Shiftan
44 Montgomery Street, Suite 2450
San Francisco, CA 94104
Telephone: (415) 433-9000
Facsimile: (415) 433-9008
bsimon@pswlaw.com
bshiftan@pswlaw.com

Interim Co-Lead Counsel for Direct Purchaser Plaintiffs

SAVERI & SAVERI INC.

/s/ R. Alexander Saveri
R. Alexander Saveri

Geoffrey C. Rushing
706 Sansome Street
San Francisco, CA 94111
Telephone: (415) 217-6810
Facsimile: (415) 217-6813
rick@saveri.com
geoff@saveri.com

Interim Co-Lead Counsel for Direct Purchaser Plaintiffs

Chart Supporting Documents
Part II: Tabs 28-57

EXHIBIT 14

TAB 28A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: AUTOMOTIVE PARTS ANTITRUST LITIGATION	: : :	No. 12-md-02311 Hon. Sean F. Cox
In Re: Heater Control Panels In Re: Occupant Safety Systems In Re: Switches In Re: Ignition Coils In Re: Steering Angle Sensors In Re: Electric Powered Steering Assemblies In Re: Fuel Injection Systems In Re: Valve Timing Control Devices In Re: Air Conditioning Systems In Re: Automotive Constant Velocity Joint Boot Products In Re: Automotive Hoses In Re: Shock Absorbers In Re: Body Sealing Products In Re: Interior Trim Products In Re: Automotive Brake Hoses In Re: Exhaust Systems In Re: Ceramic Substrates In Re: Power Window Switches In Re: Automotive Steel Tubes In Re: Side-Door Latches	: :	Case No. 2:12-cv-00403 Case No. 2:12-cv-00603 Case No. 2:13-cv-01303 Case No. 2:13-cv-01403 Case No. 2:13-cv-01603 Case No. 2:13-cv-01903 Case No. 2:13-cv-02203 Case No. 2:13-cv-02503 Case No. 2:13-cv-02703 Case No. 2:14-cv-02903 Case No. 2:15-cv-03203 Case No. 2:15-cv-03303 Case No. 2:16-cv-03403 Case No. 2:16-cv-03503 Case No. 2:16-cv-03603 Case No. 2:16-cv-03703 Case No. 2:16-cv-03803 Case No. 2:16-cv-03903 Case No. 2:16-cv-04003 Case No. 2:17-cv-04303
THIS DOCUMENT RELATES TO: End-Payor Actions	: :	

ORDER REGARDING END-PAYOR PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES AND PAYMENT OF INCENTIVE AWARDS TO CLASS REPRESENTATIVES IN CONNECTION WITH THE ROUND 4 SETTLEMENTS

End-Payor Plaintiffs' ("EPPs") have filed their Motion for an Award of Attorneys' Fees and Payment of Incentive Awards to Class Representatives in Connection with the Round Four Settlements.

The Court has reviewed the memorandum submitted by EPPs in support of their motion and has also reviewed all of the declarations and submissions relating to the motion filed with the Court. Pursuant to notice given to the Settlement Classes in accordance with the Court's order, the Court held a hearing by video conference on September 17, 2020 to consider the motion.[1]

Based on the entire record of these proceedings and in consideration of all of the submissions and filings made with respect to EPPs' application, and good cause appearing therefor,

IT IS HEREBY ORDERED as follows:

1. The Court has granted final approval to the settlements referred to by the parties and the Court as the Round 4 Settlements in its Order Granting Final Approval of the Round 4 Settlements.[2] The Court has considered the submissions of the parties and the relevant case law and authority relating to the motion and concludes that awards of attorneys' fees, reimbursement of expenses to Co-Lead Counsel from the litigation fund, and incentive awards to be paid out of

[1] Defined terms not otherwise defined herein shall have the meanings ascribed to those terms as noted in End-Payor Plaintiffs' Motion for an Award of Attorneys' Fees and Payment of Incentive Awards to Class Representatives in Connection with the Round Four Settlements and the papers associated with that motion. *See, e.g.*, *Exhaust Systems*, Case No. 2:16-cv-03703, ECF No. 174.

[2] EPPs filed their motion for an award of attorneys' fees and for incentive awards to Class Representatives in the cases that are being settled as to the Settling Defendants that are parties to the Round 4 Settlements. This Order will accordingly be separately entered as an order in each specific case docket to which it applies. The litigation expenses that are the subject of EPPs' motion will be paid from the litigation expense fund previously approved by the Court. If, at the conclusion of this litigation, funds remain in that fund, they will be added to the Settlement Funds for distribution to authorized Class member claimants.

the proceeds of the Round 4 Settlements are appropriate under Federal Rules of Civil Procedure 23(h) and 54(d)(2). Notice of the motion for fees and incentive awards was provided to the potential Settlement Class members pursuant to, and in compliance with, the order of the Court by direct and published notice and a settlement website that identified and made available for inspection the Court's long-form notice and filings in this litigation. The notice given regarding the motion fully satisfied the requirements of Rule 23 and constitutional Due Process.

2. The Court has considered the reaction of class members to the fee request. Out of the millions of potential class members who were given notice or who were made aware of the settlements and the fee request, the Court received no objections to EPPs' motion.

3. The Court engages in a two-part analysis when assessing the reasonableness of a petition seeking an award of attorneys' fees to be paid out of the proceeds of a class action settlement. *In re Cardinal Health Inc. Sec. Litig*., 528 F. Supp. 2d 752, 760 (S.D. Ohio 2007). The Court first determines the method of calculating the attorneys' fees: it applies either the percentage-of-the-fund approach or the lodestar/multiplier method. *Id.*; *Van Horn v. Nationwide Prop. & Cas. Inc. Co*., 436 F. App'x 496, 498 (6th Cir. 2011).

4. The Court has the discretion to select the appropriate method for calculating attorneys' fees "in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them." *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). In common fund cases, whichever method is used, the award of attorneys' fees need only "be reasonable under the circumstances." *Id.* The Court also analyzed and weighed the six factors described in *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974).

5. Consistent with prior attorneys' fees awards in this litigation, the Court will award fees to EPPs using the percentage-of-the-fund approach. This method of awarding attorneys' fees is preferred in this District because it conserves judicial resources and aligns the interests of class counsel and the class members. *Rawlings*, 9 F.3d at 515; *In re Packaged Ice Antitrust Litig.*, No. 08-md-01952, 2011 WL 6209188, at *16 (E.D. Mich. Dec. 13, 2011); *In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 502 (E.D. Mich. 2008); *Cardinal*, 528 F. Supp. 2d at 762 (the Sixth Circuit has "explicitly approved the percentage approach in common fund cases"); *In re Skelaxin (Metaxalone) Antitrust Litig.*, No. 12-md-2343, 2014 WL 2946459, *1 (E.D. Tenn. Jun. 30, 2014).

6. The Court hereby authorizes Co-Lead Counsel to pay the expenses of the settlement notice and claims administration from the Round 4 Settlements on a *pro rata* basis.

7. Co-Lead Counsel have requested a fee award equal to 22% of the Settlement Funds. The award requested is within the range of fee awards made by courts in this Circuit. *In re Prandin Direct Purchaser Antitrust Litig.*, No. 10-cv-12141, 2015 WL 1396473, *5 (E.D. Mich. Jan. 20, 2015) (awarding one-third of the common fund); *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *19; *Skelaxin*, 2014 WL 2946459, at *1; *In re Southeastern Milk Antitrust Litig.*, No. 08-md-1000, 2013 WL 2155387, at *8 (E.D. Tenn. May 17, 2013); *Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d 521, 528 (E.D. Ky. 2010); *Bessey v. Packerland Plainwell, Inc.*, No. 4:06-CV-95, 2007 WL 3173972, at *4 (W.D. Mich. 2007); *Delphi*, 248 F.R.D. at 502-03; *In re National Century Financial Enterprises, Inc. Investment Litig.*, 2009 WL 1473975, *3 (S.D. Ohio, May 27, 2009); *Kogan v. AIMCO Fox Chase, L.P.*, 193 F.R.D. 496, 503 (E.D. Mich. 2000).

8. As noted below, the Court has previously made interim fee awards equal to 20% of the principal amount of the Round 1 Settlements; 20% of the Round 2 Settlements, net of litigation expenses; and 25% of the Round 3 Settlements, net of litigation expenses.

9. The Court has considered the six *Ramey* factors in weighing a fee award to Co-Lead Counsel: (1) the value of the benefits rendered to the class; (2) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (3) whether the services were undertaken on a contingent fee basis; (4) the value of the services on an hourly basis [*i.e.*, the lodestar cross-check]; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel on both sides. *Ramey*, 508 F.2d at 1196.

10. The Court has carefully analyzed the settlements and applied the *Ramey* factors to EPPs' motion and concludes that the factors are met and justify an interim fee award to Co-Lead Counsel. The Round 4 Settlements collectively total $183,958,000,[3] and provide substantial cash and non-monetary benefits, including, with few exceptions, extensive discovery cooperation from all Settling Defendants and injunctive relief prohibiting certain conduct at issue in the litigation from all but a few of the Settling Defendants who are parties to the Round 4 Settlements.[4]

[3] Pursuant to a settlement with the Reorganized TK Holdings Trust ("TKH") in bankruptcy proceeding, Co-Lead Counsel have secured a $53,200,000 authorized claim against TKH, but they expect to receive only a small fraction of this amount for distribution to the classes. Because the ultimate settlement amount in connection with the TKH settlement remains undetermined at this time, this figure was not included in Co-Lead Counsel's calculation of the Round 4 settlement proceeds. TKH is also the only Settling Defendant which is not required to provide cooperation under its settlement agreement.

[4] Cooperation obligations of certain defendants are in certain cases deemed mostly satisfied once final judgment as to all defendants in those cases has been entered and all appeals, if any, have been exhausted. However, even in these circumstances, the Settling Defendants are still required to provide cooperation in the form of providing vehicle lists and to produce to the EPPs documents that they produce to other parties.

11. Courts in the Sixth Circuit weigh "society's stake in rewarding attorneys who [obtain favorable outcomes for a class] in order to maintain an incentive to others," and counsel's success in complex antitrust litigation "counsels in favor of a generous fee." *Cardizem*, 218 F.R.D. at 534 (internal quotation marks omitted). The substantial recoveries obtained by EPPs to date serve the strong public policy of holding accountable those who violate the antitrust laws, thereby promoting fair competition and honest pricing.

12. EPP Class Counsel have worked on a contingent basis and the results of this litigation have never been certain.

13. The legal and factual issues in this litigation are complex and the parties have zealously asserted their claims and defenses. Co-Lead Counsel have asserted a number of claims under both federal and state antitrust laws, as well as state consumer protection and unjust enrichment laws. Likewise, issues attendant to serving and conducting discovery against numerous foreign defendants located around the world compound the complexity of this case.

14. The Court is satisfied that these settlements were the result of arm's-length negotiations conducted in good faith by informed and experienced counsel, and, in many cases, with the assistance of highly experienced mediators.

15. The *Ramey* factors and a cross-check of the lodestar incurred by EPP Class Counsel suggest that EPP Class Counsel are entitled to appropriate compensation to take into account the risks they assumed, the magnitude of work done, and the benefits achieved for the members of the Settlement Classes. Here, Co-Lead Counsel reviewed all EPPs' attorney time submissions received through September 30, 2019, and included detailed information about the resulting lodestar in EPPs' motion. EPP Class Counsels' lodestar in this litigation totals $154,782,333.18, from March 23, 2012 through September 30, 2019, calculated in accordance

with EPP Class Counsels' current hourly rates.[5] These hours and rates are reasonable and justified given the length and complexity of this litigation and EPP Class Counsels' many years of experience in prosecuting complex antitrust class actions. Further, the defendants in these cases are represented by some of the most prominent antitrust defense lawyers in the world. EPP Class Counsels' hourly rates are also in-line with the market. In each of the EPP Class Counsel firm's declarations, only the most senior attorneys list hourly rates above $700. These rates are well in line with the market, with recent reports explaining that senior lawyers at top law firms routinely charge well over $1,000. *See* Sara Randazzo & Jacqueline Palank, *Legal Fees Cross New Mark: $1,500 an Hour*, WALL ST. J., Feb. 9, 2016, available at https://www.wsj.com/articles/legal-fees-reach-new-pinnacle-1-500-anhour-1454960708 ("Despite low inflation and weak demand for legal services, rates at large corporate law firms have risen by 3% to 4% a year since the economic downturn").

16. Accordingly, the Court **GRANTS** an award of attorneys' fees to Co-Lead Counsel equal to 22% of the Round 4 Settlements including a *pro rata* share of the interest earned thereon, excluding the yet to be determined TKH settlement amount. This award, taken together with the prior awards from the Round 1 Settlements, Round 2 Settlements, and Round 3 Settlements will result in a total award equal to 22.05% of the proceeds of the four rounds of settlements, excluding

[5] The Court determines that the time included in connection with the Round 1, Round 2, and Round 3 Settlement fee requests should be included in the lodestar/multiplier cross-check for the Round 4 Settlements. In calculating the lodestar for purposes of the cross-check, it would be impractical to compartmentalize and isolate the work that EPP Class Counsel did in any particular case at any particular time because all of their work assisted in achieving all of the settlements and has provided and will continue to provide a significant benefit to all of the EPP classes. *See Southeastern Milk*, 2013 WL 2155387, at *7-8 (rejecting objection based on the proposition that the calculation of class counsel's lodestar should be limited to work performed after the period covered by a prior fee award); *Lobatz v. U.S. West Cellular of California, Inc.*, 222 F.3d 1142 (9th Cir. 2000) (same).

the TKH settlement. The Round 4 attorneys' fees, totaling $40,470,760.00, together with a *pro rata* share of the interest earned thereon, shall be paid on a *pro rata* basis from the net settlement funds provided by each of the Round 4 Settlements currently before the Court.

17. Using the lodestar/multiplier cross-check methodology and reviewing the total fees awarded against the lodestar generated on these cases from March 23, 2012 to September 30, 2019, the 22% fee awarded results in an overall lodestar/multiplier of 1.74, excluding the TKH settlement. Such a multiplier is well within, if not substantially below, the range of reasonable multipliers awarded in similar contingent fee cases. *See In re Prandin*, 2015 WL 1396473, at *14 (awarding attorneys' fees in the amount of one-third of a $19 million settlement fund, which equaled a multiplier of 3.01); *Bailey v. AK Steel Corp.*, No. 1:06-cv-468, 2008 WL 553764, at *3 (S.D. Ohio Feb. 28, 2008) (awarding attorneys' fees with a multiplier of approximately 3). This interim fee award is reasonable in light of the complexity of this litigation, the results achieved for the class members to date, the work and labor of EPP Class Counsel, and the risks assumed by EPP Class Counsel.

18. Co-Lead Counsel are hereby authorized to allocate the attorneys' fees awarded herein among EPP Class Counsel who performed work on behalf of EPPs in accordance with Co-Lead Counsel's assessment of each firm's contribution to the prosecution and settlement of these actions.

19. Co-Lead Counsel have also requested a total of $565,000 in incentive awards to be paid to fifty-nine named Class Representatives. Co-Lead Counsel have split those Class Representatives into two groups based on their contributions to the cases.

20. The first group ("Group 1") is comprised of the following five individuals: (1) Jane Butler; (2) Melissa Croom; (3) Theresia Dillard; (4) James Phelps; and (5) Bonnie Vander

Meulen. Co-Lead Counsel have proposed that each of these individuals would receive a single $5,000 award per person.

21. The second group ("Group 2") is comprised of the following fifty-four individuals: (1) Ifeoma Adams; (2) Halley Ascher; (3) Gregory Asken; (4) Melissa Barron; (5) Kimberly Bennett; (6) David Bernstein; (7) Ron Blau; (8) Tenisha Burgos; (9) Kent Busek; (10) Jennifer Chase; (11) Rita Cornish; (12) Nathan Croom; (13) Lori Curtis; (14) Jessica DeCastro; (15) Alena Farrell; (16) Jane Fitzgerald; (17) Frances H. Gammell-Roach; (18) Carroll Gibbs; (19) Dori Gilels; (20) Jason Grala; (21) Ian Groves; (22) Curtis Gunnerson; (23) Paul Gustafson; (24) Tom Halverson; (25) Curtis Harr; (26) Andrew Hedlund; (27) Gary Arthur Herr; (28) John W. Hollingsworth; (29) Carol Ann Kashishian; (30) Elizabeth Kaufman; (31) Robert P. Klingler; (32) Kelly Klosterman; (33) James E. Marean; (34) Michelle McGinn; (35) Rebecca Lynn Morrow; (36) Edward T. Muscara; (37) Stacey R. Nickell; (38) Sophie O'Keefe-Zelman; (39) Roger D. Olson; (40) William Dale Picotte; (41) Whitney Porter; (42) Cindy Prince; (43) Janne Rice; (44) Robert M. Rice, Jr.; (45) Darrel Senior; (46) Meetesh Shah; (47) Darcy C. Sherman; (48) Erica J. Shoaf; (49) Arthur Stukey; (50) Kathleen A. Tawney; (51) Jane Taylor; (52) Keith Uehara; (53) Michael Wick; and (54) Phillip G. Young. Co-Lead Counsel have proposed that each of these individuals would receive a single $10,000 award per person.

22. This is the first time Co-Lead Counsel have requested incentive awards on behalf of the Class Representatives. Notice that EPPs would be requesting incentive awards for the Class Representatives was included in the published notice given to the Settlement Classes. And Co-Lead Counsel have only requested $565,000 in incentive awards, which is equal to approximately 0.3% of the Round 4 Settlement Funds, excluding the TKH settlement.

23. The Sixth Circuit has noted that incentive awards are typically awarded to class representatives for their extensive involvement with a lawsuit. *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003). Awards encourage members of a class to become class representatives and reward their efforts taken on behalf of the class. *Id.* Payment of incentive awards to class representatives is a reasonable use of settlement funds. *Moulton v. U.S. Steel Corp.,* 581 F.3d 344, 351 (6th Cir. 2009). Courts have approved incentive awards of up to $15,000 for individual plaintiff class representatives for providing information to class counsel, receiving and approving pleadings, assisting in discovery, and participating in settlement discussions. *See In re CMS Energy ERISA Litig.*, No. 02-72834, 2006 WL 2109499, at *3 (E.D. Mich. June 27, 2006). Courts have also provided awards of $10,000 for class representatives who "searched their personal records multiple times to locate documents" in addition to "testif[ying] via depositions" and awards of $5,000 for class representatives who "participated in discovery by locating and producing documents." *The Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, Case No. 2:10-cv-14360-DPH-MKM, ECF No. 364 at pp. 27.

24. After reviewing the request for incentive awards, the Court finds that the awards requested are reasonable. Here, Class Representatives provided discovery and assistance in a litany of cases, sometimes in as many as forty-one cases.

25. As to the individual awards to Group 1, these Class Representatives provided important and indispensable service to the Settlement Class. They searched their personal records to locate documents responsive to discovery requests and provided information to Co-Lead Counsel. They also came forward to serve as named plaintiffs. The Court finds that the requested incentive awards for this set of Class Representatives are reasonable in light of their participation

during the discovery phase of the litigation. Their participation in this litigation benefitted the Classes.

26. As to the individual awards to Group 2, the individuals in this group participated in discovery by locating and producing documents, came forward as Class Representatives in many, if not all, of the EPP cases, provided Co-Lead Counsel with information, in most cases provided verified responses to interrogatories and, most importantly, testified in a deposition. In light of these significant contributions, the Court finds that their services in the litigation supports the requested incentive awards.

27. These incentive awards, totaling $565,000, shall be paid on a *pro rata* basis from the net settlement funds provided by each of the Round 4 Settlements currently before the Court.

IT IS SO ORDERED.

Dated: September 23, 2020

s/Sean F. Cox
Sean F. Cox
U. S. District Judge

TAB 28B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: AUTOMOTIVE PARTS ANTITRUST LITIGATION	:	No. 12-md-02311 Hon. Marianne O. Battani
In Re: Heater Control Panels In Re: Occupant Safety Systems In Re: Switches In Re: Ignition Coils In Re: Steering Angle Sensors In Re: Electric Powered Steering Assemblies In Re: Fuel Injection Systems In Re: Valve Timing Control Devices In Re: Air Conditioning Systems In Re: Automotive Constant Velocity Joint Boot Products In Re: Automotive Hoses In Re: Shock Absorbers In Re: Body Sealing Products In Re: Interior Trim Products In Re: Automotive Brake Hoses In Re: Exhaust Systems In Re: Ceramic Substrates In Re: Power Window Switches In Re: Automotive Steel Tubes In Re: Side-Door Latches	: :	Case No. 2:12-cv-00403 Case No. 2:12-cv-00603 Case No. 2:13-cv-01303 Case No. 2:13-cv-01403 Case No. 2:13-cv-01603 Case No. 2:13-cv-01903 Case No. 2:13-cv-02203 Case No. 2:13-cv-02503 Case No. 2:13-cv-02703 Case No. 2:14-cv-02903 Case No. 2:15-cv-03203 Case No. 2:15-cv-03303 Case No. 2:16-cv-03403 Case No. 2:16-cv-03503 Case No. 2:16-cv-03603 Case No. 2:16-cv-03703 Case No. 2:16-cv-03803 Case No. 2:16-cv-03903 Case No. 2:16-cv-04003 Case No. 2:17-cv-04303
THIS DOCUMENT RELATES TO: End-Payor Actions	: :	

END-PAYOR PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEESAND PAYMENT OF INCENTIVE AWARDS TO CLASS REPRESENTATIVES IN CONNECTION WITH THE ROUND FOUR SETTLEMENTS

STATEMENT OF ISSUES PRESENTED

1. Should counsel for End-Payor Plaintiffs, who have obtained more than $183,958,000 million in class settlements that are presently before the Court for final approval, be awarded attorneys' fees equal to 22% to be paid out of the proceeds of these settlements?

   Yes.

2. Should counsel for End-Payor Plaintiffs be reimbursed for certain litigation costs and expenses incurred in pursuing the claims in this litigation?

   Yes.

3. Should the Class Representatives for the End-Payor Plaintiffs receive an incentive award in the amount of $10,000 for those who appeared for a deposition in this litigation and $5,000 for those who did not appear for a deposition, but who participated in discovery?

   Yes.

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INTRODUCTION

Pursuant to Federal Rules of Civil Procedure ("Rules") 23(h) and 54(d)(2), End-Payor Plaintiffs' ("EPPs'")[1] respectfully request an award of $40,470,760.00 in attorneys' fees plus a pro rata share of the interest earned thereon, which is equal to 22% of the settlement amounts paid by 17 Defendants in this litigation as part of the fourth round of settlements excluding the settlement with the Reorganized TK Holdings Trust pursuant to the company's bankruptcy proceeding ("Requested Award").[2]

EPPs make this application for attorneys' fees in connection with EPPs' Motion for Final Approval of Settlements ("Round 4 Settlements") with Brose, Corning, Delphi, Green Tokai, Keihin, KYB, Maruyasu, Meritor, Mikuni, Mitsubishi Heavy, Panasonic, Sanoh, Showa, the Reorganized TK Holdings Trust ("TKH"), Tokai Rika, Toyo Denso, and Toyoda Gosei ("Round 4 Settling Defendants").[3] *See* Joint Declaration of Hollis Salzman, Marc M. Seltzer, and Adam J. Zapala in Support of End-Payor Plaintiffs' Motion for an Award of Attorneys' Fees and Payment of Incentive Awards to Class Representatives in Connection with the Round Four Settlements ("Joint Decl.") at ¶ 9.

These settlements with the Round 4 Settling Defendants, each of which was separately negotiated and therefore is separate and independent of the other, total $183,958,000[4] in cash

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[1] In granting preliminary approval of these settlements, the Court appointed Robins Kaplan LLP, Cotchett, Pitre & McCarthy, LLP and Susman Godfrey L.L.P. as Settlement Class Counsel ("Class Counsel" or "Co-Lead Counsel"). *See, e.g.*, Order Granting End-Payor Plaintiffs' Motion for Preliminary Approval of Proposed Settlement with Defendant Meritor and Provisional Certification of Settlement Class at ¶ 6, *Exhaust Systems*, No. 2:16-cv-03703, ECF. No. 120.

[2] Contemporaneously with this motion, EPPs have filed their Motion for Orders Granting Final Approval of the Round Four Settlements and Approving the Plan of Allocation and Memorandum in Support thereof.

[3] The Round 4 Settling Defendants and corresponding affiliated cases and settlement amounts are listed in **Appendix A**.

[4] Pursuant to a settlement with TKH reached in its bankruptcy proceeding, Class Counsel have secured a $53,200,000 authorized claim against TKH, but expect to receive only a small fraction

("Round 4 Settlement Amount") and also include, among other benefits, injunctive relief obtained from all but two of the Round 4 Settling Defendants and agreements by all but one of the Settling Defendants to cooperate in the EPPs' continued prosecution of their claims against the Defendants remaining in the Actions ("Non-Settling Defendants").[5] These Round 4 Settlements are only possible because of the dedication, effort, and skill of Co-Lead Class Counsel and the firms working at their direction ("EPP Class Counsel"), including their substantial multi-year investment of time and expenses. The request for 22% of each Round 4 settlement amount is in line with percentages that the Court approved in previous settlements in this case,[6] is supported by Sixth Circuit authority, and is consistent with the previously expressed preference of the Court. Transcript of August 1, 2018 Fairness Hearing at 36:11-15, 2:12-md-2311, ECF No. 1937 (stating that the Court would grant a 25% fee award in Round 3, bringing the total attorneys' fee award to "22 point-something" and noting: "I want you to stick with that for your round four. I'm telling

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of this amount for distribution to the class. Because the ultimate settlement amount in connection with the TKH settlement remains undetermined at this time, this figure was not included in Class Counsels' calculation of the total amount of the Round 4 settlement proceeds.

[5] At this time, the only remaining Non-Settling Defendants are members of the Bosal Defendant Group in the *Exhaust Systems* case, No. 2:16-cv-03703. The cooperation of one Settling Defendant, namely Tenneco, has to date been very valuable during the discovery phase of that matter.

[6] *See, e.g.*, Order Granting in Part Award of Attorneys' Fees, *Wire Harness*, No. 2:12-cv-00103, ECF No. 498 (granting interim fee award of 10% of the Round 1 Settlements, defined below) ("Round 1 Fee Award"); Supplemental Order Granting End-Payor Plaintiffs Additional Attorneys' Fees, *Wire Harness*, No. 2:12-cv-00103, ECF No. 545 (granting additional interim fee award of 10% of Round 1 Settlements) ("Round 1 Supplemental Fee Award"); Order Regarding End-Payor Plaintiffs' Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses, *Wire Harness*, No. 2:12-cv-00103, ECF No. 578 (granting fee award of 20%, net of certain expenses, of Round 2 Settlements, defined below) ("Round 2 Fee Award"); Order Regarding Auto Dealers' Motion for an Award of Attorneys' Fees, Reimbursement of Litigation Expenses and Service Awards at 4 ¶ 11, *Wire Harness*, No. 2:12-cv-00102, ECF Nos. 401 (granting interim fee award of 33% of the settlement amount); Order Regarding End-Payor Plaintiffs' Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses at 7 ¶ 17, *Wire Harness*, No. 2:12-cv-00102, ECF Nos. 626 (granting fee award of 25% of the Round 3 settlement amount, net of expenses and noting that this together with the Round 2 and Round 1 awards resulted in a total award equal to 22.06%) ("Round 3 Fee Award").

you that now. I think that that would be a fair resolution for an adequate and well deserved attorney fee"). Class Counsel and EPP Class Counsel have undertaken a significant risk, invested substantial amounts of their time and money on a contingent basis, and foregone other work opportunities to dedicate their professional efforts to this case. EPPs also seek incentive awards for named class representatives in the amount of $10,000 for those who appeared for a deposition in this matter and $5,000 for those who did not appear for a deposition, but who participated in significant discovery efforts, including providing EPP Class Counsel with documents and information regarding their purchases or leases of vehicles at issue in this litigation and, in some cases, providing formal discovery responses.

A. The Settlements Achieved

The Round 4 Settlements total $183,958,000 and resolve EPPs' claims against 17 Defendants and their affiliates ("Settling Defendants") in 20 automotive parts cases, as set forth in the chart included at **Appendix A**. The settlements provide the settlement classes with substantial cash benefits and valuable cooperation from the Settling Defendants. These settlements resolve only a portion of EPPs' claims in this MDL litigation, *In re Automotive Parts Antitrust Litigation*, MDL No. 2:12-md-02311 ("Auto Parts Action"), and represent approximately 15% of the total settlement recoveries obtained on behalf of EPPs across all rounds of settlements. These excellent results were only possible because of the dedication, effort, and skill of Co-Lead Class Counsel and the firms working at their direction, including their substantial multi-year investment of time and expenses.

B. EPP Class Counsel's Vigorous Prosecution on Behalf of the Round 4 Settlement Classes

Since 2012, attorneys for EPPs have diligently worked to advance the claims of members of the proposed Round 4 Settlement Classes. As the Court has repeatedly recognized, the EPP

class actions are extraordinarily complex, involving over 160 Defendants in 41 separate, but coordinated, antitrust class actions alleging distinct violations of antitrust and consumer protection laws. *See* Order Regarding End-Payor Plaintiffs' Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses at pp. 6-7 ¶ 16 ("Round 3 Fee Award") (noting that "EPPs are entitled to appropriate compensation to take into account the risks they assumed, the magnitude of work done, and the benefits achieved for eh members of the Settlement Classes"); Order Granting Final Approval to the Round 2 Settlements at p. 12, *Wire Harness*, No. 2:12-cv- 00103 (Jul. 10, 2017), ECF No. 576 ("Round 2 Final Approval Order") ("The Court agrees with EPPs' counsel's assessment that antitrust class actions of the magnitude and size of this very complicated litigation make this among the most difficult and complex actions to prosecute."); *see also* Transcript of May 11, 2016 Fairness Hearing at 72-73, 2:12-md-2311, ECF No. 1365 (noting the complexity of the EPP action and referring to the difficulty of the case as "extraordinary"); *In re Packaged Ice Antitrust Litig.*, No. 08-MDL-01952, 2011 WL 6209188, at *19 (E.D. Mich. Dec. 13, 2011) (stating that antitrust class actions are "arguably the most complex action[s] to prosecute" given the "legal and factual issues . . . [that are] numerous and uncertain in outcome."); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 533 (E.D. Mich. 2003) ("Antitrust class actions are inherently complex . . . .").

The size and complexity of *Auto Parts* has required a huge undertaking by all involved, including EPP Class Counsel. EPP Class Counsel's activities have included:

- Performing extensive research into the worldwide automotive parts industry, as well as the federal antitrust laws and the antitrust, consumer protection, and unjust enrichment laws of at least 30 states and the District of Columbia;

- Researching and drafting scores of class action complaints, including more than 70 amended complaints, incorporating extensive new factual information obtained as a result of additional investigation, document review, and proffers

and interviews of witnesses made available by certain settling and cooperating Defendant groups;

- Successfully opposing dozens of motions to dismiss filed by Defendant groups through extensive briefing and oral argument before the Court;

- Reviewing and analyzing millions of pages of English and foreign language documents (many of which Class Counsel and the attorneys working with them were required to translate) produced by Defendants;

- Drafting and coordinating discovery with all Plaintiff groups against over 100 Defendants, as well as preparing and arguing numerous contested discovery motions;

- Meeting with Defendants' counsel in connection with factual proffers obtained pursuant to the cooperation provisions of settlement agreements or the Antitrust Criminal Penalty Enhancement Reform Act, and interviewing key witnesses from various Defendant groups, including abroad and in federal prison in the United States;

- Coordinating the actions of EPPs, and sometimes of all Plaintiff groups, with the United States Department of Justice ("DOJ");

- Obtaining, analyzing and producing thousands of pages of documents and data from more than 50 EPP class representatives, and responding to multiple rounds of detailed Interrogatories propounded by more than 10 separate sets of Defendant groups;

- Spearheading the drafting and negotiation of written discovery, discovery plans, protocols, and stipulations with Defendant and different Plaintiff groups;

- Exchanging information and coordinating with counsel for Direct Purchaser Plaintiffs, Automobile Dealer Plaintiffs, Truck and Equipment Dealer Plaintiffs, and State Attorneys General regarding various case and settlement issues;

- Preparing for and defending more than 50 EPP class representative depositions;

- Preparing for and taking the depositions of more than 190 Defendant witnesses in the U.S. and abroad;

- Participating in or reviewing the results of more than 140 depositions of automotive dealer class representatives and third-parties;

- Meeting and coordinating with economic and industry experts to analyze facts learned through investigation and discovery;

- Working with experts to discuss and craft appropriate damages methodologies in preparation for class certification, motion practice, and computation of class-wide damages for purposes of trial;

- Spearheading a joint effort between EPPs, Automobile Dealer Plaintiffs, Truck and Equipment Dealer Plaintiffs, and Defendants to obtain Original Equipment Manufacturer ("OEM") discovery, including drafting, serving, and negotiating over 100 subpoenas directed to at least 17 OEM groups, taking numerous depositions, participating in mediations, drafting and successfully arguing two motions to compel discovery and subsequently drafting both general and OEM-specific orders governing production, and negotiating for months to obtain both upstream and downstream OEM discovery;

- Preparing for class certification motions by, among other things, analyzing tens of thousands of documents and other discovery, conducting numerous depositions and interviews, working closely with experts and economists, and coordinating with both Plaintiff and Defendant groups to obtain essential discovery from OEM families;

- Performing the numerous settlement-related tasks necessary to achieve more than 70 settlements totaling over $1.2 billion, the largest indirect purchaser recovery in U.S. history. These tasks included analyzing economic evidence and data and formulating settlement demands; engaging in extensive arm's-length negotiations with Defendant groups, dozens of in-person meetings, countless other communications, and in many instances, working with the assistance of outside neutral mediators; negotiating and preparing drafts of settlement agreements; preparing preliminary approval motions and escrow agreements for each settlement; briefing and arguing responses to settlement objections before this Court and on appeal;

- Crafting, in consultation with EPPs' class-notice expert, four extensive notice programs that were approved by the Court, including the most recent July 2019 class notice program;

- Responding to objections to the settlements and ensuring the settlements will be available to the classes years earlier than would be the case if litigation against Defendants continued through trial and appeal; and

- Creating an efficient and effective plan of allocation for the settlements, including a methodology for calculating the value of claims under the plan of allocation.

See Joint Decl. at ¶ 5.

EPP Class Counsel's efforts are particularly important because the DOJ in its criminal

prosecutions did not seek or obtain restitution for the victims of Defendants' unlawful conduct. Indeed, the criminal fines negotiated by the DOJ were determined in light of the fact that the EPPs would be seeking restitution. The plea agreements each recite that "[i]n light of the availability of civil causes of action which potentially provide for a recovery of a multiple of actual damages, the recommended sentence does not include a restitution order for the offense charged in the Information." *See, e.g.*, Plea Agreement, *United States v. Corning International Kabushiki Kaisha*, No. 2:16-cr-20357 (E.D. Mich. 2016), ECF No. 12. Thus, EPP Class Counsel have undertaken the responsibility of recovering monetary recoveries for the American purchasers and lessees of new vehicles, who are the ultimate victims in these cases.

I. AWARD OF ATTORNEYS' FEES

A. Legal Standards and General Practice

1. Substantial Fee Awards are Common and Necessary

District courts may award reasonable attorneys' fees and expenses from the settlement of a class action under Rules 54(d)(2) and 23(h). The Supreme Court "has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (citation omitted); *see also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392-93 (1970). This doctrine recognizes that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Washington Public Power Supply System Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994).

The Supreme Court has also consistently recognized that private antitrust litigation provides an important public benefit as a necessary and desirable tool to assure the effective enforcement of the antitrust laws. *See, e.g.*, *Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972).

Substantial fee awards in successful cases, such as this one, encourage meritorious class actions, and thereby promote private enforcement of, and compliance with, antitrust laws. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 653-54 (1985); *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co.*, 481 F.2d 1045, 1050 (2d Cir.), *cert. denied*, 414 U.S. 1092 (1973).

2. The Reasonableness of a Proposed Fee Award is Judged by the Circumstances of the Case

The Sixth Circuit and district courts within this Circuit have repeatedly held that it is within the district court's discretion to determine the "appropriate method for calculating attorney's fees" based on the "the unique circumstances of the actual cases before [it]." *In re Sulzer Ortho. Inc.*, 398 F.3d 778, 780 (6th Cir. 2005) (internal quotation omitted); *see also In re Southeastern Milk Antitrust Litig.*, No. 08-md-1000, 2013 U.S. Dist. LEXIS 70167, at *10 (E.D. Tenn. May 17, 2013). Accordingly, "[t]he district court's award of attorneys' fees in common fund cases need only be 'reasonable under the circumstances.'" *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 779 (6th Cir. 1996) (quoting *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993)); *see also In re Polyurethane Foam Antitrust Litig.*, No. 10-md-2196, 2016 U.S. Dist. LEXIS 49592, at *12-13 (N.D. Ohio Apr. 13, 2016) (stating that, in common fund cases, a district court's award of attorneys' fees "need only be reasonable under the circumstances") (internal citations omitted). This Court has explicitly agreed with this approach in granting EPPs' previous fee requests. Order Regarding End-Payor Plaintiffs' Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses at 6-7 ¶ 16, *Wire Harness*, 2:12-cv-00103, ECF No. 626 ("Round 3 Fee Award") (noting that "[i]n common fund cases, whichever method is used, the award of attorneys' fees need only be reasonable under the circumstances") (internal quotations omitted); *see also* Order Regarding EPPs' Motion for an Award of Attorney' Fees and Reimbursement of Litigation Expenses at ¶ 4, *Wire Harness*, 2:12-cv-00103, ECF No. 578 ("Round 2 Fee Award") (same).

To assess the reasonableness of a fee application in a class action case, the court first determines the appropriate method of calculating the attorneys' fees by applying either the percentage-of-the-fund approach or the lodestar multiplier method. *Van Horn v. Nationwide Prop. & Cas. Inc. Co.*, 436 F. App'x 496, 498 (6th Cir. 2011); *In re Cardinal Health Inc. Sec. Litig.*, 528 Supp. 2d 752, 760 (S.D. Ohio 2007); *see also Rawlings*, 9 F.3d at 516 ("[I]t is necessary that district courts be permitted to select the more appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them."). Where the court selects the percentage-of-the-fund approach, to confirm the reasonableness of the fee award, courts analyze and weigh the six factors described in *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974). *See Rankin v. Rots*, No. 02-CV-71045, 2006 WL 1791377, at *1 (E.D. Mich. June 27, 2006).

3. Interim Fee Awards are Common in Cases such as *Auto Parts*

Interim fee awards are appropriate in large-scale litigation, such as this one, where the litigation will last many years, and in which settlements are reached periodically throughout the course of the ongoing litigation. *See, e.g.*, *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 JG VVP, 2015 WL 5918273, at *6-7 (E.D.N.Y. Oct. 9, 2015) (awarding fourth round of interim attorneys' fees); *In re Diet Drugs Prod. Liab. Litig.*, No. 99-md-1203, 2002 U.S. Dist. LEXIS 19396, at *34 (E.D. Pa., Oct. 3, 2002) (awarding attorneys' fees after four years of litigation and noting, "[t]o make them wait any longer for at least some fee award would be grossly unfair"). The Court has already acknowledged the propriety of interim fee awards in this case and has authorized such awards to Class Counsel, Auto Dealer Plaintiff Class Counsel, and Direct Purchaser Plaintiff Class Counsel on multiple occasions.[7] Like the examples cited above, this

[7] *See supra* note 6.

litigation has been ongoing for more than seven years, and there is still more work to be done in litigating the case against the single remaining Non-Settling Defendant, including discovery, briefing and arguing dispositive motions, engaging in settlement discussions and mediations, and preparing class certification motions. EPP Class Counsel may also be required to prepare for and potentially conduct a trial. It is well known that indirect purchaser cases such as this are notoriously complex, involving proof of pass-on, among other issues.

B. The Court Should Continue to Use the Percentage-of-the-Fund Approach

As noted above, the Court should first determine whether to apply the percentage-of-the-fund approach or the lodestar multiplier method. This Court has applied the percentage-of-the-fund approach in each of its fee awards to EPPs to date.[8] As stated in prior fee motions and incorporated herein, the Court's approach is consistent with that of other courts in this District, which almost always utilize the percentage-of-the-fund approach in common fund cases. End-Payor Plaintiffs' Memorandum of Law in Support of Motion for An Award of Attorneys' Fees and Reimbursement of Certain Expenses in Connection with the Round Three Settlements, *Exhaust Systems*, No. 2:16-cv-03703-MOB-MKM, ECF No. 115 (June 14, 2018), at pp. 9-10 (marshaling sources in support).

C. The Fee Requested by EPPs is Appropriate

EPPs respectfully request an award of attorneys' fees for the Round 4 Settlements in the amount of $40,470,760.00 plus a pro rata share of the interest earned thereon, which represents

[8] *See supra* note 6. This Court has also awarded interim fees to date for class counsel for the Direct Purchasers and Auto Dealers in this litigation using the percentage-of-the-fund approach. *See, e.g.*, Order Granting Fees, *Occupant Safety Systems*, No. 2:12-cv-00601, ECF No. 128 (awarding attorneys' fees to Direct Purchaser Plaintiffs' counsel based on a percentage of the settlement fund); Order Regarding Auto Dealers' Motion for an Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards, *Wire Harness*, 2:12-cv-00103, ECF Nos. 401, 523 (same).

22% of the Round 4 Settlement Amount. This Court has previously recognized that EPPs' requests for similar fees are reasonable. *See supra* note 4. The Court has also stated that 22% would be reasonable in Round 4. *See also* Transcript of August 1, 2018 Fairness Hearing at 36:11-15, 2:12-md-2311.

Such an award is entirely appropriate. Courts in this District routinely approve attorneys' fees of 22% or more of the common fund created for the settlement class. *Packaged Ice*, 2011 WL 6209188, at *17 & 21; *In re Prandin Direct Purchaser Antitrust Litig.*, No. 10-cv- 12141, 2015 U.S. Dist. LEXIS 5964 (E.D. Mich. Jan. 20, 2015) (awarding one-third of the common fund); *In Re Caraco Pharm. Labs.*, No. 09-cv-12830, ECF No. 96 (E.D. Mich. June 26, 2013)*; In re Skelaxin (Metaxalone) Antitrust Litig., No. 12-md-2343,* 2014 U.S. Dist. LEXIS 91661, *5 (E.D. Tenn. Jun. 30, 2014). Indeed, as stated in prior requests for attorneys' fees and incorporated herein, awards of 30% or more of the settlement amount are common in antitrust class actions. *See, e.g.*, End-Payor Plaintiffs' Memorandum of Law in Support of Motion for An Award of Attorneys' Fees and Reimbursement of Certain Expenses in Connection with the Round Three Settlements, *Exhaust Systems*, No. 2:16-cv-03703-MOB-MKM, ECF No. 115 (June 14, 2018), at pp. 12-13.

Moreover, the requested fee percentage is in line with attorneys' fees in private, non-class litigation in which commentators and courts recognize that the standard contingency-fee percentage is approximately one-third—a percentage significantly greater than the percentage award EPPs request here. *See id.* Thus, EPPs' fee request is well within market rates for legal fees in similar complex and contingent cases. *Id.*

D. The Court Should Not Apply a Reduced Percentage to the EPP Fee Applications

Just as the market would not, neither should the Court reduce the percentage award to Class Counsel based on the size of the recovery. The Court has already considered and rejected this so-

called "mega fund" theory. Round 2 Fee Award at 3, ¶ 8. As explained in its Motion for Fees in connection with Round 3, the Sixth Circuit has not endorsed the reduced percentage approach. EPPs incorporate those prior arguments here and believe the Court should reject that approach as it had done in the past.

E. Consideration of the Ramey Factors Supports the Request

After selecting a method for awarding attorneys' fees, courts consider the six *Ramey* factors: (1) the value of the benefits to the class; (2) society's stake in rewarding attorneys who produce such benefits to maintain an incentive to others; (3) whether the services were undertaken on a contingent fee basis; (4) the complexity of the litigation; (5) the professional skill and standing of counsel on both sides; and (6) the value of the services on an hourly basis. *Ramey*, 508 F.2d at 1194-97. These factors indicate that the fee requested here is fair and reasonable.

1. EPP Class Counsel have Secured Valuable Benefits for the Round 4 Settlement Classes

The principal consideration in awarding attorneys' fees is the result achieved for the class. *In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 503 (E.D. Mich. 2008). EPP Class Counsel have secured a settlement amount totaling nearly $184 million for the Round 4 Settlement Classes (and over $1.2 billion thus far in *Auto Parts*) which, after costs, expenses and fees, will be distributed to class members years earlier than it would be if litigation against the Settling Defendants continued and EPPs were successful through trial and appeal. Of course, this litigation was undertaken on a contingency fee basis with no assurances of any recovery, much less a recovery in the amount of the settlements. Further, as with the Round 1, Round 2, and Round 3 Settlements, Co-Lead Class Counsel negotiated for and obtained significant non-monetary benefits from the Settling Defendants, including injunctive relief, and carefully crafted discovery cooperation clauses for the benefit of the Round 4 Settlement Classes.

This recovery is especially important because, despite Defendants' myriad guilty pleas, the DOJ did not obtain any monetary restitution for the victims of Defendants' unlawful conduct. Yet, at the same time, the then United States Attorney General made clear that "as a result of these conspiracies, Americans paid more for their cars." *Remarks as Prepared for Delivery by Attorney General Eric Holder at Auto Parts Press Conference*, U.S. Department of Justice (Sept. 26, 2013), http://www.justice.gov/opa/speech/remarks-prepared-delivery-attorney-general-eric-holder-auto-parts-press-conference. These settlements will provide much needed restitution to American consumers and other class members.

In addition to all-cash settlements totaling to nearly $184 million, EPP Class Counsel have, as noted above, also secured non-monetary relief, including: (i) substantial cooperation by nearly all Settling Defendants, who have or will provide fact proffers, witness interviews, documents, depositions, and trial testimony; and (ii) an agreement by all but two of the Settling Defendants for a period of two years not to engage in certain specified conduct that would violate the antitrust laws involving the automotive parts that are at issue in these lawsuits.[9] This cooperation provides access to critical documents and witnesses without the delay and expense of contested discovery. *See, e.g., In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2010 WL 3070161, at *6 (E.D. Mich. Aug. 2, 2010) ("[T]here is the potential for a significant benefit to the class in the form of cooperation on the part of the settling Defendant."); *see generally In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003); *In re Corrugated Container Antitrust Litig.*, No. 81-md-310, 1981 U.S. Dist. LEXIS 11004 (S.D. Tex. June 4, 1981). This cooperation has already assisted, and will continue to assist, EPPs in the prosecution of their claims against Non-Settling Defendants, providing substantial value to the Round 4 Settlement Classes.

[9] *See, e.g.*, Long Form Notice attached as Exhibit A to EPPs' Motion for Authorization to Disseminate July 2019 Notice, *Heater Control Panels*, 2:12-cv-00403, ECF No. 291.

2. Society has a Significant Stake in Awarding Reasonable Attorneys' Fees in this Litigation

Attorneys' fees should be awarded so as "to encourage attorneys to bring class actions to vindicate public policy (e.g., the antitrust laws) as well as the specific rights of private individuals." *In re Folding Carton Antitrust Litig*., 84 F.R.D. 245, 260 (N.D. Ill. 1979), *aff'd in part and rev'd on other grounds*, 744 F.2d 1252, 1253 (7th Cir. 1984). Courts in the Sixth Circuit weigh "society's stake in rewarding attorneys who [obtain favorable outcomes for a class] in order to maintain an incentive to others," and counsel's success in complex antitrust litigation "counsels in favor of a generous fee." *Cardizem*, 218 F.R.D. at 534 (internal quotes omitted); *Delphi*, 248 F.R.D. at 503.

Members of the Round 4 Settlement Classes will recover for their injury only through counsel pursuing this litigation entirely on a contingent fee basis. The substantial recoveries obtained to date serve the invaluable public policy of holding accountable those who violate U.S. antitrust laws, thereby promoting fair competition and honest pricing. *Vendo Co. v. Lektro- Vend Corp.*, 433 U.S. 623, 635 (1977) ("Section 16 [of the Clayton Act] undoubtedly embodies congressional policy favoring private enforcement of the antitrust laws, and undoubtedly there exists a strong national interest in antitrust enforcement."); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 122 (2d Cir. 2005) ("[I]t is especially important to provide appropriate incentives to attorneys pursuing antitrust actions because public policy relies on private sector enforcement of the antitrust laws."); *Linerboard*, 2004 U.S. Dist. LEXIS 10532, at *53 ("[T]he incentive for 'the private attorney general' is particularly important in the area of antitrust enforcement because public policy relies so heavily on such private action for enforcement of the antitrust laws.").

3. EPP Class Counsel are Working on a Contingent Fee Basis

The determination of a reasonable fee must include consideration of the contingent nature of any EPP Class Counsel's undertaking to devote their time and labor to this litigation, the equally contingent outlay of millions of dollars of out-of-pocket costs and expenses, and the fact that the

risks of failure in a class action are notoriously high. A number of courts "consider the risk of non-recovery as the most important factor in fee determination." *Kritzer v. Safelite Solutions, LLC*, No. 10-cv-0729, 2012 U.S. Dist. LEXIS 74994, at *30 (S.D. Ohio May 30, 2012) (quoting *Cardinal*, 528 F. Supp. 2d at 766); *Stanley v. United States Steel Co.*, No. 04-74654, 2009 U.S. Dist. LEXIS 114065, at *8 (E.D. Mich. Dec. 8, 2009) ("Numerous cases recognize that the contingent fee risk is an important factor in determining the fee award . . . [a] contingency fee arrangement often justifies an increase in the award of attorneys' fees." (internal quotations omitted)).

The contingency fee factor "stands as a proxy for the risk that attorneys will not recover compensation for the work they put into a case." *Cardinal*, 528 F. Supp. 2d at 766. Indeed, "within the set of colorable legal claims, a higher risk of loss does argue for a higher fee." *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 746 (7th Cir. 2011); *see also Ballatore v. Comm'r of Soc. Sec.*, No. 11-15335, 2015 U.S. Dist. LEXIS 135402, at *14 (E.D. Mich. Aug. 5, 2015) ("[T]the contingent fee [] may be high because the risk of default (*i.e.*, losing the case) is high."). Since 2012, EPP Class Counsel have undertaken significant financial risks in prosecuting these antitrust class cases, an inherently complex and risky form of litigation of unprecedented size and scope against scores of Defendants represented by the largest defense law firms in this country. EPP Class Counsel have devoted millions of dollars of their financial resources to this litigation, with no guarantee of success, and will continue to devote significant time to continue to prosecute the remaining *Auto Parts* case against the remaining Non-Settling Defendant family as well as administer the claims process for the settlements reached to date.[10] The requested fee award is reasonable in light of the substantial risks involved.

[10] Class Counsel reserve the right to seek additional fees and reimbursement of expenses at a later date for work performed in connection with the settlement claims administration process.

4. The Complexity of the Litigation Supports the Requested Fee

Antitrust class actions are "arguably the most complex action(s) to prosecute. The legal and factual issues involved are always numerous and uncertain in outcome." *Packaged Ice*, 2011 WL 6209188, at *19 (quoting *In re Cardizem*, 292 F. Supp. 2d at 639); *see also Cardizem*, 218 F.R.D. at 533 ("Antitrust class actions are inherently complex . . . ."). This litigation is manifestly more complex than typical antitrust class actions. The DOJ has described its investigation of Defendants' bid-rigging and price-fixing conspiracies at issue here as the largest criminal cartel it has ever uncovered. The misconduct at issue is unprecedented in breadth—involving at least 41 automotive component parts, many hundreds of affected vehicle models, and scores of foreign and domestic Defendants. Based on sheer volume alone—with 41 separately filed EPP class cases within this MDL—this antitrust litigation is massive.

EPPs have asserted a number of claims under both federal and state antitrust, consumer protection, and unjust enrichment laws. As indirect purchasers, EPPs' claims for damages and restitution are based on the laws of approximately thirty states and the District of Columbia. This creates substantial additional risk, uncertainty, and complexity.[11] As one court noted in a similar indirect purchaser action involving allegations of price-fixing of component parts by defendants, "[a]ssessment of damages involved a difficult analysis, which required taking into account the impact of and relationship between federal and state rules concerning damage analysis . . . ." *Flat Panel*, 2013 U.S. Dist. LEXIS 49885, at *70; *In re Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917, 2013 U.S. Dist. LEXIS 137945, at *65 (N.D. Cal. June 20, 2013) (recommending class certification for indirect purchasers and noting that the indirect purchaser plaintiffs "still have

[11] Some states permit indirect purchaser actions under state antitrust laws, others under state consumer protection laws, and still others under both state antitrust and consumer protection laws.

the burden of demonstrating that there is a reasonable method for determining on a class-wide basis whether and to what extent that overcharge was passed on to each of the indirect purchasers at all levels of the distribution chain.") (internal quotes omitted); *Cardizem*, 218 F.R.D. at 533 (granting indirect purchaser plaintiffs' motion for final approval and for attorneys' fees noting that plaintiffs "also faced substantial additional difficulties as indirect purchasers.").

Issues attendant to serving and conducting discovery against numerous foreign Defendants located around the world compound the complexity of this litigation. Further, the vast majority of Defendants brought at least one motion to dismiss EPPs' claims challenging standing and the sufficiency of EPPs various state law claims, among other issues. *See* Joint Decl. at ¶¶ 5, 25. EPPs overwhelmingly prevailed on those motions. EPP Class Counsel also had to manage multiple and overlapping processes of pleading, discovery, and settlement with multiple Defendants. It is respectfully submitted that the unique and complex nature of this litigation has required extraordinary time and effort, and the expenditure of significant funds and other resources by EPP Class Counsel, which further justifies the requested fee and expense award.

5. The Skill and Experience of EPP Class Counsel Support the Requested Fee

Courts consider the skill and experience of counsel on both sides of the litigation in determining a reasonable fee award. *In re Polyurethane Foam Antitrust Litig.*, No. 10-md-2196, 2015 U.S. Dist. LEXIS 23482, at *13 (N.D. Ohio Feb. 26, 2015); *Packaged Ice*, 2011 WL 6209188, at *9, 12. The Court has found EPP Class Counsel to have the requisite skill and experience in class action and antitrust litigation to effectively serve the interests of EPPs. *See* Round 3 Fee Award at ¶¶ 10-16. EPP Class Counsel's prosecution of this litigation, including the highly favorable settlements achieved to date and the denial, in substantial part, of Defendants' motions to dismiss, demonstrates EPP Class Counsel's skill. Defendants are also represented by

highly skilled and experienced attorneys at some of the largest law firms in the world.

6. A Lodestar Crosscheck Confirms That The Requested Fee Is Reasonable

Finally, *Ramey* requires courts to consider the value of services rendered on an hourly basis. *Ramey*, 508 F.2d at 1196. As set forth above, EPP Class Counsel's requested fee is reasonable as a percentage of the Round 4 Settlement Amount. *See supra* § I.B-C. Some courts, however, apply a lodestar "cross-check" on the reasonableness of the requested fee calculated as a percentage of the fund. *Cardinal*, 528 F. Supp. 2d at 764; *Packaged Ice*, 2011 WL 6209188, at *18. Because the lodestar is only used as a cross-check, the Court need not engage in a detailed scrutiny of time records. *Cardinal*, 528 F. Supp. 2d at 767. Indeed, when this Court previously awarded attorneys' fees to Class Counsel, the Court relied on the same detailed declarations that Class Counsel submit in support of this motion setting forth, *inter alia*, hours worked, tasks performs, and hourly rates. *See, e.g.*, Transcript of April 19, 2017 Final Approval Hearing at 49:6-17; 57:2-13, 2:12-md-2311, ECF No. 1748. The substantial time EPP Class Counsel has expended confirms that the fee requested is well "aligned with the amount of work the attorneys contributed" to the recovery, and does not, in any way, constitute an unearned "windfall." *Cardinal*, 528 F. Supp. 2d at 764.

The Court has previously held that the relevant attorney hours for purposes of the lodestar cross-check is attorney time since the beginning of the case:

> The Court rejects the argument made by certain objectors that time included with the Round 1 Settlement fee request should not be included in the lodestar cross-check for the Round 2 Settlements. In calculating the lodestar for purposes of the cross-check, it would be impractical to compartmentalize and isolate the work that EPPs' counsel did in any particular case at any particular time because all of their work assisted in achieving all of the settlements and has provided and will continue to provide a significant benefit to all of the EPPs classes.

Round 2 Fee Award at 6 n.2 (citing *Southeastern Milk*, 2013 U.S. Dist. LEXIS 70167, at *26-27 (rejecting objection based on the proposition that the calculation of class counsel's lodestar should

be limited to work performed after the period covered by a prior fee award). The Court should continue to follow that approach here as it did in determining the Round 3 Fee Award.[12]

In other words, to perform this lodestar cross-check, the Court should once again add any previous awards of attorneys' fees to the fee requested in the pending interim fee application and then divide that total fee amount by the total lodestar from the time of the appointment of lead counsel to the date of the pending interim fee application. *See, e.g., Southeastern Milk*, 2013 U.S. Dist. LEXIS 70167, at *26-27 (adopting this approach over objection). In calculating the attorneys' fee lodestar for the cross-check purposes, it would be impractical to compartmentalize and isolate the work that EPP Class Counsel did in any particular case, as most of their work has provided and will continue to provide a significant benefit to the EPP classes in all cases and had, and will continue to have, a material impact in strengthening the claims of the EPPs.

As discussed in further detail below, EPP Class Counsel have provided ongoing litigation efficiencies because the work and effort spent in an early-filed case benefited subsequently-filed cases. *See infra*, § I.F. EPP Class Counsel's briefing of EPPs' oppositions to Defendants' multiple motions to dismiss provides an example. As the Court is aware, Defendants' motions to dismiss filed in later cases advanced many of the same arguments rejected by the Court in earlier cases. As a result, EPP Class Counsel relied and built on previous work when drafting successful responses to Defendants' motions to dismiss in the later-filed cases. Joint Decl. at ¶ 15. Thus, the time and effort EPP Class Counsel devoted to one or more of the earlier-filed cases directly

[12] Class Counsel require the plaintiff law firms working on behalf of EPPs to keep contemporaneous time and expense records. Class Counsel have monitored the work of the firms working for EPPs to ensure efficiency and avoid unauthorized and unnecessary work. Consequently, Class Counsel have been submitting detailed time and expense records that are, and will continue to be, reviewed and analyzed by Class Counsel prior to submission to the Court in conjunction with any attorneys' fee applications. Time not authorized by Class Counsel was struck from this submission.

benefited the EPP classes in later-filed cases, including those in which there will be subsequent settlements and recoveries.[13] *Id.*

EPP Class Counsel have vigorously prosecuted this litigation with a keen eye to efficiency and economy of time and resources. *See* Joint Decl. at ¶¶ 5, 11-12. Counsel representing EPPs and their professional staff have worked 380,975.60 hours from Co-Lead Class Counsel's appointment as Interim Co-Lead Class Counsel on March 23, 2012 through September 30, 2019.[14] *Id.* at ¶ 25. Applying the rates charged by counsel to the hours expended yields a "lodestar" of $154,782,333.18. The requested fee in this motion is $40,470,760.00, which represents 22% of the Round 4 Settlement Amount. *Id.* at ¶ 23. As previously noted by the Court, this award when added to the prior awards equals a total recovery from the Rounds 1, 2, 3, and 4 settlements of approximately 22.05%, which total $1,220,850,658, excluding the yet-to-be-determined TKH settlement amount. The resulting multiplier is approximately 1.74 of the total lodestar. *Id.* at ¶ 25.

The resulting multiplier is consistent with (and in fact below) awards made in numerous other class action cases as noted in the prior briefing provided to this Court that is incorporated herein. *See, e.g.*, End-Payor Plaintiffs' Memorandum of Law in Support of Motion for An Award of Attorneys' Fees and Reimbursement of Certain Expenses in Connection with the Round Three Settlements, *Exhaust Systems*, No. 2:16-cv-03703-MOB-MKM, ECF No. 115 (June 14, 2018), at pp. 26-27 (marshaling sources in support).

Where a single, long-running case has multiple interim fee awards, it is reasonable to expect,

[13] Class Counsel's efficiencies are described in further detail below in § I.F., *infra*.

[14] EPP Class Counsel performed work in the case at the direction of Co-Lead Class Counsel. As more fully explained in the Joint Declaration, Class Counsel imposed rules and guidelines on the work assigned to and billing practices of EPP Class Counsel. Joint Decl. at ¶ 22. All time submitted by EPP Class Counsel in support of this motion was reviewed by Class Counsel for compliance with these rules and guidelines. *Id.*

as in the present case, that the later interim fee awards will have a higher multiplier. *Id.* at p. 27 Indeed, it is entirely reasonable for Class Counsel to receive an award of attorneys' fees that reflects a notably increasing lodestar multiplier where EPP Class Counsel's substantial work and effort has continuously helped advance later cases and led to future recoveries.

As a basis for the lodestar cross-check, EPP Class Counsel's hourly rates are reasonable. As a starting point, EPP Class Counsel are mainly based in Los Angeles, the San Francisco Bay Area, and New York City, and have deep and specialized experience in bringing antitrust cases. "A reasonable hourly rate is determined according to the prevailing market rates in the relevant community. To ascertain that community, district courts 'are free to look to a national market, an area of specialization market, or any other market they believe appropriate to fairly compensate particular attorneys in individual cases.'" *Ford v. Fed.-Mogul Corp.*, No. 2:09-cv-14448, 2015 U.S. Dist. LEXIS 3399, at *2-3 (E.D. Mich. Jan. 7, 2015) (quoting *McHugh v. Olympia Entm't, Inc.*, 37 F. App'x 730, 740 (6th Cir. 2002)). Even if counsel's "requested rates are high for this district . . . Class Counsel should be compensated at rates that reflect their skill and their success." *Schumacher v. AK Steel Corp. Ret. Accum. Pen. Plan*, 995 F. Supp. 2d 835, 847 (S.D. Ohio 2014).

On this basis, even the attorneys charging the highest hourly rates in this matter are well within the parameters of reasonableness. In national markets, "partners routinely charge between $1,200 and $1,300 an hour, with top rates at several large law firms exceeding $1,400."[15] In specialties such as "antitrust and high-stakes litigation and appeals . . . [f]or lawyers at the very top of those fields, hourly rates can hit $1,800 or even $1,950." *Id.* A handful of "difference

[15] *See* Sara Randazzo & Jacqueline Palank, *Legal Fees Cross New Mark: $1,500 an Hour*, The Wall Street Journal (Feb. 16, 2016), https://www.wsj.com/articles/legal-fees-reach-new-pinnacle-1-500-an-hour-1454960708; see also Martha Neil, Top partner billing rates at BigLaw firms approach $1,500 per hour, ABA Journal (Feb. 8, 2016), http://www.abajournal.com/news/article/top_partner_billing_rates_at_biglaw_firms_nudge_1500_per_hour.

makers" in the most complex fields, including antitrust litigation, even charge $2,000 an hour.[16]

Another indication that counsel's rates are reasonable for purposes of a lodestar cross-check in a contingency case is if, as in the present case, the attorneys charge similar rates in their *per diem* work. "The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client." *Matter of Cont'l Illinois Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992), as amended on denial of reh'g (May 22, 1992). In any event, this Court has previously recognized that EPP Class Counsel's rates in this matter "are well in line with the market, with recent reports explaining that senior lawyers at top law firms routinely charge well over $1,000." *See, e.g.*, Round 2 Fee Award at 7, ¶ 18 (quoting Randazzo & Palank, *supra* note 19); *see also* Round 3 Fee Award at 7 ¶ 16.

7. In Sum, the Requested Fee is Fair and Reasonable

The substantial amount of time over the last seven years EPP Class Counsel have devoted to representing EPPs confirms that the fee requested is well "aligned with the amount of work the attorneys contributed" to the recovery, and does not, in any way, constitute a "windfall." *Cardinal*, 528 F. Supp. 2d at 764. While the hours EPP Class Counsel have worked are substantial, they are reasonable and reflect the difficult and challenging nature of this extraordinarily large and complex international cartel litigation. *See* Eisenberg & Miller, 1 J. Empirical Legal Stud. at 64-66, 77 (noting that "complexity is correlated with higher fees" and that "fees as a percentage of recovery tend to be higher in high-risk cases"). Given the excellent results achieved to date, the legal and factual complexity of the claims and defenses, the risk of non-recovery, the formidable opposing

[16] *See* Natalie Rodriguez, *Meet the $2,000 An Hour Attorney: What it Takes to Earn Top Dollar in the Rate-Crunch Era*, Law360, June 11, 2016, https://www.law360.com/in- depth/articles/804421 ("[E]arlier this year, BTI Consulting Group found that a handful of in-house counsel had paid as much as $2,000 per hour, after discounts, to attorneys in the past year. Several other in-house counsel, meanwhile, had paid highs of $1,900 per hour or $1,800 per hour.").

counsel for Defendants, the experience and skill of EPP Class Counsel, and the fact that the resulting multiplier on the lodestar is 1.74, the requested fee is demonstrably fair and reasonable.

F. The Proposed Fee Structure Rewards and Encourages Efficiencies

The time and expense devoted to prosecuting claims against Defendants related to one automotive part are intimately related to and overlap with the prosecution of EPPs' claims related to other automotive parts and against other Defendants. As the Judicial Panel on Multidistrict Litigation specifically contemplated, the centralization of numerous auto parts cases has reduced duplicative discovery and conserved the resources of the parties, their counsel, and the judiciary. *In re Auto. Wire Harness Systems Antitrust Litig.*, 867 F. Supp. 2d 1349 (J.P.M.L. 2012).

EPP Class Counsel have worked to take advantage of the overlapping and interrelated nature of the cases in this litigation to maximize efficiencies. Two types of efficiencies have very much benefited the classes overall. The first is a collective efficiency, where the time and expense devoted by EPP Class Counsel have benefited multiple cases. The second is an ongoing efficiency, where work or expenses incurred in an early-filed case benefits subsequent cases. These efficiencies have allowed EPP Class Counsel to maximize their efforts where time dedicated to one case can and does benefit the classes in other cases.

Significant collective efficiencies occurred throughout the litigation. For example, EPP Class Counsel secured a collective efficiency in this litigation by arguing for and obtaining an Order ensuring that each EPP Class Representative would only be deposed once by Defendants across all cases. Joint Decl. at ¶ 14. This resulted in a substantial savings of time and attorneys' fees across all of the cases. *Id.* Any attempt to parcel out how much time devoted to each deposition benefited each of EPPs' claims against each Defendant in each *Auto Parts* case would be arbitrary.

A second example of a collective efficiency can be found in briefing motions to dismiss. In several rounds of briefing, EPPs proposed and entered into stipulations with Defendants to brief

certain collective issues across multiple cases rather than on a case-by-case basis. Joint Decl. at ¶ 19. Like EPP depositions, this resulted in a substantial cost and time savings and reflects the overlapping nature of the issues to be litigated in all of the cases. Another example of a collective efficiency is EPP Class Counsel drafting, serving, and negotiating subpoenas directed to original equipment manufacturers, including discovery-related motion practice. *Id.* at ¶ 16. These subpoenas covered all of the parts in *Auto Parts* and ensured that the parties were not required to engage in the burdensome process of seeking this discovery 41 or more separate times, depending upon the ultimate number of cases in *Auto Parts* action. *Id.*

EPP Class Counsel also spearheaded EPPs' efforts to draft and negotiate discovery orders in all of the remaining cases. *Id.* at ¶ 20. Though negotiating scheduling orders, such as discovery plans, can be a lengthy process, EPPs drafted the orders to reflect discovery issues that arose across multiple cases. *Id.* Accordingly, only the most case-specific issues, such as class certification deadlines, had to be negotiated, allowing the parties to negotiate discovery orders in multiple cases simultaneously. *Id.* These templates were used recently in the remaining *Exhaust Systems* case. *Id.*

In addition, EPP Class Counsel helped to bring about substantial ongoing efficiencies, an example of which can be found in EPP Class Counsel's document review work. For instance, during the initial stages of the review of documents in *Wire Harness*—the first-filed case and first to proceed to discovery—each reviewing attorney was learning about the automotive parts industry as a whole, its methods of conducting business and its vocabulary. *Id.* at ¶ 17. This understanding naturally increased throughout the review process and enabled reviewing attorneys to review, process, and analyze documents in subsequent cases more effectively and efficiently. *Id.*

Reviewers also became increasingly familiar with Defendants' internal and industry

acronyms, organizational structure, business practices, and conspiratorial behavior. The review process permitted EPPs to create a cast of characters of Defendants' employees, many of whom had responsibility for multiple parts during the alleged class period. But this efficiency is not just limited to *Wire Harness*; subsequent cases all benefited from the work done in *Wire Harness*. Indeed, since these cases are inextricably intertwined, the review and analysis of documents and proffers in one case has provided EPP Class Counsel with knowledge and information applicable to the other cases. *Id.* at ¶ 17.

Yet another example of ongoing efficiencies is reflected again in EPPs' briefing of their oppositions to Defendants' motions to dismiss, which were filed in more than 25 cases. *Id.* at ¶ 15. As the Court is aware, Defendants in subsequent cases filed motions to dismiss advancing many of the same arguments rejected by the Court in prior cases. The time EPP Class Counsel spent researching and drafting successful responses to Defendants' motions to dismiss in the earlier cases therefore benefited the EPP classes in subsequent cases, where in many instances, the Court adopted its prior rulings. *Id.* Similarly, stipulations and other protocols negotiated in the earlier-filed cases served as templates for similar stipulations and protocols in the other cases. *Id.* at ¶ 20.

Understanding the global benefits to class members from the inherent efficiencies in multi-district litigation, courts grant attorneys' fees from partial settlements based on all work done to-date. *See, e.g.*, *Air Cargo Shipping Services Antitrust Litig.*, 06-md-1775 (E.D.N.Y. Oct. 9, 2015), ECF No. 2362; *In re Processed Egg Prods. Antitrust Litig.*, No. 08-md-2002, 2012 U.S. Dist. LEXIS 160764, at *18 (E.D. Pa. Nov. 9, 2012); *In re Automotive Refinishing Paint Antitrust Litig.*, No. 08-md-1426, 2008 U.S. Dist. LEXIS 569 (E.D. Pa. Jan. 3, 2008). Thus, it has been recognized that the time devoted to one or more cases directly benefited the classes in other cases.

EPPs request that the Court award fees totaling 22% of the Round 4 Settlement Amount or,

in other words, 22% of each individual settlement fund. EPPs seek a *pro rata* award of fees from the Round 4 settlement funds similar to that approved by the Court in connection with the Round 3 Settlements, as well as in the Automobile Dealers cases. *See* Round 3 Fee Award at ¶ 17; Order at 5, *Wire Harness*, 2:12-cv-00102, ECF No. 401. The chart at **Appendix B** reflects the proposed allocation of the requested fees among the applicable cases.

II. CO-LEAD CLASS COUNSEL SHOULD BE AUTHORIZED TO DISTRIBUTE FEES AMONG EPP CLASS COUNSEL

EPPs also request the Court's authorization for Class Counsel to distribute the awarded attorneys' fees in a manner that, in the judgment of Class Counsel, fairly compensates each firm for its contribution to the prosecution of EPPs' claims. "Courts routinely permit counsel to divide common benefit fees among themselves." *In re Polyurethane Foam Antitrust Litig*., No. 10-md-2196, 2016 U.S. Dist. LEXIS 9609, at *51 (N.D. Ohio Jan. 27, 2016*); see also* End-Payor Plaintiffs' Memorandum of Law in Support of Motion for An Award of Attorneys' Fees and Reimbursement of Certain Expenses in Connection with the Round Three Settlements, *Exhaust Systems*, No. 2:16-cv-03703-MOB-MKM, ECF No. 115 (June 14, 2018), at pp. 34-35 (marshaling other cases in support of this proposition). Accordingly, EPPs respectfully request that the Court authorize Class Counsel to allocate the fees that are awarded among EPP Class Counsel.

III. AWARD OF EXPENSES AND COSTS PAID FROM THE LITIGATION FUND

For the last seven plus years of *Auto Parts*, EPP Class Counsel have funded and advanced the substantial expenses and costs required to prosecute the litigation. The Court has previously reimbursed expenses incurred by EPP Class Counsel in conjunction with the Round 1, Round 2, and Round 3 Settlements. *See* Round 1 Fee Award; Round 2 Fee Award at 3 n.6; Round 3 Fee Award at ¶ 6.

A. Expenditures Paid from the Litigation Fund

Class Counsel pay many of the expenses in this litigation from the previously established

litigation fund ("Litigation Fund"). *See* Supplemental Declaration of Adam J. Zapala Regarding Litigation Fund in Support of End-Payor Plaintiffs' Motion for an Award of Attorneys' Fees and Payment of Incentive Awards to Class Representatives in Connection with the Round Four Settlements ("Zapala Decl.") at ¶ 3. Class Counsel established the Litigation Fund for expenses incurred in the ongoing litigation, and EPP Class Counsel contributed to the Litigation Fund. *Id.* Additionally, the Court awarded EPPs a fund for the payment of future litigation expenses in the amount of $11,250,000.00 on June 20, 2016. *Id.* Class Counsel have used a portion of this fund for costs including (1) economic and industry expert fees in connection class certification motions and discovery; (2) document review hosting; (3) translation of documents; and (4) mediation. *Id.* at Ex. A. EPP Class Counsel are not seeking any reimbursement of costs and expenses paid out of the Litigation Fund or to be paid out of the Litigation Fund to EPP Class Counsel for their individual firm expenses or an award of future litigation costs at this time. The expenses from the Litigation Fund incurred from May 1, 2018 through October 15, 2019, which total $1,116,351.67, are detailed in the Zapala Decl., filed in support of this motion. *Id.* at ¶ 4. After the deduction of those expenses, the Litigation Fund has a current balance of $7,575,712.44. *Id.* at ¶ 8.

B. Reimbursement of Costs Already Incurred

EPP Class Counsel also note that they have incurred individual firm costs and from April 1, 2018 through October 15, 2019 that have not yet been reimbursed. The amount of unreimbursed litigation costs and expenses incurred for the benefit of the Round 4 Settlement Class Members during this period totals $156,124.80. *See* Joint Decl. at ¶ 28. These costs include, among other items, fees for legal research, travel for court appearances, travel for witness interviews, and other reasonable litigation costs and expenses. *See id.* at ¶ 28; *see generally id.* at Compendium to Exhibit A, Declarations 1 through 26. EPP Class Counsel intend to use Litigation Fund monies to reimburse incurred individual firm costs and therefore, as noted above, do not seek any

reimbursement of those costs and expenses. *Id.* at ¶ 28. Class Counsel plan to direct the balance of any unused Litigation Fund monies back to the class net settlement funds for disbursement to the Settlement Classes at the conclusion of the claims administration process.

IV. AWARD TO CLASS REPRESENTATIVES

EPPs finally request that each remaining named Plaintiff who participated in any of the End-Payor Plaintiff *Auto Parts* cases be awarded a single monetary award of $10,000 if that named Plaintiff appeared for a deposition in conjunction with these cases and $5,000 if such named Plaintiff did not appear for a deposition, but otherwise participated in discovery. "Incentive awards are typically awards to class representatives for their often extensive involvement with a lawsuit." *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003). These awards may be "efficacious ways of encouraging members of a class to become class representatives and awarding individual efforts taken on behalf of the class." *Id.* Payment of incentive awards to class representatives is a reasonable use of settlement funds. *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 351-52 (6th Cir. 2009) (approving a $10,000 award to each of the seven class representatives).

Several district courts in this jurisdiction have also recently approved incentive awards of up to $15,000 for individual. *See, e.g.*, *The Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, Case No. 2:10-cv-14360-DPH-MKM, ECF No. 364 at pp. 25-27 (awarding a total of $165,000 in incentive awards, which amounted to 0.55% of the Settlement Fund, including awards to two individuals in the amount of $10,000 a person and two other individuals in the amount of $5,000 a person); *In re CMS Energy ERISA Litig.*, No. 02-72834, 2006 WL 2109499, at *3 (E.D. Mich. June 27, 2006) (noting that "Class Counsel's request for Class Representative Compensation in the amount of $15,000 each is fair and reasonable in light of the Class Representatives' substantial contribution to the litigation on behalf of the Class"). And most recently, the *Shane* Court awarded very similar amounts to those requested here for the same expended effort.

For example, the *Shane* Court approved the $5,000 per person award for two individuals who "participated in discovery by locating and producing documents." Case No. 2:10-cv-14360-DPH-MKM, ECF No. 36 at p. 27. Similarly, the *Shane* Court approved $10,000 awards to two individuals who "searched their personal records multiple times to locate documents responsive to Blue Cross' discovery requests and obtained documents in the custody of third parties." *Id.* The Court also noted that "[b]oth testified via depositions, which required them to travel to Detroit from northern Michigan." *Id.* Similarly, in *In re CMS Energy ERISA Litig.*, the Court specifically noted that a $15,000 award—higher than any individual award requested here—was appropriate. 2006 WL 2109499, at *3.

As stated in the Joint Declaration of Class Counsel, each Class Representative for whom an award is requested sustained a significant discovery burden. EPPs seek incentive awards for two distinct groups of Class Representatives. The first group comprises five Class Representatives who would receive an award of $5,000 each, for a total award of $25,000. EPPs believe these individuals are entitled to this award because they served as a named Class Representative in this historic litigation, provided Class Counsel with information, provided Class Counsel with documents, and, in at least one case, provided Class Counsel with several sets of verified interrogatory responses. *See* Joint Decl. at ¶ 31 & Figure 2A.

The second group comprises fifty-four Class Representatives who would receive an award of $10,000 each, for a total award of $540,000. EPPs believe these individuals are entitled to this award because, in addition to engaging in the activities of the first group, these individuals also appeared for a deposition in conjunction with these cases. *See* Joint Decl. at ¶ 31 & Figure 2B. A specific chart outlining the exact contribution of each Class Representative for whom an incentive awarded is requested is available at **Appendix C**. Class Representative will receive only ***one*** award

for participation as a Class Representative on behalf of EPPs despite the fact that most participated and provided discovery in the dozens of separate cases that comprise this MDL. *See* Joint Decl. at ¶ 33. Plaintiffs who were dismissed from the case, all of whom were dismissed without prejudice, are not requested to receive any award. *Id.*

The requested awards are reasonable in light of the contribution of each Class Representative and are commensurate with the time and resources expended by each Class Representative to facilitate and further this historic litigation. The award amounts are also commensurate with awards previously approved in this jurisdiction, including in *Shane* and in *In re CMS Energy ERISA Litig*.

All Class Representatives selected as potential recipients of incentive awards provided important and indispensable services to the settlement class, including by searching their personal records to locate documents responsive to discovery requests and in many cases preparing and verifying sworn interrogatory responses. Moreover, with respect to the Class Representatives in the higher-award group, these individuals testified via depositions, which required them to give up substantial time from their lives (many depositions lasted in excess of four hours) and in some cases to travel. The $5,000 award for Class Representatives who participated in discovery but did not testify and the $10,000 award for Class Representatives who did testify are identical to the awards recently approved in *Shane*, which stratified the individual awards based on the same distinction. Case No. 2:10-cv-14360-DPH-MKM, ECF No. 364 at p. 27. Moreover, other plaintiff groups in the *Auto Parts* litigation have previously requested incentive awards for Class Representatives in higher amounts. Interim Co-Lead Counsel for the Auto Dealers' Motion for an Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards, *Wire Harness Dealership Actions*, 2:12-cv-00102-MOB-MKM, ECF No. 379 (requesting incentive

awards of $50,000 each to dealership class representatives based on their discovery burden). And this Court has three times approved Auto Dealer Plaintiffs' requests to set aside a portion of the settlement funds for incentive awards. Order on Auto Dealers' Motion to Set Aside Funds for Future Requests for Class Representative Service Awards, No. 2:12-cv-00102-MOB-MKM, ECF No. 524 (Nov. 29, 2016) (granting approval for ADPs to deduct 1.5% in set aside for future potential payment of service awards); Order Regarding Auto Dealers' Motion to Set Aside Funds From Round Three Settlements For Future Requests For Class Representative Service Awards, No. 2:12-cv-00102-MOB-MKM, ECF No. 567 (Nov. 5, 2018) (granting approval for ADPs to deduct 1% ($1,121,814.00) in set aside for future potential payment of service awards).

The awards requested here are in line with if not less than the awards addressed in these prior cases. They also total only $565,000, and represent only 0.3% of the Round 4 Settlement Funds. Joint Decl. at ¶ 34. EPPs request this amount to be paid from each of the Round 4 Settlement Funds on a *pro rata* basis as noted in **Appendix D**. *Id.* at ¶ 36.

II. CONCLUSION

For the reasons set forth above EPPs respectfully request that the Court grant their motion and award the requested attorneys' fees and reimbursement of certain litigation costs and expenses.

Date: October 31, 2019

Respectfully submitted,

/s/ Hollis Salzman

Hollis Salzman
William V. Reiss
Noelle Feigenbaum
ROBINS KAPLAN LLP
399 Park Avenue, Suite 3600 New York, NY 10022 Telephone: (212) 980-7400 Facsimile: (212) 980-7499
HSalzman@RobinsKaplan.com
WReiss@RobinsKaplan.com
NFeigenbaum@RobinsKaplan.com

TAB 29A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

THE HOSPITAL AUTHORTIY OF METOPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, d/b/a NASHVILLE GENERAL HOSPITAL and AMERICAN FEDERATION OF STATE, COUNTY AND MUNICPAL EMPLOYEES DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN,	)	**No. 3:15-cv-01100**
Plaintiffs,	)	
v.	)	
MOMENTA PHARMACEUTICALS, INC. and SANDOZ INC.,	)	
Defendants.	)	

ORDER

Having reviewed Plaintiffs' Motion for Attorneys' Fees, Costs and Class Representative Service Awards (Doc. No. 504), which is not opposed, Plaintiffs' supporting memorandum of law and declarations as well as the entire record in this case, the Court finds as follows:

1. The resolution of this case has created a common benefit fund for the class, so it is appropriate to assess attorney's fess against the fund. Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980).

2. Class Counsel's requested fee award is fair and reasonable under the percentage-of-the-fund approach. This is the preferred method where, as here, "a substantial common fund has been established for the benefit of class members through the efforts of class counsel." In re Se. Milk Antitrust Litig., No. 07-208, 2013 WL 2155387, at *2 (E.D. Tenn. May 17, 2013). While the requested fee of one-third of the fund is very significant, it "is certainly within the range often

awarded in common fund cases, both nationwide and in the Sixth Circuit," and is appropriate given the exceptional result Class Counsel achieved notwithstanding substantial risk. Id. at *3.

3. The requested fee meets all of the factors the Sixth Circuit articulated in Ramey v. Cincinnati Enquirer, Inc., 508 F.2d 1188, 1196 (6th Cir. 1974), specifically:

a. the non-reversionary recovery of $120 million, which represents half of Plaintiffs' estimated Class-wide damages, is an excellent outcome for the Class, especially relative to the norm in indirect purchaser pharmaceutical cases, see, e.g., In re Relafen Antitrust Litig., 231 F.R.D. 52, 74 (D. Mass. 2005) ($75 million settlement was 26% of damages estimate); In re Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 258 (D. Del. 2002) ($44.5 million settlement was 33% of maximum damages);

b. society has a strong interest in compensating Class Counsel for the risks and complex issues posed by this case, thereby encouraging others to bring similar litigation in the future;

c. fees and reimbursement of costs in this case were entirely contingent upon success, creating a risk of under-compensation in the absence of settlement or victory at trial, see Lonardo v. Travelers Indem. Co., 706 F. Supp. 2d 766, 795 (N.D. Ohio 2010);

d. Class Counsel devoted tens of thousands of hours to this case and the time-value of their services was substantial;

e. this case involved highly complex drug distribution channels and novel theories of harm and liability, requiring Class Counsel to overcome "a multitude of difficult issues in the areas of antitrust law, patent law, and the laws governing pharmaceutical drugs[,]" In re Cardizem CD Antitrust Litig., 218 F.R.D. 508, 533 (E.D. Mich. 2003); and

f. Class Counsel, who are among the most experienced class action and antitrust practitioners, displayed superior skill and commitment throughout the litigation.

4. The Court has confirmed the reasonableness of Class Counsel's fee request by conducting a lodestar cross-check. This involves multiplying reasonable rates by reasonable hours. Gascho v. Global Fitness Holdings, LLC, 822 F.3d 269, 279 (6th Cir. 2016). The "sum may then be increased by a 'multiplier' to account for the costs and risks involved in the litigation, as well as the complexities of the case and the size of the recovery." In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig., 268 F. Supp. 2d 907, 922 (N.D. Ohio 2003). The Court finds that Class Counsel's reasonable lodestar was $12,838,694.00 based on Counsel's hourly billing rates for the period from the inception of the case until February 25, 2020, and that an award of $40 million yields a multiplier on a one-third fee of 3.12. This multiplier falls within an acceptable range. See, e.g., Cardizem, 218 F.R.D. at 533 (noting that direct purchaser class plaintiffs received a fee award that equated to a lodestar multiplier of 3.7); In re Cardinal Health Inc. Sec. Litigs., 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007) (awarding a multiplier of 6.0 and noting that typical multipliers range from 1.3 to 4.5). The use of current (2020) rates is appropriate to "compensate for the delay in payment during the pendency of the litigation." In re UnumProvident Corp. Deriv. Litig., No. 02-386, 2010 WL 289179, at *9 (E.D. Tenn. Jan. 20, 2010).

5. Class Counsel reasonably incurred a total of $2,269,268.79 in litigation expenses for which Class Counsel seek reimbursement in this case. Class Counsel "is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and settlement, including expenses incurred in connection with document production, consulting with experts and consultants, travel and other litigation-related expenses."

6. The requested service awards of $200,000.00 each for Class Representatives, the

named Plaintiffs, are justified by the time and resources both invested into supervising and prosecuting this case. The service awards are also justified as an economic incentive to others to bring antitrust litigation even though their claims may not be sizable.

Accordingly, Plaintiffs' Motion for Attorney Fees, Costs and Class Representative Service Awards (Doc. No. 504) is **GRANTED**, and the Court concludes that:

1. Class Counsel are awarded attorneys' fees of $40,000,000 (one-third of the $120,000,000 Settlement Fund), together with a proportional share of interest earned on the Settlement Fund. Should Defendant Momenta Pharmaceuticals, Inc. fail to make the Second Payment contemplated by Paragraph D.11 of the Settlement Agreement, the fee award shall be reduced proportionally with the reduction in the Settlement Fund.

2. Class Counsel are awarded reimbursement of their litigation expenses in the amount of $2,269,268.79.

3. Class Representatives, the named Plaintiffs, are granted service awards of $200,000.00 each.

4. The attorneys' fees awarded, including any interest, reimbursement of litigation costs and expenses, and service awards shall be paid from the Settlement Fund.

IT IS SO ORDERED.

WAVERLY D. CRENSHAW, JR.
CHIEF UNITED STATES DISTRICT JUDGE

TAB 29B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

THE HOSPITAL AUTHORITY OF METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, d/b/a NASHVILLE GENERAL HOSPITAL and AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN, Plaintiffs, v. MOMENTA PHARMACEUTICALS, INC. and SANDOZ INC., Defendants.	Civil Action No. 3:15-cv-01100 Chief Judge Waverly D. Crenshaw, Jr. Magistrate Judge Barbara D. Holmes

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE SERVICE AWARDS

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I. INTRODUCTION

Class Counsel and plaintiffs respectfully move the Court to award Class Counsel attorneys' fees of one-third of the common fund ($40 million), with any accrued interest thereon, and reimbursement expenses of $2,269,268.79; and to award Nashville General Hospital and DC 37 $200,000 each for representing the Class and investing hundreds of hours of their employees' time in prosecuting this action. These are significant numbers. They are justified by the result in this case—and the law.

First, the requested fee passes with flying colors all of the factors articulated by the Sixth Circuit in *Ramey v. Cincinnati Enquirer, Inc.*[1] It compensates an extraordinary result: the second largest class recovery ever in an indirect purchaser pharmaceutical case. Furthermore, society has a major interest in promoting cases of this sort, which seek to both redress and deter antitrust violations in the crucial market for prescription pharmaceuticals. Counsel invested tens of thousands of hours of time and millions of dollars of cash completely on contingency, with the risk of total loss. They drove the case past setback after setback to an ultimate victory for the Class. In antitrust class actions courts regularly award a one-third fee for less impressive results on less risky claims. While such a fee is at the high end of the spectrum, this case supports it.

Second, should the Court elect the optional lodestar cross-check, the effort in this case validates the requested fee. Counsel put in a total of 26,143.5 hours totaling $12,838,694 in attorney time. This implies a "multiplier" on a one-third fee of 3.12, which falls within the regularly accepted range (in the Sixth Circuit and elsewhere) of 1.01 to 4.0. The above-average multiplier simply reflects that Class Counsel litigated this case to the eve of trial with tremendous efficiency compared to other, similar cases.

[1] 508 F.2d 1188, 1196 (6th Cir. 1974).

Third, the requested expense reimbursement of $2,269,268.79 is entirely reasonable. The bulk of it—more than $1,650,000—consists of costs for retaining the six experts who supported class certification and who were poised to testify at trial when the case settled.

Fourth, the requested service awards to Nashville General and DC 37 ($200,000 each) are justified by the same factors as the proposed fee. Nashville General and DC 37 took up this fight not for service awards, but because the high cost of prescription drugs is an existential threat to both of them. That said, just as antitrust enforcement depends on counsel being willing to make enormous investments on a contingent basis, it also depends on encouraging victims to accept the burden of representing a much larger class, and compensating them when they do. And, both DC 37 and Nashville General invested significant time and resources in supervising and prosecuting this action—a service award to each of them is no mere "bounty."

As discussed in the motion to direct notice to the class, America, unlike other countries, has chosen to rely mainly on private enforcement to enforce the rules of the market, both to compensate victims and deter future misconduct. Private enforcers—private plaintiffs and their attorneys—do not depend on a budget competing with other priorities for taxpayer dollars; they do not care who gave how much to someone's political campaign; and, given the right incentives, they are willing and able to take on the biggest offenders and the most egregious violations of the law. Thus, while the Justice Department's Antitrust Division has recovered billions in civil penalties for the Treasury, the deterrent value of private enforcement dwarfs that work by more than a factor of *four*—and represents, almost always, the *only* compensation for victims.[2] Indeed, in the early 1980s several economists set out to show the effect of increased

[2] Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 Seattle L. Rev. 1269, 1276-78 (2013) (finding that while DOJ recovered $8.18 billion from 1990 to 1997, private enforcers recovered between $34 billion and

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DOJ enforcement on price-fixing in the bread industry: what they found instead was that that it was the development of the private antitrust class action lawsuit that deterred violations.[3]

If the antitrust laws depend on the engine of private class actions, the expectation that counsel will receive a percentage of what they recover for the class is the fuel powering that engine. The hope of sharing the reward motivates lawyers to bring the hardest cases and prosecute them to the last dollar available. Thus, under the correct circumstances courts nationwide do not hesitate to award fees of a third of the recovery generated. The result in this case and the effort and risk required to generate it justify such an amount here.

II. BACKGROUND

A. The Pleadings

In 2015, Nashville General solicited competitive bids to represent the hospital against alleged antitrust violators. As Nashville General's General Counsel explains, the safety-net hospital did so to fight back against the exploding costs for critical, life-saving drugs.[4] That process resulted in the retention of Lieff Cabraser. Lieff Cabraser agreed to work only on contingency and advance all costs associated with any litigation.

As the Court learned at the hearings, enoxaparin is a staple drug for hospitals, including Nashville General. Following revelations of anticompetitive conduct by the defendants, this case was filed in October 2015, with Nashville General as the sole plaintiff, asserting claims under the federal Sherman Act. The initial complaint overcame serious challenges on the pleadings, including arguments that Defendants' conduct was immune from suit under the *Noerr*-

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$36 billion).

[3] Michael Block, Frederick Nold & Joseph Sidak, *The Deterrent Effect of Antitrust Enforcement*, 89 *J. of Pol. Econ.* 429, 429-445 (1981).

[4] Overlock Decl. ¶¶ 3, 7.

Pennington doctrine and that the case did not belong in Nashville. However, Nashville General's damages claims were dismissed for lack of standing. Plaintiffs re-pled the case as an indirect purchaser action under the laws of 31 jurisdictions, adding DC 37 as a plaintiff. Defendants then challenged the Plaintiffs' ability to represent a class asserting claims under the various state laws, on both standing and personal jurisdiction grounds. They also moved to dismiss the injunctive relief claim. Class Counsel again largely overcame those challenges, losing only the injunctive relief and Alabama claims in December 2018. Dkt. 254. While the pleadings were resolved, Class Counsel also dedicated significant time and resources to class certification briefing, discovery and expert work. Dkts. 270 & 271.

B. Discovery

Beginning in January 2019, the parties launched into concentrated merits discovery on a compressed time schedule: Plaintiffs negotiated with Defendants for production of relevant documents from a total of 32 current and former employees, and served six third-party document subpoenas to the United States Pharmacopeia, distributors, and other enoxaparin manufacturers.[5] In total, Defendants and third parties produced over half a million documents (more than 2.6 million pages) to Plaintiffs. Class Counsel took a total of ten fact witness depositions of Defendants and third parties between May and October 2019. In addition to the documents, Class Counsel also analyzed more than 50 deposition transcripts from earlier related actions, and two weeks of testimony from the patent trial. At the same time, Class Counsel and Plaintiffs responded to voluminous discovery from Defendants addressing every aspect of their operations related to enoxaparin (and more), including a total of eleven depositions. Class Counsel also brought five discovery motions (and opposed several by Defendants), winning nearly every one.

[5] Glackin Decl. ¶ 45.

C. Class Certification

The Court heard Plaintiffs' first motion to certify the class on May 13 and 14, 2019. Defendants vigorously opposed class certification, asserting, *inter alia*, that the class was not ascertainable, Plaintiffs did not have standing to represent a single class of purchasers under the laws of 30 jurisdictions, Plaintiffs could not prove injury or pass-through, and the Class was riven with conflicts. At the outset of the second day of testimony, Plaintiffs proposed a change to the class definition in order to ameliorate Defendants' concerns about ascertainability; in response, the Court concluded the hearing and denied the motion to certify the class.

Plaintiffs moved to amend the class definition one week later, and, eleven days after that motion was granted, on June 18, 2019, Plaintiffs re-moved to certify the class (Dkt. 349). The motion again faced stiff opposition from Defendants, who repeated their arguments on standing, pass-through and injury, and conflicts. Defendants also submitted a brand-new 52-page supplemental expert report that raised new challenges with respect to injury; in particular, claiming that Nashville General was not injured by Defendants' conduct. Class Counsel and their expert, Dr. Lamb, responded to these new opinions, and Defendants' legal arguments based on them, in just 72 hours over July 4th.

One week later, on July 12, 2019, Class Counsel presented testimony from Dr. Lamb and Nashville General's billing manager in support of the class certification motion. On cross examination of Defendants' expert Dr. Cremieux, Class Counsel elicited a "fatal admission" undermining Dr. Cremieux's opinion that Nashville General had not been injured, which the Court observed precipitated "a significant negative change in Dr. Cremieux's demeanor."[6] This admission of "significant error" ultimately helped the Court to conclude that Dr. Cremieux was

[6] Dkt. 426 at 29.

"not credible" and to "ascribe little, if any, weight" to his opinions.[7] Closing argument briefs followed. On September 20, 2019, the Court certified the Class.[8]

D. Summary Judgment

While the Court considered class certification, Class Counsel also exchanged 26 merits expert reports with Defendants between May and July, and took and defended a total of thirteen expert depositions.[9] On September 20, 2019, Plaintiffs also opposed Defendants' summary judgment motion. In total, between January 12, 2019 and when the Class was certified on September 20, 2019, Lieff Cabraser attorneys dedicated 10,812.8 hours to the case, over 8% of all of Lieff Cabraser's attorney time during that same time period.[10]

E. Rule 23(f) Petition and Trial Preparation

Even with the Class certified, Class Counsel faced additional challenges as they prepared for trial. In the midst of pre-trial preparation, Defendants filed a Rule 23(f) petition with the Sixth Circuit and moved the Court to stay the proceedings. When this Court denied Defendants' motion to stay, Defendants made an emergency motion to the Sixth Circuit. In total, Class Counsel filed three briefs to the Sixth Circuit totaling 63 pages in a 17-day span to ensure the Class's claims would go to trial on January 7, 2020.

F. Settlement

In the midst of pre-trial exchanges, the parties mediated the case with the Honorable Edward Infante (Ret.) of JAMS on November 13, 2019. That night, the parties reached a settlement to resolve the litigation for cash payments by Defendants totaling $120 million. The settlement agreements were signed December 10, 2019, after nearly a month of intense

[7] *Id*. at 28, 32.
[8] Dkts. 427 & 464.
[9] Glackin Decl. ¶ 45.
[10] *Id.* ¶ 48.

negotiation of specific terms.[11] The Court preliminarily approved the settlement and directed notice to the class on January 3, 2020 (Dkt. 388, *as amended* Dkt. 492).

G. Nashville General and DC 37's Role in the Case

Both Plaintiffs were actively involved in the litigation, and undertook significant burden to comply with their duties as Class Representatives.[12] During discovery, both Plaintiffs searched for and produced large volumes of documents and data, and representatives and lay witnesses were deposed eleven separate times. Nashville General responded to 54 requests for production of documents and 18 interrogatories. The hospital searched for and produced a total of 14,071 documents (89,248 pages) as well as purchase and payment data from 2010 through 2018. DC 37 responded to 42 requests for production and 11 interrogatories, as well as searched for and produced 2,601 documents (24,727 pages). DC 37 also produced complete reimbursement data reflecting purchases of enoxaparin and Lovenox for the period 2011 through 2016. Representatives from Plaintiffs attended multiple hearings, gave live testimony, and played a critical role in the mediation. Nashville General employees spent (conservatively) hundreds of hours, and DC 37 invested 224.50 hours supporting the case.

III. ARGUMENT

A. The Requested Fees Are Reasonable.

When "awarding attorney's fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved."[13] The well-established common benefit doctrine embodies the principle "that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigants'

[11] Glackin Decl. ¶ 56.

[12] Overlock Decl. ¶¶ 5-6; Browne Decl. ¶¶ 6-7.

[13] *Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 279 (6th Cir. 2016) (quoting *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993)).

expense."[14] Jurisdiction "over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionally among those benefitted by the suit."[15]

Courts in this Circuit consider the "*Ramey* factors" to determine fair compensation: (a) the value of the benefits to the class; (b) society's stake in rewarding attorneys who produce such benefits to maintain an incentive to others; (c) whether the attorneys worked on a contingent fee basis; (d) the value of the services on an hourly basis; (e) the complexity of the litigation; and (f) the professional skill and standing of counsel.[16] None of the *Ramey* factors is dispositive, and this Court "enjoys wide discretion in assessing the[ir] weight and applicability."[17]

An expert in class actions and fees, Professor Brian T. Fitzpatrick of Vanderbilt Law School submits a declaration in support of Class Counsel's fee request. In 2010, Professor Fitzpatrick authored a comprehensive empirical examination of federal class action settlements and attorneys' fees requests entitled *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010) ("Fitzpatrick Study"). Professor Fitzpatrick concludes the requested fee is reasonable in light of other awards nationwide and the need to foster proper incentives in class litigation.[18] Sixth Circuit case law confirms this conclusion.

1. <u>Precedent Supports Fees of One-Third of the Fund.</u>

Courts in the Sixth Circuit have discretion to choose between the lodestar or percentage-

[14] *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).
[15] *Id*; *see also* Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement.").
[16] *See Ramey*, 508 F.2d at 1196.
[17] *Granada Invs. Inc. v. DWG Corp.*, 962 F.2d 1203, 1205-06 (6th Cir. 1992).
[18] Fitzpatrick Decl. ¶¶ 4, 19-20, 28.

of-the-fund approach.[19] Where, as here, "a substantial common fund has been established for the benefit of class members," the "percentage-of-the-fund method is the more appropriate method."[20] The percentage is not only "easy to calculate,"[21] but also "directly aligns the interests of the class and its counsel[,] incentivizes lawyers to maximize the Class recovery, but in an efficient manner,"[22] and "is consistent with the private marketplace where contingent fee attorneys are routinely compensated on a percentage of recovery method."[23] Professor Fitzpatrick agrees.[24] The lodestar method, by contrast, "is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation, and creates inherent incentive[s] to prolong the litigation."[25] As a result, and under the influence of the conservative law-and-economics movement, it has largely been rejected in the modern era.[26] The Fitzpatrick Study revealed that the lodestar method is used only on a small percentage of cases, usually where the settlement calls for substantial non-monetary relief or fee-shifting (neither present here).[27]

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[19] *E.g.*, *Rawlings*, 9 F.3d at 516.

[20] *In re Se. Milk Antitrust Litig.*, No. 07-208, 2013 WL 2155387, at *2 (E.D. Tenn. May 17, 2013); *see also, e.g.*, *Salinas v. U.S. Xpress Enters., Inc.*, No. 13-245, 2018 WL 1477127, at *8 (E.D. Tenn. Mar. 8, 2018), *report and recommendation adopted* (E.D. Tenn. Mar. 26, 2018) (percentage of fund is the "favored method of calculating attorneys' fees in class action cases"); *Manners v. Am. Gen. Life Ins. Co.*, No. 98-266, 1999 WL 33581944, at *29 (M.D. Tenn. Aug. 11, 1999) ("The preferred approach to calculating attorneys' fees to be awarded in a common benefit case is as a percentage of the class benefit.").

[21] *Rawlings*, 9 F.3d at 516.

[22] *Gokare v. Fed. Exp. Corp.*, No. 11-2131, 2013 WL 12094887, at *3 (W.D. Tenn. Nov. 22, 2013) (internal quotation marks omitted).

[23] *Manners*, 1999 WL 33581944, at *29.

[24] Fitzpatrick Decl. ¶ 11.

[25] *Milk*, 2013 WL 2155387, at *2 (citation and internal quotation marks omitted).

[26] Monique Lapointe, *Attorney's Fees in Common Fund Actions*, 59 Fordham L. Rev. 843, 843, 847 (1991) ("Lodestar…is fast becoming a relic of common fund litigation.") (footnote omitted).

[27] Fitzpatrick Decl. ¶ 9. *See also* Theodore Eisenberg et al., *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 945 (2017) (finding lodestar method used only in 6.29% of cases between 2009-2014).

The requested fee of one-third of the fund is appropriate in light of the excellent result achieved through perseverance in the face of great risk, and "one third of the settlement fund . . . is certainly within the range often awarded in common fund cases, both nationwide and in the Sixth Circuit."[28] A one-third fee has been awarded in countless antitrust cases, including:[29]

In re Se. Milk Antitrust Litig., No. 07-208, 2013 WL 2155387, at *2 (E.D. Tenn. May 17, 2013)	**33% of $158.6 million**
In re Titanium Dioxide Antitrust Litig., No. 10-cv-00318 (RDB), 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013)	**33% of $163.5 million**
In re Urethane Antitrust Litig., No. MDL 1616, 2016 WL 4060156, at *8 (D. Kan. July 29, 2016)	**33% of $835 million**
In re Vitamins Antitrust Litig., No. MDL 1285, 2001 WL 34312839, at *9-10 (D.D.C. July 16, 2001)	**33%+ of $365 million**
In re Relafen Antitrust Litig., No. 01-12239, Dkt. 297 at 7-8 (D. Mass. Apr. 9, 2004)	**33% of $175 million**
In re Tricor Direct Purchaser Antitrust Litig., No. 05-340-SLR, Dkt. 543 at 9-10 (D. Del. Apr. 23, 2009)	**33% of $250 million**
In re Skelaxin (Metaxalone) Antitrust Litig., No. 2:12-CV-83, 2014 WL 2946459, at *3 (E.D. Tenn. June 30, 2014)	**33% of $73 million**
In re Flonase Antitrust Litig., 291 F.R.D. 93, 106 (E.D. Pa. 2013)	**33% of $35 million**
Seaman v. Duke Univ., No. 15-462, 2019 WL 4674758, at *1 (M.D.N.C. Sept. 25, 2019)	**33% of $54.5 million**

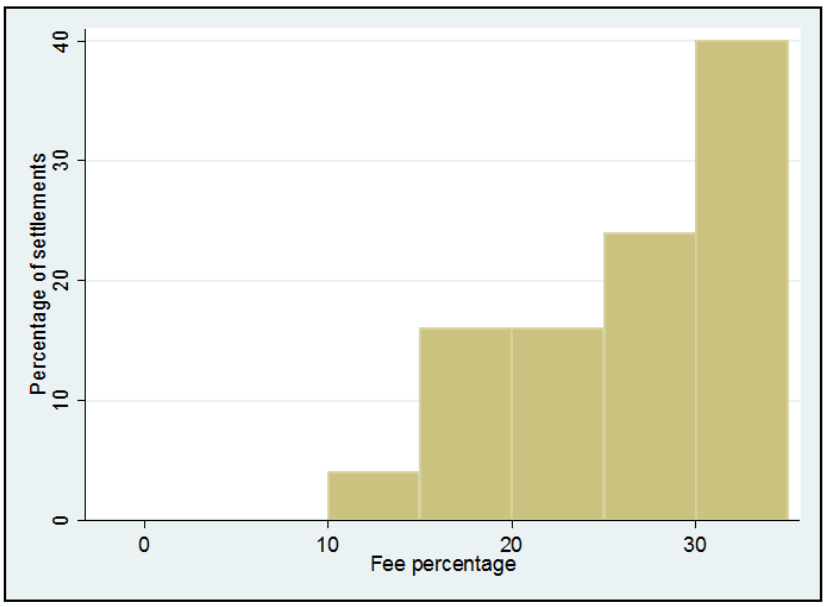
[28] *Milk*, 2013 WL 2155387, at *3 (awarding antitrust class counsel one-third of $159 million settlement fund).

[29] *See also, e.g.*, *Schuh v. HCA Holdings, Inc.*, No. 11-1033, Dkt. 563 (M.D. Tenn. Apr. 14, 2016) (awarding 30% of $215 million settlement fund); *Skelaxin*, 1014 WL 2946459, at *1 (awarding one-third of $73 million settlement fund); *Gokare*, 2013 WL 12094887, at *4 ("The requested attorneys' fee award of 30.9% from the common fund is appropriate; the percentage requested is similar to or lower than percentage-of-the-fund awards approved in numerous other common fund cases in this Circuit" and collecting cases between 30% and one-third); *Dallas v. Alcatel-Lucent USA, Inc.*, No. 09-14596, 2013 WL 2197624, at *12 (E.D. Mich. May 20, 2013) (preliminarily approving one-third fee and noting that "[v]arious courts have expressed approval of attorney fees in common fund cases at similar or higher percentage"); *Bessey v. Packerland Plainwell, Inc.*, No. 06-95, 2007 WL 3173972, at *4 (W.D. Mich. Oct. 26, 2007) ("Empirical studies show that . . . fee awards in class actions average around one-third of the recovery.") (citation and internal quotation marks omitted); *In re Cardizem CD Antitrust Litig.*, No. 99-1278, Order No. 47 (E.D. Mich. Nov. 25, 2002) (awarding 30% of $110 million settlement).

In re Buspirone Antitrust Litig., No. 01-md-1413 (S.D.N.Y. Apr. 17, 2003)	**33% of $220 million**

Indeed, the Fitzpatrick Study revealed that nearly two-thirds of awards nationwide fall between 25 and 35%.[30] And, forty percent of the awards in the Sixth Circuit landed between 30 and 35%[31]; the most populous segment.

Figure 1: Percentage-method fee awards in the Sixth Circuit, 2006-2007



Here, the risk, result, and effort present in this case more than justify a fee in the upper segment.

It is true that larger settlements tend on average to result in lower fee percentages; the Fitzpatrick Study found that the average fee percentage for settlements ranging from $100 million to $250 million was less than 20%.[32] Some courts—but not the Sixth Circuit—have even

[30] Fitzpatrick Decl. ¶ 19, 23.

[31] Fitzpatrick Decl. ¶ 20.

[32] *See* Fizpatrick Decl. ¶¶ 21-23 (discussing findings in Fitzpatrick Study at 838, 842-44, and other studies).

suggested that as recoveries go up fees should go down.[33] That thinking misses the mark. First, on average fee percentages go down as settlements go up because the larger the settlement the less likely it is that a high-percentage fee will pass the lodestar cross-check. Imagine the prototypical securities stock-drop case that resolves on the pleadings for a nine-figure amount; counsel's work at that stage simply will not support a high percentage fee. As discussed below, that is not the case here. Second, as Judge Greer recognized in *Milk*, reducing the fee percentage as the fund increases creates the wrong incentives, encouraging lawyers to settle early "when the returns to effort are highest" rather than "investing additional time and maximizing plaintiffs' recovery."[34] In other words, it perversely reduces the award for prosecuting the case to the brink of trial to maximize recovery, as Class Counsel did here. Finally, as Judge Greer also explained, "it is not the size of the request, although a very large number, that is necessarily relevant but the size of the award when compared to the size of the risk taken."[35] Here, the risk could not have been greater, and Class Counsel poured enormous time and resources into this case at a high risk of total loss, and to the exclusion of other matters and opportunities,[36] to achieve this outstanding result.

2. Every *Ramey* Factor Supports the Requested Fee.

The result. First, Class Counsel's efforts resulted in an all-cash, non-reversionary recovery of $120 million. This recovery is excellent by any measure, but it stands apart when

[33] For example, in one 2015 antitrust case, a district court awarded a fee of 20% in part on this reasoning. *See In re Polyurethane Foam Antitrust Litig.*, 135 F. Supp. 3d 679, 689-94 (N.D. Ohio 2015). But there, the counsel had already received "substantial fee awards from prior settlements" in the same litigation and the court had serious concerns that counsel's lodestar was inflated, "doubt[ing] that all of that time was reasonably necessary to advance this case." *Id.* at 689, 693.

[34] 2013 WL 2155387, at *8 (internal quotation marks omitted). *See also* Fitzpartick Decl. ¶ 23.

[35] *Id.* at *8 n.7.

[36] Glackin Decl. ¶¶ 25-60.

compared to other pharmaceutical indirect purchaser cases, both in size and as a portion of total estimated damages. Research reveals that the $120 million recovered in this case represents the second largest settlement in a pharmaceutical indirect purchaser action ever. The biggest was *Cipro*—another case filed and led by Lieff Cabraser.[37] In fact, most settle for less than $100 million.[38] Further, the recovery represents ***half*** of Plaintiffs' estimated Class wide damages of $234 million (and 13 times Defendants' expert's damages figure of $9 million). In indirect purchaser pharmaceutical cases lesser recoveries are the norm.[39]

Society's interest. Second, "the Court must ensure that Class Counsel is fairly compensated in order to facilitate the goal of class actions—i.e., to provide a vehicle for collective action to pursue redress for tortious conduct that is not feasible for an individual litigant to pursue."[40] This case embodies society's interest in creating the incentives for proper enforcement of the law: it required a single law firm to commit more than $12.8 million in time and more than $2.2 million in out-of-pocket costs pursuing complex claims against deep-pocketed corporations with no guarantee of any recovery at all. Class Counsel's efforts,

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[37] *Cipro Cases I and II*, JCCP Nos. 4154 and 4220 (Cal. Super. Ct.), recovered a total of $399 million for indirect purchasers in a case that lasted 17 years.

[38] *See, e.g., In re Lidoderm Antitrust Litig.*, 14-md-02521, 2018 WL 4620695, at *2 (N.D. Cal. Sep. 20, 2018) ($105 million); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508 (E.D. Mich. 2003) ($80 million); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 74 (D. Mass. 2005) ($75 million); *In re Aggrenox Antitrust Litig.*, 14-md-2516, Dkt. 821 (D. Conn. July 19, 2018) ($54 million); *In re Solodyn Antitrust Litig.*, 14-md-02503, Dkt. 1175 (D. Mass. July 18, 2018) ($43 million); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 394 (D.D.C. 2002) ($35 million for end-payor third-party payors); *In re Wellbutrin XL Antitrust Litig.*, 2:08-cv-02433, Dkt. 473 (E.D. Pa. July 22, 2013) ($11.75 million); *In re Loestrin 23 Fe Antitrust Litig.*, No. 13-md-02472, Dkt. 1400 (D.R.I. Feb. 6, 2020) (settlement of $62.5 million, added to earlier settlement of $1 million, announced in January 2020).

[39] *See, e.g., Relafen*, 231 F.R.D. at 74 ($75 million settlement was 26% of damages estimate); *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 258 (D. Del. 2002) ($44.5 million was 33% of maximum damages).

[40] *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 795 (N.D. Ohio 2010).

investment, and risk-taking resulted in compensation for the Class, punishment for the Defendants, and the deterrence of other potential violators. "[F]ailing to fully compensate class counsel for the excellent work done and the various substantial risks taken would undermine society's interest in the private litigation of antitrust cases."[41]

Contingency. Third, Lieff Cabraser and Spragens Law took this case on contingency, litigating it for more than four years at the risk of total loss of the value of their time and investment in out-of-pocket costs.[42]

Investment. Fourth, in litigating this case over four-plus years, Class Counsel spent 26,143.5 hours and $12,838,694.00 in lodestar.[43] At times, Lieff Cabraser was devoting over 8% of its overall attorney resources to this case, just one of several hundred of the firm's active matters.[44] It is indisputable that the time-value of the services rendered was substantial.

Risk. Fifth, "[a]ntitrust class actions are inherently complex. The legal and factual issues are complicated and highly uncertain in outcome."[45] As with any indirect purchaser case, Plaintiffs and Class Counsel took on the "immensely difficult"[46] challenge of proving pass-through, and "this extraordinarily complex case raised a multitude of difficult issues in the areas of antitrust law, patent law, and the laws governing pharmaceutical drugs."[47]

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[41] *Milk*, 2013 WL 2155387, at *5; *see also Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 324 (1955) (noting the "public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action").

[42] Glackin Decl. ¶¶ 25-30. *See Lonardo*, 706 F. Supp. 2d at 796 (this factor "accounts for the substantial risk an attorney takes when he or she devotes substantial time and energy to a class action despite the fact that it will be uncompensated if the case does not settle and is dismissed.").

[43] Glackin Decl. ¶ 31-32; Exhibits B & C.

[44] *Id*. ¶ 48.

[45] *Skelaxin*, 2014 WL 2946459, at *3.

[46] Dkt. 363 at 2.

[47] *Cardizem*, 218 F.R.D. at 533.

This case in particular presented more complexity—and more risk—than even most pharmaceutical indirect purchaser cases. In Defendants' own words, "[t]his case is different from all other pharmaceutical cases" because while "[m]ost pharmaceutical cases deal with simple, oral-prescription drugs distributed by chain pharmacies in the 'retail' channel," "enoxaparin distribution is far more complex and includes distribution in multiple channels."[48] As Defendants put it: "this case is the first of its kind."[49] Additionally, Defendants again correctly pointed out that while "most delayed-entry cases concern delay of a first generic product, which makes some sense from an antitrust perspective because the brand manufacturer controls 100% of the molecule before generic entry," this case concerned "delay of a second—or more accurately, third—generic."[50] This theory of harm was, like the Class itself, unprecedented. And the proposed theory of liability—manipulation of a standard-setting organization to unlawfully exclude a competitor—is, at best, a highly unusual claim in the pharmaceutical context.[51] Further, the facts presented obvious questions concerning causation and damages, in particular given that Amphastar was excluded from the market for just 117 days, requiring plaintiffs to advance and support the proposition that this delay had long-term effects in the market (as it did).

In addition to these risks, the case presented complex issues at every turn—as the thirty-

[48] Dkt. 273 at 2-3 (emphasis excluded) ("hospitals (which are not traditional 'end payors') are never in the same class as end-payor consumers and patients that pay hospital bills.").
[49] Dkt. 363, at 1 (emphasis added) (citing *See Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC*, 2010 U.S. Dist. LEXIS 105646, at *69 (E.D. Pa. Sep. 30, 2010) ("It is undisputed that 'it is immensely difficult to determine class-wide economic impact in indirect purchaser cases.'").) *See also* Dkt. 273 at 1.
[50] Dkt. 273 at 2 n.4.
[51] Glackin Decl. ¶¶ 25-30.

one Rule 26 expert disclosures illustrate.[52] In total, the parties marshalled 14 expert witnesses—six for Plaintiffs and eight for Defendants—to address issues such as hospital and insurer economics and damages, substitutability of other drugs, patent infringement, FDA and USP rules and procedures, and hospital billing practices. And these challenges to class certification and liability came only after years of litigation on the pleadings over issues such as the applicability of *Noerr-Pennington* immunity, statutes of limitation, and personal jurisdiction.[53]

The Quality of Counsel. Sixth, as this Court has already twice affirmed in appointing interim class counsel (Dkt. 90) and in certifying the Class (Dkt. 426), Class Counsel are among the most experienced, committed and successful practitioners in class actions and antitrust cases in the nation.[54] The firm, founded in 1972 with offices in San Francisco, New York, and Nashville, is known for taking on the most challenging cases on behalf of victims, regardless of the risks and ultimate rewards. The Glackin Declaration details several of Lieff Cabraser's most significant success stories in antitrust, including several that, like this case, the firm took to the verge of—and in some instances through—trial. In *In re High-Tech Employee Antitrust Litigation*[55], Lieff Cabraser served as co-lead counsel and recovered a total of $435 million on behalf of employees of several technology firms under a novel theory of antitrust liability in the employment context. In *In re TFT-LCD (Flat Panel) Antitrust Litigation*[56], the firm obtained a total of $470 million in recovery for the class, including a plaintiff's jury verdict against one

[52] Glackin Decl. ¶¶ 41, 45.

[53] Defendants maintained the personal jurisdiction challenges through summary judgment (Dkt. 408 at 21-23) and were expected to present evidence on the issue at trial.

[54] Glackin Decl. ¶¶ 3-8.

[55] No. 11-cv-02509-LHK (N.D. Cal.).

[56] No. 07-1827 (N.D. Cal.).

defendant. In the pharmaceutical space, Lieff Cabraser was co-lead counsel in *In re Cipro*,[57] which recovered $399 million for indirect generic drug purchasers, including consumers and payors. The firm's roots in Nashville also run deep: In the 1990s, Lieff Cabraser represented a certified class of over 800 pregnant women and their children who were who were intentionally fed radioactive iron isotopes without consent while receiving prenatal care at the Vanderbilt University hospital. Lieff Cabraser recovered $10.2 million for the victims along with a formal apology from Vanderbilt read to them in open court.[58] The Vanderbilt case, and others like it—such as Lieff Cabraser's *pro bono* work recovering $1.25 billion for Holocaust survivors and their families—reflect the firm's commitment to broadly serve victims everywhere.

3. A Lodestar Cross-Check Confirms the Requested Fees.

The Sixth Circuit has stated that when the Court calculates a fee using one of the two permissible options, a cross-check using the other method is "optional."[59] The lodestar calculation is simple: reasonable rates multiplied by reasonable hours.[60] The "sum may then be increased by a 'multiplier' to account for the costs and risks involved in the litigation, as well as the complexities of the case and the size of the recovery."[61] The purpose of a multiplier is "to account for the risk an attorney assumes in undertaking a case, the quality of the attorney's work

[57] JCCP Proceedings Nos. 4154 & 4220 (San Diego Super. Ct.).

[58] *Craft v. Vanderbilt University*, Civ. No. 3-94-0090 (M.D. Tenn.).

[59] *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 F. App'x 496, 501 (6th Cir. 2011) (emphasis removed); *see also, e.g.*, *Schuh v. HCA Holdings, Inc.*, No. 11-1033, Dkt. 563 (M.D. Tenn. Apr. 14, 2016) (awarding fee of 30% of $215 million with no lodestar cross-check). *Cf. Bowling v. Pfizer, Inc.*, 102 F.3d 777, 779-81 (6th Cir. 1996) (affirming percentage fee award without reviewing district court's lodestar analysis).

[60] *Gascho*, 822 F.3d at 279.

[61] *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 268 F. Supp. 2d 907, 922 (N.D. Ohio 2003).

product, and the public benefit achieved."[62] It is appropriate to use current (2020) rates to "compensate for the delay in payment during the pendency of the litigation."[63] Given counsel's lodestar of $12,838,694.00, the cross-check implies a multiplier of 3.12, which is within the routinely accepted range of 1.0 to 4.0 (higher multipliers are also sometimes approved).

a. Class Counsel's Hourly Rates Are Reasonable.

Counsel's attorney billing rates range from $415 to $1,100 and are set forth in the Glackin Declaration, along with descriptions of the primary timekeepers' qualifications and contributions.[64]

Typically, the lodestar calculation looks to "the prevailing market rate, defined as the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record."[65] Counsel's rates meet that criterion. Recent class actions in this District have awarded percentage-based fees where the lodestar cross-check reflected rates up to $1,050 an hour for non-local firms[66] and up to $770 per hour for Nashville-based firms.[67] Indeed, this Court recently approved a rate of $1,060 per hour for a non-local firm.[68] Here, Mr. Glackin and Ms. Benson, the partners in charge of the day-to-day efforts in this case from the very beginning, have billing rates of $800 and $585, respectively.[69] 99.6% of the attorney

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[62] *Rawlings*, 9 F.3d at 515-17.

[63] *In re UnumProvident Corp. Deriv. Litig.*, No. 02-386, 2010 WL 289179, at *9 (E.D. Tenn. Jan. 20, 2010); *see also, e.g.*, *Barnes v. City of Cincinnati*, 401 F.3d 729, 745 (6th Cir. 2005) ("current market rate" appropriate where "the litigation had been ongoing for nearly six years").

[64] Glackin Decl. ¶¶ 9-22, 32 & Exs. B & C.

[65] *Gonter v. Hunt Valve Co., Inc.*, 510 F.3d 610, 618 (6th Cir. 2007) (citation omitted).

[66] *See Ajose v. Interline Brands*, No. 14-1707, Dkt. 269 (M.D. Tenn. Oct. 23, 2018); *see also id.* at Dkt. 259-3, Ex. 2 (declaration detailing rates).

[67] *See id.* at Dkt. 259-9, Ex. 2 (declaration); *Skeete v. Republic Sch. Nashville*, No. 16-43, Dkt. 112 (M.D. Tenn. Feb. 25, 2018) (Crenshaw, C.J.); *see also id.* at Dkt. 106, Ex. 2 (declaration).

[68] *See Cassell v. Vanderbilt Univ.*, No. 16-2086, Dkt. 174, at 3 (M.D. Tenn. Oct. 22, 2019).

[69] Ms. Benson became a partner in 2017. Her prior time is billed at her highest associate rate.

time in the matter was at $800 (Mr. Glackin's rate) or below.[70] As another metric, Class Counsel's blended rate is only $491, below the blended rates of $572 and $659 submitted on cross-check to support percentage-based fees in this District,[71] and substantially below the $686 blended rate this Court approved in *Cassell*.[72]

Counsel's lodestar can therefore be fully justified as reasonable in comparison to Nashville rates. That said, it would also be appropriate for the Court to look to rates charged for work of this nature nationally.[73] Pharmaceutical antitrust class actions are by definition national in scope and, wherever they are litigated, require the expertise of a relatively small group of specialized practitioners. No firm other than Lieff Cabraser was willing to take the risk of pursuing this matter, which featured both a "national scope" and "highly-specialized and talented opposing counsel," circumstances in which courts have found "national hourly rates" appropriate.[74] Defendants also engaged out-of-town antitrust specialists, further validating the use of national rates.[75] Nationally, Lieff Cabraser's rates have been approved in scores and scores of cases, including many antitrust cases, and by courts in this Circuit.[76]

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[70] Glackin Decl. at Exs. B & C. Only 93.2 hours were billed above Mr. Glackin's rate. Exhibit B.

[71] *See Ajose*, Dkt. 258, at 2 (fee memorandum) ($3,563,200.50 / 6,224 hours); *Skeete*, Dkt. 105 at 13 (fee memorandum) ($550,000 / 835 hours).

[72] *See Cassell*, Dkt. 174, at 3 ($3,447,826 / 5,029 hours).

[73] *See Adcock-Ladd v. Sec. of Treasury*, 227 F.3d 343, 350-51 (6th Cir. 2000) explaining that where a party was required to employ out-of-market counsel, the relevant legal market was the attorney's local market, not the court venue).

[74] *In re Ford Motor Co. Spark Plug and 3-Valve Engine Prods. Liab. Litig.*, No. 12-2316, 2016 WL 6909078, at*10 n.3 (N.D. Ohio Jan. 26, 2016).

[75] *See UnumProvident*, 2010 WL 289179, at *6 ("That the defendants were represented by skilled attorneys at large New York firms also supports Plaintiffs' judgment in selecting highly-qualified attorneys from outside this district.").

[76] Glackin Decl. ¶¶ 61-63; *see also In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, No. 08-65000, 2016 WL 5338012, at *22-24 (N.D. Ohio Sept. 23, 2016) (approving Lieff Cabraser rates); *Lonardo*, 706 F. Supp. 2d at 793-94 (same).

b. Class Counsel Worked Efficiently.

When the lodestar is employed as the *primary* method of calculating fees, the proponent must provide documentation "of sufficient detail and probative value to enable to court to determine with a high degree of certainty that such hours were actually and reasonably expended in the prosecution of the litigation," though "counsel need not record in great detail each minute he or she spent on an item."[77] A lodestar *cross-check* is simpler: "Unlike the situation when the Court employs the lodestar method in full, the hours documented by counsel need not be exhaustively scrutinized[.]"[78]

The Glackin Declaration contains summary data by timekeeper printed from Lieff Cabraser's accounting system, as well as a summary of the time invested by Spragens Law.[79] After careful, line-by-line audit that removed any time that was even arguably unnecessary, Class Counsel submit 26,143.5 hours of time as the basis for a cross-check. That time was reasonable. As detailed above and in the Glackin Declaration, Class Counsel, working without any co-counsel assistance, brought this case through class certification and summary judgment and to the eve of trial. In total, 73 individuals *from a single firm* contributed over 26,000 hours through February 25, 2020 to an effort that resulted in $120 million for the Class. To validate the reasonableness and efficiency of this massive effort, the Court need look no further than similar cases with less remarkable results. For example, in *In re Lidoderm*,[80] 23 different law firms representing end-payors logged over 51,000 hours of work and over $25 million in lodestar for a $105 million cash fund. In *In re Aggrenox*, 25 law firms logged over 40,000 hours

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[77] *Gascho*, 822 F.3d at 281 (citation omitted).

[78] *Milk*, 2013 WL 2155387, at *2 n.3.

[79] Glackin Decl. ¶¶ 31-32 & Exs. B & C. As noted above, Mr. Spragens' time from after he left Lieff Cabraser is included in Class Counsel's lodestar.

[80] *In re Lidoderm Antitrust Litig.*, 14-md-02521, Dkt. 1030, at *2 (N.D. Cal. Jul. 31, 2018).

representing end-payors to reach a $54 million settlement.[81]

c. The Cross-Check Results in a Reasonable Multiplier of 3.12.

Here, the requested fee of $40 million and lodestar of $12,838,694.00 result in a multiplier of 3.12. Multipliers of 1.01-4.0 are routinely awarded in common fund cases, including in the Sixth Circuit.[82] As Judge Greer of the Eastern District of Tennessee recently explained in awarding a one-third fee on a $159 million settlement fund in an antitrust case, the resulting "lodestar multiplier of 1.90" was "clearly within, *but in the bottom half of*, the range of typical lodestar multipliers."[83] Similarly, Judge Collier in *Skelaxin* observed that "[m]ultipliers much higher than the one requested here [2.1-2.5] are also commonplace in complex pharmaceutical antitrust class actions."[84] Furthermore, as Professor Fitzpatrick explains, larger settlements tend to result in larger multipliers: his empirical study shows that settlements of

[81] *In re Aggrenox Antitrust Litig.*, 14-md-02516, Dkt. 786-1 at 5 & Dkt. 788 (D. Conn. Apr. 13, 2018).

[82] *See, e.g.*, William Rubenstein et al., *Newberg on Class Actions* § 14:03 (5th ed.); *In re Prandin Direct Purchaser Antitrust Litig.*, No., 10-12141, 2015 WL 1396473, at *4 (E.D. Mich. Jan. 20, 2015) ("A one-third fee recovery in this matter would equate to a multiplier of 3.01 . . . . This level multiplier is reasonable in light of what has been routinely accepted as fair and reasonable in complex matters such as this one. Multipliers much higher than the one requested here are also commonplace in complex pharmaceutical antitrust class actions."); *Cardizem*, 218 F.R.D. at 533 (noting that direct purchaser class plaintiffs received a fee award that equated to a lodestar multiplier of 3.7); *In re Cardinal Health Inc. Sec. Litigs.*, 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007) (awarding multiplier of 5.9, and noting that typical multipliers ranged from 1.3 to 4.5); *Lowther v. AK Steel Corp.*, No. 1:11-CV-877, 2012 WL 6676131, at *5 (S.D. Ohio Dec. 21, 2012) (finding 3.06 multiplier "very acceptable" and citing cases awarding multipliers of 4.5 and up); *Meijer, Inc. v. 3M*, No. CIV.A. 04-5871, 2006 WL 2382718, at *24 (E.D. Pa. Aug. 14, 2006) (approving 4.77 multiplier); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-340-SLR, Dkt. 543 at 9-10 (D. Del. 2009) (multiplier of 3.93 "well within the acceptable range" for "class actions similarly alleging impeded generic competition").

[83] *Milk*, 2013 WL 2155387, at *4 (emphasis added); *see also, e.g.*, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, No. 05-1720, 2019 WL 6888488, at *22 (E.D.N.Y. Dec. 16, 2019) (noting that "proposed multiplier of 2.5 . . . falls well within a range of multipliers that have been deemed acceptable, especially in complex actions," and collecting cases); *Lonardo*, 706 F. Supp. 2d at796 (citing study finding "the average effective multiplier across 1,120 cases was 3.89); *Lowther*, 2012 WL 6676131, at *5.

[84] 2014 WL 2946459, at *2 (approving multiplier of 2.1 to 2.5).

$100-$250 million had an average multiplier of 3.47 with a median of 2.20.[85] The multiplier here is more than reasonable, especially in light of the risks associated with this case detailed above.

B. The Requested Expenses Are Supported and Reasonable.

It is well-established that "[e]xpense awards are customary when litigants have created common settlement fund for the benefits of a class."[86] Class Counsel "is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and settlement, including expenses incurred in connection with document production, consulting with experts and consultants, travel and other litigation-related expenses."[87]

Here, Class Counsel request reimbursement for $2,269,268.79 of costs paid out-of-pocket for the benefit of the Class. These costs include (1) filing fees; (2) copying, mailing, and serving documents; (3) computer research; (4) travel; (5) notice to the certified the ligation class; and (6) (the largest component) expert fees.[88] These "categories of expenses . . . are the type routinely charged to . . . hourly fee-paying clients and thus should be reimbursed out of the settlement fund."[89] Class Counsel spent more than $1,650,000 retaining experts, one of whom, Dr. Lamb, prepared a total of five reports in the case and testified on the stand twice. And, at 1.89% of the Settlement Fund, the reimbursement request is significantly less than the average costs award,

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[85] Fitzpatrick Decl. ¶ 27.

[86] *Cardizem*, 218 F.R.D. at 534-35 (citation omitted); *see also* Newberg § 16:1.

[87] *Allan v. Realcomp II, Ltd.*, No. 10-14046, 2014 WL 12656718, at *2 (E.D. Mich. Sept. 4, 2014) (citation omitted).

[88] Glackin Decl. ¶¶ 65-66 & Exs. D-F.

[89] *New England Health Care Emps. Pension Fund*, 234 F.R.D. 627, 634-35 (W.D. Ky. 2006); *accord Cardizem*, 218 F.R.D. at 534-35 (same). Indeed, Lieff Cabraser maintains dedicated word processing, research, and litigation support departments that allow the firm to perform certain kinds of work in-house, at zero additional cost to the Class. Glackin Decl. ¶ 23.

usually around "4 percent of the relief for the class."[90] Moreover, "the fact that Class Counsel does not seek interest as compensation for the time value of money or costs associated with advancing these expenses to the Class makes this fee request all the more reasonable."[91]

C. The Court Should Allow Service Awards of $200,000 for Each Plaintiff.

Courts regularly award service awards "to compensate class representatives for their service to the class and simultaneously serve to incentivize them to perform this function."[92] Service awards help motivate class representatives to pursue relief on behalf of the class even though their own individual recoveries may be too small to justify the investment. Indeed, a core "function[] of the class action is to incentivize private parties to enforce certain laws such that the government is not required to undertake all law enforcement alone."[93] Thus, "courts have stressed that incentive awards are efficacious ways of encouraging members of a class to become class representatives"[94] and "recognize their willingness to act as a private attorney general."[95] And "because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit."[96]

Here, but for the service of the Class Representatives, the misconduct would have gone unpunished (other than the smaller Amphastar settlement), future antitrust violations undeterred, and the Class uncompensated.[97] Furthermore, substantial service awards are entirely fair and

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[90] *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1041 (N.D. Ill. 2011).

[91] *Beesley v. Int'l Paper Co.*, No. 06-703, 2014 WL 375432, at *3 (S.D. Ill. Jan. 31, 2014).

[92] Newberg § 17:1.

[93] Newberg § 17:3.

[94] *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003)

[95] *Rodriguez v. West Pub'g Corp.*, 563 F.3d 948, 959 (9th Cir. 2009).

[96] *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).

[97] *See In re Linerboard Antitrust Litig.*, No. 98-5055, 2004 WL 1221350, at *18 (E.D. Pa. June 2, 2004) (nothing that incentive payments were "particularly appropriate in this case because there

Footnote continued on next page

appropriate, given that some absent class members (large insurers and hospital systems) have hundreds of millions of dollars in claims and stand to recoup millions from the fund at no cost or effort whatsoever. These recoveries will dwarf those of Nashville General and DC 37.[98]

The Sixth Circuit has neither approved nor disapproved service awards as a general matter,[99] but has recognized that "there may be circumstances where incentive awards are appropriate."[100] The court has also articulated a "sensibl[e] fear that incentive awards may lead named plaintiffs to expect a bounty for bringing suit or to compromise the interest of the class for personal gain,"[101] and therefore requires that representatives demonstrate that the service awards reflect a class representative's "extensive involvement in a class action litigation."[102] Thus, district courts in this Circuit regularly grant incentive awards upon a showing that the representative plaintiff actively committed "time and effort [] pursuing the litigation"[103] and conferred a benefit on the class.

Nashville General and DC 37's extensive contributions to the case are detailed in declarations from Marc Overlock, General Counsel at Nashville General Hospital ("Overlock Declaration") and Audrey Browne, former Associate Administrator at DC 37 ("Browne

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Footnote continued from previous page
was no preceding governmental action alleging a conspiracy").

[98] Overlock Decl. ¶ 6; Browne Decl. ¶ 7.

[99] *See Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 310-11 (6th Cir. 2016).

[100] *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 756 (6th Cir. 2013) (citation omitted).

[101] *Shane*, 825 F.3d at 310 (quoting *Hadix*, 322 F.3d at 897). Unlike *Shane*, the record is not silent as to the contributions the class representatives made to the litigation. *Id.* at 311. Similarly, in *Dry Max* the Sixth Circuit cautioned against payments that make the class representatives whole, while leaving absent class members with "nearly worthless" injunctive relief. *See In re Dry Max Pampers Litig.*, 724 F.3d 713, 715, 722 (6th Cir. 2013).

[102] *Lonardo*, 706 F. Supp. 2d at 787.

[103] *UnumProvident*, 2010 WL 289179, at *9; *see also, e.g.*, *Milk*, 2013 WL 2155387, at *8-9.

Declaration").[104] During discovery, Nashville General responded to 54 requests for production, 18 interrogatories, and 229 requests for admission; DC 37 responded to 42 requests for production, 11 interrogatories, and 76 requests for admission. Both Plaintiffs searched for and produced large volumes of documents and data, which required significant time. Representatives and lay witnesses endured eleven separate depositions. In total, seven current and former employees of Nashville General contributed significant time to the litigation effort. Plaintiffs also routinely attended hearings (including both class certification hearings), gave live testimony on crucial issues, and traveled to San Francisco for two days of mediation. Plaintiffs' contributions to the case were particularly critical at class certification, given the Plaintiffs themselves haled from both the retail channel (DC 37) and the non-retail channel (Nashville General).

The requested service awards of $200,000 each for NGH and DC 37 are more than justified by their extraordinary and crucial contributions to this case, and consistent with those awarded in other complex antitrust class actions.[105]

IV. CONCLUSION

Plaintiffs respectfully request that the Court award $40 million in attorneys' fees, together with a proportional share of interest earned on the Settlement Fund (subject to proportional reduction in the event Momenta fails to make the Second Payment), $2,269,268.79 in costs, and $200,000 in service awards to each of the two Class Representatives.

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[104] Overlock Decl. ¶¶ 5-6; Browne Decl. ¶¶ 6-7.

[105] *See, e.g.*, *Seaman*, 2019 WL 4674758, at *7 ($125,000 service award to a single individual); *In re High-Tech Emp. Antitrust Litig.*, No. 11-2509, 2015 WL 5158730, at *17 (N.D. Cal. Sept. 2, 2015) ($100,000 service awards to each individual); *In re Titanium Dioxide Antitrust Litig.*, No. 10-318, 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) (approving $125,000 service award to a small business).

TAB 30A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

FUND LIQUIDATION HOLDINGS LLC, as assignee and successor-in-interest to FrontPoint Asian Event Driven Fund L.P., MOON CAPITAL PARTNERS MASTER FUND LTD., and MOON CAPITAL MASTER FUND LTD., on behalf of themselves and all others similarly situated, Plaintiffs, v. CITIBANK, N.A., BANK OF AMERICA, N.A., JPMORGAN CHASE BANK, N.A., THE ROYAL BANK OF SCOTLAND PLC, UBS AG, BNP PARIBAS, S.A., OVERSEA-CHINESE BANKING CORPORATION LTD., BARCLAYS BANK PLC, DEUTSCHE BANK AG, CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK, CREDIT SUISSE AG, STANDARD CHARTERED BANK, DBS BANK LTD., ING BANK, N.V., UNITED OVERSEAS BANK LIMITED, AUSTRALIA AND NEW ZEALAND BANKING GROUP, LTD., THE BANK OF TOKYO-MITSUBISHI UFJ, LTD., THE HONGKONG AND SHANGHAI BANKING CORPORATION LIMITED, COMMERZBANK AG, AND JOHN DOES NOS. 1-50, Defendants.	Docket No. 16-cv-05263 (AKH)

~~[REVISED PROPOSED]~~

ORDER GRANTING PLAINTIFFS' COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

This matter came for a duly-noticed hearing on November 29, 2022 (the "Fairness Hearing"), upon Plaintiffs' Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Expenses ("Fee and Expense Application") in the above-captioned action (the "Action"). The Court has considered the Fee and Expense Application and all supporting and other related materials, including the matters presented at the Fairness Hearing. Due and

adequate notice of the settlement agreements between Representative Plaintiffs'[1] and Settling Defendants[2] (the "Settlement Agreements") having been given to the Settlement Class Members, the Fairness Hearing having been held, and the Court having considered all papers filed and proceedings held herein, having found the settlement of the Action to be fair, reasonable and adequate, and otherwise being fully informed in the premises and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. This Court has personal jurisdiction over Plaintiffs and Settling Defendants and all Settlement Class Members who have not timely and validly requested exclusion, and subject matter jurisdiction over the Action to approve the Settlement Agreements and all exhibits attached thereto.

2. Notice of the Fee and Expense Application was provided to potential Settlement Class Members in a reasonable manner, and such notice complies with Rule 23(h)(1) of the Federal Rules of Civil Procedure and due process requirements.

3. The Court hereby awards Plaintiffs' Counsel attorneys' fees of $38,864,500.00 (25% of the total Settlement Funds), and litigation expenses of $179,945.33, together with interest for the same time period and at the same rate as earned by the Settlement Funds until paid, which shall be paid out of the Settlement Funds.

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[1] Representative Plaintiffs are Fund Liquidation Holdings, LLC, individually and as assignee and successor-in-interest to FrontPoint Asian Event Driven Fund, L.P., Moon Capital Partners Master Fund Ltd., and Moon Capital Master Fund Ltd. (hereinafter and collectively "Plaintiffs"). Unless otherwise noted, ECF citations are to the docket in *Fund Liquidation Holdings LLC, et al. v. Citibank, N.A., et al.*, No. 16-cv-05263 (AKH) (S.D.N.Y.) and internal citations and quotation marks are omitted. In addition, unless otherwise defined, capitalized terms herein have the same meaning as in the Settlement Agreements. ECF Nos. 473-1, 473-2, 473-3, 473-4, 473-5, 473-6, and 499-1.

[2] "Settling Defendants" include (1) Citibank, N.A. and Citigroup Inc., (2) JPMorgan Chase & Co., (3) The Hongkong and Shanghai Banking Corporation Limited, (4) Credit Suisse AG, (5) Deutsche Bank AG, (6) ING Bank N.V., (7) Australia and New Zealand Banking Group, Ltd., (8) Bank of America, N.A., (9) Barclays Bank PLC, (10) BNP Paribas, S.A., (11) Commerzbank AG, (12) Crédit Agricole Corporate and Investment Bank, (13) DBS Bank Ltd., (14) MUFG Bank, Ltd. (f/k/a The Bank of Tokyo-Mitsubishi UFJ, Ltd.), (15) Oversea-Chinese Banking Corporation Limited, (16) The Royal Bank of Scotland plc (n/k/a NatWest Markets plc), (17) Standard Chartered Bank, (18) UBS AG, and (19) United Overseas Bank Limited.

4. Plaintiffs' Counsel is hereby authorized to allocate the attorneys' fees among Plaintiffs' Counsel and Goldstein & Russell, P.C., in a manner in which, in Plaintiffs' Counsel's judgment, reflects the contributions of such counsel to the institution, prosecution, appeal and settlement of the Action.

5. In making this award of attorneys' fees and payment of litigation expenses, the Court has considered and found that:

a. the Settlement Agreements with Settling Defendants have created a fund of $155,458,000 in cash that Settling Defendants have paid into escrow pursuant to the terms of the Settlement Agreements;

b. Class Members who or which submit valid Proofs of Claim and Release will benefit from the Settlements reached because of the efforts of Plaintiffs' Counsel;

c. Plaintiffs' Counsel has prosecuted the Action and achieved the settlement with skill, perseverance, and diligent advocacy;

d. The Action involves numerous complex factual and legal issues and was actively litigated and, in the absence of the Settlements, would have involved lengthy proceedings with uncertain resolution of the numerous complex factual and legal issues;

e. Had Plaintiffs' Counsel not achieved the Settlements with Settling Defendants, there would remain a significant risk that Plaintiffs and the Settlement Class may have recovered less or nothing from Settling Defendants;

f. The contingent nature, risks and complexity of the Action favor the fee awarded above;

g. Public policy considerations support the requested fee, as only a small number of firms have the requisite expertise and resources to successfully prosecute cases such as the Action;

h. Notice was disseminated stating that Plaintiffs' Counsel would be moving for attorneys' fees of not more than $51,819,333.33 (which is one-third of the Settlement Funds) and payment of litigation expenses and costs not to exceed $750,000, plus interest; and

i. The amount of attorneys' fees awarded and expenses to be paid from the Settlement Funds are fair and reasonable in view of the applicable legal principles and the particular facts and circumstances of the Action.

6. Without affecting the finality of this Order in any way, this Court hereby retains continuing jurisdiction over the Parties and the Class Members for all matters relating to this Action, including the administration, interpretation, effectuation, or enforcement of this Order.

7. In the event the Settlement Agreements are terminated, or the Effective Date does not occur in accordance with the terms of the Settlement Agreements, this Order shall be null and void, of no further force or effect, and without prejudice to any of the Parties, and may not be introduced as evidence or used in any actions or proceedings by any Person against the Parties.

8. Pursuant to the Settlement Agreements, the attorneys' fees and expense awards are independent of the Court's consideration of the fairness, reasonableness, and adequacy of the Settlements and are also independent of the Court's consideration of the Distribution Plan.

9. The attorneys' fees and payment of expenses awarded herein shall be paid to Plaintiffs' Counsel from the Settlement Funds as follows, subject to the terms, conditions, and obligations of the Settlement Agreements which terms, conditions, and obligations are incorporated herein:

a. The award for payment of expenses shall be paid on December 30, 2022;

b. One-third (1/3) of the attorneys' fee award shall be paid on January 20, 2023;

c. One-third (1/3) of the attorneys' fee award shall be paid on July 14, 2023; and

d. One-third (1/3) of the attorneys' fee award shall be paid upon the first distribution of the Settlement Funds to Authorized Claimants, which will occur no later than September 29, 2023.

IT IS SO ORDERED.

Signed this 29 day of November, 2022.

Honorable Alvin K. Hellerstein
United States District Judge

TAB 30B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

FUND LIQUIDATION HOLDINGS LLC, as assignee and successor-in-interest to FrontPoint Asian Event Driven Fund L.P., MOON CAPITAL PARTNERS MASTER FUND LTD., and MOON CAPITAL MASTER FUND LTD., on behalf of themselves and all others similarly situated, Plaintiffs, v. CITIBANK, N.A., BANK OF AMERICA, N.A., JPMORGAN CHASE BANK, N.A., THE ROYAL BANK OF SCOTLAND PLC, UBS AG, BNP PARIBAS, S.A., OVERSEA-CHINESE BANKING CORPORATION LTD., BARCLAYS BANK PLC, DEUTSCHE BANK AG, CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK, CREDIT SUISSE AG, STANDARD CHARTERED BANK, DBS BANK LTD., ING BANK, N.V., UNITED OVERSEAS BANK LIMITED, AUSTRALIA AND NEW ZEALAND BANKING GROUP, LTD., THE BANK OF TOKYO-MITSUBISHI UFJ, LTD., THE HONGKONG AND SHANGHAI BANKING CORPORATION LIMITED, COMMERZBANK AG, AND JOHN DOES NOS. 1-50, Defendants.	Docket No. 16-cv-05263 (AKH)

MEMORANDUM OF LAW
IN SUPPORT OF PLAINTIFFS' COUNSEL'S MOTION
FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF
EXPENSES AND PLAINTIFFS' REQUEST FOR INCENTIVE AWARDS

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Pursuant to the orders preliminarily approving the class action settlements (the "Settlements") in this action (ECF Nos. 509-15)[1] and in accordance with Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs' Counsel[2] respectfully submits this memorandum of law in support of its motion for an award of attorneys' fees in the amount of $38,864,500, reimbursement of expenses in the amount of $179,945.33, and incentive awards to the three Plaintiffs in the amount of $375,000 from the $155,458,000 common fund created by Plaintiffs' seven settlements with Defendants.[3]

INTRODUCTION

Plaintiffs' Counsel took six paragraphs from a 2013 press release from the Monetary Authority of Singapore ("MAS") and turned them into $155,458,000 in settlement value for investors who would otherwise have recovered nothing. This feat took six years, required in excess of eighteen thousand hours of attorney time valued at millions of dollars, and could have failed entirely at any time. Indeed, it did fail, in 2019 when the Court dismissed the entire action for lack of subject matter jurisdiction following Defendants' third motion to dismiss. Even Plaintiffs' preexisting settlements with Citi and JPMorgan were lost, as the Court found that it had no jurisdiction to approve them. Plaintiffs' Counsel was left with absolutely nothing to show for its

[1] As amended by the Court's Order Amending Orders Preliminarily Approving Settlements (ECF No. 523).

[2] Plaintiffs are Fund Liquidation Holdings, LLC, individually and as assignee and successor-in-interest to FrontPoint Asian Event Driven Fund, L.P., Moon Capital Partners Master Fund Ltd., and Moon Capital Master Fund Ltd. Unless otherwise noted, ECF citations are to the docket in *Fund Liquidation Holdings LLC, et al. v. Citibank, N.A., et al.*, No. 16-cv-05263 (AKH) (S.D.N.Y.) and internal citations and quotation marks are omitted. Plaintiffs' Counsel is Lowey Dannenberg P.C.

[3] Defendants are (1) Citibank, N.A. and Citigroup Inc. (collectively, "Citi"); (2) JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. (collectively, "JPMorgan"); (3) Credit Suisse AG ("Credit Suisse"); (4) Deutsche Bank AG ("Deutsche Bank"); (5) The Hongkong and Shanghai Banking Corporation Limited ("HSBC"); (6) ING Bank N.V. ("ING"); and (7) Australia and New Zealand Banking Group, Ltd. ("ANZ"), Bank of America, N.A. ("BOA"), Barclays Bank PLC ("Barclays"), BNP Paribas, S.A. ("BNPP"), Commerzbank AG ("Commerzbank"), Crédit Agricole Corporate and Investment Bank ("CACIB"), DBS Bank Ltd. ("DBS"), MUFG Bank, Ltd. (f/k/a The Bank of Tokyo-Mitsubishi UFJ, Ltd.) ("MUFG"), Oversea-Chinese Banking Corporation Limited ("OCBC"), The Royal Bank of Scotland plc (n/k/a NatWest Markets plc) ("RBS"), Standard Chartered Bank ("SCB"), UBS AG ("UBS"), and United Overseas Bank Limited ("UOB").

three years of investment in this litigation. But instead of cutting its losses and walking away, Plaintiffs' Counsel took on yet more risk with a highly complex appeal—and won. After defending that victory all the way up to the Supreme Court and making its way back to this Court on remand, Plaintiffs' Counsel was immediately faced with a *fourth* motion to dismiss from Defendants. That motion to dismiss, like its predecessors, asserted a multitude of defenses, from failure to state a claim on the merits to lack of personal jurisdiction to lack of subject matter jurisdiction (again). Once more Plaintiffs' Counsel was poised to potentially lose all of the investment it had poured into this case, which by now was considerably larger than it had been in 2019. That Plaintiffs' Counsel was able to negotiate such large settlements from a position of such risk is extraordinary.

For its uncompensated and at-risk efforts over the past six years, Plaintiffs' Counsel requests that the Court award them $38,864,500 million in attorney's fees. Plaintiffs' Counsel's request constitutes a lodestar risk multiplier of 2.57 based on its cumulative lodestar, or a fee award equivalent to 25% of the Settlement Fund. By either measure, Plaintiffs' Counsel's fee request falls comfortably within the norm of what other courts in this District and Circuit routinely award in financial services antitrust class actions. To take just one example, in June 2020, Judge Rakoff granted Plaintiffs' Counsel's full requested fee award in *In re GSE Bonds Antitrust Litig.* ("*GSE*"), No. 19-CV-1704 (JSR), 2020 WL 3250593, at *7 (S.D.N.Y. June 16, 2020), following a complete review of Plaintiffs' Counsel's detailed time records. The awarded fee of $77.3 million constituted a lodestar multiplier of 4.09. *Id.* at *5. Yet in many ways, *GSE* was a less risky case than this one, with an early-settling ACPERA applicant providing valuable cooperation enabling plaintiffs to cure pleading deficiencies, and with Lowey assisted in the prosecution of the case by a deep bench of well-qualified firms. *See GSE*, 414 F. Supp. 3d 686, 697 (S.D.N.Y. 2019); *GSE*, 2020 WL

3250593, at *4. This Court can feel entirely comfortable that the fees sought here are objectively reasonable and are a fair compensation to Plaintiffs' Counsel.

As this Court itself observed during the May 19, 2022 preliminary approval hearing, "Clearly there is risk and complexity in this case; clearly the costs of continuing litigation are enormous; clearly there's interest in quieting this issue, given the number of banks and their importance in the international banking business; and clearly there's importance in putting behind us this embarrassment of fixing interbank interest rates." May 19, 2022 Hearing Tr. (ECF No. 518) at 35:16-22. While the Court made this comment in the context of considering whether to preliminarily approve the settlements, it tracks the *Goldberger* factors closely, and is equally applicable to the question of whether to approve Plaintiffs' Counsel's fee request. This was a complex and risky case that required enormous resources to litigate. Compensating Plaintiffs' Counsel adequately for its efforts serves the public policy of incentivizing attorneys to prosecute similar misconduct, and ultimately to deter it. For all these reasons, Plaintiffs' Counsel's fee and expense request, and request for the payment of incentive awards, should be granted.

ARGUMENT

In evaluating whether a fee request is reasonable, the Court should consider "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). Each of these factors here weighs unequivocally in favor of granting the full fee requested.

To orient the Court in navigating this brief: Plaintiffs' Counsel first detail the risks and challenges it faced at each stage of this six-year-long litigation, as well as those it would have faced had the litigation continued (*Goldberger* factors 2 and 3). It then addresses the quality of

representation (factor 4) and public policy considerations (factor 6). The next section of the brief analyzes Plaintiffs Counsel's fee request under both the lodestar method (effectively addressing *Goldberger* factor 1) and the percentage of the fund method (*Goldberger* factor 5). Finally, Plaintiffs' Counsel sets forth its requests for reimbursement of expenses and Plaintiffs' request for incentive awards.

PART I: THE *GOLDBERGER* FACTORS

A. This Complex, Challenging Action Presented Plaintiffs' Counsel with Sky-High Risks.

Risk is at the heart of the *Goldberger* analysis. *See, e.g., Goldberger,* 209 F.3d at 54 ("We have historically labeled the risk of success as 'perhaps the foremost' factor to be considered in determining whether to award an enhancement."); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014) ("*Payment Card"*) ("The most important *Goldberger* factor is often the case's risk"); *In re Bristol–Myers Squibb Sec. Litig.*, 361 F. Supp. 2d 229, 233 (S.D.N.Y. 2005) (the risk of the litigation is the "first, and most important, *Goldberger* factor"). Working on a contingent fee basis, Plaintiffs' Counsel faced a substantial risk that it would not be compensated for its work or have the litigation expenses it advanced reimbursed. Declaration of Vincent Briganti in Support of (A) Representative Plaintiffs' Motion for Final Approval of Class Action Settlements; and (B) Plaintiffs' Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Expenses ("Briganti Decl.") ¶¶ 35-36. That risk stemmed from a number of sources, including the myriad of complex legal issues at play, the difficulty in ascertaining the relevant facts, challenges in modeling for class certification and then ultimately proving at trial class-wide impact and damages, and overcoming the vigorous defenses mounted by Defendants. *Id.* ¶ 36.

Plaintiffs' Counsel drew on a rich base of relevant experience in investigating and prosecuting this action. It is lead or co-lead counsel in seven different benchmark interest rate manipulation class actions for currencies across the world, and is fast approaching a billion dollars' worth of settlements for plaintiffs and absent class members in these cases.[4] Developing the law in this field, Plaintiffs' Counsel was the first firm to assert claims on behalf of investors in FX forward rate agreements and futures contracts for interbank offered rate ("IBOR") manipulation, materially expanding the scope of investors who may seek compensation for alleged rate manipulation. The expertise that Plaintiffs' Counsel gained litigating these cases (and many other large and complex antitrust cases throughout its fifty-year history) made it possible for Plaintiffs' Counsel to develop this case despite the scant regulatory and public record. But even with all of that knowledge at its disposal, Plaintiffs' Counsel still faced unique challenges at every stage of this six-year-long litigation, from initial investigation through final settlements. Each hurdle cleared was followed by a long line of increasingly higher ones. And as the litigation progressed and required ever more resources, Plaintiffs' Counsel's risk of non-recovery (high from the beginning) only continued to grow. We submit that these risks eminently support Plaintiffs' Counsel's fee request.

i. Case Inception

As this Court has previously recognized, the difficulty and risk involved in piecing together a complaint with little or no regulatory guidance "should be reflected in [counsel's] fee award."

[4] *See Laydon v. Mizuho Bank, Ltd.*, No. 12-cv-3419 (GBD) (S.D.N.Y), and *Sonterra Capital Master Fund, Ltd. v. UBS AG*, No. 15-cv-5844 (GBD) (S.D.N.Y.) (involving the London Interbank Offered Rate ("LIBOR") for Japanese Yen ("Yen-LIBOR) and the Tokyo Interbank Offered Rate ("Euroyen TIBOR")); *Sullivan v. Barclays plc,* No. 13-cv-2811 (PKC) (S.D.N.Y.) (involving the Euro Interbank Offered Rate ("Euribor")); *Dennis et al. v. JPMorgan Chase & Co. et al.*, No. 16-cv-06496 (LAK) (S.D.N.Y.) (involving the Australian Bank Bill Swap Rate ("BBSW")); *Sonterra Capital Master Fund Ltd., et al. v. Credit Suisse Group AG, et al.*, No.: 1:15-cv-00871 (SHS) (S.D.N.Y.) (involving Swiss Franc LIBOR); *Sonterra Capital Master Fund Ltd., et al. v. Barclays Bank PLC, et al.*, No. 15-cv-03538 (VSB) (S.D.N.Y.) (involving Sterling LIBOR).

Levy v. Gen. Elec. Cap. Corp., No. 99-cv-10560 (AKH), 2002 WL 1225542, at *2 (S.D.N.Y. Jun. 4, 2002). This case was born out of a 17-paragraph[5] press release by the Monetary Authority of Singapore ("MAS") stating that 133 unnamed traders at 20 different financial institutions engaged in "several attempts to inappropriately influence" three financial benchmarks (SIBOR, SOR, and FX) over a four-year period. *See* Briganti Decl. ¶ 30, Ex. 1. As detailed below, the press release omitted many material facts supporting an alleged four-year conspiracy among the world's largest financial institutions to manipulate three Singapore interbank offered rates. In particular, the release failed to disclose, *inter alia*:

- Which financial institutions engaged in "attempts to inappropriately influence" which of the three interbank rates, as well as the date(s), frequency and duration of any such attempts. The MAS release left open the possibility that a financial institution may have only attempted to manipulate one rate to the exclusion of the other two.
- Whether the attempts to influence the rates succeeded in warping any of the three rates to non-competitive levels, and if so in what direction and amount. Instead, the MAS release affirmatively states that there was "no conclusive finding that SIBOR, SOR and FX Benchmarks were successfully manipulated," only that traders violated "professional ethics" in attempting to do so.
- Whether any financial institution's attempts to inappropriately influence any of the rates were orchestrated in coordination with another financial institution, and if so the details of any such coordination. MAS imposed interest-free deposits on each financial institution subject to its investigation based on a number of factors,

[5] Only six paragraphs concern the alleged misconduct by the financial institutions in question; the rest describe MAS's new regulatory regime.

> including "the number of traders within the bank who attempted to inappropriately influence benchmarks, ***whether traders from other banks were involved***, and the number of times these events occurred." The inclusion of the second factor calls into question the existence and scope of any coordination amongst all of the financial institutions subject to MAS's investigation over a four-year period.

In sum, what the MAS press release tells us is that unspecified traders at various banks attempted to manipulate one, two, or all three benchmarks in an unspecified way at an unspecified time over a four-year period; may or may not have succeeded; and may or may not have worked with other unspecified banks in their manipulation attempts.

Beyond the MAS press release, the CFTC listed SIBOR and SOR among the multiple benchmark interest rates that Deutsche Bank, RBS and UBS allegedly manipulated, stating only that the banks engaged in "similar misconduct" for SIBOR and SOR as for the other rates. Briganti Decl. ¶ 32. The U.K.'s Financial Services Authority confirmed that RBS derivatives traders made "at least 34 written requests" to manipulate SIBOR and SOR—again, providing no additional color. *Id.* Even taken together, these vague findings, in the hands of less experienced counsel, would not appear to be much of a foundation on which to build a major antitrust class action against 19 domestic and multinational banks.

Plaintiffs' Counsel, however, was able to leverage its experience to construct the complaint piece by piece, researching the SIBOR and SOR rate-setting process, the panel membership, the market for SIBOR- and/or SOR-Based Derivatives, and each bank's participation in that market in the United States. *Id.* ¶¶ 33-34. The SIBOR- and/or SOR-Based Derivatives market in the U.S. bears little resemblance to the well-known (and much larger) market for U.S. Dollar LIBOR (USD LIBOR) and other widely traded U.S.-based financial markets. The difficulty of building a case

based on such a thin regulatory record, combined with the relatively small market size (and correspondingly reduced potential damages), meant that no other firm filed a case on behalf of SIBOR- and SOR-based investors.

This fact distinguishes this case from the norm in virtually all other class actions, including *GSE,* where multiple teams of firms file similar cases and fight an extended battle for leadership. *Compare In re GSE Bonds Antitrust Litig.*, No. 1:19-cv-01704 (S.D.N.Y. 2019) (court received four co-lead counsel proposals from 6 different firms); *see also*, *e.g.*, *In re T-Mobile Customer Data Security Breach Litig.*, No. 4:21-md-03019 (W.D. Mo. 2021) (court received 35 leadership applications comprising 38 firms); *In re Foreign Exchange Benchmark Rates Antitrust Litig.*; Case No. 13-cv-7789 (S.D.N.Y.) ("FX") (court received three lead counsel applications comprising 7 firms); *In re Merrill Lynch & Co., Inc. Rsch. Reps. Sec. Litig.*, No. 02 MDL 1484(JFK), 2007 WL 4526593, at *17 (S.D.N.Y. Dec. 20, 2007) (the filing of "some 140 class-action complaints" following a highly publicized investigation showed that "the prospect of recovery was promising from the outset"). The fact that no other firm filed a complaint here, and that Lowey had no co-counsel (except for Goldstein & Russell who assisted with the appeal to the Second Circuit) with whom to share costs, risks, resources or strategy, weighs heavily in favor of Plaintiffs' Counsel's fee request.

ii. Motions to Dismiss

After the complaint was prepared and filed, Plaintiffs' Counsel's task did not become any easier. This case represented the pinnacle of complexity among antitrust cases, which are generally recognized to be "notoriously complex, protracted, and bitterly fought." *GSE*, 2020 WL 3250593, at *4 (quoting *Meredith Corp. v. SESAC LLC*, 87 F. Supp. 3d 650, 669 (S.D.N.Y. 2015)). At the time Plaintiffs reached a settlement with the final group of Defendants, the parties had been through four full rounds of motion to dismiss briefing, as well as oral arguments on the first three

motions, and were about to present oral argument on the fourth motion. Briganti Decl. ¶¶ 38-59. The motions to dismiss alone generated over 4,000 pages spread across 29 briefs, 38 declarations, and 19 supplemental law letters. In between the third and fourth motions, following the Court's dismissal in full of the action, Plaintiffs' Counsel prosecuted—and prevailed on—an appeal to the Second Circuit, and defended that victory all the way through Defendants' petition for a writ of certiorari to the United States Supreme Court.[6]

a. Risks of Alleging a Plausible Conspiracy

Plaintiffs' Counsel had to defend the plausibility of a four-year-long conspiracy among 19 different banks located across the world to manipulate three different rates (USD SIBOR, SGD SIBOR, and SOR) that impacted the prices of different types of over-the-counter[7] SIBOR- and/or SOR-Based Derivatives. *See, e.g., GSE*, 2020 WL 3250593, at *4 (citing *In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 379 (S.D.N.Y. 2013) (finding that a "class period [being] relatively lengthy and encompass[ing] a significant number of securities issuances" indicated complexity). The alleged manipulation scheme was particularly complex in that it involved manipulations of the rates in different directions at different times to benefit different banks' derivatives positions, as opposed to a simple raising or lowering of rates across the board. Though Plaintiffs' Counsel ultimately succeeded in convincing the Court that the alleged conspiracy was plausible, several other courts in this district had rejected complaints alleging similar multidirectional conspiracies. *See, e.g., In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262 (NRB), 2016 WL 7378980, at *2 (S.D.N.Y. Dec. 20, 2016); *Sonterra Capital Master Fund Ltd. v. Credit Suisse Grp. AG*, 277 F. Supp. 3d 521, 55 (S.D.N.Y. 2017) As described above, Plaintiffs also had very little to

[6] The appellate briefing, including briefing on Defendants' petition for rehearing and for a writ of certiorari, spanned 1,308 pages.

[7] The over-the-counter market is opaque, without the publicly available information about each trade that exchanges provide.

work with in the way of publicly available facts about which banks did what in furtherance of which conspiracy to manipulate which rate, beyond the few regulatory findings specific to RBS, UBS and Deutsche Bank and the identities of the SIBOR and SOR panel members. This deficiency alone could easily have been fatal to Plaintiffs' complaint. *See, e.g., GSE*, 396 F. Supp. 3d 354, 363-65 (S.D.N.Y. 2019) (dismissing claims against all banks for which the complaint did not detail specific acts of involvement. Plaintiffs were only able to amend their complaint to add facts for each bank thanks to detailed cooperation they received from an ACPERA applicant.).

b. Risk of Pleading Antitrust Standing

Plaintiffs' Counsel had to litigate difficult questions of antitrust standing, including whether direct transactions between a plaintiff and a defendant were required (before that question was resolved by the Second Circuit), and whether Plaintiffs had sufficiently pled the link between SIBOR/SOR and the prices of the derivatives in question. To address the Court's rulings on these issues in the first and second motions to dismiss, Plaintiffs' Counsel had to amend the complaint to provide more detail about the price link between SIBOR/SOR and FX forwards, and to add new plaintiffs (the Moon Plaintiffs) who had transacted directly with Defendant UBS. Briganti Decl. ¶ 48.

c. Risk of Asserting Personal Jurisdiction Over the Foreign Banks

Personal jurisdiction was also hotly contested, given that all but two of the Defendants are headquartered overseas and the relevant rates are set in Singapore. On the first, second, and fourth motions to dismiss, Defendants filed a separate set of briefing devoted just to this issue. ECF Nos. 145, 239, 448. On top of that separate briefing, several of the banks located in Asia filed motions for reconsideration when this Court found it had personal jurisdiction over them following the second motion to dismiss, and renewed those motions yet again along with the fourth motion to

dismiss. ECF Nos. 303-306. In *GSE*, by contrast, Judge Rakoff considered the action sufficiently complex and risky to justify a full fee award (at a multiplier much larger than that sought here), even though there were *no* disputes over personal jurisdiction. *See GSE*, 2020 WL 3250593, at *4.

d. Risk of Establishing Subject Matter Jurisdiction

The most challenging question of all in this litigation was subject matter jurisdiction. The fundamental question was whether this Court had subject matter jurisdiction over this action in light of the fact that it was initially filed in the names of two entities that had assigned their claims to current plaintiff Fund Liquidation Holdings LLC ("FLH"), and then dissolved. But that question embraces a whole host of difficult sub-questions concerning the interplay between Article III and the Federal Rules, Cayman Island law, the historical development of the real party in interest doctrine from the early common law days through the current rules, the distinctions between capacity and standing and how each is affected by a corporate dissolution, contract principles relating to assignments of claims (including a champerty defense), and issues relating to equitable tolling in the class action context. The parties and the Court wrestled with these issues over the course of both the second and third motions to dismiss, with the Court first permitting Plaintiffs to substitute FLH under Rule 17, and then concluding that it lacked subject matter jurisdiction altogether and dismissing the case entirely following the third motion to dismiss. Briganti Decl. ¶¶ 44, 52. In its order dismissing the case, the Court also denied Plaintiffs' motion for leave to amend their complaint to join the Moon Plaintiffs, and their motions to preliminarily approve the settlements they had reached with Citi and JPMorgan. *Id.* ¶ 52.

At this point, Plaintiffs' Counsel had invested more than half their total lodestar to date into the case. The Court's denial of preliminary approval of the Citi and JPMorgan settlements put Plaintiffs' Counsel under particular pressure. Not only were they unable to recoup even a portion

of their financial investment to offset their risk, but they were also unable to avail themselves of any of the cooperation from Citi and JPMorgan to which Plaintiffs were entitled under the settlement agreements. Early cooperation from settling defendants is enormously valuable in financial antitrust cases, especially where the case (like this) alleges a multi-year conspiracy among numerous bank defendants located here and abroad. In *GSE*, for example, immediately after the court appointed lead counsel, defendant Deutsche Bank stepped forward to offer cooperation in accordance with the terms of its criminal settlement with the Department of Justice and to settle with plaintiffs. The cooperation Deutsche Bank provided was invaluable in helping plaintiffs amend their complaint with specific allegations of each defendant's actions in furtherance of the conspiracy, and served as a catalyst for multiple other settlements. *GSE*, 414 F. Supp. 3d at 697. Here, Plaintiffs had none of those benefits. No money, no inside information with which to continue the prosecution, no leverage whatsoever to convince other Defendants to settle. Plaintiffs' Counsel was faced with the Hobson's choice of either walking away with a total loss on its investment or sinking yet more resources into a challenging appeal that was far from guaranteed to succeed. Indeed, the Second Circuit's reversal rate for civil litigations as of June 2021 was just ***5.7%***.[8]

Plaintiffs' Counsel elected to continue and engaged the highest quality appellate co-counsel, Goldstein & Russell, to maximize its chances in a high-risk appeal that implicated a multitude of novel legal issues. Briganti Decl. ¶ 53. Plaintiffs' Counsel and Goldstein & Russell dedicated more than 1,900 hours combined to the appellate briefing and oral argument preparation. That work yielded a 52-page opinion from the Second Circuit that found this Court does have

[8] *See* Table B-5—U.S. Courts of Appeals Statistical Tables for The Federal Judiciary (June 30, 2021), *available at:* https://www.uscourts.gov/statistics/table/b-5/statistical-tables-federal-judiciary/2021/06/30.

subject matter jurisdiction and instructed this Court on remand to revisit the settlement approval motion and the motion for leave to amend to add the Moon Plaintiffs that this Court had previously denied. *Id.* ¶ 53-55.

Even then, the challenges facing Plaintiffs' Counsel were far from over. Defendants challenged the Second Circuit's ruling both before the Second Circuit itself, in a petition for panel rehearing and rehearing *en banc*, and before the Supreme Court, in a petition for certiorari. *Id.* ¶ 56. Not only did both Plaintiffs' Counsel and Goldstein & Russell expend yet more resources in defeating both petitions, but until the Supreme Court denied certiorari, Plaintiffs *still* could not enforce the Citi and JPMorgan settlement agreements and receive the cooperation to which they were entitled. And when the case finally returned to this Court on remand, Defendants moved to dismiss for a fourth time, not only on the merits and on personal jurisdiction, but also on subject matter jurisdiction—seeking to undo all the progress that Plaintiffs' Counsel had painstakingly made since the Court's order dismissing the action in 2018. *Id.* ¶ 58. Had Defendants succeeded in persuading the Court for a second time that it lacked subject matter jurisdiction, Plaintiffs' Counsel would once again have found itself staring down the unappealing choice between a total loss on its (now considerably larger) investment and another costly and risky appeal. At the time the parties reached their final settlement, the stakes for Plaintiffs could not have been higher.

iii. Risks Facing Plaintiffs Had Litigation Progressed Past Defendants' Fourth Motion to Dismiss

a. Discovery Risks

If Plaintiffs had prevailed on Defendants' fourth motion to dismiss, Plaintiffs' Counsel would have faced a whole new set of challenges. Discovery would have been hotly contested and extremely costly. In addition to the ordinary yet substantial difficulties of litigating discovery against highly skilled counsel with well-resourced clients, Defendants are almost all located

abroad, a factor that courts often consider in evaluating litigation risk for purposes of awarding fees. *See, e.g., In re Graña y Montero S.A.A. Sec. Litig.*, No. 17-cv-01105 (LD)(HST), 2021 WL 4173684, at *17 (E.D.N.Y. Aug. 13, 2021), *report and recommendation adopted*, No. 17-cv-1105 (LDH)(ST), 2021 WL 4173170 (E.D.N.Y. Sept. 14, 2021) (finding risk of litigation, especially the difficulties of obtaining discovery from foreign defendants and third-parties, as a factor in favor of awarding the uncontested amount of fees in the settlement); *Berlinsky v. Alcatel Alsthom Compagnie Générale D'Electricité*, 970 F. Supp. 348, 352 (S.D.N.Y. 1997) (finding increased risk contingency due to defendant's foreign status as a factor in deciding attorney's fees). Here, many Defendants are in jurisdictions such as Singapore with strong bank secrecy and data privacy laws and would likely use those laws to great effect to shield themselves from discovery.[9] Furthermore, given that the Class Period is from 2007-2011, Plaintiffs' Counsel could potentially find relevant witnesses unavailable, memories faded, and relevant documents inaccessible, lost, or destroyed.

b. Class Certification Risks

Using data obtained from discovery, Plaintiffs' Counsel would then have to engage experts to construct a sophisticated class-wide impact and damages model that accounted for different types of derivatives, positions both on the buyer's and seller's side, manipulation of SIBOR and SOR in different directions at different times, and the duration of the effects of changes in SIBOR and SOR. This complex work would of course be costly and would be the subject of vigorous attack by Defendants. A battle of experts heightens the risk as "it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors." *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d

[9] Singapore has been compared to Switzerland for the strictness of its bank secrecy laws. *See* Neil Gough, "Singapore, a Rising Home for Quiet Money, Comes Under Pressure," N.Y. Times, May 12, 2017.

Cir. 1986); *see also In re Facebook, Inc., IPO Sec. & Derivative Litig*., 343 F. Supp. 3d 394, 410 (S.D.N.Y. 2018), *aff'd*, 822 F. App'x 40 (2d Cir. 2020) (experts "tend[] to increase both the cost and duration of litigation").

The Court expressed concerns about proving damages during both the May 19, 2022 (ECF No. 518 at 29:23-25; 36:22-37:4) and June 9, 2022 hearings, stating "It's not at all sure that if this were a different case that there would be a class or a coherent class or a methodology for providing damages that would be satisfactory to the law." June 9, 2022 Hearing Tr. at 21, Briganti Decl. Ex. 2. Defendants would likely use the complexity of the financial products in the market, the sophistication of their alleged misconduct, the temporal breadth of the alleged conspiracy, and the alleged market movement on various days to argue that a litigation class cannot be certified on these claims. *In re LIBOR-Based Fin. Instruments Antitrust Litig*., 327 F.R.D. 483, 494 (S.D.N.Y. 2018) (stating that "the certainty of maintaining a class action is by no means guaranteed" and noting that maintaining the action as a class requires proving the 16-bank conspiracy that was alleged). Defendants of course would have strenuously opposed Plaintiffs' class certification motion. *See GSE*, 414 F. Supp. 3d at 694 (the risk of maintaining a class through trial "weighs in favor of settlement where it is likely that defendants would oppose class certification if the case were to be litigated"); *In re AOL Time Warner, Inc. Sec. and "ERISA" Litig*., No. 02-cv-5575 (SWK), 2006 WL 903236, at *12 (S.D.N.Y. Apr. 6, 2006) ("[T]he process of class certification would have subjected Plaintiffs to considerably more risk than the unopposed certification that was ordered for the sole purpose of the Settlement."). Even if a litigation class were to be certified, that certification could be challenged on appeal, or at another stage in the litigation. *See, e.g., In re Visa Check/Mastermoney Antitrust Litig*., 192 F.R.D. 68, 89 (E.D.N.Y. 2000), *aff'd*, 280 F.3d 124 (2d Cir. 2001) ("If factual or legal underpinnings of the plaintiffs' successful class certification

motion are undermined once they are tested . . . , a modification of the order, or perhaps decertification, might then be appropriate."); *Frank v. Eastman Kodak Co*., 228 F.R.D. 174, 186 (W.D.N.Y. 2005) ("While plaintiffs might indeed prevail [on a motion for class certification], the risk that the case might be not certified is not illusory and weighs in favor of the Class Settlement."). Plaintiffs' Counsel would continue to bear the risk of maintaining the class through trial and appeal.

c. Trial Risks

Further, Plaintiffs' Counsel's ability to prove liability at trial would have been uncertain. *See In re LIBOR-Based Fin. Instruments Antitrust Litig*., 327 F.R.D. at 494 ("[A]s to liability, establishing the existence and extent of a conspiracy will necessarily be a complex task, and many of the hurdles that plaintiffs have overcome at the pleading stage will raise substantially more difficult issues at the proof stage."); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998) (*"NASDAQ III"*) (discussing the difficulties of proving antitrust liability where plaintiffs had to prove, among other things, a complex conspiracy involving a larger number of defendants, a common motive, actions against defendants' financial interest and/or evidence of coercion). If Plaintiffs' Counsel had established liability at trial, it would still face the challenge of proving class damages to a jury. There is a substantial risk that a jury might accept one or more of Defendants' damages arguments and award far less than the funds secured by the Settlements, or even nothing at all. "[T]he history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., et al.*, 396 F.3d 96, 118 (2d Cir. 2005); *accord In re Sumitomo Copper Litig*., 189 F.R.D. 274, 283 (S.D.N.Y. 1999) ("These [ ]

settlements are outstanding in light of the substantial risk that a jury might award only a modest judgment or find no damages at all.").

iv. Post-Settlement Risk

Finally, even after Plaintiffs agreed to a global settlement with all Defendants, Plaintiffs' Counsel's risks were *still* not over. At the first preliminary approval hearing, the Court expressed concerns over its ability to certify a settlement class, and Plaintiffs' Counsel's ability to prepare a fair plan of distribution, in a multidirectional manipulation case. May 19, 2022 Hearing Tr. (ECF No. 518) at 13:9-16:15, 31:7-33:17. Plaintiffs' Counsel had to address those concerns in supplemental briefing and at a second in-person hearing. While the Court did ultimately issue an order preliminarily approving the settlements, the complexity and difficulty of the analysis perfectly typified this litigation. At every stage, Plaintiffs' Counsel risked a total loss on its investment, nothing was taken for granted, and any victories had to be defended. Even now, Plaintiffs' Counsel could still be faced with objections from absent class members, who are sophisticated institutional investors accustomed to evaluating the fairness of settlements. (To date, however, no objections have been made either to the settlements or to Plaintiffs' Counsel's fee and expense request.)

B. The Quality of the Representation Supports the Requested Fee

"[T]he quality of representation is best measured by results," *Goldberger*, 209 F.3d at 55, which are evaluated in light of "the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 141 (S.D.N.Y. 2008).

Results Obtained. The seven Settlements provide for a $155,458,000 benefit to the Class. As further detailed in Plaintiffs' motions for preliminary and final approval, this is an extraordinary result. It constitutes the *only* relief for investors damaged by manipulation of SIBOR and SOR,

unlike in cases where governmental bodies provide relief to damaged investors through a victim compensation fund. Further, in relation to the market size, it massively exceeds the size of the settlements in other benchmark rate manipulation cases. *See* ECF No. 499 (Declaration of Vincent Briganti dated May 27, 2022) ¶¶ 25-26.

Background of Counsel. Plaintiffs' Counsel has decades of experience prosecuting class action cases, including some of the largest class action recoveries under the commodities and antitrust laws. *See* ECF No. 473-12 (firm resume). This includes specific expertise in benchmark manipulation as demonstrated by Plaintiffs' Counsel's tenure as lead or co-lead counsel in cases alleging anticompetitive and manipulative conduct. *Id*.

Another consideration for assessing the quality of the representation is "[t]he quality of the opposing counsel" in the case. *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 373 (S.D.N.Y. 2002). The fact that Plaintiffs' Counsel successfully prosecuted this action for six years against 19 different Defendants all represented by well-respected and high-caliber law firms and obtained a substantial recovery for the Class reflects the quality of representation provided.

C. Public Policy Supports Awarding the Requested Fee

The Supreme Court has recognized the benefits of private civil suits as a means of enforcing federal antitrust laws. *Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983) ("This Court has emphasized the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws."); *see also GSE*, 2020 WL 3250593, at *5 ("Congress has encouraged enforcement of the antitrust laws through private civil suits to deter infringing conduct in the future."); *In re Credit Default Swaps Antitrust Litig.* ("*CDS*"), No. 13-md-2476 (DLC), 2016 WL 2731524, at *18 (S.D.N.Y. Apr. 26, 2016) ("Our antitrust laws address issues that go to the heart of our economy. Our economic health, and indeed our stability as a nation, depend upon adherence to the rule of law and our citizenry's trust in the

fairness and transparency of our marketplace."). If Plaintiffs' Counsel had not taken on the risks of this lawsuit in 2016, the Class would have been left entirely without recompense. Not only that, but the damage to the integrity of the markets caused by Defendants' manipulation of SIBOR and SOR would have gone virtually unpunished, with the only sanction being the year-long interest-free deposits imposed by MAS. Private antitrust actions like this one serve a key function in compensating damaged class members and deterring future misconduct, goals which are not always fully achieved by government enforcement alone.

Awarding reasonable fees from the common fund ensures that skilled attorneys remain able and willing to pursue antitrust violations at their own expense even when recovery is uncertain. *Goldberger*, 209 F.3d at 51 ("There is . . . commendable sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest."); *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 352 (S.D.N.Y. 2014) ("While court awarded fees must be reasonable, setting fees too low or randomly will create poor incentives to bringing large class action cases." Accordingly, "providing lawyers with sufficient incentive to bring common fund cases . . . serve[s] the public interest") (citations omitted); *see also Espinal v. Victor's Café 52nd St., Inc.*, No. 16-CV-8057 (VEC), 2019 WL 5425475, at *3 (S.D.N.Y. Oct. 23, 2019) ("The Second Circuit and courts in this District have taken into account the 'social and economic value of class actions, and the need to encourage experienced and able counsel to undertake such litigation' as a basis for increasing the percentage of the fund awarded to [Plaintiffs'] Counsel."). Here, awarding the full fee requested will serve the public policy of incentivizing attorneys to take on the substantial risks of prosecuting similar actions in the future.

PART II: COUNSEL'S FEE REQUEST IS FAIR AND REASONABLE UNDER MULTIPLE DIFFERENT METRICS

"[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Victor v. Argent Classic Convertible Arbitrage Fund L.P.*, 623 F.3d 82, 86 (2d Cir. 2010). Courts "may award attorneys' fees in common fund cases under either the 'lodestar' method or the 'percentage of the fund' method" although "the trend in this Circuit is toward the percentage method." *McDaniel v. Cnty. of Schenectady*, 595 F.3d 411, 417 (2d Cir. 2010) (citing *Wal-Mart Stores,* 396 F.3d at 121). Here, counsel's requested fee is eminently reasonable under either analysis.

A. The Requested Fee Is Well Within the Range of Risk Multipliers Approved in This Circuit

Under the lodestar method, the Court first ascertains the number of hours reasonably billed to the Class and then multiplies that figure by an appropriate hourly rate. *City of Westland Police and Fire Ret. Sys.*, No. 12-CV-0256 (LAK), 2021 WL 2453972, at *1 (S.D.N.Y. June 15, 2021). Courts compare the requested award to the time and labor expended to confirm that the fee award is reasonable. *Grice v. Pepsi Bev. Co*., 363 F. Supp. 3d 401, 406 (S.D.N.Y. 2019); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 232 (2d Cir. 1987) (adoption of the lodestar method intended to "provide counsel with [fair and just] compensation and, at the same time, temper these awards to prevent windfalls").

Counsel's Limitations and Audits of Time. Plaintiffs' Counsel self-imposed certain limits on its lodestar. Plaintiffs' Counsel's timekeepers with less than 10 hours billed in the Action have been excluded from the lodestar. Plaintiffs' Counsel audited its time and the time of Goldstein & Russell to review the appropriateness of the hours billed, and (if necessary) adjusted the lodestar

in the exercise of billing judgment. All lodestar by Goldstein & Russell was incurred on projects specifically approved by Plaintiffs' Counsel.

Number of Hours Billed. As reflected in the accompanying attorney declarations, Counsel invested a total of 18,108.45 hours working on this case: 17,230.05 hours for Plaintiffs' Counsel and 878.25 for appellate counsel Goldstein & Russell. While this represents a substantial investment of resources on the part of the two firms, it is also a very modest number in light of the amount of work done during the six-year pendency of this action. As detailed above and in the declarations, in those 18,108.45 hours, counsel investigated and developed the initial complaint effectively from scratch; litigated four motions to dismiss raising a vast array of arguments; amended their complaint four times to respond to the Court's rulings on the motions to dismiss; achieved a total victory in a major appeal and defended that appeal all the way to the Supreme Court; negotiated settlements with 19 Defendants; and developed a robust plan of distribution.

By way of comparison, in *GSE*, Plaintiffs' Counsel shared the lead counsel position with another firm (Scott+Scott), and the two firms together billed just over 30,000 hours. While those 30,000 hours did encompass discovery, there was no appeal to contend with in *GSE Bonds*, and only two motions to dismiss rather than four. Judge Rakoff nonetheless considered counsel's time to be "efficiently spent," and awarded counsel's full requested fee of $77 million, even though he observed that the number of hours was "not particularly high in light of the dollar amount of the requested fees." 2020 WL 3250593, at *4. Here, Plaintiffs' counsel bore the substantial risk of this case alone, but their requested fees are about half those awarded in *GSE*, and its hours billed are in the same proportion.

The Declarations of Vincent Briganti and Eric F. Citron describe in detail the specific contributions of their respective firms. Plaintiffs' Counsel staffed the case strategically for

maximum efficiency—allowing associates and younger partners to take responsibility wherever possible for briefing and arguments, but with senior partners maintaining constant supervision and involvement due to the complexity and risk involved in the case. Of the eight highest-billing timekeepers in this matter, four are attorneys who were also heavily involved in the *GSE* litigation where their detailed time records were vetted by Judge Rakoff: Mr. Briganti, Mr. Levis, Ms. MacLean, and Mr. St. Louis.

Hourly Rates. The billing rates used to develop the lodestar are also reasonable. The hourly billing rates for attorneys working on this case ranged from $400 to $1,980.[10] Declaration of Vincent Briganti in Support of Plaintiffs' Counsel's Motion for Award of Attorneys' Fees and Reimbursement of Expenses ("Briganti Fee Decl.") ¶ 7 (schedule listing attorney rates from $325-$1,295); Declaration of Eric F. Citron on Behalf of Goldstein & Russell, P.C., in Support of Plaintiffs' Counsel's Motion for Award of Attorneys' Fees and Reimbursement of Expenses ("Citron Decl.") (schedule listing attorney rates from $400-$1,980). These are the current billing rates that both firms charge their clients in non-contingent fee cases. Briganti Fee Decl. ¶ 8; Citron Decl. ¶ 10. They are consistent with rates charged by other firms in this market, and with rates routinely approved by courts in this District in cases of comparable size and complexity. *See, e.g.,* Transcript of Proceedings at 11, *Leonard v. John Hancock Life Ins. Co. of New York*, No. 18-cv-4994 (AKH) (S.D.N.Y. May 17, 2022), ECF No. 226 (finding lodestar reasonable where attorney rates ranged from $375 to $1,200, *see* Declaration of Seth Ard, ECF No. 208 (Mar. 11, 2022); *City of Westland,* 2021 WL 2453972, at *1 (finding counsel's hourly rates between $170 to $1,058 were reasonable); *GSE*, 2020 WL 3250593, at *1 (granting fee award using partner rates of $675 to $1,150 and associate rates of $365 to $820), *see also* Decls. in Support of Award for Attorney's

[10] Only one attorney bills at the $1,980 rate—renowned Supreme Court litigator Thomas Goldstein of Goldstein & Russell. Mr. Goldstein billed just six hours to the case.

Fees and Expenses, *GSE*, 19-cv-1704 (JSR) (S.D.N.Y. Apr. 13, 2020), ECF No. 393-96; *In re Foreign Exchange Benchmark Rates Antitrust Litig*., No. 13 Civ. 7789 (LGS), 2018 WL 5839691 (S.D.N.Y. Nov. 8, 2018) (granting fee award using partner rates up to $1,375 and associate rates of $350 to $700), Decl. in Support of Award for Attorney's Fees and Expenses, *In re Foreign Exchange,* No. 13 Civ. 7789 (LGS), (S.D.N.Y. Jan. 12, 2018), ECF No. 939; *CDS*, 2016 WL 2731524, at *17 (granting fee award using partner rates of $834 to $1,125 and associate rates of $411 to $714; *see CDS*, No. 13-md-2476 (DLC), (S.D.N.Y. Jan. 29, 2016), ECF No. 482). Plaintiffs' Counsel's rates in particular have been found reasonable time and again in this District and others. *See, e.g.*, *Laydon v. Mizuho Bank, Ltd. et al*, No. 12-cv-3419 (GBD), ECF No. 687-1 (Declaration of Vincent Briganti dated Sept. 27, 2016, Ex. A – Schedule of Attorney Rates); ECF No. 723 ¶ 5 (Order Granting Class Counsel's Motion for Award of Attorneys' Fees dated Nov. 10, 2016); ECF No. 817-1 (Declaration of Vincent Briganti dated Oct. 31, 2017, Ex. A – Schedule of Attorney Rates); ECF No. 837 ¶ 5 (Order Granting Class Counsel's Motion for Award of Attorneys' Fees dated Dec. 7, 2017); ECF No. 871-1 (Declaration of Vincent Briganti dated June 4, 2018, Ex. A – Schedule of Attorney Rates); ECF No. 889 ¶ 5 (Order Granting Class Counsel's Motion for Award of Attorneys' Fees dated July 12, 2018); ECF No. 992-1 (Declaration of Vincent Briganti dated Nov. 8, 2019, Ex. A – Schedule of Attorney Rates); ECF No. 1012 ¶ 5 (Order Granting Class Counsel's Motion for Award of Attorneys' Fees dated Dec. 19, 2019); *Sullivan v. Barclays PLC et al*, No. 13-cv-2811 (PKC), ECF No. 411 ¶ 7 (Declaration of Geoffrey M. Horn dated Mar. 23, 2018); ECF No. 425 ¶ 5 (Order Granting Class Counsel's Motion for Award of Attorneys' Fees dated May 18, 2018); ECF No. 483 ¶ 7 (Declaration of Geoffrey M. Horn dated Mar. 22, 2019); ECF No. 500 ¶ 5 (Order Granting Class Counsel's Motion for Award of Attorneys' Fees dated May 20, 2019); *In re JPMorgan Precious Metals Spoofing Litig.*, No. 18-cv-10356

(GHW), ECF No. 100 ¶ 9 (Declaration of Vincent Briganti dated May 6, 2022); ECF No. 114 ¶ 5 (Order Awarding Attorneys' Fees, Payment of Expenses, and Incentive Awards to Class Plaintiffs dated July 7, 2022); *In re JPMorgan Treasury Futures Spoofing Litig.*, No. 20-cv-3515 (PAE), ECF No. 86 ¶ 9 (Declaration of Vincent Briganti dated April 1, 2022); ECF No. 96 ¶ 5 (Order Awarding Attorneys' Fees, Payment of Expenses, and Incentive Awards to Class Plaintiffs dated June 3, 2022); *Boutchard v. Gandhi et al*, No. 18-cv-7041 (JJT), ECF No. 139 ¶ 6 (Declaration of Vincent Briganti dated May 27, 2021); ECF No. 154 ¶ 6 (Order Awarding Attorneys' Fees, Payment of Expenses, and Incentive Award to Class Plaintiffs dated July 30, 2021).

Lodestar. Lodestar is calculated by "multipl[ying] the reasonable hours billed by a reasonable hourly rate." *Colgate-Palmolive*, 36 F. Supp. 3d at 347. The total lodestar here is $15,100,428.00, comprising $14,028,053.00 for Plaintiffs' Counsel and $1,072,375.00 for Goldstein & Russell.

*Risk Multiplier***.** Once the lodestar figure is determined, courts typically enhance it by a risk multiplier. This multiplier is not a bonus or a windfall to counsel. Rather, it is necessary to compensate counsel for the major risk they undertake in working on a contingent fee basis. *See, e.g., Guevoura Fund Ltd. v. Sillerman*, No. 1:15-CV-07192-CM, 2019 WL 6889901, at *19–20 (S.D.N.Y. Dec. 18, 2019) ("[I]n numerous cases, [Plaintiffs'] Counsel working on a contingent basis, such as this, have expended thousands of hours only to receive no compensation. There have been many hard-fought lawsuits where…excellent professional efforts of members of the plaintiffs' bar produced no fee for counsel. Losses such as these are exceedingly expensive. [T]his factor counsels strongly in favor of the fee request."); *In re Cont'l Illinois Sec. Litig.*, 962 F.2d 566, 569 (7th Cir. 1992), *as amended on denial of reh'g* (May 22, 1992) (failure to award risk multiplier "was error in a case in which the lawyers had no sure source of compensation for their

services"); *see also In re Synthroid Mktg. Litig.*, 264 F.3d 712, 721 (7th Cir. 2001) ("The market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case."). When a firm bills a client hourly, it can set the rates at a level that accounts for its overhead expenses and builds in a reasonable profit margin, knowing that it will be paid for its work on an ongoing basis. But here, Plaintiffs' Counsel had no way of knowing whether it would ever be paid at all over the six-year period that it gave its best efforts to the prosecution of this case. Judge Posner in the Seventh Circuit explains well that the lodestar multiplier is intended to address this uncertainty and aid counsel in achieving market compensation:

> Suppose a lawyer can get all the work he wants at $200 an hour regardless of the outcome of the case, and he is asked to handle on a contingent basis a case that he estimates he has only a 50 percent chance of winning. Then if (as under the lodestar method) he is still to be paid on an hourly basis, he will charge (if risk neutral) $400 an hour for his work on the case in order that his *expected* fee will be $200, his normal billing rate. If the fee award is to simulate market compensation, therefore, the lawyer in this example is entitled to a risk multiplier of 2 (2 × $200 = $400). The need for such an adjustment is particularly acute in class action suits. The lawyers for the class receive no fee if the suit fails, so their entitlement to fees is inescapably contingent.
>
> The example is oversimplified, because the risk of loss varies over the life of a case. . . . We are not trying to put him into a straitjacket but are merely emphasizing that the failure to make any provision for risk of loss may result in systematic undercompensation of plaintiffs' counsel in a class action case, where as we have said the only fee that counsel can obtain is, in the nature of the case, a contingent one.

In re Cont'l Illinois Sec. Litig., 962 F.2d at 569. This is not a case where the risks would have decreased over time. As described in detail above, the risk of total non-recovery was (and would have continued to be) very high throughout the entire litigation, yet at every stage Plaintiffs' Counsel chose to press forward on behalf of the Class rather than to contain its losses. Awarding

an appropriate risk multiplier compensates Plaintiffs' Counsel for taking on this risk and accounts for the opportunity costs the firm experienced in choosing to handle a contingent matter.

The fee request here represents a lodestar multiplier of 2.57. This multiplier is comfortably within the range of multipliers that courts regularly apply in complex antitrust class actions. Indeed, in view of this case's unique risks and challenges, it is on the lower end. In *GSE*, for example, Judge Rakoff awarded a multiplier of 4.09, even where counsel enjoyed many advantages that Plaintiffs' Counsel did not have here: ability to share risk with co-counsel, a treasure trove of early cooperation from a DOJ leniency applicant, early settlements to offset risk, no personal jurisdiction issues, and no appeal. *GSE,* 2020 WL 3250593, at *5. Similarly, this Court recently awarded a multiplier of 3.01 in a case where the defendant did not even move to dismiss, but simply filed its answer and moved straight to discovery. *See Leonard v. John Hancock Life Ins. Co. of N.Y.*, No. 18-cv-4994 (AKH) (S.D.N.Y.), ECF Nos. 223 (May 20, 2022), 17 (Aug. 22, 2018). Other examples abound. To list a few:

- *Wal-Mart Stores*, 396 F.3d at 123 (upholding a multiplier of 3.5 as reasonable and observing that "multipliers of between 3 and 4.5 have become common");
- *Carlson v. Xerox Corp*., 355 F. App'x 523, 526 (2d Cir. 2009) ("the resulting multiplier would be 3.59, still below the 3.6 average and in line with the 3.1 median for similar cases");
- *CDS*, 2016 WL 2731524, at *17 (approving a lodestar multiplier of "just over 6" in a complex antitrust class action);
- *Beckman v. KeyBank N.A.,* 293 F.R.D. 467, 481 (S.D.N.Y. 2013) (approving a multiplier of 6.3 in class action, explaining that "[c]ourts regularly award lodestar

multipliers of up to eight times the lodestar, and in some cases, even higher multipliers.");

- *Maley*, 186 F. Supp. 2d at 371 (holding that a 4.65 lodestar multiplier is modest, fair, and reasonable);
- *NECA-IBEW Health & Welfare Fund v. Goldman, Sachs & Co.*, No. 1:08-CV-10783, 2016 WL 3369534, at *1 (S.D.N.Y. May 2, 2016) (approving attorneys' fees that represented a lodestar multiplier of 3.9.).

B. The Requested Fee Is Within the Range of the Fees Approved in This Circuit for Similarly Sized Settlements

The reasonableness of the requested fee is confirmed when compared to cases applying the "percentage method" to calculate fees, the method favored in this Circuit. *Wal-Mart Stores*, 396 F.3d at 121 ("The trend in this Circuit is toward the percentage method"); *In re Beacon Assoc. Litig.*, No. 09 Civ. 777(CM), 2013 WL 2450960, at *5 (S.D.N.Y. May 9, 2013) (explaining that "percentage of recovery" is "the preferred method of calculating the award for Plaintiffs' Counsel in common fund cases"). Courts that are skeptical of the percentage method fault it for allowing counsel "to collect a large fee after investing relatively little time in the case, rather than continuing the litigation in order to maximize plaintiffs' recovery but receiving a lower marginal rate of return on his or her work." *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71, 77 (S.D.N.Y. 2000). Here, of course, the opposite has happened: Plaintiffs' Counsel pushed this litigation forward for six years to turn around a total loss into a major recovery for the class.

In this case, even if used simply as a point of comparison to the lodestar method, a fee of 25% is amply reasonable. The percentage is comparable to fees awarded in other less complex actions with settlements between $100 and $300 million, such as:

- *Bd. of Trustees of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, No. 09 CIV. 686 SAS, 2012 WL 2064907, at *1 (S.D.N.Y. June 7, 2012) (approving attorneys' fees that equaled 25% of $150 million settlement and that represented a lodestar multiplier of 2.86);
- *In re Comverse Tech., Inc. Sec. Litig.,* No. 06-CV-1825 (NGG)(RER), 2010 WL 2653354, at *6 (E.D.N.Y. June 24, 2010) (awarding attorneys' fees that equaled 25% of $225 million settlement and that represented a lodestar multiplier of 2.78.);
- *In re Sumitomo Copper Litig.,* 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999) (Pollack, J.) (approving attorneys' fees that equaled 27.5% of $116.6 million settlement);
- *Laydon v. Mizuho Bank Ltd.*, No. 12-cv-3419 (GBD) (S.D.N.Y.) ECF Nos. 723 (Nov. 10, 2016) (granting 25% fee on first set of settlements totaling $58 million).

See also Alaska Elec. Pension Fund v. Bank of Am. Corp., No. 14-cv-7126 (JMF), 2018 WL 6250657, at *3 (S.D.N.Y. Nov. 29, 2018) (awarding 26% of the net settlement fund from a $504.5 million settlement involving the manipulation of ISDAfix).

Recent studies of antitrust class actions further confirm the reasonableness of the requested 25% fee. *See* Center for Litigation and Courts and The Huntington National Bank, *2021 Antitrust Annual Report: Class Actions in Federal Court* (April 2022) at 27-28 (median fee awards of 30% in antitrust settlements ranging from $100 million to $249 million between 2009 and 2021)[11]; Theodore Eisenberg *et. al*., *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 951 (2017) (the average fee award in nineteen different antitrust class actions studied during 2009-2013 was 27%); WILLIAM B. RUBENSTEIN, 5 NEWBERG ON CLASS ACTIONS § 15:78 (5th ed. Supp.

[11] *Available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4117930

Dec. 2016) (mean percentage for fees in Second Circuit class action cases from 2006 to 2011 was 26.9%).

PART III: PLAINTIFFS' COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE SETTLEMENTS AND SHOULD BE REIMBURSED

Plaintiffs' Counsel also request reimbursement in the amount of $179,945.33 for out-of-pocket expenses reasonable and necessarily incurred in connection with the prosecution of this Action from inception through to the present. *See* Briganti Decl. ¶¶ 125-26. Expert costs comprise the bulk of Plaintiffs' Counsel's expenses, totaling $116,402.52 for work with experts engaged to assist with issues of foreign law, analysis of relevant data and trends, and the development of the Distribution Plan, among other issues. Over the course of the litigation, Plaintiffs' Counsel paid $24,653.05 in costs relating to legal and factual research expenses, $17,705.50 on in house copying (at $0.20 per page) and $9,793.32 in connection with document hosting related to the cooperation materials provided by Settling Defendants. Briganti Fee Decl. ¶¶ 10-11. The remaining $11,390.94 in expenses incurred by Plaintiffs' Counsel and Goldstein & Russell include, *inter alia*, filing fees, court transcripts, postage, shipping, and telephone charges, outside copying and appellate printer charges, and travel expenses. *Id*. ¶¶ 10-11; Citron Decl. ¶ 12. This amount is well below the $750,000 Plaintiffs' Counsel advised in the Court-approved notice sent to Settlement Class Members. *See* ECF No. 499-2 at 29.

The attorneys whose work leads to the creation of "a common settlement fund for a class are entitled to reimbursement of [reasonable] expenses that they advance to a class." *Meredith Corp.*, 87 F. Supp. 3dat 671; *see also In re LIBOR-Based Fin. Instruments Antitrust Litig*., No. 11 MD 2262 (NRB), 2018 WL 3863445, at *1 (S.D.N.Y. Aug. 14, 2018) (citation omitted) ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course."). Plaintiffs' Counsel's costs and expenses here were "incidental and necessary to the

representation of the [C]lass," and should be reimbursed. *See Beckman*, 293 F.R.D. at 482. Indeed, "[t]he fact that [Plaintiffs'] Counsel [were] willing to [incur these expenses], where reimbursement was entirely contingent on the success of this litigation, is perhaps the best indicator that expenditures were reasonable and necessary." *Fleisher v. Phoenix Life Ins. Co*., No. 11-CV-8405 (CM), 2015 WL 10847814, at *23 (S.D.N.Y. Sept. 9, 2015).

PART IV: THE COURT SHOULD GRANT PLAINTIFFS' INCENTIVE AWARDS REQUEST

Plaintiffs seek incentive awards totaling $375,000, with $125,000 each awarded to class representatives Fund Liquidation Holdings LLC, Moon Capital Partners Master Fund Ltd., and Moon Capital Master Fund Ltd. Awards to class representatives, whether termed as "service" or "incentive" awards, are granted at the discretion of the Court to "compensate class representatives for their services to the class and simultaneously serve to incentivize them to perform this function." WILLIAM B. RUBENSTEIN, 5 NEWBERG ON CLASS ACTIONS § 17:1 (5th ed. 2011). In deciding whether to grant such awards, a court considers "'the personal risk (if any) incurred by the plaintiff-applicant in becoming and continuing as a litigant, the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (*e.g.*, factual expertise), any other burdens sustained by that plaintiff . . . and, of course, the ultimate recovery.'" *Dial Corp. v. News Corp.*, 317 F.R.D. 426, 439 (S.D.N.Y. 2016) (quoting *Roberts v. Texaco*, 979 F. Supp. 185, 200 (S.D.N.Y. 1997)); *see also Anwar v. Fairfield Greenwich Ltd.*, No. 09-cv-118 (VM), 2012 WL 1981505, at *3 (S.D.N.Y. June 1, 2012) ("Courts consistently approve awards in class action lawsuits to compensate named plaintiffs for the services they provide and burdens they endure during litigation."); *Beckman*, 293 F.R.D. at 483 ("It is important to compensate plaintiffs for the time they spend and the risks they take."); *Varljen v. H.J. Meyers & Co*., No. 97-CV-6742 (DLC), 2000 WL 1683656, at *5 n.2 (S.D.N.Y. Nov. 8, 2000)

(reimbursement of such expenses should be allowed because it "encourages participation of plaintiffs in the active supervision of their counsel").

Plaintiffs took a significant risk in serving as class representatives and suing Defendants. Prosecuting financial institutions, including some of the most significant banks in the financial markets, carries with it the inherent risk of adversely impacting existing or future business opportunities or relationships with those same institutions. *See Dial Corp.*, 317 F.R.D. at 439 ("[N]amed Plaintiffs in this case assumed a substantial risk in antagonizing a longstanding, powerful business partner and suffering sweeping consequences in the marketplace as a result of filing this action"). That Plaintiffs served as class representatives despite the risk of potentially being locked out of other business opportunities supports granting Plaintiffs' request for incentive awards.

Further, Plaintiffs were vigilant in pursing their responsibilities as class representatives and devoted significant time to prosecuting this Action that would have been otherwise spent running their businesses. FLH (from the outset of the case) and the Moon Plaintiffs (since 2018) provided valuable assistance to Plaintiffs' Counsel by, among other things, providing relevant information, transaction data, and other documents critical to developing the allegations made in the complaints; providing feedback concerning Plaintiffs' Counsel's litigation strategy; reviewing pleadings and motions; reviewing appellate briefs; playing instrumental roles during the settlement negotiations with Defendants, and keeping apprised of key developments in the case and communicating with Plaintiffs' Counsel.

The risks and efforts undertaken by Plaintiffs merit incentive awards, and Plaintiffs' requested award amounts are consistent with those awards in other complex class actions. *See, e.g., Alaska Elec. Pension Fund,* 2018 WL 6250657, at *4 (awarding six $50,000 service awards

and two $100,000 awards for named plaintiffs, recognizing that "in aggregate they amount to a minuscule portion of the settlement fund"); *In re Petrobras Sec. Litig.*, 317 F. Supp. 3d 858, 873 (S.D.N.Y. 2018) (Rakoff, J.) (awarding three class representatives a total of $400,000 as compensation for, among other things, responding to discovery, "providing oversight of the mediation and settlement process," and reviewing and authorizing settlement); *In re Vitamin C Antitrust Litig*., No. 06-MD-1738 (BMC)(JO), 2012 WL 5289514, at *11 (E.D.N.Y. Oct. 23, 2012) (approving $50,000 incentive award for each of two class representatives); *Bd. of Tr. of AFTRA Ret. Fund*, 2012 WL 2064907, at *3 ($50,000 incentive awards to three class representatives); *Bellifemine v. Sanofi-Aventis U.S. LLC*, No. 07 Civ. 2207 (JGK) ,2010 WL 3119374, at *7 (S.D.N.Y. Aug. 6, 2010) ($75,000 awards to five named plaintiffs and $25,000 to $60,000 awards to four class member witnesses); *Kifafi v. Hilton Hotels Ret. Plan*., 999 F. Supp. 2d 88, 105 (D.D.C. 2013) ($50,000 incentive award to lead plaintiff).

As a percentage, the total requested incentive awards represent just 0.24% of the total value of the Settlements. This percentage is also comparable to the incentive or service awards granted in other similarly complex class actions. *See GSE,* 19-cv-1704 (JSR) (S.D.N.Y.) (awarding $400,000 in incentive awards, representing 0.103% of the settlement fund); *Laydon v. Mizuho Bank, Ltd.*, No. 12-cv-3419 (GBD), ECF No. 724 (S.D.N.Y. Nov. 10, 2016) (awarding $580,000 in incentive awards, representing 1% of the settlement fund); *Dial Corp.*, 317 F.R.D. at 438-39 (awarding 0.12% of the $244 million settlement fund ($300,000) to six class representatives); *In re Air Cargo Shipping Services Antitrust Litig.*, No. 06-MD-1775 (JG)(VVP), 2015 WL 5918273, at *6 (E.D.N.Y. Oct. 9, 2015) (granting $540,000 in incentive awards, representing 0.06% of the total $900 million in settlements, to six class representatives).

The Settlement Notice to Class Members stated that, in the event Plaintiffs sought incentive

awards for their roles in this Action, such amount would not exceed $500,000 in the aggregate. To date, there have been no objections by Class Members to the incentive awards. In light of their active roles and the risks involved with representing the Class, Plaintiffs respectfully request that the Court issue incentive awards of $125,000 to FLH; $125,000 to Moon Capital Partners Master Fund Ltd., and $125,000 to Moon Capital Master Fund Ltd.

CONCLUSION

For the foregoing reasons, Plaintiffs' Counsel respectfully requests that the Court approve their motion for attorneys' fees and payment of litigation costs, and Plaintiffs' request for Incentive Awards, in the amounts set forth above.

Dated: October 10, 2022
White Plains, New York

LOWEY DANNENBERG, P.C.

By: */s/ Vincent Briganti*

Vincent Briganti
Geoffrey M. Horn
44 South Broadway, Suite 1100
White Plains, New York 10601
Tel.: 914-997-0500
Fax: 914-997-0035
E-mail: vbriganti@lowey.com
E-mail: ghorn@lowey.com

Counsel for Representative Plaintiffs and the Proposed Class

TAB 31A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

IN RE: LOESTRIN 24 FE ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: Direct Purchaser Actions	MDL No. 2472 Master File No. 1:13-md-2472-S-PAS

ORDER GRANTING DIRECT PURCHASER CLASS PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF SETTLEMENT, APPROVAL OF PROPOSED PLAN OF ALLOCATION, ADOPTION OF REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE, AND ORDER OF DISMISSAL WITH PREJUDICE

Upon review and consideration of the Settlement Agreement between direct purchaser plaintiff Ahold USA, Inc. ("Ahold") and defendants Warner Chilcott[1] and Watson Laboratories, Inc. (collectively, "the defendants"), related Warner Chilcott and Watson entities,[2] and parent entity Allergan, plc, dated January 14, 2020; Direct Purchaser Class Plaintiffs' Amended Motion for Preliminary Approval of Settlement, Approval of the Form and Manner of Notice to the Class, Appointment of Claims Administrator and Escrow Agent, and Setting the Final Settlement Schedule and Date for a Fairness Hearing; Direct Purchaser Class Plaintiffs' Unopposed Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Service Award for the Class Representative; Report and Recommendation Regarding Direct Purchaser Class Motion for Approval of Attorneys' Fees, Expenses and a Service Award;[3] and Direct Purchaser Class Plaintiffs' Unopposed Motion for Final Approval of Settlement, Approval of Proposed Plan of

[1] Warner Chilcott Co., LLC f/k/a Warner Chilcott Co., Inc.; Warner Chilcott (US), LLC; and Warner Chilcott Sales (US), LLC (together and individually, "Warner Chilcott").

[2] Warner Chilcott plc n/k/a Allergan WC Ireland Holdings Ltd.; Warner Chilcott Holdings Co. III, Ltd.; Warner Chilcott Corp.; Warner Chilcott Laboratories Ireland Limited; and Watson Pharmaceuticals, Inc.

[3] *See also* Advisory with Respect to Report & Recommendation Regarding Direct Purchaser Class Mot. for Approval of Attorneys' Fees, Expenses & Service Award, ECF No. 1466.

Allocation, Adoption of Report and Recommendation of Magistrate Judge, and Order of Dismissal with Prejudice; and all memoranda, exhibits and materials submitted in support thereof, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. This Order and Final Judgment incorporates by reference the definitions in the Settlement Agreement among the parties to the action on file with this Court, and all capitalized terms used and not otherwise defined herein shall have the meanings set forth in the Settlement Agreement.

2. This Court has jurisdiction over this case, each of the parties, and all members of the Direct Purchaser Plaintiff Class.

3. As set forth in this Court's order[4] dated July 2, 2019, certifying the Direct Purchaser Class pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3), as well as the Order Granting Direct Purchaser Class Plaintiffs' Motion for Preliminary Approval of Proposed Settlement, Approval of the Form and Manner of Notice to the Class, and Setting the Final Settlement Schedule and Date for a Fairness Hearing, dated March 23, 2020,[5] the Class is defined as follows:

> All persons or entities in the United States and its territories who purchased brand or generic Loestrin 24 directly from Warner [Chilcott] or Amneal at any time during the period from September 1, 2009, through and until June 3, 2015, and all persons or entities in the United States and its territories who purchased brand Minastrin 24 directly from Warner at any time during the period from September 1, 2009, through and until March 14, 2017 (the "Class Period").
>
> Excluded from the Class are defendants, and their officers, directors, management, employees, subsidiaries, or affiliates, and, all federal

[4] *In re Loestrin 24 Fe Antitrust Litig.*, No. 13-md-2472, 2019 WL 3214257 (D.R.I. July 2, 2019) (filed at ECF No. 1050).

[5] ECF No. 1426.

> governmental entities. Also excluded from the class are educational institutions such as universities and colleges.
>
> Also excluded from the Class are the following entities that have opted out of the Class: Walgreen Co., The Kroger Co., Safeway Inc., HEB Grocery Company L.P., Albertson's LLC, CVS Pharmacy, Inc., Rite Aid Corporation, and Rite Aid Hdqtrs. Corp.

4. Nothing in this Order affects the claims of the end-payor plaintiffs or end-payor class or the individually litigating retailer plaintiffs in this action.

A. Notice Satisfies Due Process

5. The notice of settlement (in the form attached as Exhibit A to the Declaration of Tina Chiango Regarding Notice of Settlement to the Direct Purchaser Class) ("Notice"), mailed and emailed directly to the members of the Class, constituted the best notice practicable under the circumstances. In making this determination, the Court finds that the Notice provided for individual notice to all Class members who were identified through reasonable efforts. Copies of the Notice were disseminated via First-Class U.S. mail on or around April 6, 2020 to Class members identified from the sales data produced by Defendants and third-party generic manufacturers.[6] Between April 10, 2020 and April 13, 2020, the Notice was sent to an email address for every class member.[7] Only one Class member was unreachable by email, but that Class member was sent the Notice via First-Class U.S. mail.[8] The Notice was also posted on the settlement website, www.loestrin24antitrustlitigation.com. Pursuant to, and in accordance with, Rule 23 of the Federal Rules of Civil Procedure, the Court hereby finds that the Notice provided Class members with due and adequate notice of the Settlement Agreement, these proceedings, and the rights of Class members to object to the Settlement. Due and adequate notice of the

[6] Declaration of Tina Chiango Regarding Notice of Settlement to Direct Purchaser Class ¶¶ 8-11.

[7] *Id* ¶¶ 12-17.

[8] *Id*. ¶¶ 11, 17.

proceedings having been given, and a full opportunity having been offered to the Class to participate in the fairness hearing, it is hereby determined that all Class members are bound by this Order and Final Judgment.

B. Final Approval of Direct Purchaser Settlement

6. The Court has held a hearing to consider the fairness, reasonableness, and adequacy of the proposed Settlement and has been advised that there have been no objections to the Settlement from any members of the Class.

7. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court hereby approves the Settlement, as set forth in the Settlement Agreement, and finds that the Settlement is, in all respects, fair, reasonable, and adequate to Class members. Specifically, the Settlement is fair, reasonable, and adequate in light of the factors set forth in *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir. 1974),[9] as follows and for the reasons set forth in the Memorandum of Law in Support of Direct Purchaser Class Plaintiffs' Unopposed Motion for Final Approval of Settlement, Approval of Proposed Plan of Allocation, Adoption of Report and Recommendation of Magistrate Judge, and Order of Dismissal with Prejudice:

a. This case was highly complex, expensive, and time consuming, and would have continued to be so if the case had not settled;

b. There were no objections to the Settlement by Class members, all of whom were sent notice by U.S. First Class mail and/or email;

[9] Courts in this district have used the *Grinnell* factors to assess the fairness, reasonableness, and adequacy of settlements. *See, e.g.*, *Sesto v. Prospect Chartercare,* LLC, No. 18-cv-328, 2019 WL 5067200, at *3 (D.R.I. Oct. 9, 2019); *Medoff v. CVS Caremark Corp.*, No. 09-cv-554, 2016 WL 632238, at *5-7, 8 (D.R.I. Feb. 17, 2016); *Trombley v. Bank of Am. Corp.*, No. 08-cv-456, 2013 WL 5153503, at *5 (D.R.I. Sept. 12, 2013); *Baptista v. Mut. of Omaha Ins. Co.*, 859 F. Supp. 2d 236, 642 (D.R.I. 2012).

c. Because the case settled after the parties had completed discovery, the Court had ruled on class certification, the Court had held hearings on and the parties had fully briefed summary judgment motions, *Daubert* motions, and motions *in limine*, and the case was on the verge of trial, Class Counsel had a full appreciation of the strengths and weaknesses of their case in negotiating the Settlement;

d. Class Counsel and the Class would have faced risks in establishing liability, causation, and damages if they had decided to continue to litigate rather than settle; and

e. The amount of the Settlement is well within the range of reasonableness in light of the best possible recovery and the risks the parties would have faced if the case had continued to verdicts as to both liability and damages.

8. The Court finds that Co-Lead Counsel, listed below, along with other Class Counsel, have fairly and adequately represented the interests of the Class and satisfied the requirements of Federal Rule of Civil Procedure 23(g):

Thomas M. Sobol
Kristen A. Johnson
HAGENS BERMAN SOBOL SHAPIRO LLP
55 Cambridge Parkway, Suite 301
Cambridge, MA 02142

Peter R. Kohn
FARUQI & FARUQI LLP
1617 JFK Boulevard, Suite 1550
Philadelphia, PA 19103

Joseph H. Meltzer
KESSLER TOPAZ MELTZER & CHECK LLP
280 King of Prussia Road
Radnor, PA 19087

David F. Sorensen
Ellen T. Noteware
BERGER MONTAGUE PC
1818 Market Street, Suite 3600
Philadelphia, PA 19103

9. All of the Class's claims against Warner Chilcott and Watson are hereby dismissed with prejudice and without costs as provided in the Settlement Agreement.

10. Upon the Settlement becoming final upon the Effective Date as defined in Paragraph 5 of the Settlement Agreement, Ahold and all Class Members, whether or not they object to the Settlement and whether or not they make a claim upon or participate in the Settlement Fund, on behalf of themselves and their respective past, present, and future parents, subsidiaries, associates, affiliates, officers, directors, employees, insurers, general or limited partners, divisions, agents, attorneys, servants, trustees, joint ventures, heirs, executors, administrators, representatives (and the parents', subsidiaries', and affiliates' past and present officers, directors, employees, agents, attorneys, servants, and representatives), and their predecessors, successors, heirs, executors, administrators, and representatives (collectively, the "Direct Purchaser Class Releasors"), release and forever discharge, and covenant not to sue, Defendants and their past, present, and future parents, subsidiaries, divisions, affiliates, joint ventures, stockholders, officers, directors, management, supervisory boards, insurers, general or limited partners, employees, agents, attorneys, servants, representatives (and the parents', subsidiaries', and affiliates' past, present, and future officers, directors, employees, agents, attorneys, servants, and representatives), and the predecessors, successors, heirs, executors, administrators and representatives of each of the foregoing (collectively, the "Defendant Releasees") from all manner of claims, debts, obligations, demands, actions, suits, causes of action, damages whenever incurred, liabilities of any nature whatsoever, including costs, expenses, penalties and attorneys' fees, under federal or state laws, whether known or unknown, foreseen or unforeseen, suspected or unsuspected, contingent or non-contingent, in law or equity, that arise out of or relate, in whole or in part in any manner, to:

> (i) the subject matter of or acts, omissions, or other conduct alleged in the Direct Purchaser Class Plaintiffs' Third Amended Consolidated Class Action Complaint and Jury Demand (ECF No. 380), dated March 28, 2018, in the Direct Purchaser Class Action,

> or any prior complaints or subsequent amended complaints filed in the Direct Purchaser Class Action (collectively "Complaints"); (ii) the subject matter of pre-trial proceedings in the Direct Purchaser Class Action; and/or (iii) all claims concerning alleged delay or impairment in the marketing, sale, manufacture, pricing, or purchase of, or the enforcement of intellectual property related to, Loestrin 24, Minastrin 24, Lo Loestrin 24, or their generic equivalents that could reasonably have been asserted in the Direct Purchaser Class Action, including but not limited to claims of reverse payments, product hops, fraudulent procurement of U.S. Patent No. 5,552,394, sham patent listings, and sham patent litigations prior to the date hereof (collectively, this entire paragraph the "Released Claims").

11. Upon the occurrence of the Effective Date as defined in Paragraph 5 of the Settlement Agreement, Defendants, on behalf of themselves and their respective past, present, and future parents, subsidiaries, associates, affiliates, officers, directors, employees, insurers, general or limited partners, divisions, agents, attorneys, servants, trustees, joint ventures, heirs, executors, administrators, representatives (and the parents', subsidiaries', and affiliates' past and present officers, directors, employees, agents, attorneys, servants, and representatives), and their predecessors, successors, heirs, executors, administrators, and representatives (collectively, the "Defendant Releasors"), release and forever discharge, and covenant not to sue, Direct Purchaser Class Members and their past, present, and future parents, subsidiaries, divisions, affiliates, joint ventures, stockholders, officers, directors, management, supervisory boards, insurers, general or limited partners, employees, agents, attorneys, servants, representatives (and the parents', subsidiaries', and affiliates' past, present, and future officers, directors, employees, agents, attorneys, servants, and representatives), and the predecessors, successors, heirs, executors, administrators and representatives of each of the foregoing (collectively, the "Direct Purchaser Class Releasees") from all claims, debts, obligations, demands, actions, suits, causes of action, damages whenever incurred, liabilities of any nature whatsoever, including costs, expenses, penalties and attorneys' fees, under federal or state laws, whether known or unknown, foreseen

or unforeseen, suspected or unsuspected, contingent or non-contingent, in law or equity, asserted in connection with the Action or that should have been asserted in the Action as compulsory counterclaims arising out of the alleged conduct that is the subject matter of Paragraph 11 of the Settlement Agreement.

12. In addition, upon the occurrence of the Effective Date as defined in Paragraph 5 of the Settlement Agreement, each Direct Purchaser Class Releasor and Defendant Releasor (collectively "Releasors") waives and releases, upon the Settlement Agreement becoming final, any and all provisions, rights, and/or benefits conferred by § 1542 of the California Civil Code, which reads:

> Section 1542. General Release; extent. A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor;

or by any law of any state or territory of the United States, or principle of common law, which is similar, comparable, or equivalent to § 1542 of the California Civil Code. Each Releasor may hereafter discover facts other than or different from those which he, she, or it knows or believes to be true with respect to the claims that are the subject matter of Paragraph 11 of the Settlement Agreement. Nonetheless, upon the Effective Date each Releasor hereby expressly waives and fully, finally, and forever settles and releases any known or unknown, foreseen or unforeseen, suspected or unsuspected, asserted or unasserted, contingent or non-contingent claim that is the subject matter of Paragraph 11 of the Settlement Agreement, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts. Each Direct Purchaser Class Releasor also hereby expressly waives and fully, finally and forever settles, releases and discharges any and all claims that are the subject matter of Paragraph 11 of the Settlement Agreement that it may have against any Defendant Releasees under § 17200, et

seq., of the California Business and Professions Code or any similar comparable or equivalent provision of the law of any other state or territory of the United States or other jurisdiction. Each Defendant Releasor also hereby expressly waives and fully, finally and forever settles, releases and discharges any and all claims that are the subject matter of Paragraph 11 of the Settlement Agreement that it may have against any Direct Purchaser Class Releasees under § 17200, et seq., of the California Business and Professions Code or any similar comparable or equivalent provision of the law of any other state or territory of the United States or other jurisdiction.

13. The releases set forth in Paragraphs 10, 11, and 12 of this Order and Final Judgment effect a complete and total resolution of this Action to the extent of the claims of the Direct Purchaser Class that were or could have been asserted relating to the allegations in this Action, as well as any compulsory counterclaims of Defendants relating to the allegations in this Action that were or should have been asserted, but the releases set forth in Paragraphs 10, 11 and 12 of this Order and Final Judgment do not release any claims (1) arising in the ordinary course of business between any Direct Purchaser Class member and any Defendant arising under Article 2 of the Uniform Commercial Code (pertaining to sales), the laws of negligence or product liability or implied warranty, breach of contract, breach of express warranty, or personal injury; (2) other claims unrelated to Loestrin 24 Fe, Minastrin 24 Fe, Lo Loestrin Fe, or their generic equivalents; or (3) arising out of or in any way relating to the alleged horizontal price-fixing agreements between Defendants and other manufacturers of generic pharmaceutical products that are alleged in *In re Generic Pharmaceuticals Pricing Antitrust Litigation*, MDL No. 2724, 16-md-2724 (E.D. Pa.).

14. The Court retains exclusive jurisdiction over the Settlement and the Settlement Agreement as described therein, including the administration and consummation of the Settlement, and over this Order and Final Judgment.

C. Approval of Plan of Allocation for Direct Purchaser Class

15. The Court approves Direct Purchaser Class Plaintiffs' Proposed Plan of Allocation for the Direct Purchaser Class, filed on January 22, 2020 as Exhibit 8 to the Declaration of Thomas M. Sobol in Support of Direct Purchaser Class Plaintiffs' Motion for Preliminary Approval of Settlement, Approval of the Form and Manner of Notice to the Class, Appointment of Claims Administrator and Escrow Agent, and Setting the Final Settlement Schedule and Date for a Fairness Hearing[10] and available on the official settlement website (www.loestrin24antitrustlitigation.com), which addresses the allocation of funds from the Settlement Agreement, plus interest and net of the Court-approved expense reimbursement, award of attorneys' fees, and service award to the class representative.

16. The Court retains, for all time, exclusive jurisdiction over the Settlement and the Settlement Agreement as described therein, including the administration and consummation of the Settlement, and over this Order.

17. Co-Lead Counsel and RG/2 Claims Administration LLC, the Court-appointed claims administrator, are authorized to begin administration and distribution of claim forms and the net proceeds of the Settlement in accordance with the Plan of Allocation within five (5) business days of entry of this Order.

[10] ECF No. 1396-8.

D. Adoption of Report and Recommendation Regarding Direct Purchaser Class Plaintiffs' Motion for Attorneys' Fees, Expenses, and a Service Award

18. On June 16, 2020, this Court referred Direct Purchaser Class Plaintiffs' Unopposed Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Service Award for the Class Representative ("Fee Motion")[11] to United States Magistrate Judge Patricia A. Sullivan, who has reviewed the reasonableness of Class Counsel's time and expenses on a quarterly basis since the outset of the litigation, pursuant to 28 U.S.C. § 636(b)(1)(B), Rule 72(b) of the Federal Rules of Civil Procedure, and Local Rule Cv 72 to submit to the undersigned district judge proposed findings of fact and recommendations for disposition of the Fee Motion.[12]

19. Judge Sullivan filed a Report and Recommendation Regarding the Direct Purchaser Class Motion for Approval of Attorneys' Fees, Expenses, and a Service Award ("Fee and Expense R&R") on July 17, 2020,[13] which acknowledged the quality of work performed by Class Counsel and recommended that the Court grant the Fee Motion and approve payments of (i) $3,965,558 in reimbursement for costs and expenses, (ii) $38,678,147 in attorneys' fees, and (ii) a $100,000 service award for class representative Ahold USA, Inc. out of the settlement fund.[14]

20. The Fee and Expense R&R advised that any party could serve and file specific objections to the proposed findings and recommendations as provided by Rule 72(b)(2) of the Federal Rules of Civil Procedure and the Local Rule Cv 72(d) within fourteen days of its issuance and stated that failure to timely file such objections constituted waiver of the right to

[11] ECF No. 1428.

[12] *See* Elec. Order, June 16, 2020.

[13] ECF No. 1443; *see also* Advisory with Respect to Report & Recommendation Regarding Direct Purchaser Class Mot. for Approval of Attorneys' Fees, Expenses & Service Award, ECF No. 1466.

[14] *Id.* at 14.

review by the district judge and to appeal any judgment or ruling from the Court based on the findings and recommendations of the Fee and Expense R&R.[15] No party filed objections to the Fee and Expense R&R, and the deadline for doing so has passed.

21. The Court has reviewed the Magistrate Judge's thorough and well-reasoned Fee and Expense R&R and hereby ADOPTS and APPROVES IN FULL the findings and recommendations set forth therein. Accordingly, the Court hereby ORDERS that Direct Purchaser Class Plaintiffs' Unopposed Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Service Award for the Class Representative is GRANTED and approves the following payments for distribution from the settlement fund:

a. Direct Purchaser Class Counsel's request for reimbursement of their reasonable litigation expenses, totaling $3,965,558[16];

b. A fee award of 33⅓% of the net settlement amount (one-third of $120 million settlement minus the requested litigation expenses), totaling $38,678,147, plus any interest on that amount that may accrue prior to distribution; and

c. A $100,000 service award to Ahold in recognition of its participation in the case and the time and effort it expended on behalf of the Class.

E. Final Judgment

22. The Court finds that this Order and Final Judgment adjudicates all of the claims, rights, and liabilities of the parties to the Settlement Agreement (including the members of the Class), and is final.

[15] *Id.*

[16] As detailed by Class Counsel, there are still outstanding expenses related to the administration of the settlement that were accounted for in the total expense reimbursement request. Any changes to the final expenses should be reported in the forthcoming distribution request.

23. Neither this Order and Final Judgment, nor the Settlement Agreement nor any other Settlement-related document shall constitute any evidence or admission of liability by Defendants or any other released party, nor shall either the Settlement Agreement, this Order, or any other Settlement-related document be offered in evidence or used for any other purpose in this or any other matter or proceeding except as may be necessary to consummate or enforce the Settlement Agreement of the terms of this Order or if offered by any released party in responding to any action purporting to assert Released Claims.

SO ORDERED this 1st day of September, 2020.

Hon. William E. Smith
U.S. District Court for the District of Rhode Island

TAB 31B

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

IN RE: LOESTRIN 24 FE ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: DIRECT PURCHASER ACTIONS	MDL NO. 2472 Master File No. 1:13-md-2472-WES-PAS

MEMORANDUM OF LAW IN SUPPORT OF DIRECT PURCHASER CLASS PLAINTIFFS' UNOPPOSED MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND SERVICE AWARD FOR THE CLASS REPRESENTATIVE

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I. INTRODUCTION

On December 13, 2019—days before jury selection and a few weeks to trial—direct purchaser class plaintiff Ahold USA, Inc. reached an agreement on behalf of itself and the certified class of direct purchasers to settle all claims against Warner Chilcott[1] and Watson Laboratories, Inc., related Warner Chilcott and Watson entities,[2] and parent entity Allergan, plc. The settlement provides for a payment from the defendants in the total gross amount of $120 million in cash to the direct purchaser class; in exchange, the direct purchasers dismiss their case with prejudice and provide a full release of all claims.[3] To get there, class counsel[4] expended, over about seven years, more than 54,973 hours of uncompensated professional time on behalf of the direct purchaser class.

Class counsel now respectfully seek three things: (1) reimbursement of out-of-pocket litigation expenses totaling $3,965,558, (b) an award of attorneys' fees of one-third of the settlement (after first deducting for reimbursement of expenses from the total settlement amount), totaling $38,678,147,[5] and (c) a service award of $100,000 for Ahold in recognition of its service to the class.

Expenses. Class counsel have incurred approximately $3,965,558 in litigation-related

[1] Warner Chilcott Co., LLC f/k/a Warner Chilcott Co., Inc.; Warner Chilcott (US), LLC; and Warner Chilcott Sales (US), LLC (together and individually, "Warner Chilcott").

[2] Warner Chilcott plc n/k/a Allergan WC Ireland Holdings Ltd.; Warner Chilcott Holdings Co. III, Ltd.; Warner Chilcott Corp.; Warner Chilcott Laboratories Ireland Limited; and Watson Pharmaceuticals, Inc.

[3] *See* Ex. 1 to Sobol Decl. in Supp. of Direct Purchaser Class Pls.' Am. Mot. for Prelim. Approval of Settlement, ECF No. 1141-1.

[4] On July 2, 2019, the Court appointed Hagens Berman Sobol Shapiro LLP ("HBSS"), Faruqi & Faruqi LLP ("F&F"), Berger Montague P.C. ("BM"), and Kessler Topaz Meltzer & Check LLP ("KTMC") as co-lead counsel for the direct purchaser class. *In re Loestrin 24 Fe Antitrust Litig.*, No. 13-md-2472, 2019 WL 3214257, at *17 (D.R.I. July 2, 2019). In addition, the direct purchaser class was represented by the Radice Law Firm ("RL"), Taus Cebulash & Landau LLP ("TCL"), and Lynch & Pine.

[5] $120 million − $3,965,558 in expenses = $116,034,442 × $\frac{1}{3}$ = $38,678,147.

expenses.[6] The largest component of this figure by far is expert fees, totaling approximately $2,798,527; this amount is not unexpected given the number of complex legal and factual issues (and the number of expert reports) involved here. The remaining expenditures were for expenses such as filing fees, court reporting fees, document management/database hosting fees, and travel costs to attend depositions and hearings.[7] We outline the safeguards used to assure the Court these expenses are reasonable.

Fees. The fee request is reasonable using the prevailing percentage-of-fund approach, and then deriving a percentage using either the holistic or mimic-the-market methods. With only a few outliers, district courts have awarded a full one-third fee in similar generic suppression and other pharmaceutical antitrust cases over the last fifteen years. Despite the unique challenges in this case, and the growing complexities, risk, and expense of pharmaceutical antitrust litigation generally, the settlement represents a significant recovery for members of the class. Using the lodestar cross-check sometimes, used in class action fee awards, the requested fees represent 130% of class counsel's reported lodestar (that is, a 1.3 multiplier at the hourly rates in effect at the time the work was performed),[8] a reasonable request given the nature of the case, the degree of risk undertaken in bringing the action, and the excellent result.

Service award. Class counsel also request that the Court approve a service award of

[6] *See* Decl. of Co-Lead Counsel Peter R. Kohn in Supp. of Direct Purchaser Class Pls.' Mot. for Award of Attorney's Fees, Reimbursement of Expenses & Service Award to the Class Representative ("Kohn Decl.") ¶¶ 105-07 (submitted herewith).

[7] *See id.*

[8] Total loadstar using hourly rates in effect at the time the work was performed equals $29,542,219. A fee award of $38,678,147 results in a multiplier of 1.31 ($38,678,147 ÷ 29,542,219 = 1.31). Class counsel also report their lodestar for all hours incurred in the case using the rates for each professional in effect in December 2019 when the case settled. *See* Kohn Decl. ¶ 109. Expressing the lodestar figure in terms of current rates because of the delay in payment of fees for the services provided is consistent with precedent in this Circuit. *See Lipsett v. Blanco*, 975 F.2d 934, 942-43 (1st Cir. 1992). The reported loadstar using 2019 rates is $31,684,741. Using this figure results in a multiplier of 1.22.

$100,000 to the class representative, Ahold, in recognition of its vital participation in this case and the time and effort expended in prosecuting the action on behalf of the class.[9]

II. BACKGROUND

In support of this motion, class counsel submit three things. First, the Kohn declaration describes in detail the work undertaken by class counsel from inception of this case through settlement. Second, each co-lead counsel firm provides a separate declaration summarizing the individual firm's involvement, hours expended by each professional, hourly rates, total lodestar from inception to settlement of the case, out-of-pocket expenses by category and any contributions to the joint litigation fund used to pay case related expenses.[10] Third, the Fitzpatrick declaration[11] provides empirical information of fee determinations in similar cases and provides a context for the fee request here.

The Court is too familiar with the procedural and substantive history of this matter. For the Court's convenience, a short summary of the litigation follows. As the Court knows, the direct purchasers coordinated much of their discovery and pre-trial work with the other two plaintiff groups, the end payers and the retailers.

A. The direct purchasers allege that the defendants violated federal antitrust law and imposed overcharges on the class.

Starting in March 2012, co-lead and class counsel for direct purchasers performed an independent investigation of the facts in this case—before the Supreme Court's decision in *FTC*

[9] *See* Kohn Decl. ¶¶ 111-13.

[10] *See* Kohn Decl. Exs. A-G.

[11] *See* Declaration of Brian T. Fitzpatrick ("Fitzpatrick Decl.") submitted herewith. Brian Fitzpatrick is a professor at Vanderbilt University Law School. His teaching and research focus on class action litigation. In addition, he has published several articles on class action litigation, including *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010) (Fitzpatrick Decl. Appendix 2). Professor Fitzpatrick has also published many papers on how the economic incentives of attorneys and others affect class action litigation, culminating in his recent book, *The Conservative Case for Class Actions* (Univ. of Chicago Press 2019).

v. Actavis, Inc.[12] In May 2013, the first Loestrin 24 direct purchaser complaint was filed.[13] In October 2013, the Judicial Panel on Multidistrict Litigation transferred four actions pending in the Eastern District of Pennsylvania to this district for consolidated pretrial proceedings.[14] In December 2013, the direct purchasers filed the first of three consolidated amended class action complaints.[15] Each complaint alleged that the defendants engaged in a wrongful anticompetitive scheme to impede and delay market entry of AB-rated, less expensive, generic versions of Warner Chilcott's brand name prescription drug, Loestrin 24.[16] The direct purchasers alleged that, as a result of the violations, they were forced to pay artificially inflated prices for branded products.[17]

In February 2014, the defendants moved to dismiss the direct purchasers' Consolidated Amended Class Action Complaint.[18] This amended complaint included only a reverse payment claim under § 1 of the Sherman Act, 15 U.S.C. § 1. At the time, the *Actavis* decision was less than a year old, and there were few district court opinions interpreting it.[19] In September 2014, this Court dismissed the amended complaint, holding that only cash reverse payments are actionable under *Actavis*.[20]

The direct purchasers timely appealed the dismissal to the United States Court of Appeals

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[12] Kohn Decl. ¶ 6.

[13] *Am. Sales Co., LLC v. Warner Chilcott Public Ltd. Co.*, No. 13-cv-347 (D.R.I. May 14, 2013), ECF No. 1.

[14] JPML Transfer Order, ECF No. 1.

[15] Direct Purchaser Class Pls.' Consol. Am. Class Action Compl. & Jury Demand, ECF No. 39.

[16] *See* Kohn Decl. ¶¶ 8-12 (detailing the multi-part anticompetitive scheme).

[17] *Id.* ¶ 13.

[18] Mot. to Dismiss the Direct Purchaser Class Pls.' Consol. Am. Class Action Compl., ECF No. 74.

[19] Kohn Decl. ¶¶ 14-15.

[20] *In re Loestrin 24 Fe Antitrust Litig.*, 45 F. Supp. 3d 180, 195 (D.R.I. 2014), *vacated*, 814 F.3d 538 (1st Cir. 2016).

for the First Circuit.[21] Briefing in the First Circuit was voluminous, and the direct purchasers took the laboring oar on appeal. The direct purchasers submitted appellate briefing separate from the other plaintiffs[22] and helped facilitate five *amicus* briefs.[23] In February 2016, the First Circuit vacated the Court's decision and remanded for further proceedings.[24]

In May 2016, the direct purchasers filed their second amended complaint—a nearly 100-page pleading.[25] With the benefit of additional investigation, the direct purchasers added patent and hard switch-related claims against Warner Chilcott under § 2 of the Sherman Act, 15 U.S.C. § 2. The direct purchasers also bolstered the reverse payment claims by pleading more precise dollar figures attributable to the no-AG clause and Femring and Generess deals.[26]

The second amended complaint resulted in a renewed round of motion to dismiss briefing consisting of over 300 pages in total.[27] In August 2017, the Court upheld all of the direct purchasers' causes of action but dismissed claims against parent companies Allergan, plc and Actavis, Inc.[28]

B. The parties engage in extensive discovery.

While awaiting the Court's second motion to dismiss decision, the parties began discovery, both formal and informal, from parties and multiple non-parties.[29] The Court ordered

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[21] Direct Purchaser Pls.' Notice of Appeal, ECF No. 121.

[22] Br. of Appellants Am. Sales Co., LLC & Rochester Drug Co-Op., Inc., *In re Loestrin 24 Fe Antitrust Litig.*, No. 14-2071 (1st Cir. June 9, 2015), Doc. No. 00116847493.

[23] Kohn Decl. ¶ 16.

[24] *In re Loestrin 24 Fe Antitrust Litig.*, 814 F.3d 538 (1st Cir. 2016).

[25] Direct Purchaser Class Pls.' Second Consol. Am. Class Action Compl. & Jury Demand, ECF No. 164.

[26] *See id.* ¶¶ 198, 213, 216.

[27] Kohn Decl. ¶ 20.

[28] *In re Loestrin 24 Fe Antitrust Litig.*, 261 F. Supp. 3d 307 (D.R.I. 2017); *see* Kohn Decl. ¶¶ 22-23.

[29] Kohn Decl. ¶¶ 24-28.

production of documents to be substantially complete by October 5, 2017[30] and set the close of fact discovery on June 29, 2018.[31] While all parties worked to minimize discovery disputes, it was necessary for the plaintiffs to file several formal motions to compel, all of which required hearings before Magistrate Judge Sullivan.[32] The defendants and various non-party subpoena recipients produced over 410,000 documents totaling over 3.5 million pages and over a million lines of data.[33] All of this discovery needed to be analyzed. This was accomplished by dividing plaintiffs' counsel from all three plaintiff groups into various "issue teams" corresponding to each firm's expertise in a particular subject. In this way duplication of effort was largely avoided. Counsel for the direct purchasers was involved in nearly all issue teams.[34]

Under the deposition protocol negotiated by the parties (with the help and input of Magistrate Judge Sullivan), the parties deposed numerous individuals and non-parties. The plaintiffs deposed 27 fact witnesses. The direct purchasers were actively involved in nearly all fact depositions. The defendants took many depositions of non-parties in which the direct purchasers participated.[35]

Counsel for the direct purchasers also retained several experts to prepare expert reports and to testify at trial. For the sake of efficiency and economy, specific lawyers served as the primary point of contact with specific experts. The direct purchasers retained 13 testifying experts, who collectively issued 32 reports (opening reports and rebuttal reports), comprising

[30] Interim Case Management Order No. 8, ECF No. 326.

[31] Interim Case Management Order No. 13, ECF No. 480.

[32] Kohn Decl. ¶¶ 29-33.

[33] *Id.* ¶ 34

[34] *Id.* ¶ 35 (including list of issue teams and direct purchaser attorneys assigned to each).

[35] *Id.* ¶ 40 (including list of depositions and direct purchaser attorney involved in each).

thousands of pages of exhibits, and backup materials.[36] The defendants retained 17 expert witnesses to respond to the direct purchasers' experts and in support of their various defenses. In total, the defendants' experts issued 25 reports.[37] While these expert efforts were (sensibly) shared across the three plaintiff groups (direct class, end payer class, retailers), the efforts were a huge and complicated undertaking for all.

C. The Court certifies the direct purchaser class.

In November 2018, the parties completed briefing on direct purchaser class certification.[38] In February 2019, the Court held a full-day hearing on the issue. Despite the fact that the defendants raised all manner of arguments opposing class certification related to numerosity, impact, and typicality, the Court certified the following direct purchaser class:

> All persons or entities in the United States and its territories who purchased brand or generic Loestrin 24 directly from Warner [Chilcott] or Amneal at any time during the period from September 1, 2009, through and until June 3, 2015, and all persons or entities in the United States and its territories who purchased brand Minastrin 24 directly from Warner [Chilcott] at any time during the period from September 1, 2009, through and until March 14, 2017 (the "Class Period").
>
> Excluded from the Class are defendants, and their officers, directors, management, employees, subsidiaries, or affiliates, and, all federal governmental entities. Also excluded from the class are educational institutions such as universities and colleges.[39]

Following submission of requests for exclusion from the class submitted by certain entities that had independently filed actions against defendants, the Court excluded the retailer group (Walgreen Co., The Kroger Co., Safeway Inc., HEB Grocery Company L.P., Albertson's

[36] *Id.* ¶ 45 (including a list of plaintiff experts, their area of expertise and the number of expert reports issued).

[37] *Id.* ¶ 47 (including a list of defense experts, their areas of expertise, and the number of expert reports issued).

[38] Reply in Further Supp. of Direct Purchaser Class Pls.' Mot. for Class Certification, ECF No. 627

[39] *Loestrin 24*, 2019 WL 3214257, at *7.

LLC, CVS Pharmacy, Inc., Rite Aid Corporation, and Rite Aid Hdqtrs. Corporation).[40]

D. The parties move for summary judgment and prepare for trial.

The Court considered two separate rounds of summary judgment briefing.

First, in July 2018, the defendants filed a motion for summary judgment "due to lack of market power," a motion that included over 690 exhibits.[41] In October 2018, the plaintiffs counter-moved for summary judgment on market power, submitting two voluminous statements of fact and over 200 exhibits of their own.[42] Each side submitted multiple expert reports in support of their respective summary judgment motion. In March 2019, this Court held a full-day hearing on summary judgment related to the issue of market power, and in October 2019 this Court held a second hearing on the issue.

Second, in May 2019 the defendants filed a comprehensive summary judgment motion on all issues other than market power, including on plaintiffs' patent-related, reverse payment, and hard switch claims—again submitted with several hundred exhibits.[43] The plaintiffs opposed the motion, filing a responsive statement of facts,[44] an additional statement of facts[45] and several hundred exhibits of their own.[46] Counsel for direct purchasers took the lead role in compiling the plaintiffs' responsive and affirmative statements of facts—filings totaling 107 pages.[47] The direct purchasers also took on leadership roles in drafting the patent, reverse payment agreement and

[40] *See* Text Order Allowing [1295] Retailers' Requests to Opt Out from the Direct Purchaser Class, Nov. 14, 2019.

[41] Defs.' Mot. for Summ. J. Due to Lack of Market Power, ECF No. 496.

[42] Pls.' Mot. for Summ. J. on Market Power, ECF No. 569.

[43] Defs.' Mot. for Summ J., ECF No. 842; *see* Kohn Decl. ¶¶ 62-63.

[44] Pls.' Resp. to Defs.' Statement of Undisputed Facts, ECF No. 1061.

[45] Pls.' Add'l Statement of Material Undisputed Facts, ECF No. 1062.

[46] *See* Decl. of Kristen Johnson in Supp. of Pls.' Opp'n to Defs.' Mot. for Summ. J., ECF No. 981.

[47] *See* ECF Nos. 1061, 1062.

causation sections of plaintiffs' 60-page opposition brief.[48] In total, the summary judgment briefing for all issues comprised 523 pages of defense briefs and fact statements (exclusive of declarations, exhibits and appendices), 587 pages of plaintiff briefs and fact statements (again, exclusive of declarations, exhibits and appendices), and three days of oral argument.[49] In September 2019, this Court held a full day hearing.

During the fall and winter of 2019, with summary judgment motions pending, the parties continued to prepare for trial. The plaintiffs and defendants filed *Daubert* motions directed to most experts. The direct purchasers played an active role in drafting nearly all of the plaintiffs' 16 *Daubert* motions, most of which resulted in some limitation of the respective defense expert's testimony.[50] The defendants filed 8 *Daubert* motions pertinent to the direct purchaser case.[51]

In preparation for trial, the plaintiffs filed an omnibus motion *in limine*[52] consisting of 41 targeted motions, as well as a standalone motion *in limine* related to Warner Chilcott executives.[53] The defendants filed 9 motions *in limine* of their own,[54] all of which required opposition briefing by the plaintiffs.[55]

Due to the inability to compel the attendance at trial of certain witnesses, each party designated portions of a number of deposition transcripts for use at trial. The plaintiffs designated portions of 49 deposition transcripts, and the defendants designated portions of 95

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[48] Pls.' Opp'n to Defs.' Mot. for Summ. J., ECF No. 1060; *see* Kohn Decl. ¶ 63.

[49] Kohn Decl. ¶ 53.

[50] *Id*. ¶¶ 72-73 (including list of the direct purchasers' *Daubert* motions and the responsible attorneys).

[51] *Id*. ¶¶ 74-75 (including list of defendants' *Daubert* motions and responsible attorneys).

[52] Mem. in Supp. of Purchasers' Omnibus Mot. *in Limine*, ECF No. 1301.

[53] ECF No. 1300; *see* Kohn Decl. ¶¶ 78-79 (including list of motions *in limine* related to the direct purchasers' case).

[54] *See* ECF Nos. 1279-87.

[55] Kohn Decl. ¶ 80 (listing defendants' motions *in limine*).

transcripts.[56] In an initial exchange of potential trial exhibits, the plaintiffs designated 1,609 exhibits, while defendants designated 7,192 potential trial exhibits. The parties exchanged counter designations, lodged specific objections to nearly all the exhibits and deposition designations, and conducted many lengthy meet-and-confers on admissibility of exhibits.[57] Counsel for direct purchasers largely led these efforts.[58]

On December 8, 2019, the parties submitted a 231-page Joint Pretrial Memorandum that, as the Court instructed, would provide a "roadmap" for trial. To avoid duplication of effort and streamline the process, each subject-matter team was tasked with drafting their respective section. The direct purchasers extensively contributed to the patent, reverse payment, market power, and causation-related portions of the document. Given that this was a joint filing, it also required cooperation and negotiation with defense counsel.[59]

Several other important trial tasks were completed by the direct purchasers. On November 25, 2019, the parties filed competing sets of detailed jury instructions and verdict forms.[60] Counsel for the class led the drafting of plaintiffs' proposed instructions and verdict form and conducted the related research. Ultimately, the plaintiffs filed 131 detailed jury instructions spanning 179 pages.[61]

With trial scheduled to begin on January 6, 2020, the parties began the process, led by the Court, of vetting potential jurors through proposed jury questionnaires.[62] Counsel for direct

[56] Kohn Decl. ¶ 84.

[57] *Id.* ¶¶ 84-86.

[58] *Id.*

[59] *Id.* ¶ 87.

[60] *See* ECF Nos. 1348-51.

[61] Kohn Decl. ¶ 89; Pls.' Proposed Jury Verdict, ECF No. 1350; Pls.' Proposed Jury Instructions, ECF No. 1351.

[62] Interim Case Management Order No. 16 at 2, ECF No. 1277.

purchasers also took on a leadership role in plaintiffs' jury selection—reviewing juror questionnaires and establishing criteria by which to vet potential jurors.

By the time of the December 2019 direct purchaser settlement, the plaintiffs had spent hundreds of hours reviewing and preparing the witnesses and documentary evidence necessary to try the case to a jury and had conducted a mock trial to help refine arguments to be presented at trial.[63]

E. The direct purchasers and the defendants settle the case for $120 million.

Settlement negotiations between direct purchaser class counsel and counsel for the defendants were quite typical for cases such as this—hard fought, arm's length and spanning about two years. In December of 2018, the parties' first formal attempt to mediate their dispute occurred at a mediation session before mediators Layn R. Phillips and David Murphy of Phillips ADR. The direct purchasers and defendants both submitted detailed mediation briefs with exhibits prior to the mediation. Settlement talks were unsuccessful at that time, and the parties continued to litigate.[64]

With trial looming, in December 2019, the direct purchasers and the defendants again explored settlement. On December 11, 2019, a mediation session was held at White & Case LLP's New York office, overseen by mediator David Murphy of Phillips ADR. On December 13, 2019, the parties entered into a binding settlement term sheet between direct purchaser counsel and counsel for defendants.[65] That term sheet was followed by a letter between the

[63] Kohn Decl. ¶ 91.

[64] *Id.* ¶ 93.

[65] Ex. 2 to Sobol Decl. in Supp. of Direct Purchaser Class Pls.' Am. Mot. for Prelim. Approval of Settlement, ECF No. 1141-2.

parties related to the terms of the proposed settlement.[66] Subsequently, the parties negotiated the terms of a full settlement agreement, consistent with and incorporating the terms of the December 13, 2019 term sheet.[67] On January 14, 2020, the parties executed the settlement agreement, thereby agreeing to settle all direct purchaser claims for a total cash payment of $120 million.[68] On March 23, 2020, this Court granted the settlement preliminary approval. On April 6, 2020 and pursuant to that order, notice was sent to all class members via First Class mail. The notice advised that class counsel would be filing their motion for fees, reimbursement of expense, and an incentive award on April 20, 2020, and that Class counsel would be seeking up to a fee of one-third of the common fund, after deduction of expenses.[69]

F. The Court denies all summary judgment motions.

On December 17, 2019—days after the direct purchasers and the defendants reached a binding agreement to settle, but with claims still pending by the end payer and retailer plaintiffs—this Court denied all motions for summary judgment.[70]

G. The First Circuit denies the defendants' appeal of class certification.

On January 7, 2020, the United States Court of Appeals for the First Circuit denied the defendants' Rule 23(f) petition for leave to appeal the Court's certification of a direct purchaser class.[71]

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[66] Ex. 3 to Sobol Decl. in Supp. of Direct Purchaser Class Pls.' Am. Mot. for Prelim. Approval of Settlement, ECF No. 1141-3.

[67] Kohn Decl. ¶ 94.

[68] Ex. 1 to Sobol Decl. in Supp. of Direct Purchaser Class Pls.' Am. Mot. for Prelim. Approval of Settlement, ECF No. 1141-1.

[69] Class Notice of Proposed Settlement at 10, https://www.loestrin24antitrustlitigation.com/pdf/Notice-for-Mailing.pdf.

[70] Op. & Order on Summ. J. and Order Regarding Mots. to Exclude Certain Expert Ops., ECF No. 1380.

[71] Judgment, *City of Providence v. Warner Chilcott Pub. Ltd. Co.*, No. 19-8014 (1st Cir. 2020).

III. ARGUMENT

A. The request for approval of the direct purchasers' litigation expenses is reasonable and appropriate.

"[L]awyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also to recover from the fund, as a general matter, expenses, reasonable in amount, that were necessary to bring the action to a climax."[72] The reasonableness of expenses is judged by the legitimate needs, size, and complexity of a case.[73]

Class counsel have incurred $3,965,558 in litigation-related expenses.[74] Litigation expenses were incurred by class counsel in two ways. First, most direct purchaser firms contributed to a common litigation fund from which common expenses were paid. These included such expenses as expert fees, court filing fees, and document hosting fees. Expenditures from the common litigation fund total $3,250,761.[75] Second, each direct purchaser firm advanced and kept track of their own firm's non-common litigation expenses, such as expenses related to travel and legal research. These class counsel firm litigation expenses total $492,947.92.[76] The requested reimbursement for expenses also includes payment for certain unpaid invoices associated with the case totaling $160,218, as well as an estimate for payment for future work to be performed by the claims administrator who will administer the settlement and distribute the net settlement funds and the class's economic expert who will assist the claims administrator in reviewing any data submitted in the claims process and calculating each class

[72] *In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st. Cir. 1999); *accord In re Nineteen Appeals-San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 606 (1st Cir. 1992).

[73] *See In re San Juan Dupont Plaza Hotel Fire Litig.*, 111 F.3d 220, 233-38 (1st Cir. 1997).

[74] *See* Kohn Decl. ¶¶ 103-07.

[75] *Id.* ¶ 105. The largest common expenditure by far was for expert fees, totaling approximately $2,798,527. (This amount represents the agreed share paid by the direct purchasers and does not include sums expended by the other plaintiff groups).

[76] *Id.*

members' share of the net settlement fund.[77] These additional estimated future expenses to needed to bring the case to a close equal $61,631.[78]

Under the circumstances of this case, the request for approval of the direct purchasers' litigation expenses is reasonable and appropriate for several substantive and procedural reasons. Substantively, this figure is reasonable in a complex case such as this that settled shortly before trial. The expenses for which class counsel seek reimbursement are the type of costs routinely charged to fee-paying clients. The size of the expert costs is not unexpected given the number of complex legal and factual issues (and number of expert reports) involved in this matter.

Procedurally, the direct purchasers' expenses were independently reviewed under an accounting arrangement prior to *ex parte* submission to the Court and were submitted on a quarterly basis by procedures this Court established before discovery. The ongoing coordination of efforts between the three plaintiff groups largely assured the lack of duplication of expert and other shared costs (e.g., document database, certain deposition expenses).

B. The request for approval of a percentage-of-fund fee of one-third of the settlement fund (net of expenses) is reasonable and appropriate.

Under Rule 23(h), "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."[79] Fee awards encourage the prosecution of private antitrust actions, litigation the Supreme Court has recognized as necessary to assure compliance with and effective enforcement of the antitrust laws.[80] As the First Circuit has affirmed, lawyers who create a common fund pursuing such

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[77] *See* Kohn Decl. ¶ 106.

[78] $3,250,761 + $492,947 + $160,218 + $61,631 = $3,965,558.

[79] Fed. R. Civ. P. 23(h).

[80] *See, e.g., The Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983) ("This Court has emphasized the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (noting that private challenges to antitrust violations provide "a significant supplement to the limited resources available to the

litigation are entitled to compensation: "The common fund doctrine is founded on the equitable principle that those who have profited from the litigation should share its costs."[81]

Here, the efforts of class counsel resulted in the creation of a common fund of $120 million. By any measure, this is a substantial amount of money to compensate direct purchasers for their antitrust injuries.

1. The "percentage of the fund" methodology is the prevailing method for calculating a reasonable class counsel fee.

The Supreme Court holds that a "percentage of the fund" calculation may be appropriate for determining common fund fee awards.[82] Under this method, courts select a percentage that they believe is fair to counsel, multiplying the settlement amount by that percentage to arrive at a fee award.

In the First Circuit, district courts have the discretion to use either the percentage of the fund method or the lodestar method in common fund cases.[83] The lodestar method, under which courts award counsel a fee equal to the number of hours they worked on the case multiplied by both a reasonable hourly rate and a discretionary multiplier based on the risk of non-recovery

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Department of Justice for enforcing the antitrust laws and deterring violations"); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 266 (1972) (noting that Congress created rights for private citizens to enforce the antitrust laws, and Rule 23 provides for class actions that may "enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture").

[81] *Medoff v. CVS Caremark Corp.*, No. 09-cv-554, 2016 WL 632238, at * 8 (D.R.I. Feb. 17, 2016) (citing *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 n.6 (1st Cir. 1995)); *see also Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (holding that common fund doctrine "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense"); *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 384 F. App'x 299, 302 (5th Cir. 2010) (per curiam) ("It is well established that federal courts, through the exercise of their equity powers, may call upon a group that benefits from litigation efforts to share the costs of litigation, including attorneys' fees.").

[82] *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("[U]nder the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class . . . ."); *see also Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165-66 (1939); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 124-25 (1885); *Internal Imp. Fund Trs. v. Greenough*, 105 U.S. 527, 532 (1881).

[83] *See Thirteen Appeals*, 56 F.3d at 307 ("[W]e hold that in a common fund case the district court, in the exercise of its informed discretion, may calculate counsel fees either on a percentage of the fund basis or by fashioning a lodestar.").

and other factors, has fallen out of favor in common fund cases.[84] This is because it was often difficult to calculate the lodestar, and the method did not align the interests of counsel with the interests of the plaintiffs.[85]

Instead, this Court, other courts in this district, and courts throughout the country often apply the percentage-of-fund method in calculating attorneys' fees.[86] This method of calculating fees "appropriately aligns the interests of the class with the interests of class counsel . . . ."[87] The vast majority of courts of appeals now permit or direct application of the percentage method.[88]

In determining *what* percentage to apply, court apply one of the three approaches this Court described in *Cabletron*—the holistic approach, the mimic-the-market approach and a benchmark approach. Commonly, courts in this district use the holistic approach with a lodestar

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[84] *See* Fitzpatrick Decl. ¶ 11.

[85] *Id.*; *see also Mokover v. Neco Enters., Inc.*, 785 F. Supp. 1083, 1087-88 (D.R.I. 1992) (discussing advantages of the percentage of the fund approach over the lodestar method, but applying the lodestar approach prior to the First Circuit's 1995 decision in *Thirteen Appeals*).

[86] *In re Cabletron Sys., Inc. Sec. Litig.*, No. 99-cv-00408, 239 F.R.D. 30, 37 (D.N.H. 2006) ("The POF method has emerged in the last decade-plus as the preferred method of awarding fees in common fund cases. As the First Circuit has noted, the POF method has distinct advantages over the lodestar approach."); *see, e.g., Medoff*, 2016 WL 632238 at * 8 (approving attorneys' fees using the percentage of the fund method); *Trombley v. Bank of Am. Corp.*, No. 08-cv-456, 2013 WL 5153503, at * 8 (D.R.I. Sept. 12, 2013) (same); *In re Solodyn Antitrust Litig.*, No. 14-md-2503, 2018 WL 7075881, at *2 (D. Mass. July 18, 2018); *In re Asacol Antitrust Litig.*, No. 15-cv-12730, 2017 WL 11475275, at *4 (D. Mass Dec. 7, 2017) (awarding attorneys' fees totaling one-third of the settlement fund, plus costs, and interest earned); Order at 7-8, *In re Prograf Antitrust Litig.*, No. 11-md-2242 (D. Mass. May 20, 2015), ECF No. 678 ("*Prograf* Order") (awarding attorneys' fees totaling one-third of the settlement fund, plus costs, and interest earned); *Bilewicz v. FMR LLC*, Nos. 13-cv-10636 & 14-cv-10035, 2014 WL 8332137, at *6 (D. Mass. Oct. 16, 2014) (awarding one-third of the $12 million settlement amount plus expenses); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 82 (D. Mass. 2005) (awarding fees of one-third of the settlement fund); *see also In re Skelaxin (Metaxalone) Antitrust Litig.*, No. 12-cv-83, 2014 WL 2946459, at *1 (E.D. Tenn. June 30, 2014) (concurring with observations made by other courts that "the lodestar method is cumbersome; the percentage-of-the-fund approach more accurately reflects the result achieved; and the percentage-of-the-fund approach has the virtue of reducing the incentive for plaintiffs' attorneys to over-litigate or 'churn' cases").

[87] *Bussie v. Allmerica Fin. Corp.*, No. 97-cv-40204, 1999 WL 342042, at *2 (D. Mass. May 19, 1999) (quoting *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 377 (D. Mass. 1997)); *see also* Fitzpatrick Decl. ¶¶ 12-13.

[88] Fed. Jud. Ctr., *Manual for Complex Litigation (Fourth)* § 14.121 (2004) ("MCL") (gathering cases from circuits); 4 William Rubenstein, Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 14:6 n.7 (5th ed. 2012) ("The percentage method is strongly preferred in common fund class actions; indeed, one commentator has argued that Due Process concerns require utilization of the percentage method." (citing Charles Silver, *Due Process and the Lodestar Method: You Can't Get There From Here* 1809 (2000))).

cross-check. As one court explained, "the weight of the caselaw . . . approves of percentage of the fund as the methodology for determining attorneys' fees, with a lodestar calculation as a pragmatic cross-check."[89]

The mimic-the-market approach, utilized primarily in the Seventh Circuit,[90] has also been used by district courts in this Circuit to affix the appropriate percentage.[91] Absent some bidding process for class counsel services at the beginning of the case, in utilizing this approach a district court estimates what the percentage fee would have been in the market for class counsel's services prior to the commencement of the case. To do so, one examines various factors, including fee contracts large stakes class members may have entered into with their counsel prior to the litigation, fee contracts large stakes plaintiffs may have signed with counsel in similar litigation, and the fee percentages awarded by other district court judges in similar litigation.

In this case, we respectfully suggest that application of either the holistic approach or the mimic-the-market approach yields the same result—selection of a percentage of one-third of the common fund. Under the holistic approach—which admittedly has been previously described as "unprincipled"[92] when used to simply backfill a result—class counsel immodestly suggest the facts of this case hit each of the numerous considerations in favor of the proposed one-third fee award, thus avoiding the potential for an arbitrary result. Under the mimic-the-market approach,

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[89] *New Eng. Carpenters Health Benefits Fund v. First DataBank, Inc.*, No. 05-cv-11148, 2009 WL 3418628, at *1 (D. Mass. Oct. 20, 2009) (collecting authorities). Although often conducted, a lodestar cross-check is not required. *See In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 464 (D.P.R. 2011) (citing *In re Thirteen Appeals*, 56 F.3d at 307).

[90] *See*, *e.g.*, *In re Synthroid I*, 264 F.3d 712 (7th Cir. 2001).

[91] *Cabletron*, 239 F.R.D. at 39-40 (mimic-the-market approach "emulates the incentives present in a private-client attorney relationship, primarily, that the market prices should take into account 'the risk of nonpayment,' 'quality of . . . performance,' 'the amount of work,' and 'the stakes of the case'" (quoting *Nilsen v. York Cty.*, 400 F. Supp. 2d 266, 276 (D. Me. 2005)).

[92] *Nilsen*, 400 F. Supp. 2d at 277.

Prof. Fitzpatrick addresses each of the relevant factors in the context of this litigation[93] and concludes that they more than support the one-third fee request here.[94]

2. The requested one-third fee is fair and reasonable.[95]

a. Courts regularly approve a one-third fee.

"[I]n this circuit, percentage fee awards range from 20% to 35% of the fund. This approach mirrors that taken by the federal courts in other jurisdictions."[96] In awarding a one-third fee in *In Relafen Antitrust Litigation*,[97] Judge Young acknowledged the appropriateness of such a fee in light of the complexity of the legal and regulatory issues inherent in pharmaceutical antitrust cases and held that a one-third fee "is not unreasonable as a matter of law."[98] Similarly, in approving final distribution and awarding attorneys' fees of one-third of the settlement amount in *Asacol*, the court considered the factors set forth in *Gunter v. Ridgewood Energy Corp.*[99] and *Goldberger v. Integrated Resources, Inc.*[100] and found, *inter alia*:

- The settlement conferred "a monetary benefit to every member of the Class and the settlement amount [was] substantial;"[101]
- Class counsel (including several of the firms serving as counsel here) were "skillful, experienced counsel" who had "effectively and efficiently prosecuted

[93] The third factor, fee percentages awarded by other district court judges in similar litigation, is also discussed at length below in the context of the percentage of the fund analysis.

[94] *See* Fitzpatrick Decl. ¶¶ 35-44.

[95] For convenience, reference is made to class counsel's request for a "one-third fee." However, the requested fee is actually less than one third. Class counsel propose to calculate their fee based on the remaining funds in the settlement after deduction for reimbursement of reasonable out-of-pocket litigation expenses. Deducting expenses prior to applying the 1/3 requested fee amount results in a fee request that is actually 32.23% of the gross $120 million settlement amount.

[96] *Mazola v. May Dept. Stores Co.*, No. 97-cv-10872, 1999 WL 1261312, at *4 (D. Mass. Jan. 27, 1999).

[97] 231 F.R.D. 52 (D. Mass. 2005).

[98] *Id.* at 80, 82 (noting the "highly technical and complex issues with regard to pharmaceutical pricing and distribution, health insurance and federal regulation and preemption issues" involved in generic delay class action antitrust case).

[99] 223 F.3d 190 (3d Cir. 2000).

[100] 209 F.3d 43 (2d Cir. 2000).

[101] *Asacol*, 2017 WL 11475275, at *4; *see also Prograf* Order at 11.

this complex action on behalf of the Class;"[102]

- Class counsel had undertaken "numerous and significant risks on behalf of members of the class with no guarantee that they would be compensated;"[103]
- Class counsel "reasonably expended thousands of hours, and incurred [substantial] out of pocket expenses, in prosecuting the action, with no guarantee of recovery;"[104] and
- "Fee awards similar to the fee requested by Class Counsel here have been awarded in similar cases, including numerous Hatch-Waxman antitrust class actions similarly alleging impeded entry of generic drugs."[105]

Each of these observations applies equally in this case. Class counsel's request for one-third of the net settlement fund falls within that range and has been regularly approved in other direct purchaser pharmaceutical antitrust class cases.

To avoid the notion of cherry-picking examples, we provide below a summary of fee percentage determinations from all other generic suppression, antitrust direct purchaser actions that are publicly reported. We are of the view this is the most apt comparison. The cases share many features; they (i) occur against a uniquely complicated regulatory and business background, (ii) involve subject areas in antitrust, patents, FDA regulation, pharmaceutical market dynamics and medicine, (iii) impose huge expert costs, largely from multi-disciplinary areas of expertise, (iv) pose complicated and often cutting-edge legal issues, and (v) require an understandably longer time to litigate.

In direct purchaser, generic delay pharmaceutical cases over the past fifteen years, court have awarded a one-third fee (on either the gross settlement amount, or the net after payment of

[102] *Asacol*, 2017 WL 11475275, at *4; *see also Prograf* Order at 11.

[103] *Asacol*, 2017 WL 11475275, at *4; *see also Prograf* Order at 11.

[104] *Asacol*, 2017 WL 11475275, at *4; *see also Prograf* Order at 11.

[105] *Asacol*, 2017 WL 11475275, at *4; *see also Prograf* Order at 11. (citing, *e.g.*, *In re TriCor Direct Purchaser Antitrust Litig.*, No. 05-cv-340, 2009 U.S. Dist. LEXIS 133251, at *15 (D. Del. Apr. 23, 2009)).

expenses) in at least 25 of 29 matters. The below chart lists them.[106]

Attorneys' Fee Awards in Direct Purchaser Generic Delay Pharmaceutical Antitrust Cases

	Date	Case	Settlement Amount	Fee Awarded (%)
1.	09/20/18	*In re Lidoderm Antitrust Litig.*, No. 09-md-2081 (E.D. Pa.), ECF Nos. 459-1, 464	$166M	45M (27.11%)
2.	07/18/18	*In re Solodyn Antitrust Litig.*, No. 14-md-2503, 2018 WL 7075881 (D. Mass.)	$72.5M	$24.16M (33.34%)
3.	04/18/18	*In re Celebrex (Celecoxib) Antitrust Litig.*, No. 14-cv-351, 2018 WL 2382091 (E.D. Va.)	$94M	$30.72M (32.68%)[107]
4.	10/05/17	*In re K-Dur Antitrust Litig.*, No. 01-cv-1652 (D.N.J.), ECF No. 1057	$60M	$20M (33.34%)
5.	12/19/17	*In re Aggrenox Antitrust Litig.*, No. 14-md-2516 (D. Conn.), ECF Nos. 707-1, 740	$146M	$29.2M (20%)
6.	12/07/17	*In re Asacol Antitrust Litig.*, No. 15-cv-12730, 2017 WL 11475275 (D. Mass.)	$15M	$5M (33.33%)
7.	10/08/15	*King Drug Co. of Florence, Inc. v. Cephalon, Inc. (Provigil)*, No. 06-cv-1797 (E.D. Pa.), ECF No. 870	$512M	$140.8M (27.5%)
8.	05/20/15	*In re Prograf Antitrust Litig.*, No. 11-md-2242 (D. Mass.), ECF No. 678	$98M	$32.67M (33.34%)
9.	01/20/15	*In re Prandin Direct Purchaser Antitrust Litig.*, No. 10-cv-12141 (E.D. Mich.), ECF No. 68	$19M	$6.33M (33.32%)
10.	08/06/14	*In re Neurontin Antitrust Litig.*, No. 02-cv-1830 (D.N.J.), ECF No. 114	$191M	$63.33M (33.33%)
11.	09/06/14	*Mylan Pharm., Inc. v. Warner Chilcott plc*, No. 12-cv-3824 (E.D. Pa.), ECF No. 665	$15M	$5M (33.33%)

[106] Independently, Fitzpatrick conducted his own analysis of the fees awarded in a somewhat broader range of pharmaceutical antitrust cases and concludes that in 30 of 33 such cases, the court awarded a one-third fee. Fitzpatrick Decl. ¶ 17 & Appendix 4.

[107] In the *Celebrex* litigation, the fee was determined by first deducting case expenses and then awarding one-third of the remaining settlement amount. In all other cases listed here, the fee award was determined based on the gross settlement amount, with expenses deducted second.

12.	06/30/14	*In re Skelaxin (Metaxalone) Antitrust Litig.*, No. 12-md-2343, 2014 WL 2946459 (E.D. Tenn.)	$73M	$24.33M (33.33%)
13.	06/14/13	*In re Flonase Antitrust Litig.*, No. 08-cv-3149 (E.D. Pa.), ECF No. 496	$150M	$50M (33.33%)
14.	11/07/12	*In re Wellbutrin XL Antitrust Litig.*, No. 08-cv-2431 (E.D. Pa.), ECF No. 485	$37.5M	$12.5M (33.33%)
15.	05/31/12	*Rochester Drug Co-Op., Inc. v. Braintree Labs., Inc.*, No. 07-cv-142 (D. Del.), ECF No. 243	$17.25M	$5.75M (33.33%)
16.	01/12/12	*In re Metoprolol Succinate Antitrust Litig.*, No. 06-cv-52 (D. Del.) ECF No. 194	$20M	$6.67M (33.35%)
17.	11/28/11	*In re DDAVP Direct Purchaser Antitrust Litig.*, No. 05-cv-2237 (S.D.N.Y.), ECF No. 113	$20.25M	$6.75M (33.33%)
18.	11/21/11	*In re Wellbutrin SR Antitrust Litig.*, No. 04-cv-5525 (E.D. Pa.), ECF No. 413	$49M	$16.33M (33.33%)
19.	08/11/11	*Meijer, Inc. v. Abbott Labs.*, No. 07-cv-5985 (N.D. Cal.), ECF No. 514	$52M	$17.33M (33.33%)
20.	01/31/11	*In re Nifedipine Antitrust Litig.*, No. 03-mc-223 (D.D.C.), ECF No. 333	$35M	$11.67M (33.34%)
21.	01/25/11	*In re Oxycontin Antitrust Litig.*, No. 04-md-1603 (S.D.N.Y.), ECF No. 360	$16M	$5.33M (33.31%)
22.	04/23/09	*In re TriCor Direct Purchaser Litig.*, No. 05-340, 2009 U.S. Dist. LEXIS 133251 (D. Del.)	$250M	$83.33M (33.33%)
23.	04/20/09	*Meijer, Inc. v. Barr Pharm., Inc.*, No. 05-cv-2195 (D.D.C.), ECF No. 210	$22M	$7.33M (33.32%)
24.	11/08/05	*In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-cv-85 (D.N.J.), ECF No. 185	$75M	$25M (33.33%)
25.	05/20/05	*Stop & Shop Supermarket Co. v. Smithkline Beecham Corp. (Paxil)*, No. 03-cv-4578, 2005 U.S. Dist. LEXIS 9705 (E.D. Pa.)	$100M	$20M (20%)
26.	04/19/05	*In re Terazosin Hydrochloride Antitrust Litig.*, No. 99-md-1317 (S.D. Fla.), ECF No. 1557	$74M	$24.17M (32.41%)
27.	11/30/04	*N. Shore Hematology-Oncology Assoc., P.C. v. Britol-Myers Squibb Co.*, No. 04-cv-248 (D.D.C.), ECF No. 30	$50M	$16.33M (32.66%)
28.	04/09/04	*In re Relafen Antitrust Litig.*, No. 01-cv-12239,	$175M	$58.33M

		231 F.R.D. 52 (D. Mass.)		(33.33%)
29.	04/11/03	*La. Wholesale Drug Co. v. Bristol-Myers Squibb Co.*, No. 01-cv-7951 (S.D.N.Y.), ECF No. 22	$220M	$70.33M (33.33%)

The few exceptions to the cases reaching a one-third determination show how the one-third portion should apply here. In *Provigil*, for example, the court granted a fee award of 27.5% in 2015, but that settlement involved a $512 million cash payment—one of the highest cash payments ever awarded in a pharmaceutical case—and generated a $140.8 million fee that represented a multiplier of 4.12 on the total lodestar.[108] The courts in *Aggrenox* (2017) and *Paxil* (2005) similarly departed from the norm, each granting a 20% fee award. But these two cases both settled early in the litigation. In *Aggrenox*, the case settled for $146 million before any class certification or summary judgment briefing had been submitted and after only a few preliminary depositions had been taken.[109] In *Paxil*, the case settled for $100 million almost before it even got underway; the 20% fee awarded in that case still amounted to a 15.6 multiplier on barely $1 million in total lodestar.[110]

Delayed generic entry antitrust cases such as this and the circumstances surrounding them have only grown *more* complex, riskier, longer, and more expensive over the years. The components of the alleged anticompetitive conduct—patent fraud, sham litigation, promises related to the timing of authorized generics, product hops, etc.—evolve, requiring more decisions

[108] *See* Order Granting Final Judgment & Order of Dismissal Approving Direct Purchaser Class Settlement & Dismissing Direct Purchaser Class Claims Against the Cephalon Defs., *King Drug Co. of Florence v. Cephalon, Inc. (Provigil)*, No. 06-cv-0197 (E.D. Pa. Oct. 8, 2015), ECF No. 870.

[109] *See generally In re Aggrenox Antitrust Litig.*, No. 14-md-2516 (D. Conn.).

[110] *See Stop & Shop Supermarket Co. v. Smithkline Beecham Corp. (Paxil)*, No. 03-cv-4578, 2005 U.S. Dist. LEXIS 9705, at *60 (E.D. Pa. May 20, 2005).

by the appellate courts.[111] The parties engage in more discovery battles, including battles over tens of thousands of withheld documents.[112] In time, class certification standards have become increasingly more rigorous: the Supreme Court recently held that "at the class-certification stage . . . , any model supporting a 'plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation.' And for purposes of Rule 23, courts must conduct a more 'rigorous analysis' to determine whether that is so."[113] As a result of these changes, the number of experts involved in these cases grows. And the cases often take more years to resolve.[114]

Some courts apply a "lodestar cross-check" on attorneys' fees requests. In *Prograf*, Judge Zobel applied the lodestar cross-check and found that the request for attorneys' fees and reimbursement of expenses was reasonable at a multiplier of 2.35.[115] Here, the requested fee

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[111] *See*, *e.g.*, *Loestrin 24*, 814 F.3d 538 (vacating and remanding the district court's dismissal of this case, and holding that "non-monetary reverse payments fell under scope of Supreme Court's 2013 *FTC v. Actavis, Inc.* decision, and "facts must be alleged sufficient to support the legal conclusion that the settlement at issue involves a large and unjustified reverse payment, but the plaintiffs are not required to provide precise figures and calculations at the pleading stage); *King Drug Co. of Florence, Inc. v. Smithline Beecham Corp.*, 791 F.3d 388 (3d Cir. 2015) (vacating and remanding the district court's dismissal of the case, and holding that "inference arose that settlement between manufacturers was payment to eliminate risk of competition" and "plaintiffs stated rule-of-reason claim").

[112] *See*, *e.g.*, Mem. in Supp. of Plaintiffs' Mot. to Compel Produc. & for *In Camera* Review of Pfizer & Greenstone Docs. at 5-13, *In re Celebrex (Celecoxib) Antitrust Litig.*, No. 14-cv-361 (E.D. Va. Nov. 30, 2016), ECF No. 118 (chronicling plaintiffs' three-month-long effort to parse 43,747 entries on seven iterations of defendants' privilege log and persuade the defendants to correct the log's myriad of deficiencies before ultimately resorting to motion practice); Joint Statement of Pls. and Defs. Medicis Pharm. Corp. & Impax Labs., Inc. Regarding Pls.' Challenges to Privilege Log Entries at 1, *In re Solodyn Antitrust Litig.*, No. 14-md-2503 (D. Mass. Nov. 4, 2016), ECF No. 398 (elucidating plaintiffs' targeted challenges to defendants' privilege logs containing over 44,000 documents and defendants' subsequent revision and de-designation of hundreds of entries).

[113] *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013) (citations omitted) (quoting ABA Section of Antitrust Law, *Proving Antitrust Damages: Legal and Economic Issues* 57, 62 (2d ed. 2010)).

[114] According to Fitzpatrick's empirical study, this case, lasting seven years, has lasted more than twice as long as the average and median class actions (three years), and twice as long as the average and median antitrust class actions (also three years). *See* Fitzpatrick Decl. ¶ 29; *see also*, Hon. Kathryn Vratil, Presentation, *The Power of 1407 Remand* at 32 (Oct. 29, 2014), https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/mdl2015/P6-B4-Breaking_Up_Hard_To_Do.pdf (noting average months to term for antitrust MDL between 2004 and 2014 was 49.4 and higher than any other type of litigation analyzed).

[115] *Prograf* Order at 11 (finding that while "[t]he First Circuit does not require a court to cross check," cross checking provides a "useful perspective," and most multipliers fall in the 1.0—4.0 range); *see Relafen*, 231 F.R.D. at 81-82 (noting 2.02 multiplier in that case); *Asacol*, 2017 WL 11475275, at *4.

award would provide plaintiffs with a very modest multiplier of 1.31.[116]

Class counsel respectfully submit that a fee award of one-third is fair here, considering that class counsel have worked for seven years without compensation, without any guarantee of compensation, and without any guarantee that millions of dollars of self-funded, out-of-pocket costs would ever be reimbursed. Since a fee above one-third may be merited in some cases of similar complexity and challenge, the fee here is reasonable.[117]

b. The reasonableness factors commonly applied in this Circuit support class counsel's request for a one-third fee.

The First Circuit has not prescribed a particular set of factors for assessing an application for attorneys' fees and has instead allowed district courts to exercise their discretion in applying appropriate factors. Factors the district courts have applied include: (1) the size of the fund and the number of persons benefitted; (2) the skill, experience, and efficiency of the attorneys; (3) the complexity and duration of the litigation; (4) the risks of the litigation; (5) the amount of time devoted to the case by counsel; (6) awards in similar cases; and (7) public policy considerations,

[116] *See Relafen*, 231 F.R.D. at 81-82 (noting 1.0-4.0 range for most multipliers).

[117] As the Western District of Oklahoma noted, "An award of forty percent (40%) of the settlement value is well within the range of acceptable fee awards in common fund cases." *Chieftain Royalty Co. v. Laredo Petroleum, Inc.*, No. 12-cv-1319, 2015 WL 2254606, at *3 (W.D. Okla May 13, 2015) (citing cases); *see*, *e.g.*, *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 685 (D. Md. 2013) ("In considering awards in similar cases, courts look to cases of similar size, rather than similar subject matter. Fees awarded under 'the percentage-of-recovery' method in settlements under $100 million have ranged from 15% to 40%."); *Stoner v. CBA Info. Servs.*, 352 F. Supp. 2d 549, 553 (E.D. Pa. 2005) (same). This mirrors other contingency fee cases: "In non-class contingency fee litigation, a 30% to 40% contingency fee is typical." *Montague v. Dixie Nat. Life Ins. Co.*, No. 09-cv-687, 2011 WL 3626541, at *2-3 (D.S.C. Aug. 17, 2011); *dee Flournoy v. Honeywell Int'l, Inc.*, No. CV 205-184, 2007 WL 1087279, at *2 (S.D. Ga. Apr. 6, 2007) ("Forty percent fee contracts are common for complex and difficult litigation . . . ."); *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-cv-85, 2005 WL 3008808, at *16 (D.N.J. Nov. 9, 2005) ("Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation.").

Fees of 40% of the common fund have been awarded in numerous class cases, including those deemed by the court to be relatively straightforward. *Jernigan v. Protas, Spivok & Collins, LLC*, No. 16-cv-3058, 2017 WL 4176217, at *8 (D. Md. Sept. 20, 2017) (approving 40% fee even after finding the case was not complex but was "undoubtedly important to the class members" and recognizing that class members, "in all likelihood, would have had no recourse in the absence of a class action"); *Chieftain Royalty Co.*, 2015 WL 2254606, at *2 (awarding 40% attorneys' fees in a $6.7 million case litigated for almost three years).

if any.[118] Applying these factors to this case demonstrates that the fee request here is reasonable.

c. The fund is significant in size and benefits an entire industry.

"Analyzing net dollars and cents results accomplished by counsel for their clients is often the most influential factor in assessing the reasonableness of any attorneys' fee award."[119] The settlement here represents a significant percentage recovery of class damages. The direct purchaser's expert estimated that, depending on the date on which the jury determined a generic Loestrin 24 would have entered the market, single damages ranged from a high of $640 million to a low of $145 million. Accordingly, the $120 million recovery represents between 18.75% and 82.75% of the class's single damages—a significant achievement given the complexities and uncertainties involved in this case.[120]

The $120 million fund created by the settlement also provides significant benefits to direct purchasers of Loestrin 24: their overpayments for brand and generic Loestrin 24 Fe and brand Minastrin 24 will be partially reimbursed, and their interest in enforcement of the federal antitrust laws will be validated. The fund will benefit an entire industry: the class includes the vast majority of the direct purchasers of brand and generic oral contraceptives in the United States.

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[118] *See Puerto Rican Cabotage*, 815 F. Supp. 2d at 457-58 (citing *Goldberger*, 209 F.3d at 50); *accord In re Lupron Mktg. & Sales Practices Litig.*, No. 01-cv-10861, 2005 WL 2006833, at *3 (D. Mass. Aug. 17, 2005) (same); *see also Relafen*, 231 F.R.D. at 79 (listing similar factors, including "(1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases").

[119] *Puerto Rican Cabotage*, 815 F. Supp. 2d at 458 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983), for the proposition that the "most critical factor is the degree of success obtained").

[120] *See* Fitzpatrick Decl. ¶ 27 (citing John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries are Mostly Less Than Single Damages,* 100 Iowa L. Rev. 1997, 2010 (2015) (finding the weighted average of recoveries—the authors' preferred measure—to be 19% of single damages for cartel cases between 1990 and 2014)).

d. The experience, skill, and efficiency of the attorneys involved, as demonstrated by their work before this Court, justifies the request.

"[T]he quality of representation is best measured by results."[121] The results here show success. Class counsel's experience, skill, and efforts resulted in the creation of a $120 million settlement fund, despite vigorous opposition and a complex set of factual and legal claims and defenses.

Class counsel have been active in the area of pharmaceutical antitrust litigation for more than fifteen years (some more than 20). Over the same period, one or more of class counsel has served as court-appointed lead counsel, co-lead counsel, or a member of the steering committee in virtually every pharmaceutical antitrust action litigated across the country. The area of law is highly specialized, and successful class litigation in this area requires knowledge of unique legal, regulatory, scientific, and industry-specific facts implicating patent law, antitrust law, and FDA regulations. Class counsel used their specialized knowledge and years of experience to develop a trial-ready record while litigating against some of the largest law firms in the country, including White & Case LLP and Adler Pollock & Sheehan P.C. (counsel for defendants in this case). With the benefit of a full record and with trial imminent, class counsel was able to negotiate a favorable settlement with defendants, securing guaranteed compensation for the class without the substantial risks, continuing costs and uncertainties of trial.

e. The complexity of this litigation supports the requested fee.

The complexity of this case weighs heavily in favor of the requested fee award. This case involved intertwined legal issues spanning several areas of law, along with complicated scientific and medical information, patent and regulatory issues, and antitrust economics. Class counsel have had to demonstrate, factually and legally, that the defendants' conduct was anticompetitive

[121] *Goldberger*, 209 F.3d at 55.

and illegal, and that the class incurred significant overcharge damages as a result of those violations.

Having closely supervised this case for years, the Court is familiar with the parties' litigation activities and they are recounted for the Court in detail in the accompanying declaration in support of this motion.[122]

f. The risks of litigation support the requested fee.

Courts recognize the risk assumed by an attorney as a key factor in determining an appropriate fee.[123] In this case, class counsel devoted enormous resources and millions of dollars in expenses to an action in which the allegations and defenses were complex and the plaintiffs' burden of proof was challenging, and there was no guarantee that the time and costs would ever be reimbursed.

Trial of this case would also have been risky.[124] The defendants raised vigorous defenses that presented significant legal and factual hurdles. The direct purchasers bore the burden of proving to a lay jury that, among other things, Warner Chilcott engaged in an anticompetitive scheme to impede generic competition for Loestrin 24, that it had market power, that the alleged reverse payments constituted a large and unjustified payment for delay of generic Loestrin 24, that Warner Chilcott engaged in an illegal product hop to Minastrin 24, and that defendants' conduct caused harm to the direct purchaser class.

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[122] *See generally* Kohn Decl.

[123] *Goldberger*, 209 F.3d at 54.

[124] *In re Elec. Carbon Prods. Antitrust Litig.*, 447 F. Supp. 2d 389, 401 (D.N.J. 2006); *Lupron*, 2005 WL 2006833, at *4 ("History is replete with cases in which plaintiffs prevailed at trial on issues of liability, but recovered little or nothing by way of damages."); *accord Sutton v. Med. Serv. Ass'n of Pa.*, No. 92-cv-4787, 1994 WL 246166, at *7 (E.D. Pa. June 8, 1994) (granting final approval, noting that "even assuming that plaintiffs ultimately would have prevailed on liability, they faced the risk that they could not establish damages . . . that is achieved by this Settlement Agreement").

Any recovery in this case was hardly a foregone conclusion;[125] in recent years, pharmaceutical antitrust cases have met with mixed results in the courts.[126] Class counsel's success in achieving a favorable result despite significant hurdles further demonstrates the reasonableness of the fee request. Class counsel bore significant risk.

g. Class counsel devoted a substantial amount of time to this case.

Class counsel devoted substantial time to prosecuting the class's claims. In *In re Relafen*, the court took special note of the "mass of discovery" adduced in that case. The court pointed to "hundreds of hours" spent with experts, and the review of "hundreds of boxes of documents."[127] In this case, class counsel collectively expended more than 54,973 hours from inception of the case to the eve of trial. The one-third fee request here is entirely reasonable considering this immense effort.

Class counsel had every incentive to work efficiently, and the time expended is not at all surprising given the defendants' aggressive defense, the skill of their counsel, the complexity of the issues, and a voluminous record.

h. The request is reasonable when compared to empirical evidence of awards in similar cases.

Professor Fitzpatrick's empirical study found that the most common percentages awarded by all federal courts using the percentage method were 25%, 30% and 33%, with a fee award of

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[125] *Cf. In re Keyspan Corp. Sec. Litig.*, No. 01-cv-5852, 2005 WL 3093399, at *5-6 (E.D.N.Y. Sept. 30, 2005) (asserting risk of litigation is low where settlement is virtually assured).

[126] *See, e.g.*, *In re Nexium (Esomeprazole) Antitrust Litig.*, 842 F.3d 34 (1st Cir. 2016) (affirming verdict and entry of judgment for defendants following a six-week jury trial); *In re Wellbutrin XL Antitrust Litig.*, 133 F. Supp. 3d 734 (E.D. Pa. 2015) (granting summary judgment for defendants on grounds, inter alia, that the purchaser plaintiffs could not prove that they had suffered antitrust injury), *aff'd*, 868 F.3d 132 (3d Cir. 2017); *In re Effexor XR Antitrust Litig.*, No. 11-cv-5479, 2014 WL 4988410 (D.N.J. Oct. 6, 2014) (granting in part a motion to dismiss), & *In re Lipitor Antitrust Litig.*, 46 F. Supp. 3d 523 (D.N.J. 2014) (finding plaintiffs failed to state an antitrust claim against a brand pharmaceutical manufacturer), *both rev'd and remanded sub nom*, *In re Lipitor Antitrust Litig.*, Nos. 14-4202, 14-4203, 14-4204, 14-4205, 14-4206, 14-4602, 15-1184, 15-1185, 15-1186, 15-1187, 15-1274, 15-1323 & 15-1342, 2017 WL 3585180 (3d Cir. Aug. 21, 2017).

[127] *Relafen*, 231 F.R.D. at 80.

33% falling within the most populous range of fee awards nationwide.[128] While the size of the settlement may have an inverse relation to the fee percentage awarded,[129] and there is no doubt $120 million is a large settlement, as Professor Fitzpatrick points out, "nothing in the First Circuit law requires that fee percentages decline as settlement size increases."[130] He further explains that decreasing percentage fee awards merely because of the size of the settlement can undermine public policy by creating "perverse incentive for class counsel to settle too early for too little."[131] The case law is replete with examples of fee awards of 33% or more in large cases.[132] Courts in this circuit and across the country have approved fees comparable to the one requested here in cases yielding similar recoveries, even when the recovery is large.[133] The requested award of one-third in this case is thus fully supported by the "comparables."

i. Public policy considerations fully support the requested fee.

The requested fee supports recognized public policy goals.

First, the requested fee furthers the public policy goal of "providing lawyers with sufficient incentive to bring common fund cases that serve the public interest."[134] Prof. Fitzpatrick opines that "the percentage requested here will help further the social goal of appropriately incentivizing lawyers to invest properly in meritorious cases like this one in the

[128] Fitzgerald Decl, ¶ 18 fig. 2. This analysis holds true if the subject cases are restricted to those just in the First Circuit as well. Fitzgerald Decl. ¶ 19 fig. 3.

[129] Fitzgerald Decl. ¶ 20.

[130] *Id*. ¶ 21.

[131] *Id*. (citing *Allapattah Servs. Inc. v. Exxon Corp*., 454 F.Supp.2d 1185, 1213 (S.D.Fla. 2006)). Professor Fitzgerald provides the following example: if courts award class action attorneys 33.33% of settlements when they are under $100 million but only 20% of settlement when they are over $100 million, then rational class action attorneys will prefer to settle cases for $90 million (i.e. a $30 million fee award) than $125 million (i.e., a $25 million fee award). *Id*. ¶ 22.

[132] *See* Fitzgerald Decl. ¶ 23 (collecting cases).

[133] *See supra* § II.B.2.a.

[134] *Goldberger*, 209 F.3d at 51.

future."[135] Second, this litigation itself furthered "significant societal interest in obtaining redress for prescription drug [purchasers] whose harms could not, given the cost of litigation, be pursued on an individual basis."[136] Third, "the public interest is also served by the defendants' disgorgement of the proceeds of predatory marketplace behavior."[137]

3. The lodestar cross-check confirms the reasonableness of the fee request.

Although not required, courts in this Circuit have endorsed the "lodestar calculation as a pragmatic cross-check" of a percentage-based fee award.[138] A lodestar cross-check here confirms the reasonableness of the one third fee requested.

The reported total lodestar accumulated by class counsel through the date of settlement is $29,542,219. The requested fee of $38,678,147, representing one-third of the settlement funds (after deduction of reimbursement for reasonable litigation expenses totaling $3,965,558), results in a multiplier of approximately 1.31.[139]

Pursuant to the Court's direction, all contemporaneous time records, as well as multiple formatted reports for each quarter and cumulatively from inception of the case, were reviewed, certified and submitted to Magistrate Judge Sullivan quarterly by an independent public

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[135] Fitzpatrick Decl. ¶ 26.

[136] *Lupron*, 2005 WL 2006833, at *6.

[137] *Id.*

[138] *New Eng. Carpenters Health Benefits Fund*, No. 05-cv-11148, 2009 WL 3418628, at *1 (citing *In re Compact Disc Minimum Advertised Price Antitrust Litig.,* 216 F.R.D. 197, 215-16 (D. Me. 2003); s*ee Thirteen Appeals*, 56 F.3d at 307; *Manual for Complex Litigation (Fourth)* § 14.122 ("the lodestar is . . . useful as a cross-check on the percentage method by estimating the number of hours spent on the litigation and the hourly rate, using affidavits and other information provided by the fee applicant. The total lodestar estimate is then divided into the proposed fee calculated under the percentage method. The resulting figure represents the lodestar multiplier to compare to multipliers in other cases.")). As the Third Circuit has noted, however, "The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-07 (3d Cir. 2005).

[139] $38,678,147 ÷ $29,542,219 = 1.31.

accountant.[140] After reviewing these records, Magistrate Judge Sullivan met quarterly with one or more representative of co-lead counsel to review the records and provide feedback on hours, rates and expense charges. This feedback was incorporated by counsel moving forward in the case so as to ensure that timekeeping and case expenses were in line with the Court's expectations. Class counsel will make each of those quarterly reports available to the Court again, should the Court desire to review them. In further support of this motion, class counsel have also provided sworn declarations from each firm involved in the litigation that explain how much time and expenses were incurred in this case. These declarations are appended to the Kohn Declaration.[141]

Even if some adjustment were to be made on the rates or time recorded by class counsel, under any view the resultant multiplier is entirely reasonable in view of the range customarily awarded in like cases.[142] Professor Fitzpatrick's empirical study found that of 204 cases where the district court used the percentage of the fund method with a lodestar crosscheck, the multiplier ranged from .07 to 10.3 with a mean and median of 1.65 and 1.34 respectively.[143] Of the seven settlements between $100 million and $250 million in Prof. Fitzpatrick's study where the multiplier could be determined, the average multiplier was 3.47 and the median was 2.20.[144]

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[140] The accountant, Robert A. Zagrodny, C.P.A., has provided a supplemental declaration in support of this motion, including the certification of certain payments made for expenses owed out of the joint litigation fund maintained by counsel since the last quarterly report submitted to Magistrate Judge Sullivan for the fourth quarter of 2019. *See* Decl. of Robert A. Zagrodny, CPA, attached as Ex. H to the Kohn Declaration.

[141] *See* Kohn Decl. Exs. A-G; *see also Rite Aid*, 396 F.3d at 306-07 ("The district courts may rely on summaries submitted by the attorneys and need not review actual billing records.").

[142] This requested award is well within the range of those multipliers accepted by courts in similar complex and long-running litigation. In *Vizcaino v. Microsoft Corp.*, the Ninth Circuit created an appendix of fee awards and multipliers on 24 common fund cases from 1996 to 2001, and found "a range of 0.6 - 19.6 with most (20 of 24, or 83%) from 1.0 to 4.0 and a bare majority (13 of 24, or 54%) in the 1.5 - 3.0 range." 290 F.3d 1043, 1051 n.6 (9th Cir. 2002). In a similar pharmaceutical antitrust class action, Judge Young relied on the *Vizcaino* analysis in approving a 2.02 multiplier. *Relafen*, 231 F.R.D. at 82.

[143] Fitzpatrick Decl. ¶ 33.

[144] *Id.*

Class counsel's request for a fee resulting in a 1.31 multiplier is eminently reasonable. It represents only a modest premium over straight hourly compensation, a premium that appropriately reflects the fact that counsel were not paid hourly, and all work was done on a contingent basis.

C. The request for approval of a service award for the class representative is reasonable and appropriate.

"Service awards serve an important function in promoting class action settlements."[145] These payments serve "to compensate named plaintiffs for the services they provided and the risks they incurred."[146] "Courts have consistently found service awards to be an efficient and productive way to encourage members of a class to become class representatives."[147] As "a named plaintiff is an essential ingredient of any class action," a service award is an appropriate means "to encourage or induce an individual to participate."[148]

The direct purchasers request that the Court award the class representative, Ahold, a service award of $100,000 for its service to the class and for the time it expended in prosecuting this case. Ahold diligently and completely fulfilled its obligation to the class. It stepped forward to assert the class's interests by filing suit, undertaking the public service of contributing to enforcement of the nation's antitrust laws. Ahold actively protected the class's interests by undertaking all the responsibilities involved in being a named class representative plaintiff, including monitoring the progress of the case and responding to discovery requests.

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[145] *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 98 (D. Mass. 2005) (citing *Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317 (S.D.N.Y. 2005)); *see Prograf* Order at 9; *Relafen*, 231 F.R.D. at 82 (granting service awards to third-party payor plaintiffs).

[146] *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002).

[147] *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1357 (S.D. Fla. 2011); *see also Spicer v. Chi. Bd. Options Exchange, Inc.*, 844 F. Supp. 1226, 1267-68 (N.D. Ill. 1993) (collecting cases approving service awards ranging from $5,000 to $100,000).

[148] *Relafen*, 231 F.R.D. at 82 (internal quotation and citation omitted);

Discovery was a significant burden to Ahold. Ahold conducted broad document searches and collections, resulting in production of nearly 9,000 documents to defendants.[149] Ahold also prepared for and provided deposition testimony pursuant to individual and Rule 30(b)(6) deposition notices. As trial neared, two Ahold employees prepared to participate at trial.[150] These efforts required employees of Ahold to take time away from their regular job functions—time which has gone uncompensated for the entire seven years this litigation has been pending. The $100,000 requested as a service award for Ahold is within the acceptable range of payments awarded by other courts.[151]

IV. CONCLUSION

Class counsel worked diligently and efficiently over the course of many years in this complex, hard-fought litigation, all without any guarantee of compensation, and secured $120 million for the class. We request that this Court (a) approve the requested expense reimbursement ($3,965,558), (b) approve the requested percentage-of-fund one-third fee ($38,678,147), and (c) approve the service award to the class representative Ahold ($100,000).

Dated: April 20, 2020

Respectfully submitted,

/s/ Thomas M. Sobol
Thomas M. Sobol (R.I. Bar No. 5005)
Kristen A. Johnson (*pro hac vice*)
Laura Hayes (*pro hac vice*)

[149] Kohn Decl. ¶ 112.

[150] *Id.*

[151] *See, e.g.*, *Asacol*, 2017 WL 11475275, at *4 (awarding an aggregate of $400,000 to four class representatives); *Prograf* Order at 11 (awarding an aggregate of $400,000 to six class representatives); *Skelaxin,* WL 2946459, at *4 ($50,000 awarded to each of five named class representatives); *Remeron*, 2005 WL 3008808, at *18 ($60,000 each awarded to two named plaintiffs); *Ingram v. The Coca-Cola Co*., 200 F.R.D. 685, 694 (N.D. Ga. 2001) (awarding class representatives $300,000 each); *In re Revco Sec. Litig*., No. 89-cv-593, 1992 WL 118800, at *7 (N.D. Ohio May 6, 1992) (awarding $200,000 to a class representative). This request for $90,000 for each of the two class representatives is in addition to the service awards of $10,000 that each received as part of the resolution with Sandoz Inc. and Lupin Limited and Lupin Pharmaceuticals Inc. in 2017. The total of $100,000 for each class representative is still in the acceptable range of payments awarded by courts.

HAGENS BERMAN SOBOL SHAPIRO LLP
55 Cambridge Parkway, Suite 301
Cambridge, MA 02142
Telephone: (617) 482-3700
Facsimile: (617) 482-3003
tom@hbsslaw.com
kristenj@hbsslaw.com
lhayes@hbsslaw.com

David F. Sorensen (*pro hac vice*)
Ellen T. Noteware (*pro hac vice*)
Aurelia Chaudhury (*pro hac vice*)
BERGER MONTAGUE PC
1818 Market Street, Suite 3600
Philadelphia, PA 19103
Telephone: (215) 875-3000
Facsimile: (215) 875-4604
dsorensen@bm.net
enoteware@bm.net
achaudhury@bm.net

Daniel J. Walker (*pro hac vice*)
BERGER MONTAGUE PC
2001 Pennsylvania Ave, NW, Suite 300
Washington, DC 20006
Telephone: (202) 559-9745
dwalker@bm.net

Joseph H. Meltzer (*pro hac vice*)
Terence S. Ziegler (*pro hac vice*)
KESSLER TOPAZ MELTZER & CHECK LLP
280 King of Prussia Road
Radnor, PA 19087
Telephone: (610) 667-7706
Facsimile: (610) 667-7056
jmeltzer@ktmc.com
tziegler@ktmc.com

Peter R. Kohn (*pro hac vice*)
Neill W. Clark (*pro hac vice*)
FARUQI & FARUQI LLP
1617 JFK Boulevard, Suite 1550
Philadelphia, PA 19103
Telephone: (215) 277-5770
Facsimile: (215) 277-5771
pkohn@faruqilaw.com

nclark@faruqilaw.com

David C. Calvello (*pro hac vice*)
FARUQI & FARUQI LLP
685 Third Avenue, 26th Floor
New York, NY 10017
Telephone: (212) 983-9330
Facsimile: (212) 983-9331
dcalvello@faruqilaw.com

Co-Lead Counsel for the Direct Purchaser Class Plaintiffs

CERTIFICATE OF SERVICE

I, Thomas M. Sobol, hereby certify that I caused a copy of the foregoing to be filed electronically via the Court's CM/ECF system. Those attorneys who are registered CM/ECF users may access these filings, and notice of these filings will be sent to those parties by operation of the CM/ECF system.

Dated: April 20, 2020

/s/ Thomas M. Sobol
Thomas M. Sobol (R.I. Bar No. 5005)

TAB 32A

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: CATHODE RAY TUBE (CRT) ANTITRUST LITIGATION	MDL No. 1917 Case No. C-07-5944 JST
This Order Relates To: ALL DIRECT ACTION PLAINTIFFS	**ORDER ON ATTORNEYS' FEES AND EXPENSES**

Now before the Court is a motion for approval of attorneys' fees and reimbursement of expenses for the Direct Purchaser Plaintiff ("DPP") class. See ECF No. 4055 ("Mot."). DPPs originally sought $38,235,000 in combined attorneys' fees plus $1,927,392.12 in expenses, both to be paid from a settlement fund of $127,450,000.[1] No one objected. See ECF No. 4114 at 2. Plaintiffs subsequently reduced their expense demand to $1,534,748.94. See ECF No. 4264 ("Supp. Mot."). The Court held oral argument on this motion on December 15, 2015.

The Court has already granted final approval of the settlements and, by separate order, has approved incentive awards for ten named plaintiffs.[2] See ECF Nos. 4055-1 ¶¶ 59-67; 1412 (Chunghwa and Philips, settling for $10 million and $15 million, respectively); 1508 (Panasonic, settling for $17.5 million); 1621 (LG, settling for $25 million); 1791 (Toshiba, settling for $13.5 million); 3931 (Hitachi and Samsung SDI, settling for $13.45 million and $33 million, respectively), 4299 (approving incentive awards). After careful consideration and good cause

[1] Class Counsel already paid $2,867,395.32 in expenses directly from the Settlement Fund, as previously authorized by the Court. ECF Nos. 1506, 1507, 1833. In this motion, Class Counsel seek reimbursement of the balance of $1,927,392.12 that they advanced themselves.

[2] Since the instant motion was filed, the Court has granted final approval for a settlement between DPPs and Thomson. Fees for that settlement do not appear to be incorporated into this motion. See ECF No. 4260.

appearing, the Court now GRANTS the motion for attorneys' fees and reimbursement of expenses for the reasons set forth below.

I. BACKGROUND

The parties are familiar with the facts of this case, and the Court has already summarized the relevant facts as to this settlement in a prior order. See ECF No. 4260.

II. LEGAL STANDARD

"While attorneys' fees and costs may be awarded in a certified class action where so authorized by law or the parties' agreement, Fed. R. Civ. P. 23(h), courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 941 (9th Cir. 2011). "Where a settlement produces a common fund for the benefit of the entire class," as here, "courts have discretion to employ either the lodestar method or the percentage-of-recovery method" to determine the reasonableness of attorneys' fees. Id. at 942. "Because the benefit to the class is easily quantified in common-fund settlements," the Ninth Circuit permits district courts "to award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the lodestar." Id. "Applying this calculation method, courts [in the Ninth Circuit] typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying a departure." Id. (citing Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990)). However, the benchmark should be adjusted when the percentage recovery would be "either too small or too large in light of the hours devoted to the case or other relevant factors." Six (6) Mexican Workers, 904 F.2d at 1311. "[W]here awarding 25% of a 'megafund' would yield windfall profits for class counsel in light of the hours spent on the case, courts should adjust the benchmark percentage or employ the lodestar method instead." Id.; see also In re Bluetooth Headset Products Liab. Litig., 654 F.3d at 942 (9th Cir. 2011) (citing Six (6) Mexican Workers, 904 F.2d at 1311).

An attorney is entitled to "recover as part of the award of attorney's fees those out-of-pocket expenses that would normally be charged to a fee paying client." Harris v. Marhoefer, 24

F.3d 16, 19 (9th Cir. 1994) (citation omitted). An attorney seeking an expense award should file an itemized list of her expenses by category, listing the total amount advanced for each category, allowing the Court to assess whether the expenses are reasonable. Wren v. RGIS Inventory Specialists, No. 06-cv-05778-JCS, 2011 WL 1230826, at *30 (N.D. Cal. Apr. 1, 2011), supplemented, No. 06-cv-05778-JCS, 2011 WL 1838562 (N.D. Cal. May 13, 2011).

III. DISCUSSION

A. Attorneys' Fees

DPPs move the Court for $38,235,000 in aggregate attorneys' fees, split among thirty-six (36) distinct law firms. Mot. at 1. The requested fee represents thirty percent of the overall $127,450,000 million settlement fund.

The "benchmark" percentage for an award of attorneys' fees in a class action in this circuit is 25 percent. In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d at 942. But in a "megafund" settlement of this size, resort to the Ninth Circuit's 25 percent "benchmark" is of little use in determining an appropriate attorney's fee. See In re Washington Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1297 (9th Cir. 1994) ("Because a court must consider the fund's size in light of the circumstances of the particular case, we agree with the district court that the 25 percent 'benchmark' is of little assistance in a case such as this."). In fact, sometimes courts will award fees of less than 25 percent in megafund cases. See Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1052 (9th Cir.2002) (listing percentage of fund fee awards in cases with class funds of $50-$200 million from 1996-2001, showing approximately half above 25 percent and half below 25 percent).

Close examination of the cases listed in Vizcaino, however, shows that with only one exception, Fanning v. Acromed Corp., No. 1014, 2000 WL 1622741 (E.D. Pa. Oct. 23, 2000), the fees awarded in those cases were a multiple of the lodestar in the case. And in the one exception, Fanning, the only reason the Court awarded an attorneys' fee in an amount lower than the attorneys' lodestar was that the Court lacked sufficient funds to make a more generous award. Id. at *9 ("[T]he court is dealing with a limited fund and must apportion a fee award that totals only 12 percent of that fund, considerably less than either the current or historical lodestars."). Indeed,

when objection is made to the use of a percentage award in a megafund case, it is usually on the ground that a flat percentage results in a windfall to plaintiffs' counsel relative to their lodestar. In re Washington Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1297 (9th Cir. 1994); see also 1 Robert L. Rossi, Attorneys' Fees § 7:9 (3d ed. 2015) (citing cases) (noting that because of economies of scale, "fee awards in 'megafund' common fund cases frequently represent much lower percentages of the total fund").

Here, the record supports an award of 30 percent, even given the size of the settlement fund. First, counsel here has expended far more work -- over ninety-five thousand hours -- and taken upon themselves more risk -- spanning eight years of litigation -- than is present in a normal class action suit. See Vizcaino, 290 F.3d at 1047-1050 (awarding a fee in excess of 25 percent for high risks, effort, sophisticated work, and good results obtained by counsel); see also In re Pac. Enters. Sec. Litig., 47 F.3d 373, 379 (9th Cir. 1995) (citing Six (6) Mexican Workers for the proposition that 25 percent is the benchmark in this circuit yet affirming an award of fees for 33 percent due, in part, to substantial risk undertaken by counsel). Second, no class member has objected to the proposed settlement or proposed fee award. ECF No. 4114; see Ching v. Siemens Indus., Inc., No. 11-CV-04838-MEJ, 2014 WL 2926210, at *8 (N.D. Cal. June 27, 2014). Third, an award of fees of this size is consistent with decisions by Judge Illston in a similar multidistrict litigation case and awards by other judges in this district. See In re TFT-LCD (Flat Panel) Antitrust Litig. ("LCD"), No. MDL 3:07-MD-1827 SI, 2011 WL 7575003, at *1 (N.D. Cal. Dec. 27, 2011) (30 percent); LCD II, No. M 07-1827 SI, 2013 WL 149692, at *1-2 (N.D. Cal. Jan. 14, 2013) (30 percent); LCD III, No. M 07-1827 SI, 2013 WL 1365900, at *7-8 (N.D. Cal. Apr. 3, 2013), appeal dismissed (July 12, 2013), appeal dismissed (June 10, 2014), appeal dismissed (June 12, 2014), appeal dismissed (June 13, 2014) (28.6 percent); In re: Static Random Access Memory (SRAM) Antitrust Litigation, Case No. 07-md-1819-CW (N.D. Cal. June 30, 2011) (Dkt. No. 1370) (30 percent); In re Dynamic Random Access Memory (DRAM) Antitrust Litig., M-02-1486, 2007 WL 2416513 (N.D. Cal. Aug. 16, 2007), at *1 (25 percent); In re Optical Disk Drive Antitrust Litig., Case No. 10-md-2143 RS (N.D. Cal. July 23, 2015) (Dkt. No. 1658) (30 percent).

Lastly, and most importantly, the Court has cross-checked this award against DPPs'

lodestar. The Court has reviewed the documentation provided by DPPs and agrees with their calculation of an anticipated lodestar of $43,335,517.50. See Mot. at 1, 22; see also ECF No. 4055 Exs. 2, 4-38. Thus, the fee multiplier is 0.8823. This multiplier confirms the reasonableness of the award. Cf. In re High-Tech Emp. Antitrust Litig., No. 11-CV-02509-LHK, 2015 WL 5158730, at *10-11 (N.D. Cal. Sept. 2, 2015) (approving attorneys' fees for less than 30 percent but with a lodestar multiplier of 2.5); see also Vizcaino, 290 F.3d at 1052-54 (conducing a survey of attorneys' fees in "megafund" cases and finding that 83 percent of such cases award a multiplier from 1.0-4.0).

B. Expenses

DPPs originally requested a total of $4,794,747.44 in reimbursable expenses. Of this amount, counsel seeks approval of the $2,867,395.32 already paid from the Settlement Fund, as previously authorized by the Court, ECF Nos. 1506, 1507, 1833, and reimbursement of the balance of $1,927,392.12 that they advanced themselves. See Mot. at 23. The aggregate itemized claimed costs were as follows:

1. Document management: $283,694.51
2. Mediation costs: $83,724.42
3. Special Masters: $186,644.14
4. Translation costs: $127,083.17
5. Court filing fees: $6,352.59
6. Expert witnesses: $3,076,506.85
7. FedEx costs: $14,339.14
8. Transcript costs: $166,311.46
9. Online legal research: $245,126.87
10. Messenger/Delivery: $788.60
11. In-house copying: $140,085.84
12. Professional copying: $12,083.24
13. Postage charges: $1,331.39
14. Service of Process: $22,789.36
15. Phone/Fax costs: $35,282.68
16. Travel/meal costs: $392,643.18

As discussed at the December 15, 2015 hearing, the claimed travel and meal costs included many items that were clearly inappropriate, including first class airfare, expensive meals and wine, social drinks with co-counsel, and hotel rooms costing upwards of $3,500 per night. ECF No. 4266. The Court expressed its unwillingness to approve these expenses, which one Plaintiffs'

lawyer correctly described as "pure nonsense." Id. The Court further noted its reluctance to again spend the time poring over now-largely suspect meal and travel requests and gave counsel an opportunity to submit a revised request by December 22, 2015. Id. Counsel instead withdrew their request for reimbursement of meal and travel expenses. ECF No. 4264. The Court therefore removes that line item from counsel's expense request.

The Court finds the remaining expenses to be fair and reasonable, approves the $2,867,395.32 already paid from the Settlement Fund, and grants the motion for the reimbursement in the reduced amount of $1,534,748.94.

IV. CONCLUSION

The Court hereby grants in full the request for attorneys' fees in the amount of $38,235,000, approves the $2,867,395.32 already paid from the Settlement Fund, and grants reimbursement of all claimed expenses except those related to travel and meals in the amount of $1,534,748.94. Therefore, the Court orders a total of $39,769,784.94 be paid from the settlement fund to counsel for DPPs for reallocation among the 36 firms consistent with its motion as modified, see Supp. Mot., and approved herein.

IT IS SO ORDERED.

Dated: January 14, 2016

JON S. TIGAR
United States District Judge

TAB 32B

Guido Saveri (22349)
guido@saveri.com
R. Alexander Saveri (173102)
rick@saveri.com
Geoffrey C. Rushing (126910)
grushing@saveri.com
Cadio Zirpoli (179108)
cadio@saveri.com
Travis L. Manfredi (281779)
travis@saveri.com
SAVERI & SAVERI, INC.
706 Sansome Street
San Francisco, CA 94111
Telephone: (415) 217-6810
Facsimile: (415) 217-6813

Lead Counsel for the Direct Purchaser Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: CATHODE RAY TUBE (CRT) ANTITRUST LITIGATION	Master File No. CV-07-5944-SC MDL No. 1917
This Document Relates to: ALL DIRECT PURCHASER ACTIONS	**DIRECT PURCHASER PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: October 23, 2015 Time: 10:00 a.m. Judge: Hon. Samuel Conti Courtroom: 1

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that at 10:00 a.m. on October 23, 2015, Direct Purchaser Plaintiffs ("DPPs") and their counsel ("Class Counsel") will, and hereby do move before the Honorable Samuel Conti, United States District Judge, at the United States Courthouse, 450 Golden Gate Avenue, Courtroom 1, San Francisco, California, for an award of attorneys' fees in the amount of 30% of the Settlement Fund ($38,235,000) plus interest, reimbursement of litigation expenses in the amount of $1,927,392.12. DPPs also seek approval of $2,867,395.32 in expenses paid with settlement funds. This motion is brought pursuant to Fed. R. Civ. P. 23(h), 54(b) and 54(d)(2).

This motion is made on the grounds that (a) such fees are fair and reasonable in light of Class Counsel's efforts in creating the Settlement Fund; (b) the requested fees comport with the Ninth Circuit case law in common fund cases; and (c) the expenses for which reimbursement is sought were reasonably and necessarily incurred in connection with the prosecution of this action.

This motion is based upon this Memorandum of Points and Authorities; the Declaration of R. Alexander Saveri in Support of Plaintiffs' Motion for an Award of Attorneys' Fees and Reimbursement of Expenses; the proposed order submitted herewith; the declarations of Class Counsel, and other records, pleadings, and papers filed in this action; and upon such argument and further pleadings as may be presented to the Court at the hearing on this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Direct Purchaser Plaintiffs ("DPPs") and their counsel ("Class Counsel") respectfully submit this Memorandum of Points and Authorities in Support of Plaintiffs' Motion for an Award of Attorneys' Fees and Reimbursement of Expenses. DPPs have achieved an excellent result for the class. They have secured settlements with all seven of the original defendant groups totaling $127.45 million (the "Settlement Fund"). To do so, Class Counsel have invested over $43,335,517.50 in time and $1,927,392 in out of pocket expenses since this case began almost eight years ago. DPPs now seek an award of attorneys' fees of $38,235,000—30% of the Settlement Fund. DPPs also seek reimbursement of their litigation expenses in the amount of $1,927,392.12, and approval of $2,867,395.32 in expenses paid with settlement funds.

Class Counsel have prosecuted this case on a purely contingent basis. The settlements were achieved in the face of a tremendously hard fought defense, fueled by Defendants' near limitless resources. The settlements represent excellent recoveries for the class, and the fee class counsel seeks is eminently fair in light of the mammoth investment of time and money they have made and the substantial risks they have undertaken. Indeed, Class Counsel seek over $5 million less than the value of time that they have incurred to date in the prosecution of the case.

As detailed in the accompanying declarations, the work done by Class Counsel was reasonable and necessary, of high quality, and efficiently performed. Among other things, Class Counsel have:

- Conducted an initial investigation of this case to develop the theories and facts that formed the basis of the allegations against Defendants. The research included a review of publicly available information regarding the CRT industry and consultation with industry experts and economists prior to the filing of the complaints (*see e.g.*, Declaration of R. Alexander Saveri in Support of Direct Purchaser Plaintiffs' Notice of Motion and Motion for an Award Of Attorneys' Fees and Reimbursement of Expenses; Memorandum of Points and Authorities In Support Thereof ("Saveri Decl.") ¶ 15);
- Drafted a comprehensive consolidated amended complaint detailing the Defendants' violations of the antitrust laws (*id.* ¶¶ 15, 24–25);
- Conducted exhaustive legal research regarding the class's claims and the defenses thereto (*id.* ¶ 15);

- Successfully defended, over the course of nearly a year, a set of hard-fought motions to dismiss the complaint before the Special Master and this Court (*id.* ¶¶ 15, 26–30);
- Successfully defended, over the course of a year, a Summary Judgment motion by which the Defendants sought to deny any recovery for Finished Products, which constitute the majority of DPPs purchases (*id.* ¶¶ 15, 36–40);
- Propounded discovery that—after extensive research, negotiations with defendants, and motion practice—resulted in the identification of dozens of defendant-employee custodians and the production of millions of documents, as well as voluminous electronic transactional data (*id.* ¶¶ 15, 41–48);
- Reviewed and analyzed these documents (many of which were in foreign languages and required translation), as well as the transactional data (*id.*);
- Propounded several sets of interrogatories on defendants and issued Rule 30(b)(6) deposition notices (*id.* ¶¶ 15, 43–44, 49);
- Cooperated with the Indirect Purchaser Plaintiffs ("IPPs") and the Direct Action Plaintiffs ("DAPs") to take over one hundred depositions of employees and officers of Defendants (*id.* ¶¶ 15, 49);
- Contended with near-constant discovery disputes and motions to compel (*id.* ¶¶ 15, 53);
- Responded to Defendants' numerous document requests and interrogatories and prepared and defended the depositions of the class representatives (*id.* ¶¶ 15, 50–52);
- Prepared a motion for class certification and supporting materials, including over one hundred exhibits and the expert report of Dr. Jeffrey Leitzinger (*id.* ¶¶ 15, 54–56);
- Consulted extensively with experts on issues pertaining to liability, class certification, and damages throughout the course of the Action and defended the deposition of DPPs' expert Dr. Leitzinger (*id.*);
- Engaged in extensive settlement negotiations with each of the seven Defendant groups (*id.* ¶¶ 15, 58–67); and
- Documented each settlement and did the substantial work necessary to obtain final approval of each settlement—e.g., drafted and filed motions for preliminary and final approval, drafted class notices, and worked with the settlement administrator to provide notice to the class of each settlement (*id.*).

DPPs have also faced substantial risks in this case, including, among others:

- The risk of litigating against some of the largest and most sophisticated law firms in the world with seemingly limitless resources;
- The risk that the consolidated complaints would not withstand the individual and joint motions to dismiss, which claimed, *inter alia*, that the alleged conspiracy was not plausible under *Twombly* and *Iqbal*; that certain DPPs lacked standing to sue for federal antitrust violations; and that the claims were time barred;
- The risk that there would be no recovery for Finished Products—i.e., televisions and computer monitors—which comprised the vast majority of DPPs' purchases;
- The risk that Defendants would successfully argue that any antitrust violation engaged

in by their company's representatives caused no antitrust impact or damages to class members;

- The risk of not achieving class certification;
- The risk of trying a case in which many of the events occurred as much as nineteen years ago, and in which much evidence and many witnesses are now unavailable;
- The risk of diminished recovery because of the financial difficulties, bankruptcy, and/or disappearance of corporate defendants as a result of the demise of the CRT industry; and
- The changing landscape of the law with respect to civil antitrust actions and class actions.

In this context, it is apparent that the recovery DPPs obtained for the class is excellent and that DPPs' request for a fee award of 30% of the settlements is fair and reasonable. While the benchmark for attorneys' fees in the Ninth Circuit is 25%, in practice, awards generally approximate 30%. Many courts have awarded 30%, or higher, where, as here, the litigation posed substantial risks and the multiplier is low.

Importantly, DPPs' fee request appears to have the near unanimous support of the class. Each of the five notices of settlement sent to the over sixteen thousand class members disclosed that class counsel would seek as much as one-third of the settlement fund as a fee, and no objections were received. *See* Dkt. Nos. 1323-3, Ex. A; 1464-2, Ex. A; 1573-2, Ex. A; 1757-2, Ex. A; 2728-2, Ex. A. This is especially significant where, as here, the class contains many large and sophisticated companies. Saveri Decl. ¶ 78.

Class Counsel should also be reimbursed for the expenses they have advanced on behalf of the class. All were reasonable and necessary.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case is notable for and characterized by the complex issues it has presented and the tenacity and creativity with which Defendants—all possessing enormous resources and represented by law firms among the best and largest in the world—have litigated those issues. Defendants have steadfastly opposed DPPs on a cornucopia of grounds. From the outset of the case, Defendants have contended that DPPs are entitled to little or no recovery because, *inter alia*, (1) the conspiracy was limited to Asia and did not affect the United States; (2) the FTAIA barred DPPs' case; (3) DPPs lacked standing because the conspiracy did not extend to the Finished Products (i.e.,

computer monitors and televisions) most had purchased; (4) DPPs claims were barred by the statute of limitations; (5) the conspiracy involved only CDTs; and (6) the conspiracy, if it existed, caused little or no damage to DPPs. Several defendants also asserted that they were not conspirators or had withdrawn from the conspiracy long ago. At every stage of this case, Defendants asserted these arguments as a basis to dismiss all or part of the case, to limit damages, or to deny or limit discovery. DPPs battled Defendants at every step, but the battles were difficult and drawn out. For example, Defendants' motions to dismiss ultimately entailed over 500 pages of briefing and took over a year to resolve. Defendants' summary judgment motion to eliminate Finished Products from the case—which would have gutted DPPs' case—also involved hundreds of pages of briefing and took over a year to finally resolve. In this context, it is plain that the efforts of Class Counsel were not only essential to the substantial benefits conferred on the class by the settlements obtained, but that Class Counsel also managed the litigation effectively and efficiently. Saveri Decl. ¶ 15, 26–30, 36–40.

A. Commencement of the Case

This multidistrict litigation arises from an alleged worldwide conspiracy to fix prices of Cathode Ray Tubes ("CRTs"). CRTs are the primary components of CRT televisions and computer monitors. The alleged conspiracy involved some of the largest companies in the world—Samsung SDI, Panasonic, LG, Toshiba, Hitachi, and Philips. Saveri Decl. ¶ 18.

After the United States Department of Justice ("DOJ") announced its investigation into the conspiracy in November of 2007, twenty direct purchaser plaintiff class action complaints were filed alleging a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 4 of the Clayton Act, 15 U.S.C. § 15.[1] Saveri Decl. ¶ 19.

Plaintiffs commenced proceedings before the JPML, and on February 15, 2008, the JPML

[1] On February 10, 2009 and November 9, 2010, the DOJ announced the indictment of executives of Defendants Samsung SDI, LG Electronics and Chunghwa for price fixing Cathode Display Tubes ("CDTs") used in computer monitors. Ultimately, the DOJ secured only a single conviction. Defendant Samsung SDI admitted to participation in a conspiracy to fix the prices of CDTs between January 1997 and March 2006. Saveri Decl., Ex. 8 (Amended Plea Agreement, *U.S. v. Samsung SDI Co.*, Case No. 11-cr-162-WHA (N.D. Cal. Aug. 8, 2011) (Dkt. No. 29)). There were no indictments or guilty pleas with regard to Cathode Picture Tubes ("CPTs") used in televisions.

transferred all related actions to this Court. Dkt. No. 122. On May 9, 2008, the Court appointed Saveri & Saveri, Inc. ("S&S") Interim Lead Class Counsel for the putative nationwide class of direct purchasers. Dkt. No. 282. The Court's order tasked S&S with making sure the DPP action was prosecuted in an efficient manner, and required, among other things, the periodic collection of time and expenses from Class Counsel, and coordination of the work of Class Counsel. Saveri Decl. ¶ 20.

During this time, DPPs effected service of their complaints on Defendants. As to several, plaintiffs were required to utilize the procedures for international service of process set forth in the Hague conventions. This was a lengthy, time consuming, and, in certain instances, expensive endeavor requiring the appointment of a special international process server. Saveri Decl. ¶ 21.

B. The DOJ Intervenes

On February 21, 2008, the DOJ moved to intervene in the litigation for the purpose of seeking a stay of the action pending its own investigation. As a result of the DOJ's request, with the exception of limited written discovery—i.e., interrogatories—the Court stayed discovery in the action. Ultimately, document discovery was stayed, for over two years, until March 8, 2010. Depositions of Defendants and their employees were stayed until March 11, 2011. Dkt. No. 798. Saveri Decl. ¶¶ 22–23.

C. DPPs File Their Consolidated Complaint; Defendants File Motions To Dismiss

On March 16, 2009, Plaintiffs filed their Consolidated Amended Complaint ("CAC") alleging an over-arching horizontal conspiracy among the Defendants and their co-conspirators to fix prices, restrict production, and to allocate markets and customers for the sale of CRTs and Finished Products in the United States from March 1, 1995 through November 25, 2007 (the "Class Period"). The CAC alleged, *inter alia*, that Plaintiffs and members of the Class were direct purchasers of CRTs and/or CRT Finished Products from Defendants and/or their subsidiaries and were injured because they paid more for CRTs and/or CRT Finished Products than they would have absent the conspiracy. CAC ¶¶ 213–221. Plaintiffs sought, *inter alia*, treble damages pursuant to Section 4 of the Clayton Act, 15 U.S.C. §§ 15 and 22. CAC at p. 47. Saveri Decl. ¶¶ 24–25.

On May 18, 2009, beginning a process that would take almost a year to complete,

Defendants filed a massive set of motions to dismiss the CAC. Defendants filed a joint motion, and nine individual motions. Their total briefing included 197 pages of argument and hundreds of pages of supporting material. *See* Dkt. Nos. 463–493. Defendants argued, *inter alia*, that the CAC failed to allege a plausible conspiracy, that the FTAIA barred DPPs' action, that DPPs lacked antitrust standing, and that DPPs had failed to allege fraudulent concealment of the conspiracy sufficient to avoid the bar of the statute of limitations. Saveri Decl. ¶ 26.

DPPs filed their opposition to Defendants' motions—118 pages of argument, along with over 250 pages of supporting declarations and other material—on August 3, 2009 (Dkt. Nos. 530, 531) and August 31, 2009 (Dkt. No. 537). Defendants' reply briefs totaled 132 pages of argument and hundreds more pages of supporting material. *See* Dkt. Nos. 545–561. Saveri Decl. ¶¶ 27, 30.

A full-day hearing was held on October 5, 2009.[2] On February 5, 2010, the Special Master issued his Report and Recommendation ("R&R") denying Defendants' motions. Dkt. No. 597. Defendants objected to virtually all of the Special Master's recommendations. The parties filed briefs in support and in opposition to adoption of the R&R (approximately 80 pages of argument) (*See* Dkt. Nos. 605–641), and the Court conducted another hearing on March 18, 2010. Dkt. No. 656. On March 30, 2010, this Court adopted the Special Master's ruling and recommendation granting in part and denying in part Defendants' Motions to Dismiss. Dkt. No. 665. Saveri Decl. ¶ 28.

Finally, on April 9, 2010, Defendants moved to certify the Court's order for interlocutory appeal. Dkt. No. 667. DPPs filed their opposition on April 27, 2010. Dkt. No. 673. The matter was heard on April 30, 2010. Dkt. No. 711. The Court denied the motion to certify on that date. *Id.* Saveri Decl. ¶ 29.

D. Defendants' Rule 11 Motion

On April 12, 2011, certain Defendants moved to strike allegations of a finished product conspiracy from the CAC pursuant to FRCP 11. Dkt. No. 880. DPPs' opposition, filed under seal on April 20, 2011 (Dkt. No. 896) ("Rule 11 Opp."), explained that the motion was meritless for

[2] Defendants' motions to dismiss the Indirect Purchaser Plaintiffs' ("IPPs") complaint were also argued.

several reasons, namely: (1) DPPs' allegations that the conspiracy embraced Finished Products were supported by evidence and, therefore, not "baseless"; and (2) DPPs had conducted a reasonable investigation prior to filing the complaint. Rule 11 Opp. at 9–24. Defendants, therefore, did not satisfy either of the requirements of Rule 11.[3] In addition, among other things, Defendants' motion was procedurally improper: Defendants had not properly followed the required "safe harbor" provisions, the motion was filed before DPPs' allegations—which this Court had already upheld as "plausible"—had been determined to lack merit, and Defendants were seeking to use the motion as, essentially, a summary judgment motion before DPPs had a chance to conduct meaningful discovery. *Id.* at 9. Saveri Decl. ¶ 31.

After a hearing on May 26, 2011, however, and despite finding that DPPs' had conducted a reasonable inquiry prior to filing their complaint, the Special Master recommended that the motion be granted. Dkt. No. 947. The Special Master recommended that DPPs' allegations of a finished products conspiracy be stricken from the complaint and certain discovery be disallowed, but did not recommend that DPPs be otherwise sanctioned. *Id.* at 14. Saveri Decl. ¶ 32.

On June 29, 2011, DPPs objected to the Special Master's R & R. Dkt. No. 957. DPPs explained, *inter alia*, that the Special Master's finding that they had conducted a reasonable investigation compelled the denial of the motion, that he had failed to credit the evidence adduced by DPPs, had misunderstood well-established antitrust law, and had applied an improper Rule 11 standard to conclude that DPPs' allegations were baseless. Defendants asked the Court to adopt the R& R the same day. Dkt. No. 953. Saveri Decl. ¶ 33.

The Court set the matter for hearing on September 2, 2011. Dkt. No. 968. Prior to the hearing, on August 26, 2011, the parties entered into a stipulation resolving the matter. It provided, among other things, that the Special Master's recommended finding that Plaintiffs violated Rule 11 be vacated, and that DPPs withdraw their allegations of a conspiracy encompassing Finished Products and certain discovery. Significantly, the stipulation preserved DPPs' damage claims based

[3] Under the Ninth Circuit's decisions in *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1991) (en banc) and *In re Keegan Management Co. Sec. Litig.*, 78 F.3d 431 (9th Cir. 1996), the filer of a complaint may not be subject to Rule 11 sanctions unless he or she failed to conduct a reasonable inquiry under the circumstances *and* the claims are objectively baseless.

on their purchases of Finished Products. Dkt. No. 996. Saveri Decl. ¶ 34.

E. Finished Products Summary Judgment Motion

On December 12, 2011, Defendants moved for Summary Judgment against Plaintiffs who purchased CRT Finished Products only. Dkt. No. 1013. Defendants contended, as they had in their motions to dismiss, that DPPs could not bring claims under the federal antitrust law based on purchases of Finished Products containing price fixed CRTs. *Id.* at 5–12. Saveri Decl. ¶ 36.

On February 24, 2012, DPPs filed their opposition under seal (*see* Dkt. No. 1057) arguing that, as the Court had noted in its Order on Defendants' motion to dismiss, purchasers of finished products containing price fixed goods had antitrust standing under *Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323 (9th Cir. 1980). In addition, DPPs submitted a massive declaration collecting evidence that each of the class representatives Defendants had moved against had purchased Finished Products from entities "owned or controlled" by an alleged conspirator. *See* Dkt. No. 1057. DAPs also opposed the motion. Dkt. No. 1056. The motion was heard on March 20, 2012. Saveri Decl. ¶¶ 37, 40.

On May 31, 2012, the Special Master issued his Report and Recommendation that the Court grant Defendants' motion for summary judgment and that judgment be entered against certain plaintiffs that purchased CRT Finished Products from defendants. Dkt. No. 1221. The parties filed briefs in support and in opposition to adoption of the R&R. On November 29, 2012, the Court declined to adopt the R&R, and ruled that the "Ownership and Control Exception" created in *Royal Printing*, 621 F.2d 323, and confirmed by the Ninth Circuit in *In re ATM Fee Antitrust Litig.*, 686 F.3d 741 (9th Cir. 2012), conferred standing on Plaintiffs to sue "insofar as they purchased [Finished Products] incorporating the allegedly price-fixed CRTs from an entity owned or controlled by any allegedly conspiring defendant" (Dkt. No. 1470 at 16). Saveri Decl. ¶ 38.

Finally, some Defendants asked the Court pursuant to 28 U.S.C. section 1292(b) to certify the Order for interlocutory appeal. Dkt. No. 1499. DPPs filed an opposing brief. Dkt. No. 1525. The Court denied defendants' request on February 13, 2013. Dkt. No. 1569. Saveri Decl. ¶ 39.

F. Discovery

Discovery in this action was extensive and hard-fought. Defendants opposed DPPs at

almost every step. Ultimately, DPPs—in cooperation with the IPPs and the DAPs—obtained millions of documents, took over one hundred depositions, and obtained important information via interrogatories and other discovery devices. Saveri Decl. ¶ 41.

1. Requests for Production of Documents and Interrogatories

On March 12, 2010, after the partial stay of discovery was lifted, Plaintiffs propounded their Second Set of Document Requests and First Set of Interrogatories. Among other things, Defendants sought to limit the temporal and geographic scope of the discovery and sought to avoid searching the files of some or all of their subsidiaries or related companies. DPPs, along with the IPPs, engaged in exhaustive separate negotiations with each Defendant group. Eventually, Defendants agreed to produce documents from the files of designated document custodians. These negotiations, however, were lengthy and difficult, and required the intervention of the Special Master. DPPs briefed, along with the IPPs, at least ten motions relating to Defendants' discovery responses. Ultimately, Defendants produced millions of documents. Saveri Decl. ¶¶ 42–43, 46–48, 53.

DPPs, with the IPPs and DAPs, also spent substantial time obtaining Defendants' transactional data and negotiating a protocol relating to ESI. Dkt. No. 828. Saveri Decl. ¶¶ 15, 44.

A substantial percentage of the documents produced in this action were in Korean, Chinese, or Japanese. Consequently, DPPs utilized foreign language attorneys and paralegals both to review and analyze these documents, as well as to translate working copies of important documents. In addition, DPPs, along with the other parties, worked with commercial translators in order to produce "certified translations" of thousands of evidentiary documents. Ultimately, all parties negotiated a Translation Protocol (as part of the larger discovery protocol). Dkt. No. 1128. This was a laborious process that involved, first, a proposed translation, then an opportunity for other parties to object, then a meet and confer process, and, ultimately, a procedure for the Court to resolve disputes. The protocol applied to all translated documents used at depositions, attached to motions, or which a party intended to use at trial. After the protocol was established, negotiation with the Defendants about translations was virtually continual. Saveri Decl. ¶ 45.

2. Depositions

Beginning in June of 2012, after meeting and conferring with Defendants regarding the scope and topics of 30(b)(6) witnesses, Plaintiffs began taking 30(b)(6) depositions of Defendants. Beginning in December of 2012, Plaintiffs began taking merits depositions. DPPs coordinated with DAPs and IPPs in the taking all of these depositions to avoid duplication of effort. Generally, one plaintiffs' firm representing the DAPs, IPPs, or DPPs was designated to take the lead with regard to preparing for and taking each deposition. The non-lead plaintiffs would assist, as necessary, in the preparation for the depositions and the examination of the witnesses. Over one hundred depositions were taken. DPPs took the lead in over twenty-five depositions, and assisted the lead attorneys in most of the rest. DPPs participation in the depositions of some Defendants diminished after DPPs had settled with them. Saveri Decl. ¶¶ 15, 49.

3. Discovery of Plaintiffs

DPPs also spent substantial time responding to discovery propounded by Defendants. DPPs worked with each of the Class Representatives to collect and provide discoverable information and documents, object where appropriate, and meet and confer with Defendants. DPPs also briefed, in cooperation with the IPPs unless the issue was particular to the DPPs, several discovery motions in connection with Defendants' discovery demands. Saveri Decl. ¶ 50.

Defendants propounded eight sets of interrogatories and nine sets of document requests. Each of the ten Class Representatives participated in the collection of responsive hard copy documents and identification of ESI sources likely to contain responsive data. In total, the Class Representatives produced over twelve thousand pages of documents. These document requests required the Class Representatives to search for and produce both hard copy and, in certain circumstances, electronic documents from multiple sources. Saveri Decl. ¶ 51.

The Class Representatives were also deposed. DPPs spent substantial time preparing each Class Representatives for their deposition, and defending the depositions. Saveri Decl. ¶ 52.

G. Motion for Class Certification

DPPs filed a motion for class certification against Defendants Hitachi and Samsung SDI on May 14, 2013. Dkt. No. 1674. The motion was supported by the report of DPPs' expert economist,

Dr. Jeffrey Leitzinger and a declaration of counsel attaching over 130 exhibits. DPPs' moving papers comprised in excess of 2,600 pages. Defendants filed their nearly fifty-page opposition to class certification, which included hundreds of pages of exhibits, as well as a 176 page expert report critiquing Dr. Leitzinger's report, on September 11, 2013. *See* Dkt. No. 1921. DPPs filed their reply brief and Dr. Leitzinger's rebuttal report on November 11, 2013. Dkt. Nos. 2208-3, 2208-4. Saveri Decl. ¶¶ 15, 54.

DPPs spent an enormous amount of time and effort drafting their motion for class certification, analyzing relevant evidence, working with Dr. Leitzinger and his associates, preparing Dr. Leitzinger for deposition and defending his deposition, and analyzing and responding to the Defendant's opposition papers and expert report. Saveri Decl. ¶¶ 55–56.

After the motion was filed, DPPs reached settlements with both Hitachi and Samsung SDI. DPPs reached agreement with Samsung SDI after the matter was fully briefed. Saveri Decl. ¶ 57.

H. Settlements

DPPs spent substantial time in settlement negotiations throughout the litigation. Ultimately, DPPs reached settlements with all of the Defendants who appeared in the action. Saveri Decl. ¶ 58.

DPPs first settled with Chunghwa, the amnesty applicant. The parties executed an agreement in April, 2009 after several months of negotiation. The settlement required Chunghwa to pay the class $10 million and to cooperate with DPPs in the prosecution of the case against the rest of the Defendants. Saveri Decl. ¶ 59.

DPPs next settled with Philips. The parties reached an agreement in principle in January, 2012, and executed a written agreement in February, 2012, after almost a year of negotiations. The settlement required Philips to pay the class $15 million (after an opt-out reduction) and cooperate with DPPs in prosecution of the case against the remaining Defendants. Saveri Decl. ¶ 60.

DPPs moved for preliminary and final approval of the Chunghwa and Philips settlements in the summer of 2012. The Court certified settlement classes, notice was given to the classes, and, on October 19, 2012, the Court granted final approval of the two settlements. Saveri Decl. ¶ 61.

DPPs' next settled with Panasonic. The parties executed a settlement agreement in June, 2012 after several months of negotiation. The settlement required Panasonic to pay the class $17.5

million and to cooperate with DPPs in the prosecution of the case against the rest of the Defendants. After DPPs moved for preliminary and final approval of the settlement, certification of a settlement class and notice to the class, the Court granted final approval of the Panasonic settlement on December 27, 2012. Saveri Decl. ¶ 62.

DPPs executed a fourth settlement agreement with LG on August 13, 2012. The Court finally approved the LG settlement on April 1, 2013, after DPPs moved for preliminary and final approval of the settlement, certification of a settlement class and notice to the class. The settlement required LG to pay the class $25 million and to cooperate with DPPs in the prosecution of the case against the rest of the Defendants. Saveri Decl. ¶ 63.

DPPs executed a fifth settlement with Toshiba on February 6, 2013. The settlement was a reached as a result of a mediation before Mr. Eric Green. The parties exchanged mediation briefs and attended a one-day mediation on October 3, 2012. While no settlement was reached at the mediation, the parties continued their discussions with the assistance of Mr. Green and eventually reached agreement. The Court finally approved the settlement on July 23, 2013, following DPPs' motions for preliminary and final approval of the settlement, certification of a settlement class and notice to the class. Toshiba agreed to pay $13.5 million and cooperate with DPPs in the prosecution of the case against the rest of the Defendants. Saveri Decl. ¶ 64.

DPPs next settled with Hitachi. DPPs engaged in settlement discussions with Hitachi over the course of the litigation. The settlement was finally reached as a result of mediation sessions conducted by Judge Vaughn Walker (Ret.). The parties exchanged mediation briefs and attended a mediation session on March 26, 2013. On May 14, 2013, the parties again exchanged briefs and attended another mediation session. While no settlement was reached at the mediation sessions, the parties continued their discussions with the assistance of Judge Walker and executed an agreement on November 29, 2013. Hitachi agreed to pay $13.45 million and cooperate in the prosecution of the case against the rest of the Defendants. Saveri Decl. ¶ 65.

DPPs settlement with Samsung SDI was also reached as a result of mediation sessions conducted by Judge Walker. The parties exchanged mediation briefs and attended a mediation session on March 19, 2013. On September 24, 2013, the parties again submitted briefs and attended

another session. While no settlement was reached at the mediations, the parties continued their discussions with the assistance of Judge Walker and executed an agreement on February 11, 2014. Samsung SDI agreed to pay the class $33 million and to cooperate with DPPs in the prosecution of the case against other alleged conspirators. Saveri Decl. ¶ 66.

The Court granted preliminary approval, certified settlement classes, and approved class notice for the Hitachi and Samsung SDI settlements. After notice to the class, the Court held a final approval hearing on August 22, 2014. However, because of motion practice relating to DAP Sharp Corporation's failure to submit a timely request for exclusion from the settlement classes, final approval of these settlements was delayed until July 22, 2015. Saveri Decl. ¶ 67.

I. Miscellaneous Motions

DPPs were involved in a number of other motions in addition to those described above. In February, 2014, two large purchasers of CRTs and CRT Products, Viewsonic and Unisys, who had opted out of the DPP settlements with Chunghwa, Philips, Panasonic, LG, and Toshiba, moved to withdraw their requests for exclusion and rejoin the settlement classes. Dkt. No. 2403. DPPs opposed the motion and the Court denied the motion. Dkt. Nos. 2417, 2517. Saveri Decl. ¶¶ 68–69.

In the summer of 2014, two DAPs with large CRT purchases—Sharp and Dell— who failed to submit timely requests for exclusion from the Hitachi and Samsung SDI settlement classes moved the Court for leave to submit a late request. Dkt. Nos. 2696, 2698. The Court granted Dell's request and denied Sharp's. Dkt. No. 2746. Sharp moved for leave to submit a late objection to the settlements and for reconsideration. Dkt. Nos. 2750, 2751. The DPPs submitted briefs in connection with these motions, as well as Sharp's later request for a status conference. Dkt. Nos. 2715, 2753, 3160. Sharp ultimately settled with Samsung SDI and Hitachi and thus mooted the question of Sharp's membership in the settlement classes. Dkt. No. 3842. These proceedings delayed final approval for nearly a year. Saveri Decl. ¶ 70.

III. ARGUMENT

DPPs' requests (1) for an award of attorneys' fees in the amount of 30% of the Settlement Fund; (2) for approval of expenses; and (3) for reimbursement of expenses Class Counsel have advanced on behalf of the class are reasonable and appropriate.

A. The Common Fund Doctrine and the Percentage-of-the-Recovery Approach

1. The Ninth Circuit Recognizes the Common Fund Doctrine

Counsel who represent a class and produce a benefit for class members are entitled to compensation. As the Supreme Court has explained, "this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). *See also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392–93 (1970); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 123 (1885). The Supreme Court has also recognized that under the "common fund doctrine" a reasonable fee may be based "on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). The purpose of this doctrine is that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) ("*WPPSS*"); *see also Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989) ("*Paul, Johnson*") (well-settled that lawyer who helps create common fund should be allowed to share in the award).

The Supreme Court has repeatedly recognized that private antitrust litigation is essential to the enforcement of the antitrust laws. *See, e.g., Pillsbury Co. v. Conboy*, 459 U.S. 248, 262–63 (1983); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 331 (1979); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972); *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968). Reasonable fee awards encourage meritorious class actions, and thereby promote private enforcement of—and compliance with—the antitrust laws. "In the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced . . . ." *Alpine Pharmacy, Inc. v. Charles Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2d Cir.), *cert. denied*, 414 U.S. 1092 (1973),

Here, Class Counsel's efforts have created a common fund of $127.45 million. Under either a "percentage-of-the-fund" or "lodestar" method, Class Counsel's requested fee is warranted in light of the value of the extensive work performed, the difficulty and risk of the case, and the results achieved, among other things.

2. Percentage-of-the-Recovery Approach Is the Predominant Method for Determining Attorneys' Fees Under Ninth Circuit Law

The amount an award of reasonable attorneys' fees and expenses is within the sound discretion of the court. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998); *WPPSS*, 19 F.3d at 1296. In the Ninth Circuit, the court has discretion in a common fund case to choose either the "percentage-of-the-fund" or the "lodestar" method to determine fees. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) ("*Vizcaino II*"); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015) ("*Online DVD*"). Most courts have exhibited a clear preference for the percentage-of-the-fund method. Virtually all of the major recent antitrust class actions in the Northern District of California have applied the percentage-of-the-fund approach. *See, e.g.*, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2011 WL 7575003, at *1–2 (N.D. Cal. Dec. 27, 2011) ("*LCD I*") (30%); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2013 WL 149692, at *1–2 (N.D. Cal. Jan. 14, 2013) ("*LCD II*") (30%); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2013 WL 1365900, at *7–8 (N.D. Cal. Apr. 3, 2013) ("*LCD III*") (28.6%); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, Case No. 07-md-1819-CW (N.D. Cal. June 30, 2011) (Dkt. No. 1370) ("*SRAM*") (attached as Exhibit 9 to the Saveri Declaration) (30%); *Meijer v. Abbott Laboratories*, C-07-05985 (N.D. Cal. Aug. 11, 2011) (Dkt. No. 514) ("*Meijer*") (attached as Exhibit 10 to the Saveri Declaration) (33⅓%).

B. Application of the Pertinent Factors Shows that an Upward Adjustment of the Benchmark Is Justified

"[I]n this circuit, the benchmark percentage is 25%." *Id.* at *9. However, "[t]he 25% benchmark rate, although a starting point for analysis, may be inappropriate in some cases." *Vizcaino II*, 290 F.3d at 1048. Indeed, *Vizcaino II* makes clear that it is not sufficient to arbitrarily apply a percentage; rather the District Court must show why that percentage and the ultimate award are appropriate based on the facts of the case. *Id.*; *see also Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993) ("This 'benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors.'" (quoting *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir.

1990)). In considering whether an award of 30% would be fair, several factors may be considered:

> In [*Vizcaino II*], we listed several factors courts may consider in assessing a request for attorneys' fees that was calculated using the percentage-of-recovery method. These factors include the extent to which class counsel "achieved exceptional results for the class," whether the case was risky for class counsel, whether counsel's performance "generated benefits beyond the cash settlement fund," the market rate for the particular field of law (in some circumstances), the burdens class counsel experienced while litigating the case (e.g., cost, duration, foregoing other work), and whether the case was handled on a contingency basis. In addition, a court may cross-check its percentage-of-recovery figure against a lodestar calculation.

Online DVD, 779 F.3d at 954–55 (citations omitted). In addition, the Court may consider other factors including the volume of work performed, counsel's skill and experience, the complexity of the issues faced, and the reaction of the class. *See, e.g.*, *In re Heritage Bond Litig.*, 02-ML-1475 DT, 2005 WL 1594403, at *18–23 (C.D. Cal. June 10, 2005) ("*Heritage Bond*").

As this Court has noted, fee awards tend to approximate 30%. *Knight v. Red Door Salons, Inc.*, No. 08-01520 SC, 2009 WL 248367, at *6 (N.D. Cal. Feb. 2, 2009) ("nearly all common fund awards range around 30%" (quoting *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377–78 (N.D. Cal. 1989) ("*Activision*"))); *Pokorny v. Quixtar, Inc.*, Case No. c 07-0201 SC, 2013 WL 3790896, at *1 (N.D. Cal. July 18, 2013) ("30% award the norm"); *In re Omnivision Tech., Inc.*, 559 F. Supp. 2d 1036, 1048 (N.D. Cal. 2008) ("*Omnivision*") (same).

Thus, in other large electronics antitrust class actions in this district, the court has generally awarded a fee of 30% or near 30%. *See, e.g.*, *LCD I*, 2011 WL 7575003 (30%); *LCD II*, 2013 WL 149692 (30%); *LCD III*, 2013 WL 1365900 (28.6%); *SRAM*, Case No. 07-md-1819-CW (N.D. Cal. June 30, 2011) (Dkt. No. 1370) (30%); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, M-02-1486, 2007 WL 2416513 (N.D. Cal. Aug. 16, 2007), at *1 ("*DRAM*") (25%); *In re Optical Disk Drive Antitrust Litig.*, Case No. 10-md-2143 RS (N.D. Cal. July 23, 2015) (Dkt. No. 1658) (attached as Exhibit 7 to the Saveri Declaration) (30%).

Fee awards of less than 30%, unlike this case, usually involve multipliers—*i.e.*, counsel receive a multiple of their hourly rate. *See, e.g.*, *DRAM*, 2007 WL 2416513 (multiplier of 2.3); *In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730, at *10–11 (N.D.

Cal. Sept. 2, 2015) ("*High-Tech*") (multiplier of 2.5). By the same token, fees in excess of 30% often involve cases presenting substantial risk, again, as here. *See, e.g., In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) ("*Pac. Enters.*") (33%).

In this context, it is plain that the award DPPs seek is consistent with recoveries awarded in other major class action cases. Consideration of the *Vizcaino* factors confirms its fairness.

1. Class Counsel Achieved an Excellent Recovery for the Class

Courts emphasize that the recovery achieved is an important factor to be considered in determining an appropriate fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 431 (1983); *Vizcaino v. Microsoft Corp.*, 142 F. Supp. 2d 1299, 1303 (W.D. Wash. 2001) *aff'd*, 290 F.3d 1043 (9th Cir. 2002) ("*Vizcaino I*"); *Omnivision*, 559 F. Supp. 2d, 1046. Here, DPPs have obtained a $127.45 million in cash. The settlement fund confers a substantial and immediate benefit to class members, and represents an excellent recovery, especially in light of the many risks involved in the action. The quality of the recovery in this action is confirmed by the fact that in December of 2014, sophisticated DAPs with large purchases who initially opted out of the first five settlements sought to revoke their opt-out notices and rejoin the class in order to participate in the settlements. Dkt. 2403; Saveri Decl. ¶ 68.

2. A High Level of Skill Was Required to Prosecute This Case and Class Counsel Are Highly Qualified

The skill and quality of legal counsel also support the requested fee award. *See Mark v. Valley Ins. Co.*, Case No. CV 01-1575-BR, 2004 WL 2260605, at *2 (D. Or. Oct. 6, 2004). Class Counsel are among the nation's most experienced and skilled practitioners in the antitrust litigation field, and each firm has successfully litigated these types of cases on behalf of direct purchasers of price-fixed products throughout the country.[4]

This was a complex case which required DPPs to confront novel and difficult legal and factual issues which courts have recognized as a significant factor to be considered in making a fee award. *See, e.g., Vizcaino I*, 142 F. Supp. 2d at 1303, 1306. Antitrust price-fixing conspiracy cases

[4] *See, e.g., DRAM*, MDL No. 1482; *SRAM*, MDL No. 1819; *LCD*, MDL No. 1827. *See also* Exhibit 1 to the Saveri Decl. and firm biographies attached to Class Counsel's declarations.

are notoriously complex and difficult to litigate. *See, e.g.*, *In re Linerboard Antitrust Litig.*, No. CIV.A. 98-5055, 2004 WL 1221350, at *10 (E.D. Pa. June 2, 2004) ("antitrust class action is arguably the most complex action to prosecute"). Class Counsel also effectively managed the logistics of such a complex case, with more than thirty plaintiffs' firms, scores of able defense counsel, and seven defendant groups. Saveri Decl. ¶ 17, 42.

The caliber of opposing counsel is another important factor in assessing the quality of Class Counsel's work. *Vizcaino I*, 142 F. Supp. 2d at 1303; *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 634 (D. Colo. 1976); *Arenson v. Board of Trade*, 372 F. Supp. 1349, 1354 (N.D. Ill. 1974). Here, DPPs were opposed by attorneys from some of the best and largest firms in the country with near limitless resources.[5]

3. The Risks of This Litigation

Risk is another important factor in determining a fair fee award. *Online DVD*, 779 F.3d at 954–55. Consistent with the complexity and difficulty of antitrust class actions in general, this case presented substantial risk. Some of these risk factors are discussed below.

a. Defendants Have Tremendous Resources

The resources available to the opposing parties are a significant indicator of risk. *See Vizcaino I*, 142 F. Supp. 2d at 1303–04. Here, of course, Defendants' resources are vast.[6]

b. Antitrust Class Actions Are Unpredictable

"Antitrust litigation in general, and class action litigation in particular, is unpredictable." *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 475 (S.D.N.Y. 1998). "The 'best' case can be lost and the 'worst' case can be won, and juries may find liability but no damages. None of these risks should be underestimated." *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 127 (N.D. Ill. 1990). There is also always a risk of unfavorable changes in the law.

[5] For example, Kirkland & Ellis LLP (Hitachi's counsel) employs over 1,600 attorneys in 12 offices worldwide. *See* http://www.kirkland.com.

[6] For example, Samsung Group, parent of the Samsung Defendants, has $470.2 billion in assets and employs over 425,000 people. *See* http://www.samsung.com/us/aboutsamsung/samsung_group/our_performance.

c. The Risk that Class Certification Will Be Denied

While the Court ultimately granted certification here, the risk that class certification will be denied is real. Several large antitrust class actions have been denied certification in recent years. *See, e.g., In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 508 (N.D. Cal. 2008) (denying certification of indirect purchaser class and certifying a direct purchaser class that was much smaller than requested); *In re Optical Disk Drive Antitrust Litig.*, 303 F.R.D. 311, 325 (N.D. Cal. 2014); *In re Flash Memory Antitrust Litig.*, No. C 07-0086 SBA, 2010 WL 2332081, at *19 (N.D. Cal. June 9, 2010). *See also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 255 (D.C. Cir. 2013).

d. The Risk of Not Being Able to Establish Liability or Recover Substantial Damages

This case also presented substantial risks on the merits. Many large antitrust cases do not make it past summary judgment. *See, e.g., In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 914, 918 (9th Cir. 2015) (affirming grant of summary judgment against plaintiffs); *In re Citric Acid Antitrust Litig.*, 191 F.3d 1090, 1093, 1108 (9th Cir. 1999), *cert. denied sub nom. Gangi Bros. Packing Co. v. Cargill, Inc.*, 529 U.S. 1037 (2000) (summary judgment in favor of Cargill).

While one defendant eventually pled guilty, Defendants have strenuously argued the conduct underlying that plea related only to the market for CDTs in Asia, and did not support the global market wide conspiracy DPPs allege.

Defendants have also steadfastly maintained that DPPs are entitled to no recovery for finished products—i.e., televisions and computer monitors—which account for the vast majority of DPPs' damages. DPPs estimate that finished products constitute over 70% of class members' purchases. Saveri Decl. ¶ 77. The danger this argument posed to the class is made clear by the fact that the Special Master recommended that the Court grant Defendants' summary judgment motion on this issue. Dkt. No. 1221; Saveri Decl. ¶ 38.

Defendants also argued that the FTAIA and the statute of limitations bar some or all of DPPs alleged damages, and that the alleged conspiracy caused no harm to the class. Saveri Decl. ¶¶ 15, 26, 79.

Some Defendants—e.g., Hitachi, Philips, LG, and Panasonic—moved their CRT businesses into separate entities in 2001 -2004. They have argued that they withdrew from the conspiracy, and, because of the statute of limitations, have no liability whatsoever. Saveri Decl. ¶ 75.

Finally, some of the largest CRT manufacturers—e.g., Daewoo and LPD, the joint venture between LG and Philips—were bankrupt or essentially defunct by the time the case was filed. Saveri Decl. ¶ 76.

All of these issues posed serious threats to DPPs ability to prove liability against some or all Defendants or to recover substantial damages.

4. Contingent Nature of the Fee

The Ninth Circuit has confirmed that a fair fee award must include consideration of the contingent nature of the fee, where there is no assurance of attorneys' fees or reimbursement of expenses. *See, e.g.*, *Vizcaino II*, 290 F.3d at 1050; *Online DVD*, 779 F.3d at 954–55 & n.14. The commencement of a class action is no guarantee of success. "[T]he risk of non-payment in complex cases, such as this one, is very real." *In re Veeco Instruments Inc. Sec. Litig.*, No. 05-md-01695(CM), 2007 WL 4115808, at *6 (S.D.N.Y. Nov. 7, 2007). It is well-established that attorneys who take on the risk of a contingency case should be compensated for the risk they take:

> It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. *See* Richard Posner, *Economic Analysis of Law* § 21.9, at 534–35 (3d ed. 1986). Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose.

WPPSS, 19 F.3d at 1299.

Class Counsel have received no compensation during the almost eight year course of the litigation. They have invested over $43 million in time and $1.9 million in expenses, and took the chance that they might never be compensated. This factor strongly supports the requested fee.

5. Delay

For virtually all of the services for which DPPs seek payment now, Class Counsel have waited years for payment. Thus, even if DPPs were to receive their full lodestar, they would not be

fully compensated for the value of their time. *See, e.g.*, *Vizcaino*, 290 F.3d at 1051 ("Calculating fees at prevailing rates to compensate for delay in receipt of payment" allowed).

6. High Quality of Work Performed

Finally, Class Counsel respectfully submit that their work has been of the highest quality and has been of great benefit to the class. The Court is familiar with the history of this case, having presided over years of contentious litigation, represented by over four thousand docket entries. This brief provides an overview of the work Class Counsel performed by describing the various substantive motions, procedural matters, discovery requests and disputes, depositions, and other matters. Further description of the work performed by Class Counsel is set forth in the Saveri Declaration and the declarations of other Class Counsel. The amount and quality of the work of Class Counsel also strongly supports the fee they seek.

7. Lodestar Cross-Check Confirms the Reasonableness of the Requested Fee

Finally, a cross-check of the requested fee with Class Counsel's lodestar demonstrates that the proposed fee is reasonable. The lodestar method requires that the Court determine the number of hours reasonably spent by counsel on a matter, multiply it by counsel's reasonable hourly rates, and then adjust the lodestar up or down based on various factors similar to those relevant to the percentage method. Ordinarily, where there has been a substantial recovery for the class, the Court applies a multiplier to account for contingency, risk, delay and other factors which can range from one to four. *Omnivision*, 559 F. Supp. 2d, 1048. Here, because the fee sought amounts to less than the value of the time Class Counsel has invested in the case, and because the circumstances would support the application of a multiplier, the lodestar cross-check confirms the reasonableness of the fee DPPs seek. *See*, *e.g.*, *Online DVD*, 779 F.3d at 949; *Vizcaino II*, 290 F.3d at 1048–50.

Class Counsel have spent 95,229.33 hours prosecuting this Action. As explained above, all of this time was reasonable and necessary for the prosecution of this action. *Online DVD*, 779 F.3d at 949. Among other things, work was assigned by S&S among Class Counsel to avoid duplication; as required by CMO 1, counsel kept contemporaneous time records and periodically reported their time to S&S; and, where possible, DPPs worked with the IPPs and DAPs to avoid duplication of

effort. Saveri Decl. ¶¶ 8, 17.

Moreover, the lodestar understates the work performed by Class Counsel. It includes time from May 9, 2008, the date the Court appointed interim lead counsel through January, 2014, when DPPs reached agreement on a settlement with Samsung SDI. At that time, S&S instructed Class Counsel to stop working. It therefore excludes substantial work by counsel in connection with their pre-filing investigation of the case, the JPML proceeding, and the organization of counsel. It also does not include substantial time preparing this application for fees and reimbursement of expenses. Saveri Decl. ¶ 8.[7]

At historic hourly rates—i.e., those in place at the time the work was performed—this time results in a lodestar of $43,335,517.50. *See* Saveri Decl. ¶ 8 & Ex. 4. The record demonstrates that Class Counsel's hourly rates are reasonable. Each firm avers that the rates charged are that firm's usual and customary rates at the time the work was performed. *See* Declarations of Class Counsel filed herewith. *See also High-Tech*, 2015 WL 5158730, at *9 (approving rates).

DPPs' fee request of $38,235,000 thus amounts to just 88% of their lodestar. This confirms its reasonableness beyond question. *In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2007 WL 4171201, at *16 (N.D. Cal. Nov. 26, 2007) (fact that fee sought is less than the lodestar suggests fairness of award); *LCD II*, 2013 WL 149692, at *1 (fact that fee sought is less than the lodestar "serves to confirm the reasonableness of the fees requested.").

8. The Reaction of the Settlement Class to Date Supports the Fee Request

Settlement notices were sent to class members in connection with each settlement reached with Defendants. Altogether, five settlement notices were sent to class members. Each informed class members that "At a future time, Interim Lead Counsel will ask the Court for attorneys' fees not to exceed one-third (33.3%) of this or any future Settlement Fund plus reimbursement of their costs and expenses." *See* Dkt. Nos. 1323-3, Ex. A; 1464-2, Ex. A; 1573-2, Ex. A; 1757-2, Ex. A;

[7] S&S's declaration includes additional time through July 31, 2015 for work relating preliminary and final approval of the Hitachi and Samsung SDI settlements, motion practice relating to the failure of Dell and Sharp to timely submit their requests for exclusion from those settlement classes, and administrative matters. After January, 2014, S&S and Class Counsel also worked on the case against Mitsubishi and Thomson. However, DPPs do not seek a fee award for that work at this time, and have not included any such time in their lodestar calculation. Saveri Decl. ¶¶ 71–73.

2728-2, Ex. A. As noted above, out of over 16,000 class members, including many large and sophisticated businesses, no objections were received. Saveri Decl. ¶ 78. This is another strong indication of the reasonableness of the fee DPPs seek. "When a class is comprised of sophisticated business entities that can be expected to oppose any request for attorney fees they find unreasonable, the lack of objections 'indicates the appropriateness of the [fee] request.'" *In re Remeron Direct Purchaser Antitrust Litig.*, No. Civ.03-0085 FSH, 2005 WL 3008808, at *13 n.1 (D.N.J. Nov. 9, 2005) (awarding fee of 33.3% of a $75 million settlement).

C. Class Counsel Are Entitled to Reimbursement for Their Reasonable Litigation Expenses

Class Counsel also request reimbursement and/or approval of litigation costs and expenses they incurred on behalf of the class. Attorneys who create a common fund for the benefit of a class are entitled to be reimbursed out-of-pocket expenses incurred in creating the fund so long as the submitted expenses are reasonable, necessary and directly related to the prosecution of the action. *Vincent v. Hughes Air West*, 557 F.2d 759, 769 (9th Cir. 1977); *OmniVision*, 559 F. Supp. 2d at 1048 ("Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters."). Reasonable reimbursable litigation expenses include: those incurred for document production, experts and consultants, depositions, translation services, notice, and claim administration. *See, e.g.*, 1 Alba Conte, *Attorney Fee Awards* § 2.19 (3d ed. 2004).

Class Counsel incurred a total of $4,794,787.44 in reasonable expenses as follows : (i) document management system and database costs of $283,694.51; (ii) mediation costs of $83,724.42; payments to special masters of $186,644.14; (iv) payments to translation services of $127,083.17; (v) Court filing fees and costs of $6,352.59; (vi) payments to experts of $3,076,506.85; (vii) federal express costs of $14,339.14; (viii) transcript costs of $166,311.46; (ix) online legal and factual research (e.g., LexisNexis and Westlaw) of $245,126.87; (x) messenger and delivery costs of $788.60; (xi) in-house copy charges (capped at 20 cents per page) of $140,085.84; (xii) professional copy charges of $12,083.24; (xiii) postage charges of $1,331.39; (xiv) service of process charges of $22,789.36; (xv) telephone and facsimile charges of $35,282.68; and (xvi) travel and meal charges of $392,643.18. Saveri Decl. ¶¶ 12–13. As detailed in the

Declarations of Class Counsel, these expenses were reasonable and necessary for the prosecution of this action and are customarily approved by courts as proper litigation expenses. *See In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1995) (Court fees, experts/consultants, service of process, court reporters, transcripts, deposition costs, computer research, photocopies, postage, telephone/fax); *Thornberry v. Delta Air Lines*, 676 F.2d 1240, 1244 (9th Cir. 1982), *remanded on other grounds*, 461 U.S. 952 (1983) (travel, meals and lodging); *Redding v. Fairman*, 717 F.2d 1105, 1119 (9th Cir. 1983) (same); Conte, *Attorney Fee Awards* § 2.19.

Of the total amount, Class Counsel advanced $1,927,392.12 out of their own funds on behalf of the class. $986,167.30 of this was paid out of a litigation fund established by Class Counsel and maintained by S&S (the "Litigation Fund"). An accounting of the payments from the Litigation Fund by category is set forth in Exhibit 5 to the Saveri Declaration. *Id*. $941,224.82 was paid by individual Class Counsel and is detailed in their individual declarations. Exhibit 4 to the Saveri Declaration summarizes these expenses. Class Counsel therefore request that the Court Order that they be reimbursed in the amount of $1,927,392.12 from the Settlement Fund. Saveri Decl. ¶¶ 9–10.

Class Counsel paid $2,867,395.32, the balance of the expenses, from the Settlement Fund as authorized by the Court. *See* Dkt. Nos. 1506, 1507 and 1833. The Court authorized the use of up to $3 million from the Settlement Fund for use in the prosecution of the litigation, subject to an accounting. *See id.* Exhibit 6 to the Saveri Declaration accounts for these expenses per the Court's order. Saveri Decl. ¶ 11. Class Counsel request that the Court approve these expenses as reasonable. Class Counsel do not seek reimbursement for these expenses.

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IV. CONCLUSION

For the foregoing reasons, DPPs respectfully request that the Court grant Plaintiffs' Motion for an Award of Attorneys' Fees and Reimbursement of Expenses.

Dated: September 11, 2015

Respectfully submitted,

/s/ *Guido Saveri*

Guido Saveri (22349)
R. Alexander Saveri (173102)
Geoffrey C. Rushing (126910)
Cadio Zirpoli (179108)
Travis L. Manfredi (281779)
SAVERI & SAVERI, INC.
706 Sansome Street
San Francisco, CA 94111
Telephone: (415) 217-6810
Facsimile: (415) 217-6813

Lead Counsel For Direct Purchaser Plaintiffs

Joseph W. Cotchett
Steven N. Williams
Adam J. Zapala
COTCHETT, PITRE & McCARTHY, LLP
840 Malcolm Road
Burlingame, CA 94010
Telephone: (650) 697-6000
Facsimile: (650) 697-0577

Bruce L. Simon
Aaron M. Sheanin
PEARSON, SIMON & WARSHAW LLP
44 Montgomery Street, Suite 2450
San Francisco, CA 94104
Telephone: (415) 433-9000
Facsimile: (415) 433-9008

H. Laddie Montague, Jr.
Ruthanne Gordon
Charles P. Goodwin
Candice Enders
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Telephone: (800) 424-6690
Facsimile: (215) 875-4604

TAB 33A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: PHARMACEUTICAL INDUSTRY AVERAGE WHOLESALE PRICE LITIGATION	MDL NO. 1456 CIVIL ACTION: 01-CV-12257-PBS
THIS DOCUMENT RELATES TO: ALL CLASS ACTIONS RELATING TO TRACK TWO DEFENDANTS	Judge Patti B. Saris

[PROPOSED] FINAL ORDER AND JUDGMENT GRANTING FINAL APPROVAL TO PROPOSED TRACK TWO CLASS ACTION SETTLEMENTS, APPROVING PROPOSED ALLOCATION OF SETTLEMENT FUNDS, AND APPROVING CLASS COUNSEL'S APPLICATION FOR ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES AND COMPENSATION FOR CLASS REPRESENTATIVES

This Court having considered: (a) the Track Two Settlement Agreement and Release, dated March 7, 2008, including all Exhibits thereto (the "Agreement"), between the Plaintiffs and Defendants Abbott Laboratories, Amgen Inc., Aventis Pharmaceuticals Inc., Hoechst Marion Roussel, Baxter Healthcare Corp., Baxter International Inc., Bayer Corporation, Dey, Inc., Fujisawa Healthcare, Inc., Fujisawa USA, Inc., Immunex Corporation, Pharmacia Corporation, Pharmacia & Upjohn LLC (f/k/a Pharmacia & Upjohn, Inc.), Sicor, Inc., Gensia, Inc., Gensia Sicor Pharmaceuticals, Inc., Watson Pharmaceuticals, Inc., and ZLB Behring, L.L.C. (the "Track Two Defendants"); (b) the Distribution Plan, Claims Process and Notice Plan for the Settlement as contained in the Court's July 2, 2008 order preliminarily approving the Settlement; (c) Class Counsel's Proposal to Rebalance the Track Two Settlement, as embodied in Plaintiffs' Second Supplemental Submission in Support of the Rebalanced Track Two Settlement (Dkt. No. 7750), which the Court preliminarily approved in its August 28, 2011 electronic order (Dkt. No. 7772); and (d) Class Counsel's application for attorneys' fees, reimbursement of litigation expenses, and

compensation for the Class Representatives; and having held hearings on March 14, 2008, April 9, 2008, December 16, 2008, , April 27, 2009, June 13, 2011, July 7, 2011, August 8, 2011 and November 22, 2011 and having considered all of the submissions and arguments with respect thereto, and otherwise being fully informed, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that:

1. This Final Order and Judgment incorporates herein and makes a part hereof, the Agreement, including Exhibit B ("Class Drugs") and all other Exhibits thereto. Unless otherwise provided herein, the terms as defined in the Agreement shall have the same meanings for purposes of this Final Order and Judgment.

2. The Court has personal jurisdiction over all Class Representatives, Settlement Class Members, and the Track Two Defendants for purposes of this settlement only, and has subject matter jurisdiction to approve the Agreement.

3. Based on the record before the Court, including all submissions in support of the Class Settlements set forth in the Agreement ("the Class Settlements"), objections and responses thereto, as well as the Agreement itself, the Court hereby certifies the following nationwide classes (the "Classes") for settlement purposes only:

(a) Medicare Part B Co-Payment Class ("Class 1")

All natural persons in the United States who, from January 1, 1991 through January 1, 2005, made, or incurred an obligation to make, any portion of a Medicare Part B co-payment for a Class Drug manufactured, marketed, sold, or distributed by a Released Company.

(b) Third-Party Payor MediGap Supplemental Insurance Class ("Class 2")

All TPPs in the United States who, from January 1, 1991, through January 1, 2005, made, or incurred an obligation to make, reimbursements for any portion of a Medicare Part B co-payment

for a Class Drug manufactured, marketed, sold, or distributed by a Released Company.

(c) Consumer and Third-Party Payor Class For Payments Made Outside the Medicare Context ("Class 3")

All natural persons in the United States who made, or incurred an obligation to make, a non-Medicare Part B payment for a Class Drug manufactured, marketed, sold, or distributed by a Released Company, and all TPPs in the United States who made, or incurred an obligation to make, non-Medicare Part B reimbursements for a Class Drug manufactured, marketed, sold, or distributed by a Released Company, during the period from January 1, 1991, through March 1, 2008.

Excluded from each of the Settlement Classes are (1) the Released Companies; (2) their respective past, present, and future officers, directors, managers, employees, agents, sales representatives, and liability insurers; and (3) all hospitals, clinics, physicians, or physician practice groups, or other health care provider or group of providers, that purchased drugs manufactured, marketed, sold, or distributed by a Released Company, and that (a) administered, dispensed, or prescribed such drugs to a consumer and (b) billed a consumer, TPP, or ISHP for such drugs (the "Released Parties"). (The exclusion of Released Company "employees" from the Settlement Classes shall not affect the eligibility of any ERISA plans or other TPPs for settlement benefits regardless whether their plan participants might be excluded "employees.") Additionally excluded from each of the Settlement Classes are the following: (1) all natural persons who only paid flat co-payments, and not any percentage co-payments, for Class Drugs; (2) all federal, state, and local governmental entities in the United States, except any non-Medicaid state or local governmental agencies or programs that made or incurred an obligation to make a reimbursement for a Class Drug as part of a health benefit plan for their employees, but only with respect to such payments; and (3) the Independent Settling Health Plans ("ISHPs").

In so holding, the Court finds that the prerequisites of FED. R. CIV. P. 23(a) and (b)(3) have been satisfied for certification of the nationwide Classes for settlement purposes: Settlement Class Members, numbering in the thousands, are so numerous that joinder of all members is impracticable; there are questions of law and fact common to each of the Settlement Classes; the claims and defenses of the Class Representatives are typical of the claims and defenses of the Settlement Class Members they represent; the Class Representatives have fairly and adequately protected the interests of the Settlement Classes with regard to the consolidated claims of the Settlement Classes they represent; the common questions of law and fact predominate over questions affecting only individual Settlement Class Members, rendering the Settlement Classes sufficiently cohesive to warrant a nationwide class settlement; and the certification of the Settlement Classes is superior to individual litigation and/or settlement as a method for the fair and efficient resolution of the MDL Class Actions.

In making all of the foregoing findings, the Court has exercised its discretion in certifying the Settlement Classes, based, *inter alia*, upon the Court's familiarity with the claims and parties in these and other cases, including prior AWP class settlements, the interests of the various constituent groups, and the negotiation process overseen by MDL Mediator Eric Green.

4. The record shows that notice has been given to the Settlement Classes in the manner approved by the Court including in its Preliminary Approval Order of March 7, 2008 [Dkt. No. 5426] and its electronic Order Directing Notice of Track Two Settlement Revision to Affected Class Members and Scheduling Fairness Hearing (Dkt. No. 7772). The Court finds that such notice: (i) constitutes reasonable and the best practicable notice; (ii) constitutes notice that was reasonably calculated, under the circumstances, to apprise Class Members of the terms of the Agreement and Class Settlements, and Class Members' right to object to or exclude

themselves from the Settlement Classes and appear at settlement fairness hearings held on March 14, 2008, April 9, 2008, December 16, 2008, April 27, 2009, June 13, 2011, July 7, 2011, August 8, 2011 and November 22, 2011 (the "Fairness Hearings"), (iii) constitutes due, adequate, and sufficient notice to all persons or entities entitled to receive notice; and (iv) meets the requirements of due process and FED. R. CIV. P. 23.

5. No individuals or entities, other than those listed on Exhibit A hereto, have excluded themselves from the Settlement Classes. This Order shall have no force or effect on the persons or entities listed on Exhibit A hereto.

6. The Court finds that extensive arm's-length negotiations have taken place in good faith between Lead Class Counsel and the Track Two Defendants' Counsel resulting in the Agreement. Additionally the Court finds that extensive arm's-length negotiations have taken place on behalf of separate counsel appointed by Lead Class Counsel to represent the interests of Consumer Settlement Class Members and TPP Settlement Class Members in order to apportion the Settlement Fund between these constituencies and that these arm's length negotiations afforded the structural protection required to ensure adequate representation of these constituencies.

7. The Court finds that the designated class representatives are appropriate representatives for settlement purposes. The Court finds that each of these representatives, or an agent or member thereof, has made a purchase or reimbursement payment for one or more of the Class Drugs.

8. The Court has considered all of the factors enumerated in FED. R. CIV. P. 23(g) and finds that Class Counsel have fairly and adequately represented the interests of the Settlement Classes.

9. Pursuant to FED. R. CIV. P. 23(e), the Court hereby finally approves in all respects the Class Settlements set forth in the Agreement and finds that the Class Settlements, the Agreement, as revised in the rebalancing, and the plan of distribution as set forth in Paragraphs III.E-G of the Agreement, are, in all respects, fair, reasonable and adequate, and in the best interest of the Settlement Classes. The salient changes in the rebalancing are as follows:

(a) **Increase in Money Available to Consumers.** $3,125,000 was reallocated from TPPs to Consumers, resulting in Consumer members of Classes 1 and 3 being allocated $25,000,000 of the Settlement Amount and TPPs being allocated $100,000,000 of the Settlement Amount.

(b) **Change in the Way Class A Drug Claims Are Calculated.** Class A Drug claims are now based on Plaintiffs' expert's calculation of estimated overcharges or damages associated with the alleged price inflation for Class A Drugs, rather than on the amount of cash payment or co-payment made. These estimated overcharges will be doubled for the "Heartland Period" December 1, 1997 through December 31, 2003. This change conforms the Track Two Settlement distribution closer to the distributions in previous settlements approved by this Court in association with the actions against defendants AstraZeneca and BMS.

(c) **Recharacterization and Additional Documentation Related to Epogen.** Epogen was moved from a Class A Drug to a Class B Drug because it was consistent with the profile for a Class B Drug and not for a Class A Drug. Specifically, the spreads for Epogen were calculated by Plaintiff's expert to exceed 30% only in 2003 and then only minimally so, there was minimal or no evidence of spread marketing in connection with Epogen and the Plaintiff's expert concluded that Class 1 and Class 3 members

suffered either minimal or no damage relating to Epogen. Consumer claimants were required to provide documentation evidencing at least one Epogen administration during the eligible period because data received from the Center for Medicare and Medicaid Services ("CMS") did not provide sufficient detail to distinguish an administration of Epogen from an administration of Procrit due to the fact that Epogen and Procrit are different brand names for the same biologic compound (epoetin alfa) and share common J-Codes. The additional documentation was necessary to ensure the claimants had made co-payments for Epogen, which is part of this settlement, and not for Procrit, which is not part of this settlement. Furthermore, payments for most administrations of Epogen under Medicare Part B were not based on AWP and are not eligible for compensation in this settlement. Only Epogen administrations – and not Procrit administrations – under Medicare Part B that do not relate to kidney dialysis are eligible for compensation. Administrations for Epogen under Medicare Part B related to dialysis are not eligible for compensation.

(d) **Additional Documentation Related to Eligard.** To receive a distribution for Eligard administrations, eligible Consumer claimants are required to provide documentation evidencing at least one Eligard administration during the eligible period. This is necessary because data received from CMS does not provide sufficient detail to distinguish administrations of Eligard from Lupron given that the two drugs share common J-Codes.

(e) **Additional Documentation Related to Certain Drugs under Medicare Part B.** To receive a distribution for administrations of certain drugs assigned "not otherwise classified" J-Codes 3490 and J8999 (alcohol injection, bupivacaine, copper

trace/cupric chloride, diltazem hydrochloride, enalaprilat, kineret, labetalol, leucovorin calcium, manganese chloride, novacaine/procaine, pancuronium bromide, potassium acetate, propofol, sodium acetate, verapamil HCL and zinc chloride), eligible Class 1 Consumer claimants are required to provide documentation evidencing at least one administration during the eligible period. This is necessary because data received from CMS does not provide sufficient detail to distinguish administration of these drugs from other drugs covered by the same J-Codes and not part of this Settlement.

(f) **Payments for Leukine and Novantrone after 2002.** Administrations of Leukine and Novantrone after 2002 are no longer eligible for reimbursement. Defendant Immunex Corporation sold the rights to market and distribute Leukine and Novantrone in 2002 to non-defendants.

10. The Court finds that all Class 1 and Class 3 Consumers will receive more than their actual damages for eligible Class A Drug administrations. In addition, Class 1 and Class 3 Consumers will receive a substantial portion of their damages for Class B Drug administrations, and will receive greater than actual damages for some Class B Drugs.

11. The Court also finds that Class Counsel undertook substantial discovery and analysis into the Class Drugs and Defendants sufficient to fully evaluate the decision of whether to recommend this Settlement to the Court and to group the drugs into Class A and Class B. In addition, the Court finds that Class Counsel fairly assessed the liability challenges posed by the facts of this case including the dearth of spread marketing evidence, the challenges associated with multi-source drugs (including causation issues raised by J-Code identification challenges and the median price analysis), and the relatively low level of Class damage. See Plaintiffs'

Supplemental Submission in Support of a Rebalanced Track Two Settlement filed on August 3, 2011 (Dkt. No. 7697).

12. The Court further approves the establishment of the Settlement Fund as set forth in the Agreement and the Escrow Agreement submitted by the Parties. The Parties are hereby directed to implement and consummate the Class Settlements according to the terms and provisions of the Agreement. Subject to paragraph 21 below, the Effective Date of the Agreement shall be as set forth in Paragraphs III.K and II.Q of the Agreement and shall not occur until the Final disposition of all appeals relating to the Track Two Settlement, including the Notice of Appeal as to the Order denying her Motion to Intervene (Dkt. No. 7770) filed by Corinna Connick, as well as any appeals of this Order. In addition, the Parties are authorized to agree to and adopt such amendments and modifications to the Agreement that (i) are consistent in all material respects with this Final Order and Judgment, and (ii) do not limit the rights of the Settlement Classes.

13. The claims against the Track Two Defendants on behalf of the Classes in the MDL Class Actions are hereby dismissed with prejudice and without costs to any party, except as otherwise provided herein.

14. Upon the Effective Date of the Agreement, the Class Releasors (as defined in Paragraph II.E of the Agreement) shall release and forever discharge the Released Parties (as defined in Paragraph II.MM of the Agreement) from their respective Released Consumer Class Claims and Released TPP Class Claims (as defined in Paragraphs II.JJ and II.NN of the Agreement).

15. The Court finds that the Escrow Account is a "Qualified Settlement Fund" as defined in section 1.468B-1(a) of the Treasury Regulations in that it satisfies each of the following requirements:

(a) The Escrow Account is established pursuant to an order of this Court and is subject to the continuing jurisdiction of this Court;

(b) The Escrow Account is established to resolve or satisfy one or more contested or uncontested claims that have resulted or may result from an event that has occurred and that has given rise to at least one claim asserting liability arising out of an alleged violation of law; and

(c) The assets of the Escrow Account are segregated from other assets of the Track Two Defendants, the transferor of payments to the Settlement Fund, and from the assets of persons related to the Track Two Defendants.

16. Under the "relation-back" rule provided under section 1.468B-1(j)(2)(i) of the Treasury Regulations, the Court finds that:

(a) The Escrow Account met the requirements of paragraph 15 of this Order prior to the date of this Order approving the establishment of the Settlement Fund subject to the continued jurisdiction of this Court; and

(b) The Track Two Defendants and the "administrator" under section 1.468B-2(k)(3) of the Treasury Regulations may jointly elect to treat the Escrow Account as coming into existence as a "Qualified Settlement Fund" on the later of the date the Escrow Account met the requirements of paragraphs 15(b) and 15(c) of this Order or January 1 of the calendar year in which all of the requirements of paragraph 15 of this Order were met. If such relation-back

election is made, the assets held by the Escrow Account on such date shall be treated as having been transferred to the Escrow Account on that date.

17. Nothing in this Final Order and Judgment, the Class Settlements, the Agreement, or any documents or statements related thereto, is or shall be deemed or construed to be an admission or evidence of any violation of any statute or law or of any liability or wrongdoing by any of the Released Parties.

18. Class Counsel have moved pursuant to FED. R. CIV. P. 23(h), 54(d) and 52(a) for an award of attorneys' fees and reimbursement of expenses. Pursuant to Rules 23(h)(3) and 52(a) this Court makes the following findings of fact and conclusions of law:

(a) that the Class Settlements confer substantial benefits on the Settlement Class Members;

(b) that the value conferred on the Settlement Classes is immediate and readily quantifiable (upon this Judgment becoming Final (as defined in the Agreement), Settlement Class Members who have submitted valid Claim Forms will receive cash payments that represent a significant portion of their alleged financial harms);

(c) that Class Counsel vigorously and effectively pursued the Settlement Class Members' claims before this Court in this highly complex case;

(d) that the Class Settlements were obtained as a direct result of Class Counsel's skillful advocacy;

(e) that the Class Settlements were reached following extensive negotiation between Lead Class Counsel and the Track Two Defendants' Counsel, and were negotiated in good-faith and in the absence of collusion;

(f) that during the prosecution of the Track Two Claims in the MDL Class Actions, Class Counsel incurred expenses at least in the amount of $10,520,273.88, which included costs for expert witnesses and other expenses which the Court finds to be reasonable and necessary to the representation of the Settlement Classes;

(g) that Settlement Class Members were advised in the notice approved by the Court that Class Counsel intended to apply for an award of attorneys' fees in an amount of up to 33 1/3% of the Settlement Fund (plus interest thereon from the date of funding of the Settlement Fund) plus reimbursement of reasonable costs and expenses incurred in the prosecution of this action, to be paid from the Settlement Fund;

(h) that few Settlement Class Members have submitted written objections to the award of attorneys' fees and expenses;

(i) that counsel who recover a common benefit for persons other than himself or his client is entitled to a reasonable attorneys' fee from the Settlement Fund as a whole. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Blum v. Stenson*, 465 U.S. 866, 900 n.16 (1984);

(j) that use of the percentage of the fund method in common fund cases is the prevailing practice in this Circuit for awarding attorneys' fees and permits the Court to focus on a showing that a fund conferring benefit on a class resulted from the lawyers' efforts. *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295 (1st Cir. 1995); and

(k) the requested fee award is within the applicable range of percentage awards in this Circuit; *In re Relafen Antitrust Litig.*, No. 01-12239 (D. Mass. April 9, 2004) [Doc. No. 297]; *Mowbray v. Waste Management Holdings*, No. 98-11534-WGY (D. Mass. Aug.

2, 2001); *In re Copley Pharmaceutical, Inc. Sec. Litig.*, No. 94-11897-WGY (D. Mass. Feb. 8, 1996); *Wilensky v. Digital Equipment Corp.*, No. 94-10752-JLT (D. Mass. July 11, 2001). Accordingly, Class Counsel are hereby awarded (i) $ 7,000,000 from the $25,000,000 Settlement Fund allocated to Consumers in Classes 1 and 3 under the Rebalancing Proposal (representing 28% of the Settlement Fund allocated to Consumers in Classes 1 and 3), and (ii) $30,000,000 from the $100,000,000 Settlement Fund allocated to third-party payors in Classes 2 and 3 under the Rebalancing Proposal (representing 30% of the Settlement Fund allocated to TPPs in Classes 2 and 3), as Class Counsel's fee and expense award which the Court finds to be fair and reasonable, and which amount shall be paid to Class Counsel from the Settlement Fund in accordance with the terms of the Agreement, with interest from the date of the funding of the Settlement Fund to the date of payment, at the same net interest rate earned by the Settlement Fund. This award is consistent with attorneys' fee awards previously approved by the Court in this litigation. The attorneys' fees and expenses awarded by the Court shall be allocated among Class Counsel by Lead Class Counsel at their discretion. subject to review by the Court.

19. The present and former Class Representatives are hereby compensated in the following amounts for their reasonable time spent on tasks related to their representation of the Classes, which shall be paid from the Settlement Fund: Katie Bean, $6,100; Jimmie May Carter, $6,100; Pat Drewett, $2,000; Virginia Newell, $4,100; Mary Wright, $6,100; Roger Clark, $6,100; Rev. David Aaronson, $200; Alex K. Gunther, $5,700; Beverly Thomson Shaw, $3,000; Rebecca Anne Hopkins, $200; Larry Young, $8,800; M. Joyce Howe, $200; Ethel Walters, $5,700; Muriel Tonacchio, $500.00; United Food & Commercial Workers Unions & Employers Midwest Health Benefits, $2,310; Sheet Metal Workers National Health Fund, $2,000; Pirelli Armstrong Tire Corporation Retiree Medical Benefits Trust, $1,010; Teamsters Health &

Welfare Fund of Philadelphia and Vicinity, $2,540; Board of Trustees of Carpenters & Millwrights of Houston & Vicinity Welfare Trust Fund, $1,300; Philadelphia Federation of Teachers Health & Welfare Fund, $2,520; Man-U Service Contract Trust Fund, $3,340; and Pipefitters Local Union 537 Trust Funds, $1,640.

20. Without affecting the finality of this Final Order and Judgment, the Court retains continuing and exclusive jurisdiction over all matters relating to administration, consummation, enforcement, and interpretation of the Agreement and of this Final Order and Judgment, to protect and effectuate this Final Order and Judgment, and for any other necessary purpose. The Track Two Defendants, Class Representatives, and all Settlement Class Members are hereby deemed to have irrevocably submitted to the exclusive jurisdiction of this Court, for the purpose of any suit, action, proceeding or dispute arising out of or relating to the Agreement or the applicability of the Agreement, including the Exhibits thereto, and only for such purposes. Without limiting the generality of the foregoing, and without affecting the finality of this Final Order and Judgment, the Court retains exclusive jurisdiction over any such suit, action, or proceeding. Solely for purposes of such suit, action, or proceeding, to the fullest extent they may effectively do so under applicable law, the parties hereto are deemed to have irrevocably waived and agreed not to assert, by way of motion, as a defense or otherwise, any claim or objection that they are not subject to the jurisdiction of this Court, or that this Court is, in any way, an improper venue or an inconvenient forum.

21. In the event that the Class Settlements do not become effective according to the terms of the Agreement, this Final Order and Judgment shall be rendered null and void as provided by the Agreement, shall be vacated and, all orders entered and releases delivered in

connection herewith shall be null and void to the extent provided by and in accordance with the Agreement.

22. No Class Member, either directly, representatively, or in any other capacity (other than a Class Member identified on Exhibit A who validly and timely elected to be excluded from one or more of the Classes), shall commence, continue, or prosecute any action or proceeding against any or all Released Party or Parties in any court or tribunal asserting any of the Released Claims defined in the Agreement, and each Class Releasor is hereby permanently enjoined from so proceeding.

23. Pursuant to FED. R. CIV. P. 54(b) this Court expressly finds that there are no remaining claims between Class Plaintiffs and the Track Two Defendants in the MDL. There are no subsequent proceedings between the Class Plaintiffs and any remaining party in the MDL that will affect the Court's decision with respect to Class Plaintiffs' settlement with the Track Two Defendants. No party in the MDL will be prejudiced by the immediate entry of this Final Order and Judgment in accordance with the Settlement Agreement. Pursuant to FED. R. CIV. P. 54(b), this Court expressly determines that there is no just cause for delay and expressly directs that this Final Order and Judgment, upon filing in 01-CV-12257-PBS, be deemed as a final judgment with respect to each of the Settlement Classes, and specifically all such Settlement Class Members' Released Claims against the Track Two Defendants and all Released Parties.

DATED: 12/8/2011

Hon. Patti B. Saris

CERTIFICATE OF SERVICE BY LEXISNEXIS FILE & SERVE
Docket No. MDL 1456

I, Steve W. Berman, hereby certify that I am one of plaintiffs' attorneys and that, on December 2, 2011, I caused copies of **[PROPOSED] FINAL ORDER AND JUDGMENT GRANTING FINAL APPROVAL TO PROPOSED TRACK TWO CLASS ACTION SETTLEMENTS, APPROVING PROPOSED ALLOCATION OF SETTLEMENT FUNDS, AND APPROVING CLASS COUNSEL'S APPLICATION FOR ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES AND COMPENSATION FOR CLASS REPRESENTATIVES** to be served on all counsel of record by causing same to be posted electronically via LEXIS-Nexis File & Serve.

/s/ Steve W. Berman
Steve W. Berman

TAB 33B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: PHARMACEUTICAL INDUSTRY AVERAGE WHOLESALE PRICE LITIGATION	MDL NO. 1456
THIS DOCUMENT RELATES TO: TRACK TWO SETTLEMENT	CIVIL ACTION: 01-CV-12257-PBS Judge Patti B. Saris

LEAD CLASS COUNSEL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS AND COMPENSATION TO THE CLASS REPRESENTATIVES IN ASSOCIATION WITH THE TRACK TWO SETTLEMENT

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I. INTRODUCTION

The Track Two Settlement Agreement provides for Track Two Defendants[1] to pay a total of $125 million to settle claims of all Consumer Class Members, all TPP Class Members and the claims of all Independent Settling Health Plans ("ISHPs"). The Settlement provides real, immediate, and substantial cash benefits for each Class Member who submits a valid claim. Consumer Class Members are eligible to receive up to triple their damages for payments made for Class A drugs (Anzemet, Aranesp, Epogen, Ferrlecit, InFed, Neulasta, and Neupogen) the drugs driving most of the Classes damages, and single damages for the remaining Class B drugs (primarily multisource drugs).

Class Counsel now seek an award of attorneys' fees and expenses and compensation to the class representatives in association with the Track Two Settlement. Class Counsel respectfully request that the Court approve a combined fee and cost award of $37,500,000.00, to be paid from the settlement funds. This represents 30 percent of the total $125 million settlement amount.

Class Counsel also request that the Court approve compensation for the Class Representatives in the total amount of $17,160.00 at $100 per hour for the time that each Representative spent providing documents and testimony in connection with this case. Like the attorneys' fees and expenses, these amounts will be paid from the settlement funds.

The requested attorneys' fee and cost award is reasonable in light not only of the excellent results achieved for the Classes but also the risks involved in undertaking this unique and highly complex matter and the immense effort required in litigating the claims. From its

[1] Track Two Defendants are Abbott Laboratories, Amgen Inc., Aventis Pharmaceuticals Inc., Hoechst Marion Roussel, Baxter Healthcare Corp., Baxter International Inc., Bayer Corporation, Dey, Inc., Fujisawa Healthcare, Inc., Fujisawa USA, Inc., Immunex Corporation, Pharmacia Corporation, Pharmacia & Upjohn LLC (f/k/a Pharmacia & Upjohn, Inc.), Sicor, Inc., Gensia, Inc., Gensia Sicor Pharmaceuticals, Inc., Watson Pharmaceuticals, Inc., and ZLB Behring, L.L.C.

inception, this case has been intensely fought, as Track Two Defendants, like Track One Defendants, challenged discovery and class certification. The parties challenged each other virtually every step of the way until settlement was reached. Litigating this case has required immense time, energy and resources from Class Counsel. Furthermore, as the Court is well aware, the claims involve extremely complex and challenging issues of fact and law.

Class Counsel faced considerable risk in proceeding on a wholly contingent-fee basis. Class Counsel have foregone other opportunities, devoting their time to this matter instead of others. To date, Class Counsel have been awarded compensation for three settlements in the nearly ten years this action has been pending: $21,615,000 out of the proceeds of the GSK settlement, $8,580,000 in connection with the AstraZeneca Class 1 Settlement, and $30,900,000 in connection with the Astrazeneca Class 2/3 Settlement, for a total of $61,095,000. A fee request in connection with the BMS Settlement is pending. For the entire AWP litigation against all Defendants from the inception of this case in 2001 through March 31, 2011, Plaintiffs' counsel have accumulated a total lodestar of $72,190,840 and incurred expenses totaling $9,417,783,[2] for a total case "investment" of $81,608,623.[3] If the Court grants the present fee request of $37,500,000, Plaintiffs' counsel will recover their investment in these actions as well as a modest multiplier on their time.

[2] The Declaration of Marc H. Edelson In Support Of Lead Class Counsel's Motion For Award of Attorneys' Fees And Costs in Association with the Track Two Settlements ("Edelson Decl."), submitted herewith, sets forth the breakdown of total unaudited attorney hours, fees and expenses incurred from inception through December 31, 2010. Class Counsel will provide back-up for all attorneys' fees and expenses sought for reimbursement, if the Court wishes. We also note that it is possible that we have not received complete information from all counsel and that, consequently, the lodestar information attached to the Edelson Declaration may change. Nonetheless, we believe that it is a reasonable approximation of the hours and expenses incurred by counsel through December 31, 2010. Edelson Decl., ¶ 9.

[3] As the Court is aware, the MDL includes multiple Defendants in two separate tracks, and this Settlement resolves claims against Track Two Defendants. Due to the nature of the allegations, it is not possible to attribute each attorney hour or particular expenditure to litigation against a particular Defendant. Some items could be allocated to specific Defendants, but many more – for example discovery from third parties and research on particular legal or factual issues that apply to all Defendants – cannot be separately attributed to a particular Defendant.

The table below sets forth each AWP class settlement (both actual and anticipated), the actual fees awarded to date in the AWP class actions, and projected fee awards if the Court grants the anticipated requests. As shown, estimated fees for all AWP class action settlements could total $104,295,000.

Settlement Award	Amount of Actual/Projected Fee and Cost Awards	Awards as a Percent of Settlement Value
GSK Global Settlement (approved)	$ 21,615,000	33⅓%
AstraZeneca Class 1 Settlement (approved)	8,580,000	30%
AstraZeneca Class 2/3 (approved)	30,900,000	30%
BMS Global Settlement (request pending)	5,700,000	30%
Track 2 Global Settlement (requested here)	37,500,000	30%
Total	**$ 104,295,000**	

The impact of folding expenses into a percentage fee award is quite significant and should not be overlooked. Because the requested fee awards ***include*** expense reimbursements, the net fee percentage ultimately awarded by the Court for all AWP settlements will be approximately 11.5% lower given that expenses constitute roughly 11.5% of counsel's total $81,608,623 "investment" in the case. ***Thus, the "net" fee awards requested will amount to less than 19 percent once the effect of including expenses is considered***.

A total projected fee and cost award of $104,295,000 modestly exceeds Plaintiffs' counsels' collective lodestar of $72,190,840 as of March 31, 2011, resulting in a small and very reasonable multiplier of 1.45, even though the overall results achieved in the AWP litigation should warrant a larger multiplier. If Plaintiffs' counsels' collective expenses of $9,417,783 are included in the analysis, the multiplier drops to 1.28. These multiplier cross-checks should assure the Court that counsel's overall compensation for all settlements is fair and reasonable.

The results in this complex litigation and the effort required well support the requested attorneys' fee and expense award here, which is justified by relevant factors considered by courts

in this Circuit and others, is in line with the fees that Class Counsel could have obtained at arm's-length in the open market, and, when added to prior and anticipated fee awards, will result in reasonable overall compensation for Plaintiffs' counsels' substantial efforts in litigating and resolving all AWP class actions pending before this Court. Class Counsel respectfully request that the Court grant this petition.

II. HISTORY OF THE LITIGATION

The Court is well acquainted with the history of this complex case and the unique challenges that Class Counsel have faced in representing their clients and the Classes against a array of sophisticated and well-represented Defendants. Rather than burden the Court with additional pages recounting that history here, we respectfully refer the Court to the Declaration of Steve W. Berman In Support of Lead Class Counsel's Memorandum of Law in Support of Motion for Attorneys' Fees and Costs and Compensation to the Class Representatives in Association with the Track Two Settlement (the "Berman Decl."), which discusses in some detail the history of this case.

III. THE COURT SHOULD APPROVE THE FEE PETITION AS FAIR AND REASONABLE

A. Class Counsel Are Entitled To Compensation Based Upon The Benefits Created By The Litigation

Courts have long recognized that a lawyer who recovers a "common fund" is entitled to reasonable attorney fees from the fund as a whole. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 n.6 (1st Cir. 1995) ("[t]he common fund doctrine is founded on the equitable principle that those who have profited from litigation should share its costs"); *In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999) ("lawyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also

to recover from the fund, as a general matter, expenses, reasonable in amount, that were necessary to bring the action to a climax"). "The 'common fund' doctrine is designed to spread the costs of litigation among all the beneficiaries of an identifiable fund over which a court can exercise legitimate control, in effect guarding against the unjust enrichment of passive beneficiaries at the expense of the active beneficiary." *Bebchick v. Washington Metro. Area Transit Comm'n*, 805 F.2d 396, 402 (D.C. Cir. 1986).

Substantial fee awards in successful cases, such as the present action, encourage and support meritorious class actions, and promote private enforcement of, and compliance with, various RICO and consumer protection laws. Moreover, awards of attorney fees help to ensure adequate enforcement of class members' legal rights. "[A] financial incentive is necessary to entice capable attorneys, who otherwise could be paid regularly by hourly-rate clients, to devote their time to complex, time-consuming cases for which they may never be paid." *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 679, 687 (M.D. Ala. 1988).

B. The Percentage-Of-The-Fund Method Is Appropriate For Calculating Attorneys' Fees In This Circuit

The Supreme Court has repeatedly held in cases involving the computation of a common fund fee award that it is appropriate for the fee to be determined as a percentage-of-the-fund. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("under the common fund doctrine … a reasonable fee is based on a percentage of the fund bestowed on the class"); *see also Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165-66 (1939); *Central R. & Banking Co. v. Pettus*, 113 U.S. 116, 124-25 (1885); *Trustees v. Greenough*, 105 U.S. 527, 532 (1882). In a percentage fee award, the fee is measured by the benefit conferred upon the class.

The First Circuit has left it to the trial court's discretion as to whether to apply the lodestar or percentage-of-the-fund ("POF") method or a combination of the two to award

attorneys' fees. *In re Thirteen Appeals*, 56 F.3d at 308. In adopting what it termed this "malleable" approach, the court recognized that the POF is the prevailing method because it has distinct advantages in complex cases. For example, it is less burdensome to administer,[4] reduces the possibility of collateral disputes, enhances efficiency throughout the litigation, and better approximates the workings of the marketplace. *See In re Thirteen Appeals*, 56 F.3d at 307-08; *see also In re Fidelity/Micron*, 167 F.3d at 737.[5]

As a result, many district courts within the First Circuit have indicated their preference for the POF method over the lodestar method. *See*, *e.g.*, *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 79 (D. Mass. 2005); *In re Lupron Mktg. & Sales Practices Litig.*, 2005 U.S. Dist. LEXIS 17456, at *9 (D. Mass. Aug. 17, 2005); *In re Fidelity/Micron Secs. Litig.*, 1998 U.S. Dist. LEXIS 21698 (D. Mass. June 5, 1998), *vacated on other grounds*, 167 F.3d 735 (1st Cir. 1999); *Branch v. FDIC*, No. 91-CV-13270, 1998 WL 151249, at *2-4 (D. Mass. Mar. 24, 1998); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 215 (D. Me. 2003)

[4] "Rather than forcing the judge to review the time records of a multitude of attorneys in order to determine the necessity and reasonableness of every hour expended, the POF method permits the judge to focus on 'a showing that the fund conferring a benefit on the class resulted from' the lawyers' efforts." *Id*. at 307 (quoting *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991)).

[5] The trend in this Circuit is consistent with the decisions nationwide awarding fees in common fund cases based on a percentage of the total recovery. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14.121 (4th ed. 2009) ("[T]he vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases."). In addition to this Circuit, at least nine other circuits – the Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and District of Columbia – have accepted the POF method as an appropriate method for awarding attorneys' fees. *See In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 822 (3d Cir. 1995) ("[i]n common fund cases, a district judge can award attorneys' fees as a percentage of the fund recovered," and in prior cases "fee awards have ranged from nineteen percent to forty-five percent of the settlement fund"); *Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994) (fee award should be calculated using the percentage method; "use of the lodestar in common fund cases is 'out of fashion'"); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 515-16 (6th Cir. 1993) (noting "the recent trend towards adoption of a percentage of the fund method," and permitting use of the "percentage of the fund method" in common fund cases); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) ("percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases"); *In re Continental Illinois Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (fee award should not be based on "individual hours," but rather on the percentage that counsel "would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client"); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 744-45 (11th Cir. 1991) (percentage method mandatory in common fund cases); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) ("a reasonable fee under the common fund doctrine is calculated as a percentage of the recovery"); *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 254-59 (1985).

(describing the method as determining whether the "total fee [is] reasonable when examined as a percentage of recovery"); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 377 (D. Mass. 1997); *Conley v. Sears, Roebuck & Co.*, 222 B.R. 181, 187 (D. Mass. 1998); *In re Fleet/Norstar Secs. Litig.*, 935 F. Supp. 99, 108 (D.R.I. 1996).

In this case in particular, where there are multiple Defendants and the Court is considering only the fee related to settlement of some Defendants, use of the POF method saves the Court and the parties from the near impossible task of allocating the particular hours of the many attorneys involved to a particular Defendant or group of Defendants. This Court has already used the POF approach in awarding fees associated with the GSK Settlement, the AstraZeneca Class 1 Settlement, and the AstraZeneca Class 2/3 Settlements.

C. The Requested Fee And Expense Award Is Fair And Reasonable As A Percentage Of The Benefits Achieved For The Class

Courts have approved fee awards in common fund cases in the range of 25-45%. *See*, *e.g.*, *In re Relafen Antitrust Litig.*, 231 F.R.D. 52 (D. Mass. 2005) (awarding class counsel $22,311,000 in fees or 33% of class fund of $67,000,000, plus a separate award of litigation expenses in the amount of $1,297,301); *In re Fleet/Norstar*, 935 F. Supp. at 109; *Conley*, 222 B.R. at 187; *In re Compact Disc*, 216 F.R.D. at 216 n.45; *Gaskill v. Gordon*, 160 F.3d 361, 363-64 (7th Cir. 1998) (affirming award of 38% of class action settlement fund); *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (awarding 33% of $12 million common settlement fund); *In re Buspirone Antitrust Litig.*, 2003 U.S. Dist. LEXIS 26538, at *11 (S.D.N.Y. Apr. 11, 2003) (awarding fees of 33⅓% of $220 million common fund to Direct Purchaser Plaintiff's Class Counsel); *In re Lorazepam & Clorazepate Antitrust Litig.*, 2003 U.S. Dist. LEXIS 12344 (D.D.C. June 16, 2003) (awarding class counsel 30% of the common fund); *In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25067, at *57 (D.D.C. July 13, 2001) (determining that

the one-third award was reasonable and granting class counsel fee petition in the amount of $123,188,032 plus interest, or approximately 34% of the total estimated settlement amount, in antitrust price fixing litigation); *In re Activision Sec. Litig.*, 723 F. Supp 1373, 1375 (N.D. Cal. 1989) (awarding a 32.8% fee and adopting a "policy of awarding approximately 30% of the fund as attorneys' fees in the ordinary case," as "well-justified in light of the lengthy line of cases which find such an award appropriate and reasonable…").

In *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 n.4 (9th Cir. 2002), the court included an exhaustive table of 34 cases generating revenues ranging from $54 million to $185 million, all of which generated fees of 30% or more, including the case at the high end of the scale (45%), the $185 million settlement in *In re Merry-Go Round Enters., Inc.*, 244 B.R. 327 (Bankr. D. Md. 2000). *See also* Frederick C. Dunbar, Todd S. Foster, Vinita M. Juneja, Denise N. Martin, *Recent Trends III: What Explains Settlements in Shareholder Class Actions?* (NERA, June 1995) (finding that "[r]egardless of case size, fees average approximately 32 percent of the settlement"); *see also* MANUAL FOR COMPLEX LITIGATION § 14.121 ("Attorney fees awarded under the percentage method are often between 25% and 30% of the fund.").

The Court approved a 33⅓ percent fee and cost award in association with the GSK Settlement as well as a fee and cost award that amounted to 30 percent of the fund with respect to the AstraZeneca Class 1 Settlement, and 30 percent of the fund with respect to the AstraZeneca Class 2/3 Settlements. In hearings and in its orders related to these settlements, the Court has recognized that the risks incurred by Class Counsel and the results achieved for the Class have warranted the fee awards:

> Well, I do think one-third is appropriate. I might say that, for the record, I approved that in the other case [GSK]. I think this was an incredibly risky piece of litigation which was cutting-edge and no certainty of success. The pharmaceutical companies have done a

> fabulous job defending it, and it was fought tooth and nail the entire way along with the best firms in the country.

May 1, 2008 Hearing Tr. at 24 (AstraZeneca Class 1 Settlement Hearing).

The instant request falls within the foregoing ranges of reasonableness. The Settlement Amount is $125 million, and the combined $37,500,000 fee and expense request is 30% of that amount.

D. A Cross-Check With The Lodestar Confirms The Reasonableness Of The Requested Fee And Expense Award

1. If the Court grants Counsel's Track Two fee request, Plaintiff's counsel will receive a very modest multiplier on their total case "investment."

As noted, the First Circuit also provides the Court with the discretion to employ the lodestar approach (reasonable hours spent times reasonable hourly rated, subject to a multiplier or discount for special circumstances, plus reasonable disbursements) in combination with the POF approach. *In re Thirteen Appeals*, 56 F.3d at 307; *In re Compact Disc*, 216 F.R.D. at 215-16; *see also* MANUAL FOR COMPLEX LITIGATION § 14.122 ("the lodestar is … useful as a cross-check on the percentage method by estimating the number of hours spent on the litigation and the hourly rate, using affidavits and other information provided by the fee applicant. The total lodestar estimate is then divided into the proposed fee calculated under the percentage method. The resulting figure represents the lodestar multiplier to compare to multipliers in other cases.").

The total lodestar accumulated by Plaintiffs' counsel as of March 31, 2011, is $72,190,840. Edelson Decl., ¶ 5. Additionally, Class Counsel have expended $9,417,783 in litigation related expenses. Edelson Decl., ¶ 6. Both numbers represent all effort and expenses for all AWP class actions pending before this Court. The lodestar calculation is based on each law firm's historic rate (those in effect when the work was done, over the nearly ten years this case has been pending). Class Counsel are providing this historic rate calculation because it is

more conservative, even though the First Circuit has noted the appropriateness of calculating the lodestar on current hourly rates (*i.e.*, in this case, those in effect in 2011 at each firm) because of the delay in payment of the fees to the firms performing the work, as well as other factors. *See Lipsett v. Blanco*, 975 F.2d 934, 942-43 (1st Cir. 1992). Given this precedent, it would be appropriate to calculate the lodestar of all firms at current rates, which would yield a higher total lodestar.

To date, Class Counsel have been awarded compensation for three settlements in the ten years this action has been pending: $21,615,000 out of the proceeds of the GSK settlement, $8,580,000 in connection with the AstraZeneca Class 1 Settlement and $30,900,000 in connection with the AstraZeneca Class 2/3 Settlement, for a total of $61,095,000. If the Court awards the $37,500,000 requested here, Plaintiffs' counsel will recover their investment in the AWP class actions with a very modest multiplier.

2. We cannot isolate time and expenses devoted specifically to the Track Two portion of the litigation or even to efforts limited to the claims of the Track Two Classes.

In previous hearings, the Court has asked Class Counsel how time can be divided to isolate efforts related to specific Defendants. This would be a daunting and monumental task. More than 250 attorneys have spent time working on this case for plaintiffs, a testament to the breathtaking scope and complexity of this litigation. Indeed, attorneys and paralegals had collectively billed 223,789 hours as of March 31, 2011. Edelson Decl., ¶ 5. The sheer number of work hours underpinning the lodestar highlights how time-consuming and burdensome a detailed lodestar inquiry would be and demonstrates why the POF approach works best for this litigation. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 331 (3d Cir. 1998); *In re Fleet/Norstar Sec. Litig.*, 935 F. Supp. at 108. It is extremely difficult to apportion those hours by Defendant or to attribute a specific lodestar to Track Two Defendants given the

breadth of common issues and the number of tasks completed over the last ten years. An attempt to do so would involve a very time-consuming and expensive audit and even then may not result in an accurate estimate.

In addressing multiple claims based on a core of common facts, the Supreme Court has recognized that the focus should be placed on the overall relief provided:

> In other cases the plaintiff's claims for relief will involve a "common core of facts" or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.
>
> Where a plaintiff has obtained excellent results, his attorneys should recover a fully compensatory fee.

Hensley v. Eckerhart, 461 U.S. 424, 434-35 (1983).

The same concept applies here to claims against multiple defendants where common issues are inextricably intertwined. An immense amount of work was done on common issues, work that cannot be segregated from other aspects of the prosecution. This work includes researching and drafting complaints; working on issues related to the initial MDL motions; a panoply of issues related to the use of AWP as a benchmark in the Medicare program and in the private insurance market; legal research and drafting of briefs on joint motions to dismiss and briefing associated with class certification; coordination with experts regarding class certification issues; motions and discovery related to many third parties, including governmental organizations, trade associations and the hundreds of insurers, pharmacies and other market participants subpoenaed by Defendants (including Track Two Defendants).

This Court has previously recognized the difficulty in apportioning lodestar to specific Defendants: "A percentage-of-fund approach makes more sense because this multi-district

litigation has many moving parts with common issues and it would be too difficult to calculate a fair lodestar for this piece of the litigation." *Memorandum and Order Re: Requested Final Approval of the AstraZeneca Class 1 Settlement* (Dkt. No. 5624) at 4.

Because of the challenges outlined above, and because the fee amount requested is undoubtedly reasonable under the POF method, no effort was made to determine the precise amount of fees that would be specifically attributable to prosecuting the case on behalf of the Track Two Classes, which Class Counsel believe cannot be done.[6] Given the "extremely broad" discretion that the Court has in evaluating an attorneys' fee and cost petition in class litigation, *In re Thirteen Appeals*, 56 F.3d at 309 (emphasis added), Class Counsel strongly believe that the foregoing lodestar and expense information suffices for purposes of a rough cross-check on the reasonableness of the POF fee and cost award.

E. The Fee Percentages Sought Ensure That Each Settlement Class Pays An Equitable Portion Of Attorneys' Fees And That A Reasonable Overall Multiplier Results For All Fees Awarded At the End Of The Case

As Class Counsel have previously explained, their goal is to request approximately one-third of the value of each settlement in order to ensure that (i) the aggregate attorneys' fee award is, at the end of all settlements, in the "ballpark" of the one-third benchmark, and (ii) each settlement Class pays an equitable share of attorneys' fees. We believe that this responds to the

[6] As with attempting to calculate a lodestar specific to the Track Two cases, splitting expenses that way is also very difficult to do given the existence of so many common issues. Moreover, the very nature of the expenses themselves makes allocation by defendant extremely difficult. Counsel did not track expenses by Defendant and, with some limited exceptions, we are unable to go back and re-assign expenses by Defendant. These include expenses incurred for expert work, including the development of Dr. Rosenthal and Dr. Hartman's many reports; Court fees (including fees incurred for use of the Court's electronic filing system); subpoena costs; technology services, including maintaining and servicing computer stations for document review; mail and fax charges; computer research charges (*e.g.*, Lexis/Nexis); photocopy expenses; and some travel expenses. All of the expenses incurred were reasonable and necessary for the prosecution of this litigation, even though they are not amenable to division by particular Defendant. It may be possible to construct an expense allocation model taking into consideration reasonable assumptions based on the number of defendants, but this would be very time consuming and not necessary where the lodestar and expense estimate is used as a cross-check to the POF approach.

Court's frequently expressed concern that attorneys' fee awards remain reasonable across all settlements.

Comparing the actual and projected fee and cost recovery in this case against Plaintiffs' Counsel's collective lodestar accentuates the reasonableness of the percentage approach recommended by Class Counsel. If the Court grants this Track Two fee requests, Plaintiffs' counsel will recover their collective lodestar plus a small multiplier. The table below sets forth each AWP class settlement (both actual and anticipated), the actual fees awarded to date in the AWP class actions, and projected fee awards if the Court grants the Track Two fee requests. As shown, estimated fees for all AWP class action settlements could total $104,295,000.

Settlement Award	Amount of Actual/Projected Fee and Cost Awards	Awards as a Percent of Settlement Value
GSK Global Settlement (approved)	$ 21,615,000	33⅓%
AstraZeneca Class 1 Settlement (approved)	8,580,000	30%
AstraZeneca Class 2/3 (approved)	30,900,000	30%
BMS Global Settlement (request pending)	5,700,000	30%
Track 2 Global Settlement (requested here)	37,500,000	30%
Total	**$ 104,295,000**	

The impact of folding expenses into a percentage fee award is quite significant and should not be overlooked. Because the requested fee awards ***include*** expense reimbursements, the net fee percentage ultimately awarded by the Court for all AWP settlements will be approximately 11.5% lower given that expenses constitute roughly 11.5% of counsel's total $81,608,623 "investment" in the case. Thus, the "net" fee awards requested will amount to less than 19 percent once the effect of including expenses is considered.

If the foregoing settlements are all approved, there will be no further settlements in the AWP MDL class actions and, therefore, no further fee petitions. A total projected fee and cost award of $104,295,000 will modestly exceed Plaintiffs' counsels' collective lodestar of

$72,190,840 as of March 31, 2011, resulting in a small and very reasonable multiplier of **1.45**, even though the overall results achieved in the AWP litigation should warrant a larger multiplier. If Plaintiffs' counsels' collective expenses of $9,417,783 are included, total case "investment" rises to $81,608,623, and the multiplier drops to **1.28**. Lead Class Counsel will continue to incur additional time and expenses if and until all settlements are finalized. Given the multipliers approved in many other cases, Class Counsel's request here is more than reasonable. *See In re Copley Pharm., Inc.*, 1 F. Supp. 2d 1407, 1415 (D. Wyo. 1998) (finding a multiplier of two to be reasonable based on these factors); *see also In re Rite Aid Corp. Secs. Litig.*, 146 F. Supp. 2d 706, 736 n.44 (E.D. Pa. 2001) (concluding that, under the cross-check approach, a lodestar multiple in the range of 4.5 to 8.5 is "unquestionably reasonable"); *Third Circuit Task Force*, 108 F.R.D. at 265 (suggesting that courts consider the "contingency factor" in all common fund cases). ***Indeed, if the Court chooses to award lower amounts, a de minimis multiplier will likely result, which would be inconsistent with counsel's monumental efforts here and the very high percentage recoveries afforded to the Classes as a result of the settlements***.

An award of approximately 30 percent of the value of each settlement at each step along the way will lead to a reasonable, overall fee and cost award to Class Counsel. It will also further the First Circuit fee award guideposts of ease of administration, a reduction in the possibility of collateral disputes, enhanced efficiency throughout the litigation, and a better approximation of the workings of the marketplace. *In re Thirteen Appeals*, 56 F.3d at 307-08.

Moreover, the fees paid by each settlement class are proportional to the settlement amounts assignable to each settlement class, as the following table demonstrates:

Settlement	Settlement Amount	Percent of Total AWP Settlement Amounts	Actual/Projected Fee and Cost Awards	Percent of Total AWP Fees
GSK Global	$65,500,000	19.2	$21,615,000	20.7
Astra Class 1	$28,600,000	8.4	$8,580,000	8.2
BMS Class 1	$19,000,000	5.6	$5,700,000	5.5
Astra Class 2/3	$103,000,000	30.2	$30,900,000	29.6
Track 2 Global	$125,000,000	36.6	$37,500,000	36
Total	**$ 341,100,000**		**$ 104,295,000**	

In other words, the Track Two fee award, if granted, will ultimately represent 36 percent of all fees awarded in the AWP litigation. This is roughly commensurate with the value of the Track Two settlement as a percentage of all AWP settlement values: 36.6%. This analysis demonstrates that no settlement class will shoulder a disproportionate share of attorneys' fees.

F. Various Other Factors Applied By This Circuit And Others Support Class Counsel's Request

The First Circuit has not required that lower courts use a particular set of factors to determine the reasonableness of the fee request. However, the Third Circuit Task Force Report approved certain factors to assist courts in this analysis. Among other things, these factors include: (i) the size of the fund created and the number of persons benefited; (ii) the skill and efficiency of the attorneys involved; (iii) the complexity and duration of the litigation; (iv) the risk of nonpayment; (v) the amount of time devoted to the case by plaintiffs' counsel; and (vi) the awards in similar cases. *See Third Circuit Task Force*, 108 F.R.D. at 245; *see also Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000) (applying factors); *In re GMC Pick-up Truck*, 55 F.3d at 819-22 (same). The Second Circuit has adopted a similar list of factors: the time and labor expended by Class Counsel, the complexities of the litigation, the risks borne by Class Counsel in litigating this case on a contingency fee basis, the quality of the representation provided, the fee request in relation to the settlement, public policy considerations

and the reaction of the Class to the settlement. *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000).

Applying these factors, the award for both fees and litigation expenses in this case is fair and reasonable.

1. The size of the fund created and the number of people who benefit

The total fund eligible to be claimed is $125,000,000 and will benefit thousands of consumers and TPPs. Notice of the Settlement was mailed directly to over 2 million Track Two Class 1 consumers and there have been three separate national publication notice programs aimed at notifying Consumer Class members of the settlement. As of this date the Claims Administrator has received approximately 87,000 Class 1 consumer claims and 20,600 Class 3 consumer claims. Over 1,000 TPPs have also filed claims in the Settlement.

2. The time and labor expended by counsel

Class Counsel have been investigating and litigating this case intensely and thoroughly for nearly a decade. Class Counsel have devoted considerable time, energy, and resources from the beginning of this case through discovery and motion practice, and ultimately settlement. From the very beginning, "Defendants mounted an aggressive and vigorous defense throughout the course of this litigation." *In re Aetna Inc. Sec. Litig.*, 2001 U.S. Dist. LEXIS 68, at *46 (E.D. Pa. Jan. 4, 2001). Indeed each Track Two Defendant still vigorously disputes that it engaged in any wrongful conduct or violation of law.

This litigation required an all-out effort by Class Counsel. First, the motion practice in this case has in and of itself required enormous work, as the case raised many complex and difficult legal and factual issues. This required Class Counsel to oppose more than one round of substantial motions to dismiss as well as class certification motions. Second, discovery was extensive. Class Counsel had to devote substantial energy and thousands of hours in obtaining,

inventorying, and examining millions of documents and data produced by Track Two Defendants. Even more time and effort was necessary to cull those documents and create a useful database – an invaluable tool for identifying key issues and evidence for depositions and possible trial. Additionally**, Class Counsel conducted over 75 depositions of Track Two Defendants current and former employees, including senior managers. Berman Decl., ¶ 19**.

Class Counsel also spent considerable time consulting with economic experts concerning the economic impact of Defendants' scheme on the Class and the measure and amount of damages to the Class. *Id.* at ¶¶ 22. And Class Counsel spent many hours researching and briefing complex legal issues for more than one round of motions to dismiss and class certification motions. *Id.* at ¶¶ 10-13,21-23. These "efforts in posturing this case for trial … played a role in spurring the settlement [and] produced a substantial payout to the class." *In re Newbridge Networks Sec. Litig.*, 1998 U.S. Dist LEXIS 23238, at *11 (D.D.C. Oct. 23, 1998).

Throughout this entire process, Class Counsel have litigated this case with extreme efficiency. The bulk of the work was handled by a small number of experienced attorneys. Assignments were allocated so that work was performed expeditiously, efficiently and in an organized manner. Review and repetition was avoided.

Moreover, the significant investment of time required by this action necessarily precluded Class Counsel from working on other matters. Class Counsel expended hours and incurred expenses in prosecuting this case, and were prepared to put at risk more time and money had the Track Two litigation not settled. *Id.* at ¶ 25.

Based on all of the above factors, the fee and expense award requested by Class Counsel is reasonable in light of the risk, quantity, and quality of work expended by Class Counsel over nearly ten years.

3. The complexity and duration of the litigation

The complexity of the issues and the duration of the litigation support the award requested. Class actions alleging violations of RICO and fraud, particularly in the pharmaceutical reimbursement context, are arguably the most complex class actions to prosecute because the legal and factual issues are inherently complicated and uncertain. In fact, in addition to the legal issues involved in overcoming the Defendants' motions to dismiss, this case involved some highly technical and complex issues with regard to pharmaceutical reimbursement systems, pharmacy benefit manager contracting, health insurance, federal regulation, and preemption. These legal issues required exhaustive research and briefing.

4. The risk of nonpayment

A determination of a fair fee must include consideration of the uncertain nature of the fee, the wholly contingent outlay of large out-of-pocket sums by Plaintiffs' counsel, and the fact that the risks of failure and nonpayment are extremely high. Many cases recognize that attorneys' risk is "perhaps the foremost factor" in determining an appropriate fee award. *Goldberger*, 209 F.3d at 54 (citation omitted). In *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990), the court noted that:

> Generally, the contingency arrangement must be promoted to assure representation when a person could not otherwise afford the services of a lawyer… A contingency fee arrangement often justifies an increase in the award of attorneys' fees. This rule helps assure that the contingency fee arrangement endures. If this 'bonus' methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing. [*Id*. (citations omitted).]

The history of complex litigation is replete with cases in which plaintiffs succeeded at trial on liability, but recovered no damages or very small damages at trial or after appeal. *See*, *e.g.*, *United States Football League v. National Football League*, 644 F. Supp. 1040, 1042

(S.D.N.Y. 1986) ("the jury chose to award plaintiffs only nominal damages, concluding that the USFL had suffered only $1.00 in damages"), *aff'd*, 842 F.2d 1335 (2d Cir. 1988); *MCI Commc'ns Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1166-67 (7th Cir. 1983) (remanding antitrust judgment for new trial and damages); *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973) (following two trips to the Court of Appeals and one to the U.S. Supreme Court, plaintiffs, the putative class, and their counsel recovered nothing), *vacated on other grounds*, 417 U.S. 156 (1974).

Indeed, when Class Counsel undertook representation of the Class, there were no assurances that any fees would ever be received. Class Counsel were aware that they would likely have to overcome the daunting difficulties, and would have to expend thousands of hours and millions of dollars to prosecute this case over an extended period of time before having even a possibility of recovering fees and expenses. Class Counsel alone bore the risk of the case being dismissed at the pretrial stage, of not prevailing at trial, or even losing on appeal. Berman Decl., ¶¶ 29-31.

Because of the risk undertaken by Class Counsel, the requested fee award is reasonable.

5. The skill and efficiency of the attorneys involved

The experience, reputation, and ability of plaintiff's counsel has often been noted as a key factor in a court's consideration of counsel's fee request. *See*, *e.g.*, *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 748 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986); *Rosenbaum v. MacAllister*, 64 F.3d 1439, 1445 n.3 (10th Cir. 1995). The Settlement here was not easily achieved. Negotiations were hard-fought and protracted. Each Track Two Defendant is represented by experienced and highly-regarded counsel, and they contested this litigation at every stage. Therefore, settlement negotiations required persistence, negotiating skill, and a

willingness to take this case to trial. Class Counsel employed all of these, and obtained a settlement agreement.

IV. CLASS COUNSEL'S EXPENSES ARE REASONABLE AND SHOULD BE FACTORED IN THE COURT'S CONSIDERATION OF THE AWARD

In addition to being entitled to reasonable attorneys' fees, it is well-settled that "lawyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also to recover from the fund, as a general matter, expenses, reasonable in amount, that were necessary to bring the action to a climax." *In re Fidelity/Micron Secs. Litig.*, 167 F.3d at 737; *In re Nineteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 606 (1st Cir. 1992); *In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25067, at *67 (holding that "an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of … reasonable litigation expenses from that fund") (citations omitted). "[B]ecause each common fund case presents its own unique set of circumstances, trial courts must assess each request for fees and expenses on its own terms." *In re Fidelity/Micron Secs. Litig.*, 167 F.3d at 737.

The expenses incurred in this litigation in the amount of $9,417,783 are described in the accompanying Edelson Declaration. They are the type of expenses typically billed by attorneys to paying clients in the marketplace and include such costs as fees paid to experts, computerized research and other services, deposition and transcript expenses, and travel expenses in connection with this litigation through March 31, 2011. These expenses were reasonable and necessary for the prosecution of this litigation. Class Counsel do not request a separate award for expenses and will subsume the expenses within the requested 30% award. It bears repeating that folding expenses into a percentage fee award substantially decreases the net fee portion of the award given that expenses represent roughly 11.5% of counsel's total $81,608,623

"investment" in the case. We project that the "net" fee awards requested for all AWP settlements will amount to less than 19 percent once the effect of including expenses is considered.

V. THE COURT SHOULD APPROVE COMPENSATION TO THE NAMED CLASS REPRESENTATIVES

Class Counsel request that the Court approve compensation to the named class representatives. As with the approval of compensation to named representatives in the GSK, AstraZeneca Class 1 and the AstraZeneca Class 2/Class 3 settlements, and consistent with the Court's previous instructions, the amount of compensation sought on behalf of named representatives is based upon the hours expended in furtherance of the litigation. Like the combined attorneys' fees and expense award, these amounts would be paid from the common fund.

In July 2007, in connection with the GSK Settlement, the named class representatives in the GSK Settlement each submitted affidavits attesting to the time expended in furtherance of the litigation. *See* Co-Lead Counsel's Motion for Order Authorizing Compensation to Consumers and Third-Party Payor Class Representatives (Dkt. No. 4509). Each class representative in that settlement included a tally of the time spent responding to document requests, conferring with Class Counsel and preparing for depositions related to class certification and/or the merits of Plaintiffs' claims, among other tasks necessary to fulfill their obligations as class representatives. Rather than request that the full amount of time be compensated at the Court-suggested rate of $100 per hour out of the GSK Settlement, for the TPP representatives, the Court made an award of only 20% of the overall time expended on behalf of the litigation. This was meant to allow for the possibility that the remaining compensation would come from future settlement and/or verdicts against the remaining Defendants. Similar requests for compensation to class

representatives related to a portion of their work in the case were made in connection with the BMS Settlement and the AstraZeneca Settlements.

Class Counsel now seek a payment to class representative that will compensate them for the remainder of time incurred in furtherance of this litigation not covered in other settlements, as set forth in the table below. (Class representatives that did not have time since the submission of a GSK Declaration have incorporated their Declarations submitted with that settlement by reference. In addition, some class representatives have incorporated by reference the Declarations recently submitted in connection with the AstraZeneca Class 2/Class 3 Massachusetts and non-Massachusetts settlements and the BMS settlements.)

The one exception to the methodology for compensation to named representatives as outlined above is with respect to the recently added class representative for Class 1, Ms. Tonacchio. In July 2008, Class Plaintiffs sought and were granted permission to add Ms. Tonacchio as a Class 1 representative for purposes of the Track Two Settlement. Due to her late addition as a class representative, Ms. Tonacchio has spent less time than other class representatives in furtherance of the litigation. She has, however, spent time procuring relevant medical records and providing information about drug payments to Class Counsel. In recognition of these efforts, Class Counsel respectfully request that the Court award Ms. Tonacchio a one-time payment of $500 from the common fund.[7]

[7] Class Counsel may also seek to add additional consumer class representatives prior to final approval. If the Court grants the request to add additional consumer class representatives, Class Counsel will supplement this request for compensation with respect to new class representatives.

Declarant	Representative Of	Class	Hours Claimed	Compensation Requested
Muriel Tonacchio		1	N/A	$500.00
Daniel W. Ryan	United Food and Commercial Workers Unions and Employers Midwest Health Benefits Fund	2&3	115.5 (from Ryan AZ Class 2/3 Declaration, Dkt No. 7348)	$2,310.00
Glenn Randle	Sheet Metal Workers National Health Fund	2	73.5 (Fund) + 26.5 (TPA) = 100 (from Randle AZ Class 2/3 Declaration, Dkt No. 7347)	$2.000.00
Earl Seymour	Pirelli Armstrong Tire Corporation Retiree Medical Benefits Trust	2	50.5 (from Corrected Seymour AZ Class 2/3 Declaration, Dkt No. 7404)	$1,010.00
William Einhorn	Teamsters Health & Welfare Fund of Philadelphia and Vicinity	3	127 (from Einhorn GSK Decl., Dkt No. 4509-7)	$2,540.00
William A. Rhodes, Jr.	Board of Trustees of Carpenters and Millwrights of Houston and Vicinity Welfare Trust Fund	3	65 (from Rhodes GSK Decl., Dkt No. 4509-8)	$1,300.00
Arthur Steinburg	Philadelphia Federation of Teachers Health and Welfare Fund	3	63 (from GSK Decl. Dkt No 4509-7)	$2,520.00
Stephen Richman	Man-U Service Contract Trust Fund	3	41.75 (from GSK Decl. Dkt No 4509-6)	$3,340.00
Charles Hannaford	Pipefitters Local Union 537 Trust Funds	3	41 (from GSK Decl. Dkt No 4509-10)	$1,640.00
TOTAL				**$ 17,160.00**

Compensation to named plaintiffs is "not uncommon in class action litigation … particularly where a common fund has been created for the benefit of the entire class.… [C]ourts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002); *see also In re Southern Ohio Correctional Facility*, 175 F.R.D. 270, 272-73 (S.D. Ohio 1997) (collecting cases in which

awards to named representatives approved). A district court in the First Circuit has stated that "[b]ecause a named plaintiff is an essential ingredient of any class action, an incentive award can be appropriate to encourage or induce an individual to participate in the suit." *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 292 F. Supp. 2d 184, 189 (D. Me. 2003). Further, in determining whether such compensation is warranted, courts consider not only the efforts of the plaintiffs in pursuing the claims, but also the important public policy of fostering enforcement of laws and rewarding representative plaintiffs for being instrumental in obtaining recoveries for persons other than themselves. *Bussie v. Allmerica Fin. Corp.*, 1999 U.S. Dist. LEXIS 7793, at *11-12 (D. Mass. May 19, 1999).

The class representatives here actively and effectively fulfilled their obligations as representatives for the Class. The Plaintiffs went above and beyond the call of duty in complying with demands placed upon them during this litigation. Of crucial importance is the willingness of the Plaintiffs to bring this action in the first place. Each of the named Plaintiffs also monitored the case and discussed its progress with counsel and consulted with counsel concerning the Settlement.

The requested compensation is more than justified, because of the named plaintiffs' active and prominent role in this litigation. In such situations, courts have awarded compensation of the requested amount and larger. *See*, *e.g.*, *In re Revco Litig.*, 1992 U.S. Dist. LEXIS 7852, at *22 (N.D. Ohio May 5, 1992) (awarding $200,000 to a named plaintiff); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, at 203-04 (S.D.N.Y. 1997) (awarding $85,000 to a named plaintiff); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (awarding $55,000 each to two named plaintiffs); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 914 (S.D. Ohio 2001) (awarding $50,000 to the class representative).

VI. CONCLUSION

For the reasons set forth above, Class Counsel respectfully request that the Court approve the fee and expense petition and enter an order awarding Class Counsel the attorneys' fees and expenses requested and the compensation for the Class Representatives.

DATED: April 28, 2011

By /s/ **Steve W. Berman**
Thomas M. Sobol (BBO#471770)
Edward Notargiacomo (BBO#567636)
Hagens Berman Sobol Shapiro LLP
One Main Street, 4th Floor
Cambridge, MA 02142
Telephone: (617) 482-3700
Facsimile: (617) 482-3003

LIAISON COUNSEL

Steve W. Berman
Sean R. Matt
Hagens Berman Sobol Shapiro LLP
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594

Jennifer Fountain Connolly
Hagens Berman Sobol Shapiro LLP
1629 K St., NW, Suite 300
Washington, D.C. 20006
Telephone: (202) 355-6435
Facsimile: (202) 355-6455

Jeffrey Kodroff
John Macoretta
Spector, Roseman, Kodroff & Willis, P.C.
1818 Market Street, Suite 2500
Philadelphia, PA 19103
Telephone: (215) 496-0300
Facsimile: (215) 496-6611

Kenneth A. Wexler
Wexler Wallace LLP
55 W. Monroe, Suite 3300
Chicago, IL 60603
Telephone: (312) 346-2222
Facsimile: (312) 346-0022

Marc H. Edelson
Edelson & Associates LLC
45 West Court Street
Doylestown, PA 18901
Telephone: (215) 230-8043
Facsimile: (215) 230-8735

CLASS COUNSEL

CERTIFICATE OF SERVICE BY LEXISNEXIS FILE & SERVE

Docket No. MDL 1456

I, Steve W. Berman, hereby certify that I am one of plaintiffs' attorneys and that, on April 28, 2011, I caused copies of **LEAD CLASS COUNSEL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS AND COMPENSATION TO THE CLASS REPRESENTATIVES IN ASSOCIATION WITH THE TRACK TWO SETTLEMENT**, to be served on all counsel of record by causing same to be posted electronically via Lexis-Nexis File & Serve.

/s/ Steve W. Berman
Steve W. Berman

TAB 34A

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 5-25-2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARD DENNIS, et al.,

Plaintiffs,

-against-

16-cv-6496 (LAK)

JPMORGAN CHASE & CO., et al.,

Defendants.

MEMORANDUM AND ORDER

LEWIS A. KAPLAN, *District Judge.*

This is an antitrust class action that has been litigated for nearly seven years. On November 1, 2022, the Court approved eight proposed class action settlements, creating a common fund of $185,875,000. Lead counsel Lovell Stewart Halebian Jacobson LLP ("Lovell Stewart") and Lowey Dannenberg, P.C. ("Lowey Dannenberg," and together with Lovell Stewart, "Class Counsel") now seek attorneys' fees of $47,218,750, or 25.4 percent of the settlement common fund, and litigation expenses of $845,471.57, to be split among themselves and another law firm, Berman Tabacco ("Berman"), with which Class Counsel has a fee sharing agreement.[1] Familiarity with all prior proceedings is assumed.

I. Attorneys' Fees

Federal Rule of Civil Procedure 23(h) allows the Court to "award reasonable

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[1] Dkt 555, at 16 n.9, 20.

attorney's fees and nontaxable costs" in a certified class action. What is "reasonable" is left to the discretion of the Court, which is "intimately familiar with the nuances of the case."[2] In exercising that discretion, the Court acts as a fiduciary for the class, which it must protect from excessive awards.[3] Counsel bear the burden of establishing the reasonableness of their requested fee award.[4]

The Court may evaluate the reasonableness of a fee request using either the percentage of the fund obtained for the class or the lodestar method.[5] The latter, which the Court employs here, requires the Court to compute a reasonable lodestar amount. To do this, the Court first ascertains "the number of hours reasonably billed to the class," and then multiplies that figure by "an appropriate hourly rate."[6] That figure then may be increased by applying an appropriate multiplier. The Court's analysis is guided by the six factors that the Second Circuit described in *Goldberger v. Integrated Resources*: (1) counsel's time and labor, (2) the litigation's magnitude and complexity, (3) the risk of the litigation, (4) the quality of representation, (5) the requested fee in relation to the settlement, and (6) public policy considerations.[7]

Counsel submit a proposed lodestar of $29,908,595.15 based on 53,814.49 hours of

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2 *In re Bolar Pharm. Co. Sec. Litig.*, 966 F.2d 731, 732 (2d Cir. 1992) (per curiam).

3 *City of Detroit v. Grinell Corp.*, 560 F.2d 1093, 1099 (2d Cir. 1977), abrogated on other grounds by *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000).

4 *Cruz v. Local Union No. 3 of Int'l Bhd. Of Elc. Workers*, 34 F.3d 1148, 1160 (2d Cir. 1994).

5 *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005).

6 *Goldberger*, 209 F.3d at 47.

7 *Id.* at 50.

fee compensable work by many individuals, including lawyers, paralegals, and analysts.[8] Counsel based their calculation on the timekeepers' historic hourly rates and capped the hourly rates for paralegals at $200 per hour and for first-level document review at $350 per hour.[9] Counsel provided the Court with information including (1) each timekeeper's hours, tasks, and historic hourly rates, (2) the categories of work for which compensation is sought, (3) biographical information for the individuals for whom compensation is sought, and (4) additional facts supporting the reasonableness of the hourly rates, including market rates for similar professionals.[10] This information revealed that counsel seek compensation for time billed by 79 attorneys,[11] ten paralegals, and four "analysts."[12]

A. The Hourly Rates

As an initial matter, the Court finds that counsel have not shown that it was appropriate to include the hourly rates of the four "analysts" in the calculation of the lodestar. Collectively, these analysts – comprising a "financial analyst," "investigator researcher," "derivatives expert," and "analyst" – billed approximately 3,027.5 hours at historic hourly rates ranging from $165 to $545 per hour, which, at the higher end, is more than many of the firms' associates were billed out at. Counsel have included a total of $1,054,236.75 in their fee

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8 Dkt 555, at 17.

9 *Id.* at 17, 21-22.

10 *See* Dkt 555; Dkt 557-1; Dkt 562; Dkt 563.

11 This group of attorneys included 27 partners, two counsel, 44 associates, one project attorney, and five staff attorneys.

12 *See* Dkt 555; Dkt 557-1; Dkt 562; Dkt 563.

compensable lodestar for hours billed by the four "analysts," the vast majority of which were billed by counsel's "derivatives expert."

Hourly rates of non-lawyers may be included in the lodestar "if . . . consistent with market rates and practices."[13] Counsel have not provided data on the hourly rates charged by other firms for such personnel, assuming that other firms charge for them on an hourly basis. Nor have they furnished any information regarding the practices of the Bar concerning "analysts," "investigator researchers," or "derivatives experts." Indeed, the work of these types of professionals, "like that of others 'whose labor contributes to the work product,' is likely 'included in calculation of the lawyers' hourly rates,' as ordinarily is true of other overhead costs like rent, firm administrative staff, and the like."[14] Accordingly, the Court will not include the hours billed by the four analysts in the lodestar calculation.

The Court finds that the hourly rates for the remaining timekeepers – the attorneys, staff attorneys, project attorney, and paralegals – were appropriate.

B. Hours Billed

The Court now addresses whether the number of hours for which counsel request compensation is reasonable. Removing the hours billed by the four analysts, counsel seek compensation for approximately 50,787 hours of work.

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13 *See Missouri v. Jenkins by Agyei*, 491 U.S. 274, 286 (1989); *U.S. Football League v. Nat'l Football League*, 887 F.2d 408, 416 (2d Cir. 1989).

14 *Rudman v. CHC Grp. Ltd.*, No. 15-cv-3773 (LAK), 2018 WL 3594828, at *5 (S.D.N.Y. July 24, 2018) (quoting *W. Virginia Univ. Hosps. v. Casey*, 499 U.S. 83, 99 (1991), *superseded by statute, Landgraf v. USI Film Prods., et al.*, 511 U.S. 244 (1994)).

The Court notes that counsel appropriately expended significant time and labor litigating this class action. Over the course of approximately six years, they have, among other things, amended the complaint twice, opposed five motions to dismiss and one motion for reconsideration, conducted at least 70 meet and confers with defendants' counsel regarding discovery, received and reviewed more than 2.4 million documents produced by defendants, obtained certification of the class, and negotiated eight separate settlements involving twelve different banks.[15]

Nevertheless, the sheer amount of hours billed, particularly with respect to document review and other discovery, indicates a certain amount of duplication and inefficiencies in the timekeeping. Even after removing the hours billed by counsel's four analysts, counsel assert that they spent approximately 16,937.1 hours on document review, 3,614.8 hours on discovery motion practice, and 5,818.4 hours on "other discovery," accounting for the majority of the 50,787 hours billed.[16] Though discovery in this case was substantial, the Court finds these numbers to be excessive and redundant.

The Court finds that the simplest way to account for the inefficiencies and redundancy of the timekeeping in these three categories is to employ a 15 percent across the board reduction of counsel's lodestar, which the Court will employ after the reductions described above regarding hourly rates are rendered.[17] Applying all of these reductions, counsel's revised aggregate

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15 *See* Dkt 555, at 22-23.

16 *See* Dkt 555; Dkt 557-1; Dkt 562; Dkt 563.

17 *See Kirsch*, 148 F.3d at 173 ("Hours that are 'excessive, redundant, or otherwise unnecessary,' are to be excluded, and in dealing with such surplusage, the court has discretion simply to deduct a reasonable percentage of the number of hours claimed 'as a

lodestar is $24,526,204.64.

C. Multiplier

The Court finds that a multiplier of 1.5 is reasonable here, which is well within the range of multipliers typically approved in this Circuit.[18] Such a multiplier amply accounts for the time value of money and the nearly seven-year delay in counsel's payment. Additionally, a multiplier of 1.5 adequately accounts for the risk of this litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys on both sides, as well as the efforts of the many support staff who contributed to counsel's success. After approximately six years of hard-fought litigation, counsel obtained eight class action settlements with twelve settling defendants, creating a common fund of $185,875,000.[19] This was a good result for the class and counsel deserve to be compensated adequately.[20]

Applying the 1.5 multiplier to the Court's revised aggregate lodestar, counsel's fee

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practical means of trimming fat from a fee application.'" (citation omitted)); *Lunday v. City of Albany*, 42 F.3d 131, 134 (2d Cir. 1994) ("We do not require that the court set forth item-by-item findings concerning what may be countless objections to individual billing items.").

18 *See, e.g.*, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11-cv-5450, 2018 WL 3863445, at *4 (S.D.N.Y. Aug. 14, 2018) ("The mean multiplier in this Circuit is approximately 1.55, with multipliers in antitrust and securities cases recently averaging 1.77 and 1.43, respectively."); *see also* Theodore Eisenberg *et al.*, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 951 (2017) (average lodestar multiplier of 1.61 in fifteen different antitrust class actions studied during 2009-2013).

19 Dkt 555, at 10.

20 *See Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983) ("This Court has emphasized the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws.").

award is $36,789,306.96. Counsel request that the fee award be allocated as follows: 41.82% to Lovell Stewart, 41.82% to Lowey Dannenberg, and 16.36% to Berman.[21] In view of counsel's supplemental briefing on this issue and the opinion of counsel's expert, the Court finds that this constitutes an appropriate percentage allocation of the total attorneys' fees.[22] Accordingly, the Court allocates the total fee award of $36,789,306.96 as follows: $15,385,288.17 to Lovell Stewart, $15,385,288.17 to Lowey Dannenberg, and $6,018,730.62 to Berman.

II. Litigation Expenses

Counsel seek also reimbursement for $845,471.57 in litigation expenses.[23] The majority of the expenses are attributable to counsel's retained experts and consultants and to document discovery and computer research costs. The Court finds nothing objectionable and grants this request.[24]

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21 *See* Dkt 620, at 7 ("If the Court [reduces the overall attorneys' fee from $47,218,750], then Class Counsel respectfully requests that the percentages proposed above --- 41.82% to Lovell Stewart, 41.82% to Lowey Dannenberg, and 16.36% to Berman Tabacco --- still constitute an appropriate percentage allocation of the total attorneys' fees.").

22 *See* Dkt 620, at 8-10; *id.* Ex. 2 (Hyland Decl.).

23 *See* Dkt 555, at 37.

24 *See In re Platinum & Palladium Commodities Litig.*, No. 10-cv-3617, 2015 WL 4560206, at *5 (S.D.N.Y. July 7, 2015) (quoting *In re Currency Conversion Fee Antitrust Litig.*, MDL No. 1409 (WHP), 2012 WL 3878825, *2 (S.D.N.Y. Aug. 22, 2012)) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients.")

Conclusion

Lead counsel's application for attorneys' fees is granted in accordance with the following: lead counsel are awarded $36,789,306.96 in attorneys' fees, to be allocated as set forth above, and $845,471.57 in expenses. The Clerk shall terminate Dkt 554.

SO ORDERED.

Dated: May 25, 2023

Lewis A. Kaplan
United States District Judge

TAB 34B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARD DENNIS, SONTERRA CAPITAL MASTER FUND, LTD., FRONTPOINT FINANCIAL SERVICES FUND, L.P., FRONTPOINT ASIAN EVENT DRIVEN FUND, L.P., FRONTPOINT FINANCIAL HORIZONS FUND, L.P., AND ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM, on behalf of themselves and all others similarly situated, *Plaintiffs*, *-against-* JPMORGAN CHASE & CO., JPMORGAN CHASE BANK, N.A., BNP PARIBAS, S.A., THE ROYAL BANK OF SCOTLAND GROUP PLC, THE ROYAL BANK OF SCOTLAND PLC, RBS N.V., RBS GROUP (AUSTRALIA) PTY LIMITED, UBS AG, AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD., COMMONWEALTH BANK OF AUSTRALIA, NATIONAL AUSTRALIA BANK LIMITED, WESTPAC BANKING CORPORATION, DEUTSCHE BANK AG, HSBC HOLDINGS PLC, HSBC BANK AUSTRALIA LIMITED, LLOYDS BANKING GROUP PLC, LLOYDS BANK PLC, MACQUARIE GROUP LTD., MACQUARIE BANK LTD., ROYAL BANK OF CANADA, RBC CAPITAL MARKETS LLC, MORGAN STANLEY, MORGAN STANLEY AUSTRALIA LIMITED, CREDIT SUISSE GROUP AG, CREDIT SUISSE AG, ICAP PLC, ICAP AUSTRALIA PTY LTD., TULLETT PREBON PLC, TULLETT PREBON (AUSTRALIA) PTY LTD., AND JOHN DOES NOS. 1-50. *Defendants*.	Docket No. 16-cv-06496 (LAK)

MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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Pursuant to this Court's Conditional Certification Orders (ECF Nos. 517-522, 542-544) and Fed. R. Civ. P 23(h) and 23(b)(3), Court-appointed Class Counsel respectfully move for an award of attorneys' fees and reimbursement of litigation expenses from the $185,875,000 common fund created by Plaintiffs' eight proposed class action Settlements with twelve Settling Defendants.[1]

The Substantial Recovery After Six Years of Litigation. Counsel's work in this complex, high-risk case for the last six years has produced a substantial recovery of $185,875,000 for the benefit of the Class.

A. The High Risks of Successful Prosecution of These Claims. The claims here involved numerous intrinsic existential risks. Such risks began with the Fed. R. Civ. P. 12 stage. These risks included failure to state a claim, failure to show personal jurisdiction, failure to allege standing, collateral estoppel and prior release of the BBSW foreign exchange ("FX") derivatives based upon an earlier class action settlement, and various other attacks by Settling Defendants' counsel, who included the cream of the defense bar.

Second, to any extent that Plaintiffs survived the foregoing risks, Plaintiffs faced the risks of class certification. Here, Plaintiffs contended that the BBSW rate was manipulated upward on

[1] Class Counsel refers to Lowey Dannenberg, P.C. and Lovell Stewart Halebian Jacobson LLP. Plaintiffs refers to Orange County Employees Retirement System ("OCERS") and Richard Dennis. Counsel refers to Class Counsel and Berman Tabacco. Settlements refers to Plaintiffs' proposed settlements with the Settling Defendants. Settling Defendants refers to JPMorgan Chase & Co. and JPMorgan Chase Bank (together, "JPMorgan"), Westpac Banking Corporation ("Westpac"), Australia and New Zealand Banking Group Limited ("ANZ"), Commonwealth Bank of Australia ("CBA"), National Australia Bank Limited ("NAB"), Morgan Stanley and Morgan Stanley Australia Limited (together, "Morgan Stanley"), Credit Suisse AG and Credit Suisse Group AG ("Credit Suisse"), BNP Paribas, S.A. ("BNPP"), Deutsche Bank AG ("Deutsche Bank"), Royal Bank of Canada ("RBC"), The Royal Bank of Scotland Plc (n/k/a NatWest Markets plc) ("RBS"), and UBS AG ("UBS").

some days, and downward on other days. In these circumstances, various courts have not so far been receptive to certification of litigated classes.[2]

Third, Plaintiffs faced the existential risks involved in prevailing at the merits stage of the case. These risks included a mismatch between the antitrust conspiracy gravamen of Plaintiffs' claims here, and the treatment by the Australian Securities and Investment Commission ("ASIC") of each Defendant's conduct as a mere individual breach of a duty to customers. *See* "F" below (discussing the limited ASIC allegations).

1. Consistent With These High Risks, No Other Cases or Class Actions Were Filed. Likely because of the foregoing high risks, no other law firms filed a complaint or otherwise attempted to represent or seek relief for the Class. This is the polar opposite of the norm in class actions that have a significant prospect of recovery.[3]

2. Pleading Risks: Class Counsel Overcame the High Risks Involved in Seven Separate Rule 12 Motions. Counsel had to win, and (ultimately) did win, every significant litigation battle involved in seven different rounds of Rule 12 motions submitted by the Settling Defendants' excellent counsel:

- *Dennis v. JPMorgan Chase & Co.*, 343 F. Supp. 3d 122, 167, 171 (S.D.N.Y. 2018), *adhered to on denial of reconsideration*, No. 16-CV-6496 (LAK), 2018 WL 6985207 (S.D.N.Y. Dec. 20, 2018) (holding Plaintiffs plausibly alleged Defendants conspired to fix the BBSW rate; that Plaintiffs plausibly alleged these rate manipulations adversely affected BBSW-Based Derivatives; but acknowledging "the damages calculations in this case may indeed be complex");

[2] *E.g.*, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d 430 (S.D.N.Y. 2018); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 407 F. Supp. 3d 422 (S.D.N.Y. 2019); *Nypl v. JP Morgan Chase & Co.*, No. 15 CIV. 9300 (LGS), 2022 WL 819771, at *6 (S.D.N.Y. Mar. 18, 2022).

[3] *E.g.*, *In re Merrill Lynch & Co., Inc. Rsch. Reps. Sec. Litig.*, No. 02 MDL 1484, 2007 WL 4526593, at *17 (S.D.N.Y. Dec. 20, 2007) (the filing of "some 140 class-action complaints" following a highly-publicized investigation showed "the prospect of recovery was promising from the outset").

- *Dennis v. JPMorgan Chase & Co.*, No. 16-CV-6496 (LAK), 2018 WL 6985207 (S.D.N.Y. Dec. 20, 2018) (denying motion to reconsider the denial of motion to dismiss Plaintiffs' claims by alleged conspirator Defendants who were not on the Panel which made the submissions used to calculate the BBSW rate);

- *Dennis v. JPMorgan Chase & Co.*, 439 F. Supp. 3d 256 (S.D.N.Y. 2020) (denying in significant part the motion to dismiss claims directed at OCERS);

- Order dated August 4, 2020 (ECF No. 394) (denying motion by ANZ and CBA for reconsideration of the Court's Order denying motions to dismiss OCERS's claims on statute of limitations and other grounds);

- Order dated March 30, 2021 (ECF No. 458) (denying the Rule 12(c) motion by ANZ to dismiss on statute of limitations and other grounds);

- *Dennis v. JPMorgan Chase & Co.*, No. 16-CV-6496 (LAK), 2021 WL 1893988, at *2 (S.D.N.Y. May 11, 2021) (denying Rule 12(c) motion by five Defendants to dismiss Plaintiffs' claims relating to the BBSW-Based Derivatives consisting of FX forwards on the basis that the claims had been released by earlier class action settlement).

3. However, Ten Settling Defendants Prevailed on Their Motion To Dismiss For Lack Of Personal Jurisdiction. But one of the many existential Rule 12 risks was realized when this Court largely granted the Settling Defendants' personal jurisdiction dismissal motions. *Dennis v. JPMorgan Chase & Co.*, 343 F. Supp. 3d 122, 171 (S.D.N.Y. 2018).

4. Class Counsel Then Resourcefully Solved the Personal Jurisdiction Problem. After the personal jurisdiction risk had fully materialized, Counsel then accomplished a 180-degree turnaround in this litigation battle on which the Settling Defendants had largely prevailed.

Specifically, after dismissal, this Court granted Plaintiffs leave to amend the Complaint. ECF No. 276. Making the most of the opportunity afforded by the Court, Class Counsel then added as a party plaintiff Orange County Employees Retirement System ("OCERS"). *Dennis v. JPMorgan Chase & Co.*, 439 F. Supp. 3d at 269.

Defendants' excellent counsel then renewed their personal jurisdiction arguments and also made numerous other arguments to dismiss OCERS' claims. ECF Nos. 298, 303, 306. But this Court ruled that the agreements which OCERS entered into with numerous Settling

Defendants included an enforceable consent jurisdiction agreement. *Dennis v. JPMorgan Chase & Co.*, 439 F. Supp. 3d at 261-266. This Court further consistently ruled that such consent clauses were sufficient to confer personal jurisdiction over those Defendants who were parties thereto. *Id*. at 261; *see also Dennis v. JPMorgan Chase & Co.*, 343 F. Supp. 3d at 209 and *Dennis v. JPMorgan Chase & Co.*, 439 F. Supp. 3d at 266.

5. Class Counsel's Need to Obtain Substantial Discovery from Defendants While This Court Was Still Burdened by Repeated Rounds of Rule 12 Motions. Before Defendants' repeated Rule 12 motions ended, Counsel began the discovery phase of the case and performed substantial discovery work for more than 14 months *before* the later rounds of Rule 12 motions had been decided. In addition to the continuing risks from the Rule 12 motions, Class Counsel's judgment was that they needed to obtain substantial discovery documents going far beyond those reflected in the ASIC proceedings[4] in order to be able to prove by a preponderance of the evidence the antitrust conspiracy gravamen of Plaintiffs' claims.

Thus, the critical focus of Plaintiffs' discovery work was to obtain as many types of relevant documents as they successfully could. Thereby, Class Counsel would give Plaintiffs the chance to establish that the alleged manipulations of BBSW, *which were in different directions and at different times over the course of many years*, were undertaken pursuant to an unlawful agreement among Defendants to fix and manipulate prices.

[4] First, ASIC made limited settlements with limited or no findings involving three defendants' individual wrongdoings. ECF No. 136, Exs. 22-24 (BNPP, RBS and UBS enforceable undertakings). Second, ASIC made a significant record of conversations consistent with sporadic manipulations through market moving conduct during the five-minute BBSW fixing window. Order, *ASIC v ANZ*, VID 197 of 2016, (Fed. Ct. of Australia, Nov. 10, 2017); Order, *ASIC v NAB*, VID 604 of 2016, (Fed. Ct. Australia, Nov. 10, 2017); Order, *ASIC v CBA*, VID65 of 2018, (Fed. Ct. Australia June 21, 2018); Order, *ASIC v. Westpac*, VID 282 of 2016, (Fed. Ct. Australia Nov. 9, 2018).

Accordingly, Plaintiffs began aggressively pursuing discovery as soon as it opened in late March 2020. Defendants took what Class Counsel believed was an extremely narrow view of discovery. Ultimately, Class Counsel obtained approximately 2.4 million documents from Defendants.

As Class Counsel aggressively pursued discovery, they conducted more than seventy (70) discovery meet and confers with Defendants during the prosecution of these claims. Joint Declaration of Vincent Briganti and Christopher Lovell ("Joint Declaration") ¶37. These meet and confers were designed to justify why, based on the facts of this case, Defendants should produce various categories of documents. Frequently, senior partners participated in these meet and confers in order to maximize Plaintiffs' chances to obtain documents consensually, without burdening the Court.

Counsel and their experts analyzed the substantial amount of dense information produced by Defendants in discovery. These documents included industry-specific jargon, numerous types of financial instruments, different categories of records at each bank, audio recordings, and many other types of records.

However, unlike other cases involving manipulation of a daily fixed rate, this case did not involve chat rooms in which the banks worked out before each day's fixing period how they were going to conduct that day's manipulation. *Compare In re Foreign Exch.Benchmark Rates Antitrust Litig*., 74 F. Supp. 3d 581, 587-88 (S.D.N.Y. 2015). On the contrary, Defendants forcefully argued that, to paraphrase the words of one market participant to the Reserve Bank of Australian, "some days I get tackled, and other days I tackle."

Based upon their review and analysis of the records, Class Counsel skillfully used these different documents (a) to begin to piece together the types of evidence that, in their judgment,

could improve Plaintiffs' chance to prove a conspiracy, and (b) to make settlement presentations to various Defendants and seek to settle before the substantial risk of class certification or decisions on the merits materialized. As a result of Class Counsel's skillful prosecution of discovery and repeatedly prevailing against the Rule 12 attacks, by June 2021 Plaintiffs had agreed in principle to settle with six more Defendants.[5] But in order to be able to prove the alleged conspiracy, Plaintiffs continued to seek more cooperation documents from these six Defendants, while also prosecuting the Class's claims against the six remaining Defendants.

Class Counsel had unavoidably been forced to make two motions to compel discovery. ECF Nos. 427 and 428. But after this Court ruled that the release in the prior *FX* class action did not bar the Plaintiffs' claims here, the parties suggested to the Court in July 2021 that they could resolve portions of the motion to compel consensually. ECF No. 471. The Court directed the parties to resolve **all** portions of the motion to compel. *Id*.

Thereafter, relying on senior partner involvement in most of the meet and confers in order to execute the Court's direction, Class Counsel diligently negotiated with the remaining Defendants to resolve the issues in the motions to compel, obtain discovery, and do so prior to the discovery cut off. Shortly before the initial cut-off of discovery, Class Counsel reached an agreement with these six Defendants to resolve in substantial part the motions to compel. ECF No. 484, pp. 1-2.

Granting the requested extension of discovery, this Court noted that such extension was likely to be the last. ECF No. 532. Class Counsel thereafter continued zealously to pursue discovery from the remaining Defendants, worked internally and with experts to prepare a class

[5] JPMorgan had become the first settling defendant prior to the resolution of the first round of motions to dismiss. ECF No. 225-1 (stipulation of settlement dated November 20, 2018).

certification impact model, and analyzed with experts the meaning of the non-Settling Defendants' communications, and conducted settlement negotiations with the remaining Defendants. As a result of Class Counsel's extensive prior learning and persistent efforts, Plaintiffs reached an agreement for settlements with all of the remaining Defendants by late April 2022.

Through their foregoing skillful work, Class Counsel overcame all of the extensive Rule 12 risks in this case. Class Counsel then aggressively pursued discovery and skillfully used the discovery record in settlement negotiations. As a result of their foregoing and other zealous efforts, Class Counsel succeeding in producing a substantial recovery for the benefit of the Class notwithstanding the complexity and high risks of the claims.

B. **Fee Request**. Class Counsel respectfully request an award of attorneys' fees in the amount of $47,218,750. The requested fee represents approximately 25.4% of the $185,875,000 common fund and a 1.58 lodestar multiplier. The requested fee is fair and reasonable under the multiple metrics recognized by this Court for awarding fees in common fund cases. *City of Westland Police & Fire Ret. Sys. v. MetLife, Inc.*, No. 12-CV-0256 (LAK), 2021 WL 2453972, at *1 (S.D.N.Y. June 15, 2021) (Kaplan, J.) ("The Court may evaluate the reasonableness of a fee request using either the percentage of the fund obtained for the class or the lodestar method.").

C. **Lodestar Method**. The requested fee is fair and reasonable under the lodestar method because the lodestar is comprised of a reasonable number of hours of work performed at a reasonable rate. *See* "I.A" below (detailing Counsel's hours and rates). The lodestar multiplier of 1.58 is well within the range of multipliers previously awarded in this Circuit in similar complex class actions. *City of Westland*, 2021 WL 2453972, at *5 (2.5 multiplier found to be

reasonable and "well within the range of multipliers that typically are approved in this Circuit" in much less complex securities class action); *see* I.A below (collecting cases awarding similar or greater multipliers in connection with similar sized class action settlements); *see also* Theodore Eisenberg *et. al.*, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 951 (2017) (the average lodestar multiplier was 1.61 in fifteen different antitrust class actions studied during 2009-2013).

Counsel's fee compensable lodestar here is $29,908,595.15. *See* "I.A" below and accompanying attorney declarations submitted by Counsel.[6] The lodestar represents 53,814.49 hours of fee compensable work since the case began in 2016. *Id*. In accordance with this Court's recent ruling in *City of Westland*, Counsel has stated its lodestar based on historic hourly rates, not current hourly rates, and has capped the hourly rates for paralegals at $200 per hour. *See* "I.A" below; *City of Westland*, 2021 WL 2453972, at *3. Counsel has also provided the Court with: (1) each timekeeper's hours, tasks, and current and blended hourly rates, (2) the categories of work for which compensation is sought and (3) biographical information for the individuals for whom compensation is sought. *See* "I.A" below; *City of Westland*, 2021 WL 2453972, at *2. Counsel's current and historical hourly rates are reasonable and consistent with rates recently approved by this Court in *City of Westland*. *Id*.

D. <u>Percentage of the Fund Method</u>. The requested 25.4% fee is also fair and reasonable under the percentage of the fund method. *See* "I.B" below. It is well within the range of fees previously awarded in this Circuit in connection with similar sized class action settlements in complex cases. *Id*. (collecting decisions awarding fees of 25% or greater in cases

[6] Concurrently submitted herewith are the attorney declarations of Vincent Briganti on behalf of Lowey Dannenberg ("Briganti Decl."), Benjamin M. Jaccarino on behalf of Lovell Stewart ("Jaccarino Decl.") and Todd A. Seaver on behalf of Berman Tabacco ("Seaver Decl.").

with similar sized settlements and that represented lodestar multipliers greater than that requested here); *see also* Center for Litigation and Courts and The Huntington National Bank, *2021 Antitrust Annual Report: Class Actions in Federal Court* (April 2022) at 27-28 (median fee awards of 30% in antitrust settlements ranging from $100 million to $249 million between 2009 and 2021)[7]; Theodore Eisenberg *et. al*., *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. at 951 (the average fee award in nineteen different antitrust class actions studied during 2009-2013 was 27%).

E. Fee Awards Reflecting Market Rates. The 25.4% fee is also strongly supported because it follows the declining fee scale negotiated at arm's length by Counsel and Plaintiff OCERS before OCERS joined the case. Declaration of Gina M. Ratto ("Ratto Decl.", ¶¶5-8. The agreed upon fee structure employs a graduated fee scale that provides for a 28% fee on the first $25 million recovered, 25% on the next $175 million recovered, and lower percentages for any additional sums recovered. *Id*. OCERS has more than $22.4 billion in assets under management, is one of the nation's largest public pension funds, acts as a fiduciary on behalf of its more than 49,000 members and has a large stake in this litigation. *Id*., ¶¶1-4. The declining percentage fee structure negotiated by a highly sophisticated client like OCERS is the "best indication of a market rate," which is "an ideal proxy for [Class Counsel's] compensation." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000) (market rates "are the ideal proxy" for "lawyers who successfully prosecute" class actions); *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008) ("In many cases, the agreed-upon fee will offer the best indication of a market rate.").

[7] *Available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4117930

F. High Risks and Other *Goldberger* Factors. Class Counsel undertook to prosecute this case on a fully contingent basis despite the high risks involved. The risks of this case fully justify the requested fee, which represents a 1.58 lodestar multiplier. *Compare In re Bristol–Myers Squibb Sec. Litig.*, 361 F.Supp.2d 229, 233 (S.D.N.Y.2005) (the risk of the litigation is the "first, and most important, Goldberger factor") *with In re Merrill Lynch & Co., Inc. Rsch. Reps. Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 4526593, at *17 (S.D.N.Y. Dec. 20, 2007) (the filing of "some 140 class-action complaints" following a highly-publicized investigation showed that "the prospect of recovery was promising from the outset").

Class Counsel built the plausible allegations of a conspiracy among some of the largest banks in the world from the ground up and based on their prior expertise litigating benchmark rate manipulation cases. At the time Class Counsel filed the initial complaint herein (August 2016), ASIC had brought actions against certain Defendants herein. ECF No. 1, ¶¶3-4. Importantly, however, ASIC had not alleged any collusion or coordination. Instead, ASIC focused on various types of individual misconduct by certain Defendants, including BBSW submission influence and manipulative trading in prime bank bills during the BBSW rate set window. Class Counsel conducted their investigation, worked with experts and harvested materials from the public record and without the benefit of discovery in order to go far beyond the individual violations pursued by ASIC and construct plausible allegations of a conspiracy to manipulate and fix BBSW. Complaint, *passim*. Thus, Class Counsel, not ASIC, filed the first (and only) collusion claims concerning BBSW. ASIC recovered 83.6 million AUD (approximately $58 million) in connection with settlements from five Defendants, and an additional 3.3 million AUD (approximately $2.3 million) from one Defendant that did not settle

with ASIC.[8] Thus, Class Counsel ultimately recovered more than **three times** as much money as ASIC.

G. Litigation Expenses. Class Counsel also respectfully seek reimbursement of $845,471.57 in out-of-pocket expenses incidental and necessary to the representation of the Class since the inception of the case in 2016. *See* II below. The requested expenses are detailed and categorized in the accompanying attorney declarations submitted by Counsel. *Id*. More than 95% of the expenses incurred consisted of expert and consultant expenses, document discovery expenses and computer research. *Id.*

ARGUMENT

I. CLASS COUNSEL'S FEE REQUEST IS FAIR AND REASONABLE UNDER MULTIPLE DIFFERENT METRICS

"[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Victor v. Argent Classic Convertible Arbitrage Fund L.P.*, 623 F.3d 82, 86 (2d Cir. 2010). Courts "may award attorneys' fees in common fund cases under either the 'lodestar' method or the 'percentage of the fund' method" although "the trend in this Circuit is toward the percentage method." *McDaniel v. County of Schenectady*, 595 F.3d 411, 417 (2d Cir. 2010) (citing *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005)). Class Counsel's fee request is reasonable under both approaches, is further reasonable because it follows the fee agreement Counsel negotiated with Plaintiff OCERS, and is further supported by each of the *Goldberger* factors, including the high risks of litigating this case on a contingent basis.

[8] Also, four Defendants were ordered to pay litigation costs and other reimbursements totaling 59 million AUD (approximately $41 million).

A. The Requested Fee Is Reasonable Under the Lodestar Method, Including Because The Lodestar Multiplier Is Well Within The Range of Multipliers Approved In This Circuit

Under the lodestar method, the Court first ascertains the number of hours reasonably billed to the Class and then multiplies that figure by an appropriate hourly rate. *City of Westland*, 2021 WL 2453972, at *1. Courts compare the requested award to the reasonable time and labor expended to confirm that the fee award is reasonable and avoid windfalls. *Grice v. Pepsi Bev. Co.*, 363 F. Supp. 3d 401, 406 (S.D.N.Y. 2019); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 232 (2d Cir. 1987) (adoption of the lodestar method intended to "provide counsel with [fair and just] compensation and, at the same time, temper these awards to prevent windfalls). Courts in the Second Circuit routinely approve fee awards that result in multipliers between 2 and 6. *See, e.g., Wal-Mart*, 396 F.3d at 123 (upholding a multiplier of 3.5 as reasonable and observing that "multipliers of between 3 and 4.5 have become common"); *Carlson v. Xerox Corp.*, 355 F. App'x 523, 526 (2d Cir. 2009) ("the resulting multiplier would be 3.59, still below the 3.6 average and in line with the 3.1 median for similar cases"); *In re Credit Default Swaps Antitrust Litig.*, No. 13md2476 (DLC), 2016 WL 2731524, at *17 (S.D.N.Y. Apr. 26, 2016) ("*CDS*") (approving a lodestar multiplier of "just over 6" in a complex antitrust class action); *Beckman v. KeyBank N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) (approving a multiplier of 6.3 in class action, explaining that "[c]ourts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers."); *Maley v. Del Global Tech. Corp.*, 186 F. Supp. 2d 358, 371 (S.D.N.Y. 2002) (holding that a 4.65 lodestar multiplier is modest, fair, and reasonable).

Counsel's Limitations and Audits of Time. In this case, Counsel self-imposed certain limits to control time and hourly rates. The rates for timekeepers performing first-level document review were capped at $350 per hour, and rates for paralegals and other litigation

professionals were capped at $200 per hour. Timekeepers that worked less than 15 hours on the case have been excluded for the purpose of the lodestar calculation, and any time relating to preparing this motion has been excluded as well. On top of these caps, Class Counsel have audited the time of each firm and adjusted the lodestar in the exercise of billing judgment. Finally, the lodestar has been calculated based on historical rates, rather than current rates. The limits imposed by Class Counsel confirm that there is no windfall resulting from the fee request.

Number of Hours Billed. As reflected in the accompanying attorney declarations, Counsel invested a total of 53,814.49 fee compensable hours prosecuting the claims on behalf of the Class and reaching the eight Settlements. A summary of the hours spent by law firm per year is set forth in the below matrix.

Law Firm	2016	2017	2018	2019	2020	2021	2022
Lowey Dannenberg	1,398.30	1,931.96	2,363.40	2,046.05	4,247.84	8,955.77	1,727.70
Lovell Stewart	54.15	2,078.75	2,601.49	2,291.74	6,382.85	9,310.94	2,393.70
Berman Tabacco		6.15	292.40	160.90	1,248.40	3,864.50	457.50
TOTALS	**1,452.45**	**4,016.86**	**5,257.29**	**4,498.69**	**11,879.09**	**22,131.21**	**4,578.90**

Counsel assert that the fee compensable hours are reasonable when viewed in the context of the work undertaken in this case over approximately six years. Counsel's efforts on behalf of the Class are detailed in the Joint Declaration and the three attorney declarations submitted concurrently herewith, including summaries of work for each timekeeper. Counsel's work included the following:

- Investigated and filed the first and only complaint herein alleging an unlawful agreement among many of the largest banks in the world that was designed to manipulate, fix and rig BBSW;
- Amended the complaint multiple times in order to address shortcomings identified by the Court in its motion to dismiss opinions, including amending the complaint to add Plaintiff OCERS who had consent jurisdiction agreements with many of the defendants;

- Successfully defeated six rounds of dismissal motions, including motions pursuant to Rules 12(b)(1), (b)(2), (b)(3) and (b)(6), motions for judgment on the pleadings pursuant to Rule 12(c) and dismissal motions premised upon a release from a prior class action settlement;
- Prepared and served multiple Rule 34 document requests to each of the twelve Defendants during discovery;
- Engaged in individual meet and confers with each of the ten remaining Defendants concerning their responses and objections to Plaintiffs' Rule 34 requests and other discovery matters, and non-parties concerning the production of information for class notice. In total, Class Counsel conducted at least seventy (70) meet and confers.
- Mindful of the burdens on this Court, Counsel sought to and did resolve their many discovery disputes without Court intervention. Plaintiffs submitted only two motions to compel to the Court and then resolved those motions by agreement with Defendants pursuant to the Court's instructions;
- Based on Class Counsel's aggressive representation, Plaintiffs received more than 2.4 million documents produced by Defendants. Class Counsel and their experts engaged in an extensive analysis these complex documents and utilized them to build on the allegations in the complaint and also to persuade Defendants' counsel during settlement negotiations that Plaintiffs would have the proof necessary to establish their claims;
- Engaged in numerous meet and confers with several Defendants concerning Plaintiffs' responses and objections to Defendants' Rule 34 requests. Plaintiff OCERS gathered, reviewed and produced over 23,000 pages of documents for production, with meet and confer conferences continuing through the litigation and up to the time of the final settlements.
- Worked with economists to develop an impact model to detect and estimate the impact of manipulations on BBSW;
- Negotiated eight separate settlements involving twelve different banks, all of which included months of hard-fought negotiations with Defendants' counsel over material provision such as the specifics of the cooperation provisions;
- Developed a detailed class notice plan that was approved by the Court and also developed a proposed Plan of Distribution which, subject to the Court's approval, will be used to distribute the proceeds of the Settlements to eligible Class members.

The number of hours Counsel spent litigating this case is extremely reasonable given the complexity of the case (*see* "D.3" below), the length of the litigation (six years), the high volume of motion practice, the large number of Defendants and the large number of documents produced in the case (approximately 2.4 million).

Hourly Rates. The billing rates used to develop the lodestar are also reasonable. The hourly billing rates for attorneys working on this case ranged from $185 to $1,295. Briganti

Decl. Ex. A (schedule listing attorney rates from $325-$1,295); Jaccarino Decl. Ex. A (schedule listing attorney rates from $185-$1,140); Seaver Decl. Ex. A (schedule listing attorney rates from $350-$1,085). Billing rates in the same range have been previously approved in federal cases in New York for work of comparable size and complexity. *See, e.g.*, *City of Westland*, 2021 WL 2453972, at *1 (finding counsel's hourly rates between $170 to $1,058 were reasonable); *In re GSE Bonds Antitrust Litig.*, No. 19-cv-1704 (JSR), 2020 WL 3250593, at *1 (S.D.N.Y. June 16, 2020) (granting fee award using partner rates of $675 to $1,150 and associate rates of $365 to $820), *see also* Decls. in Support of Award for Attorney's Fees and Expenses, *GSE Bonds* (S.D.N.Y. Apr. 13, 2020), ECF No. 393-96; *In re Foreign Exchange Benchmark Rates Antitrust Litig.*, No. 13 Civ. 7789 (LGS), 2018 WL 5839691 (S.D.N.Y. Nov. 8, 2018) (granting fee award using partner rates up to $1,375 and associate rates of $350 to $700), *see also* Decl. in Support of Award for Attorney's Fees and Expenses, *In re Foreign Exchange*, No. 13 Civ. 7789 (LGS), (S.D.N.Y. Jan. 12, 2018), ECF No. 939; *CDS*, 2016 WL 2731524, at *17 (granting fee award using partner rates of $834 to $1,125 and associate rates of $411 to $714; *see* ECF No. 482).

Again, hourly rates for paralegals and other litigation support personnel were capped at $200. *City of Westland*, 2021 WL 2453972 at *3 (approving rate of $200 an hour for paralegals and litigation support personnel). First-level document review rates were capped at $350 an hour.

Lodestar. Lodestar is calculated by "multipl[ying] the reasonable hours billed by a reasonable hourly rate." *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 347 (S.D.N.Y. 2014). If the Court accepts the reasonableness of the hours and the rates reported here, the fee compensable lodestar totals $29,908,595.15. The lodestar for each firm is set forth below.

Law Firm	Lodestar
Lowey Dannenberg, P.C.	$12,009,690.35
Lovell Stewart Halebian Jacobson LLP	$15,190,556.80
Berman Tabacco[9]	$2,708,348.00
TOTAL	**$29,908,595.15**

Lodestar Multiplier. Once the lodestar figure is determined, courts typically enhance it by a positive multiplier "to reflect consideration of a number of factors, including the contingent nature of success and the quality of the attorney's work." *Maley*, 186 F. Supp. 2d at 370.

The fee request represents a lodestar multiplier of 1.58. This multiplier is well within the range of multipliers typically approved in this Circuit. *See, e.g.*, *GSE Bonds*, 2020 WL 3250593, at *5 (awarding $77.3 million in fees, representing a 4.09 multiplier on the lodestar); *CDS*, 2016 WL 2731524, at *18 (approving fees totaling over $253 million, which was "equivalent to a lodestar multiple of just over 6"); *Maley*, 186 F. Supp. 2d at 371 (approving a fee award that represented a 4.65 multiplier); *In re RJR Nabisco, Inc. Sec. Litig.*, No. 88 Civ. 7905 (MBM), 1992 WL 210138, at *6-8 (S.D.N.Y. Aug. 24, 1992) (awarding multiplier of 6); *In re LIBOR-Based Fin. Antitrust Litig.*, No. 11-MD-2262 (NRB), 2018 WL 3863445, at *4 (S.D.N.Y. Aug. 14, 2018) (noting "mean multiplier in this Circuit is approximately 1.55, with multipliers in antitrust and securities cases recently averaging 1.77 and 1.43, respectively"); *see also In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999) (Pollack, J.) (noting that a multiplier of "2.5 times the reported charges" would be reasonable in commodities class action); Order, at ¶¶ 2, 6, 9, *In re Nat. Gas Commodity Litig.*, 03 Civ. 6186, (S.D.N.Y. June 15, 2007), ECF No. 445 (approving a 1.9 multiplier in commodities class action); *In re Platinum &*

[9] Pursuant to Local Rule 23.1, Class Counsel state that they have a fee sharing agreement with Berman Tabacco, counsel for Plaintiff OCERS. The agreement provides that Berman Tabacco is entitled to share up to 17% of attorneys' fees awarded herein.

Palladium Commodities Litig., No. 10 Civ. 3617, 2015 WL 4560206, at *4 (S.D.N.Y. July 7, 2015) (approving a 1.9 multiplier in commodities action for attorneys representing the Futures Class); *In re BP Propane Direct Purchaser Antitrust Litig.*, No. 06 Civ. 3541, slip op. (N.D. Ill. Feb. 10, 2010), ECF No. 209, [Joint Decl. Ex. Q, Tab 2] (33% fee award that resulted in a 2.7 lodestar multiplier).

Additionally, the multiplier accounts for the risks of the litigation, the complexity of the issues, the quality of the representation (for both Plaintiffs and Defendants), the six-year delay in payment, the contingent nature of the case and each of the other *Goldberger* factors. *See* "D" below.

B. The Requested Fee Is Within The Range of the Fees Approved In This Circuit For Similar Sized Settlements And Is Further Supported by The Graduated Fee-Scale Negotiated with OCERS

The reasonableness of the requested fee is confirmed when compared to cases applying the "percentage method" to calculate fees, the method which is favored in this Circuit. *Wal-Mart Stores*, 396 F.3d at 121 ("The trend in this Circuit is toward the percentage method"); *see also In re Beacon Assoc. Litig.*, No. 09 Civ. 777(CM), 2013 WL 2450960, at *5 (S.D.N.Y. May 9, 2013) (explaining that "percentage of recovery" is "the preferred method of calculating the award for class counsel in common fund cases"). Notably, other judges, including Your Honor, find that the percentage method is not a panacea, potentially encouraging counsel to prematurely settle cases and avoid extensive opportunity costs, or "to collect a large fee after investing relatively little time in the case, rather than continuing the litigation in order to maximize plaintiffs' recovery but receiving a lower marginal rate of return on his or her work." *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71, 77 (S.D.N.Y. 2000). That has not happened here.

In this case, even if used simply as a point of comparison to the lodestar method, a fee of 25.4% is amply reasonable. The percentage is comparable to fees awarded in other **less complex**

actions with settlements of between $100 million and $300 million that resulted in higher lodestar multipliers than requested here. *In re Signet Jewelers Ltd. Sec. Litig.*, No. 1:16-CV-06728-CM-SDA, 2020 WL 4196468, at *1 (S.D.N.Y. July 21, 2020) (approving attorneys' fees that equaled 25% of a $240 million settlement and that represented a 1.89 lodestar multiplier); *NECA-IBEW Health & Welfare Fund v. Goldman, Sachs & Co.*, No. 1:08-CV-10783, 2016 WL 3369534 at *1 (S.D.N.Y. May 2, 2016) (approving attorneys' fees that equaled 21% of a $272 million settlement and that represented a lodestar multiplier of 3.9.); *Bd. of Trustees of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, No. 09 CIV. 686 SAS, 2012 WL 2064907, at *1 (S.D.N.Y. June 7, 2012) (approving attorneys' fees that equaled 25% of $150 million settlement and that represented a lodestar multiplier of 2.86); *In re Comverse Tech., Inc. Sec. Litig.*, 2010 WL 2653354, at *6 (E.D.N.Y. June 24, 2010) (awarding attorneys' fees that equaled 25% of $225 million settlement and that represented a lodestar multiplier of 2.78.); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d at 399 (Pollack, J.) (approving attorneys' fees that equaled 27.5% of $116.6 million settlement and that represented a lodestar multiplier of 2.5).

When looking at comparable cases involving benchmark manipulation, the fee request is in line with awards granted in this District where the total settlements to date were approximately $300 million or less. *Sullivan v. Barclays PLC*, No. 13-cv-2811 (PKC) (S.D.N.Y. May 18, 2018) ECF No. 425 (order granting 22.24% of the $309 million settlement fund as attorneys' fees); *Laydon v. Mizuho Bank Ltd.*, No. 12-cv-3419 (GBD) (S.D.N.Y.) ECF Nos. 723 (Nov. 10, 2016) (granting 25% fee on first set of settlements totaling $58 million), 837 (Dec. 7, 2017) (awarding attorneys' fee of 23.57% from a second set of settlements totaling $148 million); *see also Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-cv-7126 (JMF), 2018 WL 6250657, at *3 (S.D.N.Y. Nov. 29, 2018) (awarding 26% of the net settlement fund from a

$504.5 million settlement involving the manipulation of ISDAfix). Recent studies of antitrust class actions further confirm the reasonableness of the requested 25.4% fee. *See* above.

Moreover, the facts of this case demonstrate that the pitfalls that have concerned the Court about awarding fees based on a percentage are not present. Counsel have invested more than 53,800 hours over six years prosecuting this case. *See* "A" above. In that time, they have responded to and largely prevailed on six pleadings-related motions, negotiated the production of over 2.4 million documents, and conducted multiple rounds of months'-long negotiations to produce the resulting Settlements. *Id*. Moreover, based on their experience in other benchmark litigation cases, Class Counsel firmly believe that they have achieved optimal value for the Class, particularly when one considers the amount of time that has already elapsed in litigating this case, and the amount of time that would likely be required to get to a trial on the merits in this action. *In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 176 (S.D.N.Y. 2014) ("any potential recovery by Class members in the absence of a settlement would occur years in the future, substantially delaying payment to Class members"). Continuing the prosecution in the hope of obtaining a larger settlement would have subjected the Class to more uncertainty and risk.

C. The Requested Fee Is Further Supported by The Graduated Fee-Scale Negotiated with OCERS

Counsel's arm's-length fee agreement with OCERS provides the Court with a valuable guidepost that may be used to determine the appropriate fee. The Supreme Court and the Second Circuit have recognized that an appropriate Court-awarded fee is intended to approximate what counsel would receive if they were offering their services in the marketplace. *Missouri v. Jenkins*, 491 U.S. 274, 285-86 (1989); *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany and Albany Cty. Bd. of Elections*, 522 F.3d 182, 184 (2d Cir. 2008) (a

"reasonable" fee reflects "what a reasonable, paying client would be willing to pay" for counsel's services); *Goldberger*, 209 F.3d at 52 ("market rates, where available, are the ideal proxy for [class counsel's] compensation."). Courts accordingly may give weight to negotiated fee agreements because they typically reflect actual market rates *Nortel Networks*, 539 F.3d at 133 ("In many cases, the agreed-upon fee will offer the best indication of a market rate."). Moreover, there is "a well-recognized rebuttable 'presumption of correctness' given to the terms of an *ex ante* fee agreement between class counsel and lead plaintiffs" applied in antitrust cases where the fee was negotiated by a "sophisticated benefits fund with fiduciary obligations to its members and where that fund has a sizeable stake in the litigation." *CDS Litig.*, 2016 WL 2731524, at *16 (quoting *Flanagan, Lieberman, Hoffman & Swaim v. Ohio Pub. Emps. Ret. Sys.*, 814 F.3d 652, 659 (2d Cir. 2016); *see also In re Cendant Corp. Litig.*, 264 F.3d 201, 282 (3d Cir. 2001).

Here, there is no need to approximate what Class Counsel's services in this case are worth or what a reasonable client would be willing to pay. The fee request reflects the agreed-upon sliding scale percentage OCERS negotiated with Counsel prior to its participation in this action. Ratto Declaration, ¶¶5-8. OCERS has more than $22.4 billion in assets under management, is one of the nation's largest public pension funds, acts as a fiduciary on behalf of more than 49,000 members and has a large stake in this litigation. *Id.*, ¶¶1-8. The fee agreement is entitled to a "presumption of correctness" because its terms were negotiated by a "sophisticated benefits fund"—such as OCERS—"with fiduciary obligations to its members and . . . a sizeable stake in the litigation." *CDS*, 2016 WL 2731524, at *16 (quoting *Flanagan*, 814 F.3d at 659).

D. The Risks of The Case and Other *Goldberger* Factors Support The Requested Fee

Under *Goldberger*, in awarding a fee the Court should consider "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger*, 209 F.3d at 50. The requested fee is also supported by each of the six *Goldberger* factors.

1. The High Risks of the Litigation Support the Requested Fee

The risk of the litigation is the preeminent *Goldberger* factor. *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014) ("*Payment Card"*) ("The most important *Goldberger* factor is often the case's risk"); *Goldberger*, 209 F.3d at 54 ("We have historically labeled the risk of success as 'perhaps the foremost' factor to be considered in determining whether to award an enhancement."). The risk of undertaking litigation is "measured as of when the case is filed." *Goldberger*, 209 F.3d at 55.

The substantial risks in this complex case included the following. Class Counsel overcame the risks of Defendants' six rounds of Rule 12 dismissal motions and Plaintiffs would eventually face dispositive motions for summary judgment where Defendants would challenge Plaintiffs' ability to provide evidentiary support for their claims. For example, Defendants consistently challenged Plaintiffs' ability to establish a **conspiracy** to manipulate BBSW, which was essential to Plaintiffs' claims. Defendants argued that, if anything, each of their alleged unlawful conduct in connection with BBSW was an individual undertaking, and not one performed as part of any conspiracy. In order to obtain the proof necessary to defeat summary judgment (and eventually prevail at trial), Plaintiffs first needed to obtain significant discovery from Defendants. Discovery proved to be challenging. Defendants took (in Counsel's opinion)

a very narrow view of the case and aggressively opposed Plaintiffs' discovery requests. This required extensive negotiation efforts that involved more than seventy (70) meet and confers. Counsel's diligence in discovery paid off. Ultimately, Defendants produced more than 2.4 million documents to Plaintiffs. Class Counsel also faced the risk of certifying a class in this action where Plaintiffs alleged that BBSW was manipulated both higher and lower than its competitive price on different days. Class certification motions based on similar records have repeatedly been denied (incorrectly, in Class Counsel's judgment). *See* fn. 2 above. The Settlements reached with the Defendants avoids all these additional risks and the uncertainties of continued litigation and trial.

2. The Time and Labor Expended by Class Counsel That Resulted In The Creation of The Common Fund In The High Risk Environment Of This Action Support the Requested Fee

During the last six years, Counsel dedicated a substantial amount of time (more than 53,800 hours) and resources to prosecuting the claims herein on behalf of the Class. Counsel's efforts on behalf of the Class are detailed in the Joint Declaration and the individual attorney declarations submitted concurrently herewith, including summaries of each timekeeper's work. A summary of the work undertaken in this Action is set forth in "I.A" above.

3. The Magnitude and Complexity of the Litigation Support the Requested Fee

A greater fee award is warranted for counsel prosecuting complex class action cases. *In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 379 (S.D.N.Y. 2013) ("The upshot is that the magnitude and complexity of the litigation also weigh in favor of a significant award."); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998) ("*NASDAQ III*") ("[C]lass actions have a well-deserved reputation as being most complex"). Complex cases require a greater level of investment by counsel, in terms of effort, expertise, and resources, to

competently litigate the claims and issues at stake on behalf of plaintiffs and the class. Class actions involving antitrust and commodities claims stand out as some of the most "'complex, protracted, and bitterly fought.'" *Meredith Corp. v. SESAC LLC*, 87 F. Supp. 3d 650, 670 (S.D.N.Y. 2015) (citations omitted); *In re Platinum and Palladium Commodities Litig.*, No. 10cv3617, 2014 WL 3500655, at *12 (S.D.N.Y. July 15, 2014) (noting that commodities cases are "complex and expensive" to litigate); *In re Vitamin C Antitrust Litig.*, No. 06 Md. 1738 (BMC)(JO), 2012 WL 5289514, at *4 (E.D.N.Y. Oct. 23, 2012).

Complexity. This case involves an alleged conspiracy among multiple banks and interdealer brokers to fix BBSW and BBSW-Based Derivatives prices over more than 13 years through multiple means, including, *inter alia*: (1) engaging in manipulative money market transactions during the BBSW Fixing Window; (2) making false BBSW rate submissions that did not reflect actual transaction prices; (3) uneconomically buying or selling money market instruments at a loss to cause artificial derivatives prices; and (4) sharing proprietary information to align interests and avoid conduct that could harm co-conspirators. ECF No. 281 (Second Amended Class Action Complaint ("SAC")). The amount of work required to understand the inner workings of a cartel with this level of sophistication was extraordinary in both its complexity and scope and required Class Counsel to master the properties of complex financial instruments and markets. *GSE Bonds*, 2020 WL 3250593, at *4 (finding "complexity [is] present [where] plaintiffs claimed that the defendants colluded in the GSE Bond market over more than seven years, involving thousands of bond issuances, and implicating sixteen defendants"); *In re Holocaust Victim Assets Litig.*, No. CV 06-0983 (FB)(JO), 2007 WL 805768, at *46 (E.D.N.Y. Mar. 15, 2007).

Magnitude. This is a massive case. Over the course of six years of litigation involving seventeen different financial institutions as Defendants, the Court and the parties generated over 500 docket entries associated with two amended complaints, multiple motions to dismiss, reconsideration requests and multiple requests for judgment on the pleadings. More than 2.4 million documents have been produced, and thousands of hours have been spent analyzing and contextualizing the relevant information. The nature, duration, size of the case, complexity of the financial instruments, and sophistication and the breadth of the alleged conspiracy weigh heavily in favor of approving the requested fee.

4. The Quality of the Representation Supports the Requested Fee

"[T]he quality of representation is best measured by results," *Goldberger*, 209 F.3d at 55, which are evaluated in light of "the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 141 (S.D.N.Y. 2008).

Results Obtained. The eight Settlements provide for a $185,875,000 benefit to the Class. This is an extraordinary recovery in light of the challenges of prosecuting this action and the risks of continuing litigation.

Background of Counsel. Counsel has decades of experience prosecuting class action cases, including some of the largest class action recoveries under the commodities and antitrust laws. *See* ECF Nos. 452-6, 452-7 (firm resumes). This includes specific expertise in benchmark manipulation as demonstrated by Class Counsel's current tenure as lead or co-lead counsel in cases alleging anticompetitive and manipulative conduct. *Id.* Additional examples of Class Counsel's more than 70 years of combined experience with complex litigation are detailed in Class Counsel's resumes. *Id.* The background of each timekeeper for whom fees are being requested are set forth in the attorney declarations submitted herewith.

Another consideration for assessing the quality of the representation is "[t]he quality of the opposing counsel" in the case. *Maley*, 186 F. Supp. 2d. at 373. The fact that Class Counsel successfully prosecuted this action for six years against more than a dozen different Defendants all represented by well-respected and high-caliber law firms and obtained a substantial recovery for the Class reflects the quality of representation provided.

5. The Fee Award Is Reasonable in Relationship to the Settlement

Courts evaluate the requested fee in relation to the settlement by looking to "comparable cases" for "guideposts." *Payment Card.*, 991 F. Supp. 2d at 443-44 (evaluating a fee request against other "large class cases with court-set fees"). Here, the Court has several guideposts to assist its evaluation, including OCERS' retainer agreement and the cases cited above with similar lodestar multipliers and fee award percentages in cases that involved similar sized class action settlements. *See* "A"–"C" above. Class Counsel's fee request compares favorably to these other cases.

6. Public Policy Considerations Support the Requested Fee

The Supreme Court has recognized the benefits of private civil suits as a means of enforcing federal antitrust laws. *Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983) ("This Court has emphasized the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws."). If Class Counsel had not taken on the risks of this lawsuit in 2016, the Class would have been left without recompense. The relatively small regulatory fines imposed by ASIC on certain Defendants were not allocated to private investors.

Awarding a fair and reasonable fee from the common fund ensures that Class Counsel retains the ability and incentive to pursue antitrust violations at their own expense even when recovery is uncertain. *Goldberger*, 209 F.3d at 51 ("There is . . . commendable sentiment in

favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest."); *Colgate-Palmolive3*, 36 F. Supp. 3d at 352 ("providing lawyers with sufficient incentive to bring common fund cases . . . serve[s] the public interest") (citations omitted). *Espinal v. Victor's Café 52nd St., Inc.*, No. 16-CV-8057 (VEC), 2019 WL 5425475, at *3 (S.D.N.Y. Oct. 23, 2019) ("The Second Circuit and courts in this District have taken into account the 'social and economic value of class actions, and the need to encourage experienced and able counsel to undertake such litigation' as a basis for increasing the percentage of the fund awarded to Class Counsel.").

It further ensures that our legal system, which relies on citizens to act as private attorneys general to vindicate the public interest, benefits from the involvement and expertise of top tier law firms to prosecute these large and highly complex cases. *Colgate-Palmolive*, 36 F. Supp. 3d at 352 ("While court awarded fees must be reasonable, setting fees too low or randomly will create poor incentives to bringing large class action cases."). This is particularly true in the context of private prosecutions of antitrust and CEA violations. *See GSE Bonds*, 2020 WL 3250593, at *5 ("Congress has encouraged enforcement of the antitrust laws through private civil suits to deter infringing conduct in the future."); *CDS*, 2016 WL 2731524, at *18 ("Our antitrust laws address issues that go to the heart of our economy. Our economic health, and indeed our stability as a nation, depend upon adherence to the rule of law and our citizenry's trust in the fairness and transparency of our marketplace."); *Leist v. Simplot*, 638 F.2d 283, 311 (2d Cir. 1980) ("The 1974 Congress repeatedly expressed its view that the changes [to the CEA] were designed to strengthen commodity futures regulation, a goal that would be ill-served by abolishing the private right of action that everyone had thought to exist."), *aff'd sub nom. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982) (citing CEA legislative

history); *Cange v. Stotler & Co., Inc.*, 826 F.2d 581, 584 (7th Cir. 1987) (explaining that Congress depends on the "critical" role of additional private suits to deter violations of the CEA); *see also Pillsbury*, 459 U.S. at 262-263 ("This Court has emphasized the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes . . . .").

E. Plaintiff OCERS' Approval and the Class's Reaction Support the Requested Fee

Plaintiff OCERS is a highly sophisticated client with fiduciary responsibilities to its members. Ratto Declaration, ¶¶4-5. OCERS was actively involved in the prosecution and settlement of this action. *Id*., ¶¶9-15. The requested fee follows the graduated fee scale negotiated by OCERS prior to entering this case, providing *ex ante* support for the fee. *Id*., ¶¶5-8. Additionally, OCERS gives *post* hoc support of the fee request based on their knowledge of Counsel's work and the risks of continued prosecution. *Id*., ¶¶16-19.

The reaction of the Class so far also supports the requested fee. As of August 1, 2022, the Settlement Administrator had mailed the class notice to over 52,000 potential Class members and has otherwise executed the robust publication notice aspects of the Court-approved notice plan. ECF No. 548. The notice informed Class members that Class Counsel intended to request an award of attorneys' fees of up to one-third (33.33%) of the Settlement Funds. ECF No. 548-1, p. 33. The time to object and opt out does not expire until September 2, 2022. *Id*., ¶¶26-28. However, so far, no objections have been received and only one Class member has requested to opt out. *Id*. Any objection(s) received will be addressed in Class Counsel's reply brief due to be filed on October 25, 2022. ECF No. 543, ¶10.

When all of the *Goldberger* factors are considered, there is an ample basis for the Court to grant Class Counsel's requested fee of 25.4% of the common fund or $47,218,750.

II. COUNSEL'S LITIGATION EXPENSES ARE REASONABLE AND SHOULD BE REIMBURSED

District courts in this Circuit grant expense requests in common fund cases as a matter of course. *In re Arakis Energy Corp. Sec. Litig.*, 95 CV 3431(ARR), 2001 WL 1590512, at *17 n.12 (E.D.N.Y. Oct. 31, 2001). As detailed in the accompanying attorney declarations, Counsel incurred $845,471.57 in litigation expenses prosecuting this action on behalf of the Class for which they seek reimbursement. These expenses were "incidental and necessary to the representation of the [C]lass," and should be reimbursed. *Beckman*, 293 F.R.D. at 482.

Counsel incurred the requested expenses over the course of approximately six years, from the inception of the action in 2016 through August 5, 2022. The class notices approved by the Court advised Class members that Counsel would seek reimbursement of expenses of no more than $1,250,000. ECF No. 548-1, pp. 33, 41. The vast majority of the expenses related to payments to experts and consultants (approximately 60%), document discovery and computer research costs (collectively, approximately 35.5%). These types of expenses are routinely granted. *See, e.g.*, *In re Platinum & Palladium*, 2015 WL 4560206, at *5.

CONCLUSION

Class Counsel respectfully request the Court approve attorneys' fees in the amount of $47,218,750 and reimbursement of litigation expenses in the amount of $845,471.57. A proposed order is respectfully submitted herewith.

Dated: August 18, 2022
White Plains, New York

LOWEY DANNENBERG, P.C.

By: */s/ Vincent Briganti*
Vincent Briganti
Geoffrey M. Horn
44 South Broadway, Suite 1100
White Plains, New York 10601
Tel.: 914-997-0500
Fax: 914-997-0035
vbriganti@lowey.com

ghorn@lowey.com

LOVELL STEWART HALEBIAN JACOBSON LLP

By: */s/ Christopher McGrath*
Christopher Lovell
Christopher McGrath
500 Fifth Avenue, Suite 2440
New York, NY 10110
Tel: (212) 608-1900
clovell@lshllp.com
cmcgrath@lshllp.com

Counsel for Plaintiffs and the Proposed Class

Todd Seaver
Carl N. Hammarskjold
BERMAN TABACCO
425 California Street, Suite 2300
San Francisco, CA 94104
Tel.: (415) 433-3200
Fax: (415) 433-6382
tseaver@bermantabacco.com
chammarskjold@bermantabacco.com

Patrick T. Egan (PE-6812)
BERMAN TABACCO
One Liberty Square
Boston, MA 02109
Tel.: (617) 542-8300
Fax: (617) 542-1194
pegan@bermantabacco.com

Additional Plaintiffs' Counsel for Orange County Employees Retirement System

TAB 35A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

DON GIBSON, LAUREN CRISS, JOHN MEINERS, and DANIEL UMPA, individually and on behalf of all others similarly situated, Plaintiffs, v. THE NATIONAL ASSOCIATION OF REALTORS, et al., . Defendants.	)	Case No. 4:23-cv-00788-SRB

ORDER

Before the Court is Plaintiffs'[1] Motion for Final Approval of Settlements with Compass, Real Brokerage, Realty ONE, @properties, Douglas Elliman, Redfin, Engel & Völkers, HomeSmart, and United Real Estate (collectively, "Settling Defendants"). (Doc. #521.)[2] Preliminary approval was granted on April 30, 2024, July 15, 2024, and July 16, 2024. *See* Docs. 163, 297, 348. Notice to the Settlement Class commenced July 23, 2024, and Class members were provided with an opportunity to opt out of, or object to, the Settlements. A small number of Class members filed objections. (Doc. #451, Doc. #464, Doc. #467, Doc. #470, Doc. #471, Doc. #485, Doc. #527, and Doc. #528.) The Settling Defendants filed Suggestions in Support of Final Approval. (Doc. #522.) The Court held a hearing on October 31, 2024, at which arguments were presented for and against final approval. Having considered the arguments at the hearing and reviewed the written submissions, and based on all materials in the record, the motion for final

[1] "Plaintiffs" are Don Gibson, Lauren Criss, John Meiners, and Daniel Umpa.
[2] The Settling Defendants are identified with specificity in their Suggestions in Support of Final Approval of the Settling Defendants' Class Settlements. (Doc. #522.)

approval is GRANTED.

The Court hereby ORDERS the following:

1. Unless defined herein, all defined terms in this Final Approval Order and any accompanying Judgment shall have the respective meanings set forth in the Settlement Agreements.

2. At preliminary approval, the Court appointed JND Legal Administration ("JND") as the Settlement Administrator. As directed by the Court, JND implemented the Class Notice Plan. In connection with their final approval motion, Plaintiffs submitted a declaration of Jennifer M. Keough from JND summarizing the notice that was given to class members and the resulting claims to date, opt-outs, and objections. (Doc. #521-3.). Notice was provided by first-class U.S. mail, electronic mail, and digital and print publication. Without repeating all the details from Keough's declaration, the Court finds that the direct notice program was extremely successful and reached more than 97% of identified Settlement Class members. Nearly 40 million direct notices were mailed or emailed to the Class. JND's digital effort alone delivered more than 300 million impressions, and its press release was picked up at least 495 times with a potential audience of 113 million. In addition to the formal class notice process, and beyond the paid press release, more than 470 news stories addressed the litigation and settlement, including full articles in outlets such as the New York Times, USAToday, and CNN. JND also implemented a Settlement Website that had over 2 million unique visitors and over 11 million page views.

3. As of October 21, 2024, over 463,000 claims have been made. The claims period extends until May 9, 2025. This extended claims period is valuable because additional settlements covering the same Settlement Class (with minor variations on the length of the class periods) have

been reached with other defendants, and the notice process for those settlements will provide additional opportunities to submit claims.

4. In contrast to the massive scale of the notice program and the large volume of claims, there were only 8 objections (encompassing 11 total objectors) and 46 opt outs from the Settlement Class.

5. Based on the record, the Court finds that the notice given to the Settlement Class constituted the best notice practicable under the circumstances and fully satisfied the requirements of due process, Federal Rule of Civil Procedure 23, and all applicable law. The Court further finds that the notice given to the Settlement Class was adequate and reasonable.

6. The notice fully and accurately informed members of the Settlement Class of all material elements of the Settlements. The Settlement Class Members received notice of: (a) the pendency of the Actions; (b) the terms of the proposed Settlements, including the Released Claims, Released Parties, and Releasing Parties; (c) their rights under the proposed Settlement, including how to receive the benefits offered by the Settlements; (d) their right to exclude themselves from the Settlement Class and the proposed Settlements; (e) their right to object to any aspect of the proposed Settlements; (f) their right to appear at the Final Approval Hearing; (g) Class Counsel's request for attorneys' fees and expenses and an incentive award to the Class Representatives; and (h) the binding effect of this Final Judgment and Order Approving Settlement on all Persons who did not timely exclude themselves from the Settlement Class. Some of the objectors challenged certain aspects of the notice program. The Court addresses those objections below and finds that they present no valid challenge to the notice.

7. The Court also finds that the appropriate state and federal officials were timely notified of the Settlement Agreements under the Class Action Fairness Act of 2005 (CAFA), 28

U.S.C. § 1715, and that ninety (90) days have passed without comment or objection from any governmental entity.

8. For the purposes of the settlement of the claims against Compass, Douglas Elliman, HomeSmart, Real Brokerage, Realty ONE, United Real Estate, and only for that purpose, the Court certifies the following class, except for those timely opting out:

a. All persons who sold a home that was listed on a multiple listing service[3] anywhere in the United States where a commission was paid to any brokerage in connection with the sale of the home in the following date ranges:

i. October 31, 2019 to date of Class Notice.

9. For the purposes of the settlement of the claims against Redfin, and only for that purpose, the Court certifies the following class, except for those timely opting out:

a. All persons who sold a home that was listed on a multiple listing service anywhere in the United States where a commission was paid to any brokerage in connection with the sale of the home in the following date ranges:

i. Homes in Nevada: January 15, 2018 to date of Class Notice;

ii. Homes in California: October 2, 2019 to date of Class Notice; and

iii. For all other homes: October 31, 2019 to date of Class Notice.

10. For the purposes of the settlement of the claims against Engel & Völkers and @properties, and only for that purpose, the Court certifies the following class, except for those timely opting out:

[3] MLS includes non-NAR multiple listing services, including NWMLS, WPMLS, and REBNY / RLS.

a. All persons who sold a home that was listed on a multiple listing service anywhere in the United States where a commission was paid to any brokerage in connection with the sale of the home in the following date ranges:

i. Homes in Arkansas, Kentucky, and Missouri: October 31, 2018 to date of Class Notice;

ii. Homes in Alabama, Georgia, Indiana, Maine, Michigan, Minnesota, New Jersey, Pennsylvania, Tennessee, Vermont, Wisconsin, and Wyoming: October 31, 2017 to date of Class Notice;

iii. For all other homes: October 31, 2019 to date of Class Notice.

11. The Court finds that certification of the Settlement Class is warranted in light of the Settlements under the prerequisites of Federal Rule of Civil Procedure 23(a) because: (1) the members of the Settlement Class are so numerous that joinder is impracticable; (2) there are issues of law and fact common to the Settlement Class; (3) Plaintiffs' claims are typical of the claims of the Settlement Class Members; and (4) Plaintiffs and Co-Lead Counsel will fairly and adequately represent the interests of the Settlement Class Members.

12. The Court finds that certification of the Settlement Class is warranted in light of and solely for purposes of the Settlements under Federal Rule of Civil Procedure 23(b)(3) because common issues, including whether Settling Defendants entered into any conspiracy, predominate over any questions affecting only individual members of the Settlement Class in the settlement context, and settlement of the Actions on a class basis is superior to other means of resolving the Actions as to Settling Defendants.

13. The Court reaffirms the appointment of Plaintiffs Don Gibson, Lauren Criss, John Meiners, and Daniel Umpa, as the Settlement Class Representatives. The Court finds that the

Settlement Class Representatives have and will fairly and adequately protect the interests of the Settlement Class because: (1) the interests of the Settlement Class Representatives are consistent with those of Settlement Class Members; (2) there appear to be no conflicts between or among the Settlement Class Representatives and the other Settlement Class Members; (3) the Settlement Class Representatives have been and appear to be capable of continuing to be active participants in both the prosecution and the settlement of this litigation; and (4) the Settlement Class Representatives and Settlement Class Members are represented by qualified, reputable counsel who are experienced in preparing and prosecuting large, complicated class action cases, including those concerning violation of the antitrust laws.

14. In making these findings, the Court has considered, *inter alia*, (1) the interests of the Settlement Class Members in individually controlling the prosecution or defense of separate actions; (2) the impracticality or inefficiency of prosecuting or defending separate actions; (3) the extent and nature of any litigation concerning these claims already commenced; and (4) the desirability of concentrating the litigation of the claims in a particular forum.

15. As discussed below in response to objections from competing cases, the Court has specifically considered that the settlement class is nationwide and releases claims arising from sales of homes listed on NAR and non-NAR MLSs, including all claims on behalf of sellers arising from the same factual predicate. Plaintiffs here plead a nationwide conspiracy on behalf of a nationwide class that expressly challenges certain NAR rules as well as rules adopted by the Residential Listing Service ("RLS") of the Real Estate Board of New York ("REBNY"). (*See* Doc. #232, Consolidated Am. Compl., ¶ 182.) The Complaint includes specific allegations regarding the particular anticompetitive policies adopted in REBNY RLS. *Id.* The Complaint alleges that, as a result, "Defendants' conspiracy has had the following anticompetitive effects

nationwide," including in REBNY RLS: (a) "Home sellers have been forced to pay commissions to buyer-brokers—their adversaries in negotiations to sell their homes— thereby substantially inflating the cost of selling their homes"; (b) "Home sellers have been compelled to set a high buyer-broker commission to induce buyer-brokers to show their homes to home buyers."; (c) "Home sellers have paid inflated buyer-broker commissions and inflated total commissions."; (d) "The retention of a buyer-broker has been severed from the setting of the broker's commission; the home buyer retains the buyer-broker, while the home seller sets the buyer-broker's compensation"; (e) Price competition among brokers to be retained by home buyers has been restrained." *Id*. ¶ 225 (emphasis added); *see also id*. ¶¶ 28, 227 (describing "nationwide" impact).

16. Here, the Court finds that certifying a nationwide class is warranted, including because Plaintiffs have conducted extensive discovery into the alleged nationwide conspiracy and have thoroughly litigated the claims, providing a robust factual record on which to assess the claims and base negotiations. A nationwide settlement was a necessary condition of obtaining any settlement for the benefit of the class, a nationwide settlement will conserve judicial and private resources, and Class members were fully apprised of the settlement class definition through the notice process. As the Court explains more thoroughly below, it was both justified and necessary to achieve any settlement for the Settlement Class to include all multiple listing services for residential real estate nationwide, however the multiple listing services were named (e.g., real estate listing service), and regardless of whether the services were affiliated or associated with NAR or not. Moreover, the only way that the Settlements were possible was if they provided for a nationwide recovery and release.

17. As a general matter, "the law strongly favors settlements. Courts should hospitably receive them." *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 921 F.2d 1371,

1383 (8th Cir. 1990) (noting it is especially true in "a protracted, highly divisive, even bitter litigation"). *See also Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999) ("A strong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor."); *Marshall v. Nat'l Football League*, 787 F.3d 502, 508 (8th Cir. 2015) ("A settlement agreement is 'presumptively valid.'" (quoting *In re Uponor, Inc., F1807 Plumbing Fittings Products Liab. Litig.*, 716 F.3d 1057, 1063 (8th Cir. 2013)); *Sanderson v. Unilever Supply Chain, Inc.*, 10-cv-00775-FJG, 2011 WL 5822413, at *3 (W.D. Mo. Nov. 16, 2011) (crediting the judgment of experienced class counsel that settlement was fair, reasonable, and adequate) . The presumption in favor of settlements is particularly strong "in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *Cohn v. Nelson*, 375 F. Supp. 2d 844, 852 (E.D. Mo. 2005). However, the Court does not rely on any presumption in favor of settlements here because these settlements need no presumption to be found fair, reasonable, and adequate.

18. The determination whether a class action settlement is "fair, reasonable, and adequate" is "committed to the sound discretion of the trial judge. Great weight is accorded his views because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly." *Van Horn v. Trickey*, 840 F.2d 604, 606-07 (8th Cir. 1988). The ultimate question is whether the settlement is "fair, reasonable, and adequate." *In re Wireless*, 396 F.3d 922, 932 (8th Cir. 2005).

19. Rule 23(e)(2) includes four factors the Court must consider, when evaluating settlement fairness. Those factors are whether:

> (A) the Class Representatives and Class Counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;

(C) the relief provided for the Class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;
(ii) the effectiveness of any proposed method of distributing relief to the Class, including the method of processing Class-Member claims;
(iii) the terms of any proposed award of attorney's fees, including timing of payment; and
(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

20. The Eighth Circuit has also set forth four factors that a court should consider in determining whether to approve a proposed class action settlement: "(1) the merits of the plaintiff's case, weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement." *In re Wireless*, 396 F.3d 922, 932 (citing *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 124 (8th Cir. 1975); *Van Horn*, 840 F.2d at 607 (8th Cir. 1988). *See also Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d 848, 861 (S.D. Iowa 2020) (finding analysis of certain Rule 23(e)(2) factors will "necessarily include analysis of [certain] related *Van Horn* factors"); *Anderson v. Travelex Insurance Services Inc..*, No. 8:18-CV-362, 2021 WL 4307093, at *2 (D. Neb. Sept. 22, 2021) (approving settlement under Rule 23(e) by evaluating *Van Horn* factors); *Cleveland v. Whirlpool Corp.*, No. 20-cv-1906, 2022 WL 2256353 (D. Minn. June 23, 2022) (evaluating settlement under Rule 23(e)(2) factors and *Van Horn*).

21. Under Federal Rule of Civil Procedure 23(e)(2), the Court finds that the Settlements with Settling Defendants, as set forth in the Settlement Agreements, are fair, reasonable and adequate.

22. First, Settlement Class Representatives and Class Counsel have adequately represented the Class and will continue to do so. Class Counsel were previously appointed to serve

as lead counsel in *Moehrl* and *Burnett* after the courts overseeing those cases found they would adequately represent the class. *Burnett*, 2022 WL 1203100 (W.D. Mo. Apr. 22, 2022); *Moehrl*, 2023 WL 2683199 (N.D. Ill. Mar. 29, 2023). Class Counsel subsequently won a jury trial in *Burnett.* And, in this case, the Court appointed them as Interim Co-Lead Class Counsel with responsibility for any settlements.(Doc. #180.) Altogether, Class Counsel have obtained over $1 billion in proposed and approved settlements as well as historic practice change relief. Class Counsel will continue to represent the class as they have done in navigating the settlement process. Likewise, the Class Representatives have bought and sold homes and have demonstrated their commitment to the litigation by responding to discovery, providing relevant documentation, and participating in the settlement process.

23. Second, each Settlement was conducted at arm's length. The settlement negotiations were contentious and hard fought. Most of the settlements were reached only with the assistance of an experienced mediator. And all occurred only after Settling Defendants provided Class Counsel with sufficient financial information for Plaintiffs to make an informed decision about settlement. Dirks Decl. at ¶¶ 21-22; Berman Decl. at ¶¶ 2, 6-11. There is no indication that any of the Settlements are the result of anything other than tough negotiations. The lengthy history of the real estate commission litigation, which has proceeded for years through class certification and a trial in the *Burnett* case, demonstrates the arm's length nature of these Settlements.

24. Third, for the reasons stated above, the relief for the Class is fair and adequate. The Settlements provide a significant financial recovery to the Settlement Class in light of the strengths and weaknesses of the case and the risks and costs of continued litigation, including appeal, and the Settling Defendants' financial resources. The Settlements also include meaningful changes to

the Settling Defendants' policies. The parties naturally dispute the strength of their claims and defenses. The Settlements reflect a compromise based on the parties' educated assessments of their best-case and worst-case scenarios, and the likelihood of various potential outcomes. Plaintiffs' best-case scenario is obtaining class certification, prevailing and recovering on the merits at trial, upholding a verdict on appeal, and then actually receiving the awarded damages from Defendants. But "experience proves that, no matter how confident trial counsel may be, they cannot predict with 100% accuracy a jury's favorable verdict, particularly in complex antitrust litigation." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 523 (E.D. Mich. 2003); *see also In re Lithium Ion Batteries Antitrust Litig.*, No. 13-md-02420, 2020 WL 7264559, at *15 (N.D. Cal. Dec. 10, 2020) ("Antitrust cases are particularly risky, challenging, and widely acknowledged to be among the most complex actions to prosecute."). And it would make little sense to try the case against the Settling Defendants where none of them has the ability to pay anywhere near the judgment amount sought. D Dirks Decl. at ¶ 22; Berman Decl. at ¶¶ 11-12.

25. Against these risks, the Settlements provide at least a $110.6 million recovery from the nine Settling Defendants, as well as substantial practice changes. *See In re Pork Antitrust Litig.*, No. 18-1776, 2022 WL 4238416, at *2 (D. Minn. Sept. 14, 2022) (granting final approval of antitrust settlement that provided "substantial relief against the backdrop of a great deal of uncertainty where the merits are highly contested" in case involving alleged price-fixing conspiracy among pork processing companies); *In re Polyurethane Foam Antitrust Litig.*, 168 F. Supp. 3d 985, 995-96 (N.D. Ohio 2016) (granting final approval of settlement in light of "real possibility that [plaintiffs] could have received much less—even zero—from a jury at trial or following an appeal"). The Settlements are also supported by the fact that this is a partial settlement of the claims arising from the alleged conspiracy; Class Counsel have continued to work

to achieve additional recoveries on behalf of the Class, including an agreement with NAR to eliminate the Mandatory Offer of Compensation Rule. Although some Class members have objected that they may not recover every dollar they paid to real estate agents, that is true of nearly every settlement. A guaranteed full recovery to every class member would have been untenable, perhaps resulting in no recovery at all.

26. In addition, the Settlements effectively distribute relief to the Class, including via the proposed method for processing class member claims. The Court-appointed notice and claims administrator, JND, will work with Class Counsel in processing Class member claims and distributing relief. JND has extensive experience in distributing relief in connection with large and complex class action settlements. Keough Decl. at ¶¶ 1, 47-51. JND will be responsible for reviewing claim forms and evidence of purchase to determine whether a claim is an approved claim, and any claim that cannot be confirmed may be subject to challenge, nonpayment, or a reduced share of the available funds. *See* Settlement Notice at ¶ 9. Class members with approved claims will have several options for receiving payment, including by debit card, Zelle, Venmo, or check. *See* Claim Form at p 1. Finally, as discussed below, the attorneys' fee request is reasonable and in line with Eighth Circuit precedent.

27. Fourth, the Settlements treat Class Members fairly and equitably relative to each other. Reviewing the terms of the proposed Settlements, it is clear that under the plain language of the Settlements, no class member is treated differently from any other. The practice change relief applies the same to all Class members nationwide. With respect to the monetary relief, every person who meets the class definition is eligible to submit and receive compensation for a claim. That is all that is required. *Petrovic*, 200 F.3d at 1152–53 ("We do not agree with the objectors' contention that a mailed notice of settlement must contain a formula for calculating individual

awards."). The settlement website advises both that: (i) settlement payment "will take into account the amount of commissions class member claimants paid to a real estate broker or agent"; and (ii) "[t]o the extent the value of total claims exceeds the amount available for distribution from the settlement funds, each class member's share of the settlement may be reduced on a pro rata basis." Settlement FAQ 11.

28. Finally, the requested service awards are reasonable and in line with other cases recognizing the work performed by the class representatives. The *Van Horn* Factors also support settlement approval. As discussed above under the Rule 23(e)(2) factors, the Settlements reflect a compromise based on the parties' educated assessments of their best-case and worst-case scenarios, and the likelihood of various potential outcomes, including potential financial outcomes of the Settling Defendants. The merits of the plaintiffs' case weighed against the terms of the settlement supports approval. Plaintiffs' claims raise numerous complex legal and factual issues under antitrust law. This is reflected in the voluminous briefing in *Moehrl* and *Burnett*, which includes extensive class certification and summary judgment briefing, as well as post-trial briefing in *Burnett*. In addition, plaintiffs have engaged in extensive appellate briefing, including Rule 23(f) petitions in both *Moehrl* and *Burnett* as well as two separate appeals in the *Burnett* litigation concerning arbitration issues, and a denial of certiorari by the United States Supreme Court. By contrast, the Settlements provide for certain and swift recovery for the Class. In light of the many uncertainties of continued litigation, a significant and certain recovery weighs in favor of approving the proposed Settlements. *See In re Coordinated Pretrial Proc. in Antibiotic Antitrust Actions*, 410 F. Supp. 669, 678 (D. Minn. 1974) (approving settlement where price-fixing claims faced "substantial roadblocks" on top of the "difficulties inherent" in prevailing on such claims); *In re Flight Transp. Corp. Sec. Litig.*, 730 F.2d 1128, 1137 (8th Cir. 1984) (affirming final approval

of settlement where "no reported opinion addresses the precise [merits] question presented here," which created "a substantial question whether [plaintiff] would prevail"); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 393 (D.D.C. 2002) ("Any verdict would have led to an appeal and might well have resulted in appeals by both sides and a possible remand for retrial, thereby further delaying final resolution of this case. These factors weigh in favor of the proposed Settlement.") (cleaned up).

29. The fairness, adequacy, and reasonableness of the Settlements are also supported by the Settling Defendants' financial condition and their inability to satisfy a judgment. As discussed above, in order to evaluate the Settling Defendants' financial condition, Plaintiffs reviewed the financial information of each Settling Defendant and its ability to pay. Class Counsel attested that these amounts are reasonable in light of limitations on the Settling Defendants' ability to pay. "[A] defendant is not required to 'empty its coffers' before a settlement can be found adequate." *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 665 (S.D.N.Y. 2015) (quoting *In re Sony SXRD Rear Projection T.V. Class Action Litig.*, No. 06-cv-5173, 2008 WL 1956267, at *8 (S.D.N.Y. May 1, 2008)); *see also Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 125 (8th Cir. 1975) (affirming antitrust settlement and explaining that a "total victory" for plaintiffs after trial "would have been financially disastrous if not fatal" to the defendant, and the final settlement "gave valuable concessions to the [settlement class] yet maintained [the defendant's] corporate viability").

30. As discussed above, the litigation has been, and if it were to proceed forward, will be complex and expensive to prosecute. This is not merely hypothetical. The Court has observed first-hand the complexity and expense of the litigation. Settling Defendants have and would raise

numerous procedural and legal challenges to the case if they were not settling. (*See* Doc. #522, p. 6-12.)

31. Finally, the amount of opposition to the settlement is minimal and supports settlement. The Settlement Class Representatives in this action have approved the Settlements. More than 463,000 Class members have submitted claims, while only a small handful have objected and 46 opted out. Keough Decl. at ¶¶ 51, 55. This supports granting final approval. *See, e.g.*, *Keil v. Lopez*, 862 F.3d 685, 698 (8th Cir. 2017) (determining that with a settlement class of approximately 3.5 million households, and "only fourteen class members submitted timely objections," the "amount of opposition is minuscule when compared with other settlements that we have approved"); *Bishop v. DeLaval Inc.*, No. 5:19-cv-06129-SRB, 2022 WL 18957112, at *1 (W.D. Mo. July 20, 2022) ("A low number of opt-outs and objections in comparison to class size is typically a factor that supports settlement approval") (quoting *In re LinkedIn User Priv. Litig.*, 309 F.R.D. 573, 589 (N.D. Cal. 2015)); *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, No. MDL 1559 4:03-MD-015, 2004 WL 3671053, at *13 (W.D. Mo. Apr. 20, 2004) (of the 4,838,789 settlement class members who were sent notice, only 620 (0.012%) opted out of the settlement and only 33 (0.00068%) objected to the settlement, which "are strong indicators that the Settlement Agreement was viewed as fair by an overwhelming majority of Settlement Class members and weighs heavily in favor of settlement"); *In re Tex. Prison Litig.*, 191 F.R.D. 164, 175 (W.D. Mo. 1999) ("The objectors represent only about 8 per cent of the class, and this relatively low level of opposition to the settlement also indicates its fairness. The Court has an obligation not only to the minority of class members who filed objections, but also to the majority who, by their silence, indicated their approval of the Settlement Agreement.") (citing *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995)); *see also, e.g., Van Horn*, 840 F.2d at 607 ("the amount of

opposition to the settlement" is a key factor to be considered in the settlement approval process); *Marshall*, 787 F.3d at 513 ("We have previously approved class-action settlements even when almost half the class objected to it.").

32. This Court's order granting final approval of the Settlements is also supported by the substantial benefits to the class afforded by the practice changes obtained by the Settlements. Those changes include Settling Defendants, and their subsidiaries and affiliates, making the following practice changes, to the extent they are not already implemented, within six months of the Settlement Effective Date:

i. advise and periodically remind company-owned brokerages, franchisees (if any), and their agents that there is no company requirement that they must make offers to or must accept offers of compensation from cooperating brokers or that, if made, such offers must be blanket, unconditional, or unilateral;

ii. require that any company-owned brokerages and their agents (and recommend and encourage that any franchisees and their agents) disclose to prospective home sellers and buyers and state in conspicuous language that broker commissions are not set by law and are fully negotiable (i) in their listing agreement if it is not a government or MLS-specified form, (ii) in their buyer representation agreement if there is one and it is not a government or MLS-specified form, and (iii) in pre-closing disclosure documents if there are any and they are not government or MLS-specified forms. In the event that the listing agreement, buyer representation agreement, or pre-closing disclosure documents are a government or MLS-specified form, then Settling Defendant will require that any company owned brokerages and their agents (and recommend and encourage that any franchisees and their agents) include a disclosure with conspicuous language expressly stating that broker commissions are not set by law and are fully negotiable;

iii. prohibit all company-owned brokerages and their agents acting as buyer representatives (and recommend and encourage that franchisees and their agents acting as buyer representatives refrain) from advertising or otherwise representing that their services are free;

iv. require that company-owned brokerages and their agents disclose at the earliest moment possible any offer of compensation made in connection with each home marketed to prospective buyers in any format;

v. prohibit company-owned brokerages and their agents (and recommend and encourage that any franchisees and their agents refrain) from utilizing any technology or taking manual actions to filter out or restrict MLS listings that are searchable by and displayed to consumers based on the level of compensation offered to any cooperating broker unless directed to do so by the client (and

eliminate any internal systems or technological processes that may currently facilitate such practices);

vi. advise and periodically remind company-owned brokerages and their agents of their obligation to (and recommend and encourage that any franchisees and their agents) show properties regardless of the existence or amount of cooperative compensation offered provided that each such property meets the buyer's articulated purchasing priorities; and

vii. for each of the above points, for company-owned brokerages, franchisees, and their agents, develop training materials consistent with the above relief and eliminate any contrary training materials currently used.

See Settlement Agreements at ¶ 49.

33. The Court has carefully considered each of the timely filed objections. All objections are overruled. As an initial matter, the Court has already overruled objections that are similar, and in some cases identical, to each of the objections here. *See Burnett*, May 9, 2024 Order Granting Final Approval, (Doc. #1487, p. 13-29.) In any event, the Court finds that none of the objections provides a basis for denying final approval of the Settlements. *See Marshall*, 787 at 513–14 ("The district court refused to give credence to the vocal minority" and "the court aptly noted that "only one-tenth of one percent of the class objected, and less than ten percent of the class ha[d] requested exclusion from the settlement.").

34. The Court ordered "all objectors and their attorneys to appear in person at the October 31, 2024, hearing at 10:30A.M. to argue their objections." (Doc. #510.) This order is not outside the Court's purview. *See Fauley v. Metro. Life Ins. Co.*, 52 N.E.3d 427, 438-39 (Ill. App. Ct. 2016) ("requiring class members to be present in court to object did not violate their due-process rights" when the Court ordered "if you want the Court to consider your objection, then you must also appear at the final approval hearing."); *In re Train Derailment Near Amite La.*, on Oct. 12, 2002, No. CIV.A. MDL 1531, 2006 WL 644494, at *2 (E.D. La. Jan. 27, 2006) ("To preserve the right to be heard at the Fairness Hearing in opposition to the settlement, the objecting Class Member must appear at the federal court in person not later than 8:30 a.m. on the date the

Fairness Hearing is to begin and register with Class Counsel."); *Dennings v. Clearwire Corp*., No. C10-1859JLR, 2013 U.S. Dist. LEXIS 105462, at *8 (W.D. Wash. July 26, 2013) (finding when the Court ordered objectors' counsel's in person appearance, "[i]f Objectors' counsel intends to litigate in the State of Washington, he must be prepared to appear in Washington when ordered to do so by the court.").

35. Objectors may not "essentially insert[] [themselves] into the dispute and then, without explaining why, [they] refuse[] to play by the rules that the district court set." *In re T-Mobile Customer Data Sec. Breach Litig.*, 111 F.4th 849, 858 (8th Cir. 2024). An objector in *T-Mobile* refused to cooperate with counsel's efforts to conduct discovery ordered by the district court, claiming "that by subjecting her to a deposition, the district court 'unduly encumbered' her due-process right to be heard." *Id*. Both the Eighth Circuit and District Court disagreed with her refusal to follow the court's orders and struck her objection. *Id*. Similarly here, after the Court ordered their appearance, many objectors mailed letters protesting the Court's order and requesting excusal based on the cost of travel (*See* Doc. #512-1; Doc. #520), family care requirements (*See* Doc. #524-2, Doc. #523-1), or a death in the family (*See* Doc. #519-1). However, these excuses do not play "the rules that the district court has set." *Id.* Failure to comply with a Court's order can result in an objection being struck or waived. *See Ferron v. Kraft Heinz Foods Co.*, No 20-CV-62136-RAR, 2021 U.S. Dist. LEXIS 129955, at *41 (S.D. Fla. July 13, 2021) (finding when an objector failed to follow the Court order of appearing after providing the Court intent to appear at the final approval hearing, he provided the Court "sufficient grounds alone to strike his Objection."); *In re Crocs, Inc. Sec. Litig.*, 306 F.R.D. 672, 682 (D. Colo. 2014) ("As a threshold matter, National Roofing's objection failed to comply with the Court's order . . . [t]hus, National Roofing's objection is deemed waived[.]") Further, while objectors may "have to spend one

thousand ($1,000.00) dollars for a flight, hotel, and other out of town expenses" if they had to personally travel, this pales in comparison to the $13,147,775.19 in reasonable and necessary expenses exhausted by Plaintiffs' counsel in curating the current settlement for the Class. (Doc. 520-1, p. 2.) After issuing the order, the Court stated on the record at the Final Settlement Hearing important reasons for requiring Objectors' in person appearance. (Doc. #526.) Mr. Zaffarkhan, Mr. Wischer, Mr. Dyer, Ms. Cunningham, Mr. Douglass, Mr. Cheatham, Mr. Fender, Mrs. Fender, Mr. Friedman, Mr. March, and Mr. Mullis did not personally appear at the Final Settlement Hearing. All Objectors who did not appear in person failed to comply with the Court's order. Therefore, all objections filed by the above named Objectors who did not appear in person at the October 31, 2024, Final Settlement Hearing, are waived for failing to comply with the Court's order.

36. Four objections were submitted by individuals acting without counsel. (Doc. #451 (Khyber Zaffarkhan), Doc. #485 (Terry Wischer), Doc. #527 (Mark Dyer), Doc. #528 (Vivienne Cunningham)). These objections cast no doubt on the fairness, adequacy, or reasonableness of the Settlements. They are overruled.

37. Mr. Zaffarkhan represents that he paid commissions across two home sales in 2016 and 2020. Mr. Zaffarkhan's objection does not comply with Rule 23(e)(5)(A), which requires that the "objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection." Nor does Mr. Zaffarkhan provide basic information about the homes he claims to have sold, including whether he hired a listing broker, whether the homes were listed on an MLS, or how any broker fees he paid may have been allocated among those brokers. Additionally, based on the limited information provided, Mr. Zaffarkhan's claimed 2016 home sale appears to fall outside of the settlement class

period. Thus, Mr. Zaffarkhan has not established he has standing to object for at least that sale. *See Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989) ("The plain language of Rule 23(e) clearly contemplates allowing only class members to object to settlement proposals.") (citing *Jenson v. Cont'l Fin. Corp.*, 591 F.2d 477, 482 n.7 (8th Cir. 1979)); *Feder v. Elec. Data Sys. Corp.*, 248 F. App'x 579, 580 (5th Cir. 2007) ("O]nly class members have standing to object to a settlement. Anyone else lacks the requisite proof of injury necessary to establish the 'irreducible minimum' of standing"); 4 Newberg and Rubenstein on Class Actions § 13:22 (6th ed. June 2024 Update) ("Rule 23 confers the right to object upon class members, the Rule itself does not confer standing upon nonclass members" and "Courts regularly find that nonclass members have no standing to object to a proposed settlement[.]"). The burden is on the objector to show standing. *Feder*, 248 F. App'x at 581 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)).

38. Even considering Mr. Zaffarkhan's arguments, none shows that the Settlements should be rejected. *First*, Mr. Zaffarkhan objects that the monetary recovery is inadequate because the *Gibson* settlements (and other proposed and approved settlements in related cases) will not fully compensate him for the entirety of any alleged overcharges he may have paid. It is true that Class members will likely only receive from these settlements a portion of their best-day-in-court damages. But that fact is true for essentially any settlement and is not grounds for declining to approve the particular proposed settlements here. *Keil*, 862 F.3d at 696. As described herein, Plaintiffs sought to obtain the largest recovery they could in light of the risks of the continued litigation, and including each Settling Defendant's ability to pay limitations. Mr. Zaffarkhan's objection does not account for or otherwise address those risks and limitations. Nor does he opine that these particular Settling Defendants could reasonably have paid more. Further, although Mr. Zaffarkhan acknowledges that "the Settlement Fund will continue to grow," (Doc. #451, p. 3 n.1),

his objection does not account for the fact that the proposed Settlements would resolve claims against only one set of defendants and do not release claims against other defendants against whom Plaintiffs continue to seek relief on behalf of the class. *Second*, Mr. Zaffarkhan's objection notes Plaintiffs' requests to recover attorneys' fees, costs and expenses, and service awards. That objection is overruled. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (paying attorneys out of the fund "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense"); *Vogt v. State Farm Life Ins. Co.*, No. 2:16-cv-04170, 2021 WL 247958, at *1 (W.D. Mo. Jan. 25, 2021) ("When a class action creates a common fund for the benefit of the class members, the Court may award class counsel reasonable attorneys' fees 'equal to some fraction of the common fund that the attorneys were successful in gathering during the course of the litigation.'") (quoting *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 244-45 (8th Cir. 1996)). In addition, to the extent Mr. Zaffarkhan disagreed either with the amount of his recovery or the attorneys' fee request, he was free to opt out of the settlements and retain an attorney to pursue claims individually. But he chose not to do so.

39. Terry Wischer objects that sellers could not have been harmed by Defendants' conduct. (Doc. #485.) As an initial matter, Mr. Wischer does not indicate whether he is a class member who sold an eligible home during the class period. *See Gould*, 883 F.2d at 284 ("The plain language of Rule 23(e) clearly contemplates allowing only class members to object to settlement proposals."); *Feder*, 248 F. App'x at 580 ("only class members have standing to object to a settlement. Anyone else lacks the requisite proof of injury necessary to establish the 'irreducible minimum' of standing"); 4 Newberg and Rubenstein on Class Actions § 13:22 (6th ed. June 2024 Update) ("Rule 23 confers the right to object upon class members, the Rule itself

does not confer standing upon nonclass members" and "Courts regularly find that nonclass members have no standing to object to a proposed settlement[.]"). The burden is on the objector to show standing. *Feder*, 248 F. App'x at 581. Nor does Mr. Wischer comply with Rule 23(e)(5)(A), which requires that the "objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection."

40. In any event, Mr. Wischer's objection that sellers could not have been injured is incorrect both legally and factually. Under binding Supreme Court precedent, only direct purchasers are ordinarily eligible to sue for damages, and they may recover the entirety of any overcharge paid without consideration of any amount that may have been passed on to others. *See, e.g.*, *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1997); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968). Consistent with this case law, in similar cases, courts have held that home sellers (and not buyers) are direct purchasers under federal antitrust law, and a jury concluded that those sellers were injured. *See Leeder v. Nat'l Ass'n of Realtors*, 601 F. Supp. 3d 301, 308-11 (N.D. Ill. 2022); *Burnett*, Verdict Form (Doc. #1294 at ECF 2.) Even if he had standing, Mr. Wischer's objection is overruled.

41. Mark Dyer objects that requiring buyers to sign a representation agreement before they have the opportunity to know the broker does not serve the best interest of the public. (Doc. #527.) As an initial matter, Mr. Dyer does not indicate whether he is a class member who sold an eligible home during the class period. *See Gould*, 883 F.2d at 284 ("The plain language of Rule 23(e) clearly contemplates allowing only class members to object to settlement proposals."); *Feder*, 248 F. App'x at 580 ("only class members have standing to object to a settlement. Anyone else lacks the requisite proof of injury necessary to establish the 'irreducible minimum' of

standing"); 4 Newberg and Rubenstein on Class Actions § 13:22 (6th ed. June 2024 Update) ("Rule 23 confers the right to object upon class members, the Rule itself does not confer standing upon nonclass members" and "Courts regularly find that nonclass members have no standing to object to a proposed settlement[.]"). The burden is on the objector to show standing. *Feder*, 248 F. App'x at 581. Nor does Mr. Dyer comply with Rule 23(e)(5)(A), which requires that the "objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection." As such, Mr. Dyer's objection is overruled.

42. Vivienne Cunningham objects that requiring buyers to sign a representation agreement before they have the opportunity to know the broker does not serve the best interest of the public. (Doc. #528.) As an initial matter, Ms. Cunningham does not indicate whether she is a class member who sold an eligible home during the class period. *See Gould*, 883 F.2d at 284 ("The plain language of Rule 23(e) clearly contemplates allowing only class members to object to settlement proposals."); *Feder,* 248 F. App'x at 580 ("only class members have standing to object to a settlement. Anyone else lacks the requisite proof of injury necessary to establish the 'irreducible minimum' of standing"); 4 Newberg and Rubenstein on Class Actions § 13:22 (6th ed. June 2024 Update) ("Rule 23 confers the right to object upon class members, the Rule itself does not confer standing upon nonclass members" and "Courts regularly find that nonclass members have no standing to object to a proposed settlement[.]"). The burden is on the objector to show standing. *Feder*, 248 F. App'x at 581. Nor does Ms. Cunningham comply with Rule 23(e)(5)(A), which requires that the "objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection." As such, Ms. Cunningham's objection is overruled.

43. Four objections were lodged by counsel for plaintiffs in other cases alleging the same or similar claims as those in this case, as well as *Moehrl* and *Burnett*. None of these cases is a certified class. All are at the infancy of the litigation. All were filed after and appear to have been derived from this case, *Moehrl*, and *Burnett*. Each of these objectors could have opted out of the Settlements and pursued their own claims, but instead each chose to object. *See Marshall*, 787 at 520. None of these objections furthers the interest of Class members who will benefit from both the monetary and practice change relief afforded by the Settlements.

44. The South Carolina objectors argue that the aggregate monetary recovery reflected across all of the settlements in this action and the *Burnett* action is too low. But they do not argue that any particular settlement in this action is inadequate. They do not argue what total amount would have been reasonable and adequate, only that they do not like what was obtained. Nor do they seriously assert that the Settlements were the product of collusion or any conflict. The applicable standard is whether the settlements are fair, reasonable, and adequate—not whether they provide complete relief to all Class members. *See Godson v. Eltman, Eltman, & Cooper, P.C.*, 328 F.R.D. 35, 54 (W.D.N.Y. 2018) ("The court's task, then, is simply to decide whether the settlement agreement *as written* is fair, reasonable, and adequate, not whether the parties or the court could conceivably have come up with a 'better' agreement."). "As courts routinely recognize, a settlement is a product of compromise and the fact that a settlement provides only a portion of the potential recovery does not make such settlement unfair, unreasonable or inadequate." *Keil*, 862 F.3d at 696; *see also Pro. Firefighters Ass'n of Omaha, Loc. 385*, 678 F.3d at 649 ("Appellant falls far short of establishing the settlement agreement was unfair or inadequate simply because the retirees did not get as much as they believed they should."); *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984) (approving settlement despite the fact

that "the settlement amount would not begin to cover the total costs of medical treatment for the class which easily could amount to billions of dollars" and holding "[t]he fact that the settlement amount may equal but a fraction of potential recovery does not render the settlement inadequate"), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

45. Nor must a settlement exhaust all of a settling defendant's financial resources in order to be deemed fair, reasonable, and adequate. *See Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 665 (S.D.N.Y. 2015) ("[A] defendant is not required to 'empty its coffers' before a settlement can be found adequate.") (quoting *In re Sony SXRD Rear Projection T.V. Class Action Litig.*, No. 06-cv-5173, 2008 WL 1956267, at *8 (S.D.N.Y. May 1, 2008)); *see also Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir. 1999) ("While it is undisputed that [the settling defendant] could pay more than it is paying in this settlement, this fact, standing alone, does not render the settlement inadequate."); *Grunin*, 513 F.2d at 125 (affirming antitrust settlement and explaining that a "total victory" for plaintiffs after trial "would have been financially disastrous if not fatal" to the defendant, and the final settlement "gave valuable concessions to the [settlement class] yet maintained [the defendant's] corporate viability").

46. In reaching these settlements, Class Counsel, who have extensive antitrust experience and have vigorously litigated similar cases for years, sought to obtain the best possible recovery for the Class. There is no suggestion here, nor could there be, that Class Counsel were uninformed, lacked experience and expertise, or were somehow prevented from negotiating the best deal possible for the Class. To the contrary, Class Counsel negotiated based on their extensive knowledge of the issues, including liability, damages, the risks of continued litigation, and the financial condition of the Settling Defendants. Class Counsel also thoroughly analyzed the finances of each of the Settling Defendants, including the risk that each could file for bankruptcy

protection, which likely would have resulted in lower recoveries, if any, for the Class than were obtained via the Settlements. Berman Decl., ¶ 12.

47. The South Carolina Objectors also purport to object to the scope of the release reflected in the Settlements—but their objection misconstrues what the releases actually say and do. And in any event the court finds the scope of release to be fair, reasonable and adequate. In addition, the South Carolina Objectors refer to "Realtors" being released, but it is unclear whether they intended to object to the release of individual real estate agents or, instead, to "local entities" whose brokers are NAR members. *Id.* Regardless, the South Carolina Objectors have not sued individual real estate agents and do not explain how complex and expensive antitrust suits could proceed against millions of individual real estate agents. Moreover, the release of individual real estate agents was bargained for as part of the settlement agreement. Such releases of employees and agents of defendants are common and appropriate. *See In re Am. Inv'rs Life Ins. Co. Annuity Mktg. & Sales Practices Litig.*, 263 F.R.D. 226, 240 (E.D. Pa. 2009) (overruling objection to release of independent sales agents of insurance company because "the release of agents is a necessary component of the settlement agreement in order to provide finality. Otherwise, dissatisfied policyholders could sue the defendants' agents who would then, in turn, look to the defendants for indemnity or contribution.") (citing *In re Prudential Ins. Co. of Am. Sales Prac. Litig. Agent Actions*, 962 F. Supp. 450, 522-23 (D.N.J. 1997), *aff'd*, 148 F.3d 283 (3d Cir. 1998)); *Shay v. Apple Inc.*, No. 3:20-cv-1629, 2024 WL 1184693, at *8 (S.D. Cal. Mar. 19, 2024) ("The release of non-party retailers is common practice in cases such as this, where the released claims against these non-parties concern an identical injury arising from common facts.") (citing *Hesse v. Sprint Corp.*, 598 F.3d 581, 590-91 (9th Cir. 2010)); *Maine State Ret. System v. Countrywide Fin. Corp.*, No. 10-CV-00302, 2013 WL 6577020, at *7, *17 (C.D. Cal. Dec. 5, 2013) (overruling

objection that argued "non-parties cannot be released for the claims asserted in the Settlement Actions"); *Retta v. Millennium Prods., Inc.*, No. 15-CV-1801, 2017 WL 5479637, at *8 (C.D. Cal. Aug. 22, 2017) (overruling objection that release of third party retailers was inappropriate: "this argument is meritless because the purpose of the settlement is to prevent duplicative litigation of identical claims . . . . Millennium is a manufacturer that sells its products through various retailers, so any claims Ference purports to have against third-party retailers of the Subject Products are going to be based on the same false or misleading labeling allegations asserted here. This objection is overruled."); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 108–09 (2d Cir. 2005) (approving class settlement with broad releases including non-parties, such as member banks, insurance companies and Swiss governmental entities).

48. The same is true with respect to releases of franchisees. *See Flaum v. Doctor's Assocs., Inc.*, No. 16-CV-61198, 2019 WL 2576361, at *3 (S.D. Fla. Mar. 11, 2019) (final approval of settlement releasing all Subway franchisees in suit against Subway franchisor); *Adkins v. Nestle Purina PetCare Co.*, No. 12-CV-2871, 2015 WL 10892070, at *4 (N.D. Ill. June 23, 2015) (final approval of settlement releasing variety of non-parties, including suppliers, manufacturers, retailers, and franchisees); *McCabe v. Six Continents Hotels, Inc.*, No. 12-CV-4818, 2015 WL 3990915, at *3 (N.D. Cal. June 30, 2015) (preliminary approval of settlement releasing franchisees) & ECF No. 167 (Feb. 8, 2016) (ordering final approval of settlement).

49. The South Carolina Objectors also object to the adequacy of the class notices. In doing so, they do not argue that the method for distributing class notice was ineffective. As noted above, the Court finds that the notice given to the Settlement Class constituted the best notice practicable under the circumstances and fully satisfied the requirements of due process, Federal Rule of Civil Procedure 23, and all applicable law. South Carolina objectors argue that the notices

lacked the following information, which they claim was necessary for class members to decide whether to participate in the Settlements: (1) the fact of jury verdict in *Burnett*; (2) an explanation of the size of the class; and (3) information "for class members to evaluate whether there could be better outcomes in their own jurisdictions." (Doc. #464, pp. 5-7.) None of these is a basis for rejecting the Settlements.

50. The Court finds that Class members were provided with the information the South Carolina Objectors advocate for and sufficiently informed class members of their rights. Moreover, "the mechanics of the notice process are left to the discretion of the court subject t only to the broad 'reasonableness' standards imposed by due process." *Grunin*, 513 F.2d at 120 . "As a general rule, the contents of a settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with (the) proceedings." *Id.* at 122 (quotation omitted). "Valid notice of a settlement agreement 'may consist of a very general description' of settlement terms." *In re Uponor, Inc., F1807 Plumbing Fittings Prod. Liab. Litig.*, 716 F.3d 1057, 1065 (8th Cir. 2013) (quoting *Grunin*, 513 F.2d at 122).

51. The Court finds the notice here easily satisfied this standard. Among other things, notice apprised Class members of the nature of the action; the class claims and issues; and the settlement terms. It also advised Class members of their options, including their right to file objections, opt out, and appear at the fairness hearing. And it explained how Class members could obtain additional information including by contacting Class Counsel, contacting the claims administrator, and through the settlement website, which included numerous key case documents, FAQs, and every Settlement Agreement.

52. Courts are unanimous that not every detail of the litigation need be included in settlement notices and have rejected objections seeking the inclusion of every conceivable detail. *See, e.g.*, *Vargas v. Capital One Financial Advisors*, 559 F. App'x. 22, 27 (2d Cir. 2014) (a settlement notice need only apprise class members of the settlement terms and "of the options that are open to them in connection with the proceedings," and, consequently, rejecting objector's arguments that notice was inadequate because it failed affirmatively to advise unsatisfied class members to opt out and failed to calculate the damages sustained by each individual class member); *In re TikTok, Inc., Consumer Privacy Litig.*, 2022 WL 2982782, at *18 n.20 (N.D. Ill. July 28, 2022) ("Rule 23 does not require the settlement notice to contain every last bit of information necessary to file an objection."); *Good v. Am. Water Works Company, Inc.*, 2016 WL 5746347, *9 (S.D. W. Va. Sept. 30, 2016) ("The basic requirements of Rule 23 and due process are intended to ensure that notices fairly and reasonably apprise class members of a pending action affecting their rights and their options with respect to that action, but those requirements should not transform the notice into a long brief of the parties' positions, precise in every detail and slated in such fashion as to please every litigant." (quotation omitted)). Notices do not need to include every detail because "[c]lass members are not expected to rely upon the notices as a complete source of settlement information." *Grunin*, 513 F.2d at 122; *see also UAW v. General Motors Corp.*, 2006 WL 891151, *33 (E.D. Mich. Mar. 31, 2006) ("It is inevitable that some details will be omitted from a notice, but the fact that the notices do not fully explore certain issues is immaterial. Class members are not expected to rely upon the notices as a complete source of settlement information." (cleaned up)). For instance, in *Petrovic*, the Eighth Circuit rejected the "contention that a mailed notice of settlement must contain a formula for calculating individual awards" because "[t]he notice described with sufficient particularity the stakes involved: the

settlement of environmental claims against [the defendant], the award of significant injunctive relief, and the potential aggregate payout of over seven million dollars in compensatory damages." *Petrovic v. Amoco Oil Co.*, 200 F.3d at 1152–53.

53. Moreover, notices that are overly long and complex are counter-productive because they reduce the likelihood that Class members will actually review and understand essential information. *See Kagan v. Wachovia Securities, L.L.C.*, 2012 WL 1109987, at *10 (N.D. Cal. Apr. 2, 2012) ("[The proposed notice] is simply too long. The Court is concerned that few class members will read a fifteen-page, single-spaced Class Notice.").

54. Finally, the Court finds the vast majority of class members from South Carolina favor approval of the Settlements. Although the claims deadline is still months away, over 6,600 South Carolina residents have already submitted claims; and none have objected (aside from the clients of class counsel with competing class litigation). Keough Decl. at ¶ 51. If the Settlements are not approved, these class members risk receiving no compensation for their injuries.

55. The New York Objectors, Friedman and March,[4] argue their cases are "wholly distinct" from the *Gibson* case (Doc. #467, p. 3) and should not be subject to the nationwide releases reflected in the Settlements. They further assert that their claims do not share the same "factual predicate" as the *Gibson* case.

56. First, the basis behind the New York objection is unequivocally rebutted by the plain language of the *Gibson* Complaint. Plaintiffs here plead a nationwide conspiracy on behalf of a nationwide class that expressly challenges rules adopted by the Residential Listing Service ("RLS") of the Real Estate Board of New York ("REBNY"). (*See* Doc. #232), Consolidated Am. Compl., ¶ 182. There is no basis to claim that the *Gibson* case does not share a "factual predicate"

[4] The New York Objectors have stated that they are collectively objecting only to the Compass, Douglas Elliman, @properties, and Engel & Volkers Settlements.

with claims challenging the same RLS rules that are referenced in the *Gibson* complaint. Even so, the Complaint further alleges that anticompetitive restraints, including those promulgated by NAR, apply to brokers nationwide, including to non-NAR MLSs like NWMLS, WPMLS, and REBNY RLS because:

> these MLSs and their participating brokerages are generally subject to the same or similar anticompetitive restraints that apply in MLSs that are under NAR's formal control, including because: (i) all realtor members of non-NAR MLSs are subject to NAR's Code of Ethics; and (ii) each non-NAR MLS has adopted the same or similar anticompetitive restraints as those imposed by NAR on its affiliated MLSs.

Id.

57. The Complaint alleges that, as a result, "Defendants' conspiracy has had the following anticompetitive effects *nationwide*," including in NWMLS, WPMLS, and REBNY RLS: (a) "Home sellers have been forced to pay commissions to buyer-brokers—their adversaries in negotiations to sell their homes— thereby substantially inflating the cost of selling their homes"; (b) "Home sellers have been compelled to set a high buyer-broker commission to induce buyer-brokers to show their homes to home buyers."; (c) "Home sellers have paid inflated buyer-broker commissions and inflated total commissions."; (d) "The retention of a buyer-broker has been severed from the setting of the broker's commission; the home buyer retains the buyer-broker, while the home seller sets the buyer-broker's compensation"; (e) Price competition among brokers to be retained by home buyers has been restrained." *Id*. ¶ 225 (emphasis added); *see also id*. ¶¶ 28, 227 (describing "nationwide" impact).

58. Plaintiffs also allege that any non-NAR MLS are controlled by, "NAR-aligned brokerages and are not fully independent from NAR." *See id*. ¶ 182 (describing in detail NAR's and its members' control over and influence of MLSs not exclusively owned or operated by NAR associations). Plaintiffs also point out that there are more than 17,000 NAR members in the New

York City area alone. *See* https://www.realtor.com/realestateagents/new-york_ny. Thus, the Court rejects the New York Objectors' claim that the Settlement is limited to NAR only MLSs.

59. Second, the New York Objectors' argument that their claims do not share the same "factual predicate" as the *Gibson* case (Doc. #467, p. 2; Doc. #470, p. 3) is contradicted by their own prior judicial admissions. Although the New York Objectors *argue* that their cases are "wholly distinct and unrelated" to this one, they and their counsel filed complaints expressly linking their claims to the rules challenged in *Gibson*, including those adopted by NAR. *See* Class Action Compl. at ¶ 73, *March v. REBNY*, 1:23-cv-09995 (S.D.N.Y. Nov. 13, 2023); *Friedman v. REBNY*, 1:24-cv-0405 (S.D.N.Y. Jan. 18, 2024). As the New York Objectors' own complaints reflect, the challenged NAR and REBNY rules are functionally identical.[5]

60. Third, consistent with Plaintiffs' allegations in *Gibson*, the evidentiary records in *Burnett* and *Moehrl* reflect that: (i) the REBNY RLS rules challenged here were anticompetitive in similar ways to the challenged NAR rules; and (ii) the challenged NAR rules applied nationwide, including to transactions in REBNY RLS. Plaintiffs' experts analyzed rules implemented by non-NAR MLSs, including REBNY/RLS, (8-10-22 Schulman Reply Rept., *Burnett* Doc. #922-3, pp. 23-25) and concluded that Realtors operating in those jurisdictions "remain obligated to compensate the buyer's agent per the NAR Code of Ethics and are thereby incentivized to require sellers to make unilateral offers of compensation to buy-side brokers/agents." *Id.* at ¶ 75. Prof. Einer Elhauge further opined as part of a detailed, multi-page

[5] The New York Objectors also assert that some of the Settling Defendants took positions before the Judicial Panel on Multidistrict Litigation ("JPML") that are inconsistent with the position that the claims in *Gibson*, *March*, and *Friedman* all share the same factual predicate. To the contrary, the JPML proceedings, on balance, support finding that these cases all have the same factual predicate. Moreover, as Settling Defendants explained, their positions before the JPML do not support the New York Objectors' arguments here. Some of Settling Defendants even withdrew the submissions quoted by March and Friedman. (*See* Doc. #522, pp. 20-22.)

analysis of REBNY's rules that "the RLS rules, like the NAR [Buyer Broker Commission Rule (BBCR)], required listings to include an offer of buyer-broker compensation whenever sellers wanted to sell to buyers who were represented by buyer-brokers" and "had several other restraints similar to the NAR version of the BBCR." Elhauge Class Cert. Rebuttal Report, at ¶ 67, *Moehrl v. Nat'l Assn of Realtors* (N.D. Ill. Oct. 18, 2022) (Doc. #372.) The Court is familiar with the REBNY and other non-NAR MLS policies and practices because they were discussed at length in *Burnett*. The Court finds that the challenged REBNY rules share the same common nucleus of operative fact, and thus the same factual predicate, as *Burnett* and *Gibson*, and therefore were not "wholly distinct" from *Burnett* or *Gibson*, as the New York Objectors contend.

61. The slight differences that the New York Objectors contend exist between the relevant NAR and REBNY rules are not material or sufficient to create a distinct factual predicate. Objectors ask the Court to define factual predicate too narrowly, thereby needlessly creating piecemeal litigation arising from the same conduct – a practice courts routinely reject. *See, e.g.*, *In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.*, 716 F.3d 1057, 1065 (8th Cir. 2013) (overruling objection that "settlement contained an overbroad release" since it permissibly released only claims related to the factual subject of the litigation); *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 248 (2d Cir. 2011) (finding that objectors took an "overly narrow view" of factual predicate where claims arose from same underlying facts); *Elna Sefcovic, LLC v. TEP Rocky Mountain, LLC*, 807 F. App'x 752, 765-66 (10th Cir. 2020) (same); *see also In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, 272 F. App'x 9, 13 (2d Cir. 2008) (finding reliance on different documents for misrepresentation claims based on investment losses did not create separate factual predicate where claims were each based on reliance on misleading opinions by defendants). Accordingly, claims involving properties listed on non-NAR

MLSs like NWMLS, WPMLS, and REBNY RLS all share the same factual predicate as those involving properties listed on NAR-affiliated MLS.[6]

62. The New York Objectors assert that the Class Representative "do not have standing" to settle their claims. (Doc. #467, p. 13.) But the Class Representatives allege that they were injured as part of the same alleged anticompetitive conspiracy that impacts sellers of homes on REBNY RLS.

63. The New York Objectors argue that the total settlement amount is inadequate to fully compensate them for their injuries. But as described above, that is not the proper legal standard for assessing adequacy. The New York Objectors further claim that Plaintiffs have not provided evidence of the Settling Defendants' ability to pay limitations. The court disagrees. *See* Berman Decl. at ¶¶ 2, 6-11. In addition, Settling Defendants Douglass Elliman and Compass are publicly traded companies whose financial records are publicly accessible.

64. Although the New York Objectors state that the practice changes reflected in the settlements are a "commendable step in the right direction," they argue those changes could have been stronger and lasted longer. (Doc. #470, p. 15.) But that is true in essentially any settlement that is the product of compromise and is not a basis for rejecting the Settlements here. *See, e.g.*, *In re Colgate-Palmolive Softsoap Antibacterial Hand Soap Mktg. and Sales Practices Litig.*, No. 12-MD-2320, 2015 WL 7282543, at *10 (D.N.H. Nov. 16, 2015) (approving final settlement and overruling objections "that the injunctive remedies go away in five years" and observing the injunctive relief "provides a valuable benefit to the class" and just because the injunction is not as broad as some class members wanted "does not make this settlement inadequate").

[6] To the extent that the New York Objectors rely on Second Circuit case law applying an "identical factual predicate" test, the Court finds that it does not support a different conclusion than Eighth Circuit precedent on the facts presented here. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96 (2d Cir. 2005).

65. The New York Objectors also argue that Class members who sold homes on REBNY have not been given guidance on whether they "will be provided a *pro rata* distribution" or if the higher commissions that some of those Class members paid will be reflected in claim payments. The Court disagrees. The settlement website advises both that: (i) settlements payment "will take into account the amount of commissions class member claimants paid to a real estate broker or agent"; and (ii) "[t]o the extent the value of total claims exceeds the amount available for distribution from the settlement funds, each class member's share of the settlement may be reduced on a pro rata basis." Settlement FAQ 11.

66. Objector Friedman asserts, with no basis whatsoever, that the Settlements' inclusion of sellers who listed homes on REBNY "appears to be the product of a so-called 'collusive settlement.'" (Doc. #467, p. 14.) As discussed above at length, Class Counsel diligently sought to obtain the largest possible recovery on behalf of the nationwide class they were appointed to represent, given the strength and risks of the litigation, including the Settling Defendants' financial limitations. The New York Objectors fail to point to any evidence suggesting otherwise, beyond the mere fact that overlapping claims in a different lawsuit are within the scope of the release. That is not a basis for rejecting the Settlements.

67. The Court finds the vast majority of Class members from New York favor approval of the Settlements. Although the claims deadline is still months away, over 13,000 New York residents have already submitted claims; and none have objected (aside from the clients of counsel with competing class litigation). Keough Decl. at ¶ 51. If the Settlements are not approved, many of these Class members risk receiving no compensation for their injuries.

68. The *Batton* objectors seek to carve out indirect purchaser buyer claims from the releases. But every class member sold a home during the class period, and most also bought

homes. After all, few people sell a home without first buying it. And most home sellers then buy a different home with the proceeds because they need somewhere to live. Thus, most Class members had possible claims both as home sellers and home buyers. Yet Settling Defendants quite reasonably balked at paying large amounts in settlement only to have the same people they just paid sue them again for the same alleged antitrust conspiracy.

69. The parties solved this problem by crafting the releases to incorporate the Eighth Circuit's "same factual predicate" standard, and to otherwise comply with federal law. This standard recognizes that basic fairness stops a party from suing twice for the same wrong. When cases go to final judgment, res judicata bars relitigating not only the claims tried, but also claims that "could have been raised" in that action. *Brown v. Kansas City Live, LLC*, 931 F.3d 712, 714 (8th Cir. 2019). The same holds true in class actions litigated to conclusion. *In re General Am. Life Ins. Co. Sales Practices Litig.*, 357 F.3d 800, 803 (8th Cir. 2004). And for class judgments that arise from settlement, courts have developed a parallel test that gives preclusive effect to all claims – even those not pleaded – that "arise out of the same factual predicate as the pleaded claims." *In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.*, 716 F.3d 1057, 1065 (8th Cir. 2013). The same rules apply because "'the situation is analogous to the barring of claims [under res judicata] that could have been asserted in the class action.'" *Thompson v. Edward D. Jones & Co.*, 992 F.2d 187, 191 (8th Cir. 1993) (quoting *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982)).

70. Each settlement incorporates the *Uponor* standard by limiting the term "Released Claims" to include only causes of action "arising from or relating to conduct that was alleged or could have been alleged in the Actions based on any or all of the same factual predicates for the claims alleged in the Actions . . . ." Settlement Agreements at ¶ 11. In addition, "[f]or avoidance

of doubt" as to enforceability, the releases "extend[] to, but only to, the fullest extent permitted by law." Settlement Agreements at ¶ 28. By using these legal terms of art, the parties correctly restricted the releases' scope. The Class members would have been bound by res judicata if the case had proceeded to final judgment, and the releases impose no greater preclusive effect from settlement. Every Class member was free to weigh their competing claims and make a choice. They could have opted out and would be free to pursue buyer claims either individually or in the *Batton* cases[7] (should a court ever certify those classes). And people with buyer-only claims are completely unaffected because they are not part of the class.

71. The *Batton* objectors argue that the settlements release indirect purchaser buyer claims "for no additional consideration." (Doc. #471, p. 8.) Having properly limited the scope of the releases based on the "same factual predicate" standard, however, the Court finds the parties were under no further obligation to assign separate settlement values to every distinct claim that class members might have asserted. As the Eighth Circuit recognized in *In re General American Life Insurance Co. Sales Practices Litigation*, 357 F.3d 800, 805 (8th Cir. 2004), that argument ignores "the way settlements usually work."

72. Like the objectors here, the *General American* plaintiff tried to void a class settlement release by complaining that "the class representative gave away all modal-billing claims (in the release) and received nothing in exchange for them." *Id*. Thus, the argument went, class members (including the plaintiff) received compensation for one type of claim, but "plaintiff and others similarly situated received nothing for their modal-billing claims." *Id*. But the Eighth

[7] References to the *Batton* cases include each of the following actions: (1) *Batton et al. v. The National Association of Realtors, et al.*, No. 21-cv-00430 (N.D. Ill), (2) *Batton et al. v. Compass, Inc. et al.*, No. 23-cv-15618 (N.D. Ill.), and (3) *Lutz et al. v. Homeservices of America, Inc. et al.*, No. 24-cv-10040 (S.D. Fl.).

Circuit rejected this contention because it ignored the give-and-take nature of the settlement process:

> It simply is not true that modal-billing claims were given away for nothing. It is true that no separately stated consideration was paid for those claims, but that is quite another thing. In addition to the claims specifically pleaded in the class action, all claims related to policy charges, necessarily including modal-billing claims, were released. The release of the latter category of claims was one of a series of benefits conferred on the defendant by the class as part of the settlement. On the other side, defendant conferred benefits on the plaintiff class, including a monetary settlement, from which the plaintiff in this case has benefitted, and a claims-evaluation procedure that could produce additional relief. No part of the consideration on either side is keyed to any specific part of the consideration of the other. Each side gives up a number of things.

Id.; *accord Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 113 (2d Cir. 2005) (quoting same). The Eighth Circuit further declined to enmesh itself in trying to determine "the relative value of the modal-billing clams," and instead deferred to the judgment of the class representative and class counsel that releasing all claims arising from the same factual predicate "was a proper thing to give up to obtain the benefits offered by General American." *In re General Am.*, 357 F.3d at 805.

73. Plaintiffs here bargained for and obtained great benefits: money at the limits of Defendants' ability to pay, along with injunctive relief eliminating the challenged business practices. This relief is immediate, eliminating litigation and bankruptcy risk threatened by complex additional proceedings. But every negotiation has two sides, and Plaintiffs made the judgment that providing a release tracking federal law by releasing all claims arising from the same conspiracy was "a proper thing to give up to obtain the[se] benefits." *Id.* There was no "discount applied" to buyer claims because "[n]o part of the consideration on either side" was "keyed to any specific part of the consideration of the other." *Id.* Rather, a complete release – including indirect purchaser buyer claims – was "part of the consideration necessary to obtain [one of] the largest

antitrust settlement[s] in history." *Wal-Mart Stores*, 396 F.3d at 113. Nor were any class members bound by this determination involuntarily; dissenters retained the right to opt out. The *Batton* objectors have offered no evidence to enable the Court to second-guess Plaintiffs' determination, and the Court declines to do so.

74. The *Batton* objectors also argue that indirect purchaser buyers require their own subclass. Yet "[a] class need not be subdivided merely because different groups within it have alternative legal theories for recovery or because they have different factual bases for seeking relief." 7AA C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1760 (3d ed. June 2024 update). Rather, conflicts arise (and subclasses are required) only "when the class is found to have members whose interests are divergent or antagonistic." *Id.*; *see also DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995) ("There is no indication that DeBoer's interest was antagonistic to the remainder of the class or that the claims were not vigorously pursued."). *Cf. Petrovic*, 200 F.3d at 1146 ("If the objectors mean to maintain that a conflict of interest requiring subdivision is created when some class members receive more than other class members in a settlement, we think that argument is untenable. It seems to us that almost every settlement will involve different awards for various class members."). No such division of interest is presented here.

75. The only people included in the settlement – and thus the only people giving any release – are people who sold homes during the class period.[8] Their interests are common and focused on achieving the greatest relief for the class. *See In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 208 (5th Cir. 1981) ("[S]o long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests

[8] People who only bought homes during the class period are not class members. They have released nothing and can continue to litigate indirect purchaser claims should they so desire.

are not antagonistic for representation purposes."). That many of these class members also bought homes during the class period does not make their interests divergent or antagonistic.

76. The Supreme Court's decisions in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), provide no support for objectors' argument. As the Eighth Circuit has recognized, *Amchem* and *Ortiz* were completely different product liability cases that involved stark conflicts of interest not present here. *Petrovic*, 200 F.3d at 1146. Both cases represented attempts to settle all asbestos cases, now and forever. *Id.* The "injuries involved in those cases were extraordinarily various, both in terms of the harm sustained and the duration endured." *Id.* Worse yet, the diseases had a latency period of up to 40 years, meaning that many class members currently suffered from no illness. *In re Target Corp. Customer Data Sec. Breach Litig.*, 892 F.3d 968, 975 (8th Cir. 2018) (discussing *Amchem*). The Eighth Circuit stated that this latency period created an inherent conflict "between class members who already had asbestos-related injuries (and who would want to maximize immediate payout) and class members who might develop asbestos-related injuries in the future (and who would want to maximize testing, protection from inflation, and future fund size)." *Petrovic*, 200 F.3d at 1146. Adding to the problem, "the settlement offered no assurance that sufficient funds would remain to protect the interests" of future claimants. *In re Target Corp.*, 892 F.3d at 975 (discussing *Amchem*). In other words, both *Amchem* and *Ortiz* involved a strong likelihood that some claimants would be paid, but others (numbering in the hundreds of thousands) would receive nothing. That concern is not present here, where every Class member sold a home and therefore will receive compensation.

77. The *Batton* objectors imply that *Amchem* and *Ortiz* require subclasses whenever Class members claim different amounts or types of damage. But *Petrovic* forecloses that

argument. *Petrovic* was a class action arising from underground oil seepage originating from a petroleum refinery. In crafting settlement relief, the parties created three zones, labeled A, B, and C. Claimants in Zone A, situated above the underground oil, were "guaranteed to receive 54 percent of the value of their properties." *Petrovic*, 200 F.3d at 1145. Claimants in the surrounding Zone B were guaranteed $1,300 per property. *Id*. And claimants in Zone C, the area farthest removed from the oil, could apply for compensation only by proving damage. *Id*. Faced with objectors from different zones, the Eighth Circuit held that *Amchem* and *Ortiz* required no subclasses: "If the objectors mean to maintain that a conflict of interest requiring subdivision is created when some class members receive more than other class members in a settlement, we think that the argument is untenable." *Id*. at 1146. Indeed, "almost every settlement will involve different awards for various class members." *Id*.

78. The same is true here. Every Class member stands to gain from the settlements, both in terms of money and injunctive relief. Each Class member could try to prove individual damages at trial and these amounts would all vary. But courts approve class settlements all the time that forgo these individual determinations. Indeed, the most common method for allocating settlement funds in antitrust cases is on a *pro rata* basis. *In re Namenda Direct Purchaser Antitrust Litig.*, 462 F. Supp. 3d 307, 316 (S.D.N.Y. 2020) ("courts uniformly approve as equitable" plans in antitrust cases that "allocate[] funds among class members on a *pro rata* basis."); *see also Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 531 (E.D. Mich. 2003) (approving *pro rata* distribution of settlement fund as fair and reasonable).

79. *Amchem* and *Ortiz* also presented procedural settlement problems not presented here. As the Eighth Circuit recognized, each involved a settlement before litigation, presenting the district court with a complaint, proposed class, and proposed settlement all at the same time.

Petrovic, 200 F.3d at 1145-46. This deprived the trial courts of "'the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold.'" *Id*. at 1146 (quoting *Amchem*, 521 U.S. at 620). This case, by contrast, arises from facts extensively developed during the *Burnett* litigation and trial, giving the Court an extensive record on which to base its findings. *Id*. In addition, *Amchem* and *Ortiz* presented the possibility of collusion between class counsel and the defendants. *Id*. No objector meaningfully alleges here any facts reflecting such collusion in connection with these settlements. The difficulties associated with *Amchem* and *Ortiz* therefore are not present.[9]

80. The *Batton* objectors also fail to demonstrate that the class representatives or counsel provided inadequate representation. The mere fact that some Class members might allege indirect purchaser buyer claims presents no divergent interests that would preclude general representation of an undivided class. This is because "[t]he interests of the various plaintiffs do not have to be identical to the interests of every class member; it is enough that they 'share common objectives and legal or factual positions.'" *Petrovic*, 200 F.3d at 1148 (quoting 7A Wright, Miller, and Kane, *Federal Practice and Procedure: Civil* 2d § 1769 at 367 (2d ed. 1986)). All Class members here "share the common objective" of ending Defendants' anticompetitive conspiracy and recovering the excessive commissions they paid as a result of that

[9] The *Batton* objectors' other cases are similarly distinguishable. *See In re Bank of America Securities Litig.*, 210 F.R.D. 694, 712 (E.D. Mo. 2002) (finding settlement unreasonable where it allocated no damages to set of claims that plaintiffs had previously pursued and represented as among the strongest in the case); *Branson v. Pulaski Bank*, No. 4:12-CV-01444-DGK, 2015 WL 139759, at *6-7 (W.D. Mo. Jan. 12, 2015) (rejecting settlement where there was no evidence of the merits of plaintiffs' claims and settlement appeared to stem from unequal bargaining power); *Martin v. Cargill, Inc.*, 295 F.R.D. 380, 385-87 (D. Minn. 2013) (rejecting proposed settlement submitted the day after complaint was filed when the court had no information about the potential damages or relative strengths and weaknesses of claims). The rest are cases where there were intractable conflicts between subclasses of class members holding present, known claims and those holding claims for potentially future, unknown injuries.

conspiracy. *In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.*, 716 F.3d 1057, 1064 (8th Cir. 2013).

81. The *Batton* objectors brush aside the valuable injunctive relief obtained by the settlements. But the financial payments to Class members are "not the only, or perhaps even the primary, benefit of the settlement agreement[s]." *Marshall*, 787 F.3d at 509. Rather, "the injunctive relief offered under the settlement[s] has value to all class members." *In re Target Corp.*, 892 F.3d at 974 n.6; *accord Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 329 (3d Cir. 2011) (en banc) (argument that some class members "receive no money" fails because it "fails to acknowledge the injunctive relief offered by the settlement," which "is intended to benefit all class members regardless of individual monetary recovery.").

82. The *Batton* objectors also ignore the fact that the only people included in the settlements are people who sold homes during the class period. People who only bought homes are not Class members. Such "buyer only" individuals have released nothing and can litigate indirect purchaser buyer claims any way they desire, whether individually or in the *Batton* cases. Those cases will continue to be litigated. The sole limitation imposed is that people who accept settlement benefits here cannot turn around and pursue a second recovery for the same conduct. This is not a case where anyone is releasing claims without compensation. Instead, all Class members "share the common objective of maximizing their recovery from [Defendants] for the same alleged misconduct." *Schutter v. Tarena Int'l, Inc.*, No. 21-CV-3502, 2024 WL 4118465, at *5 (E.D.N.Y. Sept. 9, 2024).

83. For these reasons, Objectors' reliance on *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242 (2d Cir. 2011), is not persuasive. *Literary Works* involved a settlement that placed claims in groups A, B, and C (each group arising under a different provision

of the Copyright Act). *Literary Works*, 654 F.3d at 246. If claims exceeded a set cap, then Category C claims would be reduced first and might be eliminated entirely. *Id*. The Second Circuit therefore found a lack of adequate representation because Category A and B claims were "more lucrative" than Category C and "because the reduction of Category C claims could 'deplete the recovery of Category C-only plaintiffs in their entirety before the Category A or B recovery would be affected.'" *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1277 (11th Cir. 2021) (quoting *Literary Works*, 654 F.3d at 252, 254). The settlement agreements here, by contrast, present "no risk that any members of the class will have their ability to get settlement benefits reduced to zero because some other members got more relief from the settlement." *Id.* Instead, "all class members are entitled to the same class benefits." *Id*. Again, the fact that many Class members both bought and sold a home presents no "fundamental conflict" that requires the use of subclasses or additional lawyers.

84. The *Batton* objectors also complain that "the settling parties have not made any plan of allocation available." (Doc. #471, p. 5.) But this argument is premature and should be raised in the allocation phase. "[C]ourt approval of a settlement as fair, reasonable and adequate is conceptually distinct from the approval of a proposed plan of allocation." 2 McLaughlin on Class Actions § 6:23 (20th ed. Oct. 2023 Update). "The prime function of the district court in holding a hearing on the fairness of the settlement is to determine that the amount paid is commensurate with the value of the case," which "can be done before a distribution scheme has been adopted so long as the distribution scheme does not affect the obligations of the defendants under the settlement agreement." *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 170 (2d.

Cir. 1987).[10] Once the allocation plan is proposed, the Court will be in a position to consider that plan and approve "a second notice to Class Members, followed by a right to object and/or file a claim." *In re Domestic Airline Travel Antitrust Litig.*, 378 F. Supp. 3d 10, 22 (D.D.C. 2019). That distribution decision will be "governed by the same standards of review applicable to approval of the settlement as a whole, *i.e.*, the distribution plan must be fair, reasonable and adequate." *In re Namenda Direct Purchaser Antitrust Litig.*, 462 F. Supp. 3d 307, 316 (S.D.N.Y. 2020). Any Class members who disagree with the proposed allocations—e.g., because they believe that plan insufficiently compensates home purchases—will be able to present such argument to the Court at that time. Nor do any Class members need allocation information in deciding whether to opt out of the settlements. The Eighth Circuit rejects the notion that class members must be provided "a formula for calculating individual awards" when receiving notice – a description of the "potential aggregate payout" is enough. *Petrovic*, 200 F.3d at 1153.

85. Finally, the Court disagrees with the *Batton* objectors' argument that buyer claims lie outside the same factual predicate as seller claims. In fact, releases in antitrust direct-purchaser settlements commonly cover all claims the settlement class members could raise against the settling defendant arising out of the same conspiracy, including when those direct purchasers may also have indirect-purchaser claims. *See, e.g., In re Transpacific Passenger Air Transportation*

[10] *See also In re Washington Pub. Power Supply Sys. Sec. Litig.*, MDL No. 551, 1988 WL 158947, at *4 (W.D. Wash. July 28, 1988) ("[D]eferral of allocation decisions is routinely followed in" these circumstances because "the appropriate allocation among class members can best be determined when further settlements have been achieved or the litigation is completely resolved."); *In re Domestic Airline Travel Antitrust Litig.*, 378 F. Supp. 3d 10, 22 (D.D.C. 2019) ("In a case such as this, involving a large number of Class Members and two Non-Settling Defendants, it would be inefficient to distribute and process claims until the entire case has been resolved through litigation or otherwise and the Total Funds Available for Distribution are known."); *In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2011 WL 717519, at *2 (E.D. Mich. Feb. 22, 2011) (developing plan of allocation is properly delayed until after final approval of settlement where "the potential for additional settlements with other Defendants . . . may affect the final plan of allocation"); *Manual for Complex Litigation, Fourth* § 21.312 (2005) ("Often . . . the details of allocation and distribution are not established until after the settlement is approved.").

Antitrust Litigation (N.D. Cal, 07-cv-5634), ECF No. 900-2 § 1.11 (releasing "any and all claims . . . on account of, arising from, or in any way related to, the pricing of passenger air transportation by JAL or Defendants . . . with respect to the facts, occurrences, transactions or other matters that were alleged or could have been alleged [in the action] . . . regardless of legal theory, and regardless of the type or amount of relief or damages claimed"); *In re: Processed Egg Products Antitrust Litigation* (E.D.P.A., MDL 2002), ECF No. 349-1 ¶ 25 (similar); *In re Intuniv Antitrust Litigation* (D. Mass., 16-cv-12653), ECF No. 480-1 ¶ 10 (similar); *In re: Prograf Antitrust Litigation* (D. Mass. 1:11-md-2242), ECF No. 652-2 ¶ 10(a) (similar); *In re Pre-Filled Propane Tank Antitrust Litigation* (W.D. Mo. 14-md-2567 / MDL No. 2567), ECF No. 362-1 ¶ 12 (similar); *In re HIV Antitrust Litigation* (N.D. Cal, 19-cv-02573), ECF No. 711-2 at 11-12 (similar); *In re Broiler Chicken Antitrust Litigation* (N.D. Ill. 16-cv-8637), ECF No. 3324, ¶ 26 (similar). Courts have approved these settlements even over objections that the settlement improperly released or otherwise devalued a subset of claims. *See In re Transpacific Passenger Air Transportation Antitrust Litig.*, 701 F. App'x 554, 555-56 (9th Cir. 2017) ("The district court properly certified the settlement class and was not obligated to create subclasses for purchasers of U.S.-originating travel and direct purchasers of airfare. Federal Rule of Civil Procedure 23(a) does not require a district court to weigh the prospective value of each class member's claims or conduct a claim-by-claim review when certifying a settlement class."); *In re HIV Antitrust Litig.*, No. 19-CV-02573-EMC, 2023 WL 7397567, at *1 (N.D. Cal. Nov. 8, 2023) (rejecting indirect purchasers' request to set aside portion of direct-purchaser settlement).

86. Comparing the complaints in the *Batton* cases with Plaintiffs' complaint here shows that the buyer claims arise from the same factual predicate as the seller claims. *See also Batton I,* Mar. 5, 2021 Plaintiffs' Initial Joint Status Report, No. 21-cv-00430, at Doc. #48 ("In filing this

case, Plaintiff took the position that this case is related to Moehrl v. NAR et al."); *Id.* at Doc. #59 – Transcript of Proceedings held on Mar. 23, 2021 (reflecting Mullis's counsel's representation that *Moehrl* "raises substantially similar allegations"). All such claims arise from the same common nucleus of operative fact, and any class member with both seller and buyer claims would "ordinarily be expected to try them all in one judicial proceeding." *North Dakota v. Lange*, 900 F.3d 565, 568-69 (8th Cir. 2018). The Court therefore rejects the *Batton* objectors' attempt to force claim splitting between the seller and buyer claims. The seller and buyer claims share the same factual predicate.

87. Finally, the Court finds that Mr. Mullis appears to be a Nevada resident. Over 7,200 Nevada residents have already submitted claims; and none have objected (aside from the clients of class counsel with competing class litigation). Keough Decl. at ¶ 51. If the Settlements are not approved, these class members risk receiving no compensation for their injuries.

88. The Court finds the requirements of Rule 23(g) of the Federal Rules of Civil Procedure are met, and the Court reaffirms the appointment of the law firms of Ketchmark and McCreight P.C., Williams Dirks Dameron LLC, Boulware Law LLC, Hagens Berman Sobol Shapiro LLP, Cohen, Milstein, Sellers & Toll, PLLC, and Susman Godfrey LLP as Co-Lead Counsel for the Settlement Class ("Class Counsel").

89. The 46 persons and entities identified in the Parties paperwork (*see* Exhibit L to Keough Decl.) have timely and validly requested exclusion from the Settlement Class and are therefore excluded from the Settlement Class and are not bound by this Order, and may not make any claim upon or receive any benefit from the Settlements, whether monetary or otherwise. Nothing in this order should be construed as a determination by this Court that the excluded persons and entities are members of the Settlement Class or that they meet other prerequisites,

such as standing, for bringing claims alleged in the Actions. Each Settlement Class member who is not listed in Exhibit L to the Keough Declaration is bound by this Order and will remain forever bound, including by releasing all Released Claims of Releasing Parties against Released Parties. The Court specifically approves these releases as set forth in the Settlement Agreements.

90. Members of the Settlement Class, unless they excluded themselves from the Settlement Class, are hereby enjoined from filing, commencing, prosecuting, intervening in, or pursuing as a plaintiff or class member any Released Claims against any of the Released Parties, which include Settling Defendants' franchisees and affiliated brokerages, and agents affiliated with those franchisees or affiliated brokerages. *See* 28 U.S.C. § 1651; *Bank of Am., N.A. v. UMB Fin. Servs., Inc.*, 618 F.3d 906, 914 (8th Cir. 2010) (noting that "the district court has the inherent ability to protect its own jurisdiction over the dispute pending before it"); *Janson v. LegalZoom.com, Inc.*, 2012 WL 13047852, at *2 (W.D. Mo. Apr. 30, 2012) ("In order to protect the continuing jurisdiction of the Court, prevent a multiplicity of lawsuits, and protect and effectuate the Court's Judgment in this Litigation, Plaintiffs and Class Members . . . are barred and enjoined from instituting, commencing, or continuing to prosecute . . . any action in this Court, any other state or federal court, or any other tribunal or forum of any kind, against any Released Party that asserts any claims that are Released Claims under the terms of the Settlement[.]") (granting final approval); *accord Almanzar v. Home Depot U.S.A., Inc.*, 2024 WL 36175, at *13 (E.D. Cal. Jan. 3, 2024); *Smith v. Floor & Decor Outlets of Am., Inc.*, 2017 WL 11495273, at *6 (N.D. Ga. Jan. 10, 2017); *In re Ortho. Bone Screw Prods. Liab. Litig.*, 176 F.R.D. 158, 188 (E.D. Pa. 1997). Released Claims include claims that arise from or relate to conduct that was alleged or could have been alleged in the Actions based on any or all of the same factual predicates for the claims alleged in the Actions, including but not limited to commissions negotiated, offered,

obtained, or paid to brokerages in connection with the sale of any residential home. For the avoidance of doubt, this injunction extends to claims arising from or relating to transactions where Settlement Class Members either sold or purchased a home on any multiple listing service nationwide, regardless of affiliation or association with NAR or not, and thus includes, *e.g.*, NWMLS, WPMLS, and REBNY/RLS. This injunction does not extend to any individual claims that a plaintiff or class member may have against his or her own broker or agent based on breach of contract, breach of fiduciary duty, malpractice, negligence or other tort claim, other than a claim that a class member paid an excessive commission or home price due to the claims at issue in the Actions.

91. This Order does not settle or compromise any claims by Class Representatives or the Settlement Class against entities or persons other than Released Parties, and all rights against any other person or entity are specifically reserved.

92. Settling Defendants shall issue payment in accordance with the Settlement Agreement.

93. Plaintiff's request for service awards for Class Representatives is hereby approved. The Court finds these individuals not only put their names on the line to advance the litigation, but that they have provided invaluable work on behalf of the Class through participating in discovery and the settlement process. Courts routinely approve service awards to compensate class representatives for the services they provide and the risks they incur on behalf of the class. The factors for deciding whether the service awards are warranted are: "(1) actions the plaintiffs took to protect the class's interests, (2) the degree to which the class has benefited from those actions, and (3) the amount of time and effort the plaintiffs expended in pursuing litigation." *Caligiuri*, 855 F.3d at 867. Here, Plaintiffs seek a service award of $10,000 per Settlement Class Representative.

The Settlement Class Representatives performed important work on the case, including time-consuming gathering of facts and documents and assisting Class Counsel with the specifics of their transactions. That work materially advanced the litigation and protected the Settlement Class's interests. *Id.* Indeed, without their time and effort, these Settlements would have been impossible. Finally, the requested service awards are consistent with other awards approved in the Eighth Circuit. *Tussey*, 850 F.3d 951, 961–62 (8th Cir. 2017) (approving $25,000 service awards); *Rogowski*, 2023 WL 5125113, at *6 (approving $25,000 service awards for named plaintiffs); *Wolfert v. UnitedHealth Group, Inc.*, No. 08-CV-01643 (E.D. Mo. Aug. 21, 2009), ECF No. 38 at 4–5 (approving a service award of $30,000). Accordingly, Plaintiffs' request falls within a fair range of service awards—especially given the landmark nature of this litigation. The Court will therefore approve the requested service awards for each Settlement Class Representative.

94. Class Counsel has adequately represented the Class. Their application for an award of attorneys' fees and reimbursement of costs as set forth in the Motion for Attorneys' Fees and Costs (Doc. #399) is hereby approved and shall be paid in accordance with the Settlement Agreements.

95. Courts in the Eighth Circuit typically use the "percentage-of-the-fund method" to award attorneys' fees from a common fund. *See, e.g., Rawa v. Monsanto Co.*, 934 F.3d 862, 870(8th Cir. 2019). "In the Eighth Circuit, use of a percentage method of awarding attorney fees in a common-fund case is not only approved, but also 'well established,'" *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 991 (D. Minn. 2005) (quoting *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999)), or even "preferable,'" *Barfield v. Sho-Me Power Elec. Co-op.*, No. 11-CV-4321, 2015 WL 3460346, at *3 (W.D. Mo. June 1, 2015) (quoting *West v. PSS World Med., Inc.*, No. 13-CV-574, 2014 WL 1648741, at *1 (E.D. Mo. Apr. 24,

2014)). The percentage method aligns the interests of the attorneys and the class members by incentivizing counsel to maximize the class's recovery. *See Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 245 (8th Cir. 1996) ("[T]he Task Force [established by the Third Circuit] recommended that the percentage of the benefit method be employed in common fund situations.") (citing *Court Awarded Attorneys Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 255 (3rd Cir. 1985))). The Court will therefore use the percentage approach to award fees in this case. This Court and others within the Eighth Circuit confirm that one-third of the common fund is an appropriate amount for class counsels' fees in complex class actions, including antitrust litigation. Eighth Circuit and Missouri courts "have frequently awarded attorney fees between twenty-five and thirty-six percent of a common fund in other class actions." *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017) (quoting *In re Xcel*, 364 F. Supp. 2d at 998); *see also Rawa*, 934 F.3d at 870 ("courts have frequently awarded attorneys' fees ranging up to 36% in class actions") (quoting *Huyer*, 849 F.3d at 399); *Yarrington v. Solvay Pharm., Inc.*, 697 F. Supp. 2d 1057, 1064 (D. Minn. 2010) (holding fee award of 33% reasonable); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir.2002) (affirming fee award representing 36% of the settlement fund as reasonable)); *In re Xcel*, 364 F.Supp.2d at 998 (collecting cases demonstrating that district courts routinely approve fee awards between 25% and 36%). Just recently, this District approved one-third of the fund in a settlement valued at $325 million. *See Rogowski v. State Farm Life Ins. Co.*, No. 22-CV-203, 2023 WL 5125113, *4-5 (W.D. Mo. April 18, 2023). Thus, judges in the Western District of Missouri and the Eighth Circuit routinely apply the one-third-of-the-fund fee calculation, even to large settlements.

96. In doing so, courts typically consider some or all of the relevant factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974). *See In re Target*

Corp. Customer Data Security Breach Litig., 892 F.3d 968, 977 (8th Cir. 2018). The *Johnson* factors are:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

In re Target, 892 F.3d at 977 n.7. To be sure, "[m]any of the *Johnson* factors are related to one another and lend themselves to being analyzed in tandem." *Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d 848, 886 (S.D. Iowa 2020). Therefore, courts in the Eighth Circuit often focus on the most relevant *Johnson* factors in evaluating fee requests. *See Huyer*, 849 F.3d at 398–400 (affirming trial court's award of one-third of the common fund after review of Johnson factors 1-5 only); *In re Xcel*, 364 F. Supp. 2d at 993; *Tussey v. ABB, Inc.*, No. 06-CV-4305, 2019 WL 3859763, at *2 (W.D. Mo. Aug. 16, 2019); *Yarrington*, 697 F. Supp. 2d at 1062; *Hardman v. Bd. of Educ. of Dollarway, Arkansas Sch. Dist.*, 714 F.2d 823, 825 (8th Cir. 1983). The Court has considered the *Johnson* factors here, and finds that each weighs in favor of Plaintiffs' fee request. *See also* Klonoff Fee Dec. at ¶¶ 24, 34, 39.

97. Here, Class Counsel's time and labor invested was substantial and necessarily precluded other work. In addition to the over 105,000 hours they have dedicated to the litigation through July 31, 2024, Class Counsel were also required to expend over $13 million of their own money toward the combined litigation. That work was undertaken without any guarantee of payment. Moreover, the litigation faced low odds of early settlements given the attack on practices that were central to the real estate brokerage industry. *See, e.g., How the $1.8 Billion Real-Estate Commissions Lawsuit Came to Be*, Wall Street Journal, November 26, 2023

("Antitrust cases almost always settle before trial, giving attorneys some assurance they will get paid something. But in this case, the damages were so high and the threat to the industry so existential that plaintiff attorneys thought it unlikely NAR would settle."). Indeed, NAR took the position that the cases were "baseless." *See, e.g., Realtor Group Moves to Dismiss Class Action Lawsuit Alleging Collusion,* Forbes, May 21, 2019 ("According to John Smaby, president of NAR, all three claims have no merit. 'In today's complex real estate environment, REALTORS and Multiple Listing Services promote a pro-consumer, pro-competitive market for home buyers and sellers, contrary to the baseless claims of these class action attorneys,' he said. 'Our filing today shows the lawsuit is wrong on the facts, wrong on the economics and wrong on the law.'"). In sum, "the extraordinary level of work and result achieved here in the face of enormous risk warrants a substantial fee percentage." Klonoff Fee Decl. at ¶ 88.

98. "Courts have recognized that the risk of receiving little or no recovery is a major factor in awarding attorney fees." *Yarrington,* 697 F. Supp. 2d at 1062 (quoting *In re Xcel,* 364 F. Supp. 2d at 994); Theodore Eisenberg & Geoffrey Miller, *Attorney Fees In Class Action Settlements: An Empirical Study*, 1 J. Emp. L. Studies 27, 27, 38 (2004) ("Fees are also correlated with risk: the presence of high risk is associated with a higher fee, while low-risk cases generate lower fees . . . . [This] is widely accepted in the literature.")). "Unless that risk is compensated with a commensurate award, no firm, no matter how large or well-financed, will have the incentive to consider pursuing a case such as this." *Tussey*, 2019 WL 3859763, at *3. "Courts agree that a larger fee is appropriate in contingent matters where payment depends on the attorney's success." *Been v. O.K. Industries, Inc.*, No. 02-CV-285, 2011 WL 4478766, at *9 (E.D. Okla. Aug. 16, 2011). And critically, "[t]he risks plaintiffs' counsel faced must be assessed as they existed in the

morning of the action, not in light of the settlement ultimately achieved at the end of the day." *In re Xcel*, 364 F. Supp. 2d at 994.

99. Because antitrust claims are especially complex, expensive, and difficult to prosecute, courts have recognized that antitrust settlements should result in attorneys' fees equal to one-third of the fund. *See In re Peanut Farmers Antitrust Litig.*, No. 19-CV-00463, 2021 WL 9494033, at *6 (E.D. Va. Aug. 10, 2021) ("[A]n award of one-third is also common in antitrust class actions.") (citing cases); *In re Urethane Antitrust Litig.*, No. 04-CV-1616, 2016 WL 4060156, at *5 (D. Kan. July 29, 2016) (awarding one-third of $835 million settlement, noting "a one-third fee is customary"); *In re Flonase Antitrust Litig*., 291 F.R.D. 93, 100, 106 (E.D. Pa. 2013) (awarding one-third of the settlement fund as attorneys' fees in which court relied upon the fact that class counsel had litigated a number of hotly contested *Daubert* challenges). *See also* Klonoff Fee Decl. at ¶¶ 41.

100. Here it is undeniable that the antitrust claims at issue in these cases were challenging to prosecute.

101. Courts often judge class counsel's skill against the "quality and vigor of opposing counsel . . . ." *In re Charter Commc'ns, Inc.*, MDL No. 1506 All Cases, No. 02-CV-1186, 2005 WL 4045741, at *29 (E.D. Mo. June 30, 2005) (citing *In re IBP, Inc. Sec. Litig.*, 328 F. Supp. 2d 1056, 1064 (D.S.D. 2004)). In the litigation, Class Counsel faced off against no fewer than thirty highly-respected law firms over the course of the litigation. Although Class Counsel's team included some of the country's most accomplished class action and trial lawyers, Defendants also hired some of the country's most prominent and respected defense attorneys. This weighs heavily in favor of the requested award.

102. In the Eighth Circuit, courts have "frequently awarded attorneys' fees ranging up to 36% in class actions." *Huyer*, 849 F.3d at 399. Courts have recognized that prosecution of antitrust claims should result in a one-third-of-the-fund fee award. *See In re Peanut Farmers,* 2021 WL 9494033, at *6 ("[A]n award of one-third is also common in antitrust class actions.") (citing cases); *In re Urethane*, 2016 WL 4060156, at *5 (awarding one-third of $835 million antitrust settlement, noting "a one-third fee is customary").

103. Moreover, the requested one-third fee award is equal to or less than what the actual Named Plaintiffs—those with the most on the line and most involved in the case—agreed to at the outset of the case. Class representatives in *Burnett* agreed to 35%. Dirks Fee Decl. at ¶29. Class representative in *Moehrl* agreed to up to 33.3%. Berman Fee Dec. at ¶ 6. These factors also support Plaintiffs' request. Klonoff Fee Decl. at ¶¶ 60-61, 77-78.

104. Here, the Fund is pure cash and non-reversionary; so, the Settlements, plus interest earned until its distribution, require no further valuation. In requesting a fee as a percentage of the Fund, Class Counsel necessarily seeks a fee proportionate to the degree of monetary success obtained.

105. Equally important, the Settlements include significant practice change relief which require the Settling Defendants, among other things, to not enforce the Mandatory Offer of Compensation Rule and to train their agents that commissions are negotiable. Counsel is not seeking any additional fee for this valuable relief on these Settlements, but the value of that relief is substantial in itself and should be considered when evaluating the fee that is sought. *See* Klonoff Fee Fee Dec. at ¶¶ 96-98.

106. Here, the request is supported by both the size of the recovery and the results obtained as compared to the risk of a lesser recovery or none at all. Moreover, the Settlements

represent only a part of the recovery to the Class because Class Counsel have continued to prosecute these joint and several liability claims against other Defendants. Thus, any past and future settlements or judgments will also benefit the Class. This factor supports a contingency percentage of one-third, particularly given the benefits achieved. Importantly, success—including "exceptional success"—is not measured solely by the maximum damages alleged but must be evaluated against any "unusually difficult or risky circumstances and the size of plaintiffs' recovery." *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1204–05 (S.D. Fla. 2006).

107. Although a lodestar crosscheck is "not required" in the Eighth Circuit, *Keil v. Lopez*, 862 F.3d 685, 701 (8th Cir. 2017); *PHT Holdings II, LLC v. N. Am. Co. Life & Health Ins.*, 2023 WL 8522980, at *7 (S.D. Iowa Nov. 30, 2023)[11]—performing such a crosscheck here confirms that the requested fee is reasonable and should be approved. As noted above, Class Counsel have spent over 105,000 hours through July 31, 2024 in *Gibson*, *Umpa*, *Burnett*, and *Moehrl*. These hours result in an overall lodestar through July 31, 2024 of $90,853,364. Dirks Fee Decl. at ¶ 43. Combined with the fee already awarded in *Burnett*, the current fee request constitutes an approximately 1.17 multiplier on lodestar which is well within the range of reasonableness. *See* Klonoff Fee Dec. at ¶¶ 29, 122; *Rawa*, 934 F.3d at 870 (observing a lodestar multiplier of 5.3 is within the bounds of reasonableness); *Huyer v. Buckley*, 849 F.3d 395, 399–400 (8th Cir. 2017) (observing lodestar multipliers of up to 5.6 times class counsel's lodestar to be in the reasonable range for a lodestar crosscheck); *In re T-Mobile Customer Data Security Breach Litigation*, No. 23-2744, 2024 WL 3561874, at *6 (8th Cir. July 29, 2024) (observing that in a case

[11] "'[T]o overly emphasize the amount of hours spent on a contingency fee case would penalize counsel for obtaining an early settlement and would distort the value of the attorneys' services.'" *Rawa*, 934 F.3d at 870 (quoting *In re Charter Commc'ns*, 2005 WL 4045741, at *18). *Cf. In re T-Mobile Customer Data Security Breach Lit.*, No. 23-2744, 2024 WL 3561874, at *7 (8th Cir. July 29, 2024 (observing a crosscheck is not required but can be warranted "when a megafund case settles quickly")).

that settled early in the litigation, a multiplier of 5.3 is on the "high" side of reasonableness) (citing *Rawa*, 934 F.3d at 870)); *In re Charter Commc'ns, Inc., Sec. Litig.*, No. 4:02-cv-1186-CAS, 2005 WL 4045741, at *18 (E.D. Mo. Jun. 30, 2005) (finding 5.61 lodestar multiplier reasonable); *In re Syngenta AG MIR 162 Corn Litig.*, 2019 WL 1274813, at *5 (D. Kan. Mar. 20, 2019) ("a multiplier of 3 is well within the range allowed in other cases involving large settlements").

108. Additionally, upon review the Court finds that Plaintiffs' request of fees of one-third of the fund is reasonable in light of the Eighth Circuit precedent in *In re T-Mobile Customer Data Security Breach Litigation*. Unlike the parties in *T-Mobile*, who following "a few days of mediation, and less than a month after class counsel had filed the complaint," agreed to the basic terms of a settlement, here Plaintiffs have spent more than five years, $13,147,775.19 in reasonable and necessary expenses, and 105,000 hours working on the *Gibson*, *Moehrl*, and *Burnett* cases. *In re T-Mobile Customer Data Sec. Breach Litig.*, 111 F.4th at 855; Dirks Fee Decl. at ¶ 9. Additionally, Plaintiffs' counsel dealt with over thirty different firms representing multiple Settling Defendants. The current settlement was only reached after significant arms-length and adversarial negotiations with each Settling Defendant. While "recovery in a particular case [may] stem[] more from class size than attorney effort and so might merit a lower fee award," given the immense time and effort by Plaintiffs' counsel with multiple Settling Defendants and their respective counsels, Plaintiffs' request of fees of one-third of the fund is reasonable. *Id*. at 860.

109. The Court also grants Plaintiffs' request for their costs. The expenses submitted were reasonable expenses in such a large and complex litigation.

110. The Settlement Administrator shall be paid in accordance with the Settlement Agreement.

111. The Court authorizes payments to be made from the Escrow Accounts under the Settlement Agreements as qualified settlement funds ("QSF") as defined in Section 1.468B-1(a) of the U.S. Treasury Regulations and retains continuing jurisdiction as to any issue that may arise in connection with the formation or administration of the QSFs. Co-Lead Counsel are, in accordance with the Settlement Agreements, authorized to withdraw up to the amounts allowed by the Settlement Agreements out of the Escrow Accounts.

112. Co-Lead Counsel are directed to prepare and submit for Court approval a plan of allocation for the Settlement Fund, and to propose a schedule for comment and Court review. The proposed plan of allocation must be posted to https://www.realestatecommissionlitigation.com and emailed to all individuals who submit a claim in order to provide those individuals an opportunity to comment on the plan. After the plan of allocation is proposed and an opportunity to comment has been provided, the Court will evaluate the proposed plan and any objections thereto. The Court's review of the plan of allocation will be conducted separately from this final review of the Settlements. The Court believes that this additional layer of protection to the Class bolsters the Court's finding that the Settlement treats class members equitably.

113. Pursuant to Federal Rule of Civil Procedure 54(b), this Court directs entry of final judgment of dismissal with prejudice and without costs (except as provided in the Settlements) as to the defendants covered by the Settlements. This case contains claims against multiple parties, and there is no just reason to delay the entry of final judgment as to these Settling Defendants, especially considering the practice change relief and money to be paid to the class should not be delayed.

114. Settling Defendants have denied any liability, fault, or wrongdoing of any kind in connection with the allegations in the Actions, and as such, neither the Settlements, nor any of

their respective terms or provisions, nor any of the negotiations or proceedings connected with the Settlements shall be construed as an admission or concession of the truth of any of the allegations, or of any liability, fault, or wrongdoing of any kind by Settling Defendants.

115. The Court expressly retains continuing and exclusive jurisdiction over all matters relating to the administration and consummation of the Settlements and to interpret, implement, administer and enforce the Settlements (including with respect to the scope of the Settlement Class, Released Claims, and Released Parties), in accordance with their terms, and to implement and complete the claims administration process, in accordance with the Settlements, for the benefit of the Settlement Class. The Court does this for the purpose of satisfying the requirements of *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994), concerning the obligation of a Court entering a settlement agreement to speak clearly when it wishes to retain jurisdiction.

IT IS SO ORDERED.

/s/ Stephen R. Bough
STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE

Dated: November 4, 2024

TAB 35B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

DON GIBSON, LAUREN CRISS, JOHN MEINERS, and DANIEL UMPA, on behalf of themselves and all others similarly situated, Plaintiffs, v. NATIONAL ASSOCIATION OF REALTORS, et al., Defendants.	Civil Action No. 4:23-cv-00788-SRB [Consolidated with 4:23-cv-00945-SRB]

PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS, EXPENSES AND SERVICE AWARDS AND SUGGESTIONS IN SUPPORT THEREOF

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INTRODUCTION

After years of hard-fought litigation in multiple lawsuits, Plaintiffs have achieved proposed nationwide settlements now totaling at least $987.1 million in monetary relief, in addition to significant practice change relief. These include settlements with the Anywhere, RE/MAX, and Keller Williams defendants that this Court finally approved in *Burnett*,[1] settlements with NAR and the Homeservices defendants that this Court preliminarily approved in *Burnett*,[2] and settlements with nine defendant families that this Court preliminarily approved in *Gibson*.

Through this motion, Plaintiffs seek as attorneys' fees one-third of the $110.6 million recovered under the nine Settlements preliminarily approved in *Gibson*, recovery of certain case expenses, and approval of service awards to the named plaintiffs and settlement class representatives. *See* Docs. 163, 297, 348. Plaintiffs' final approval motion for these nine Settlements will be heard on October 31, 2024. Doc. 358. As with the other settlements that Plaintiffs have obtained, the $110.6 million fund created by these nine settlements is non-reversionary. To achieve this result, Class Counsel worked for more than five years to file and prosecute multiple lawsuits pending in different jurisdictions: *Moehrl*, *Burnett*, *Umpa*, and *Gibson* ("the litigation"). Class Counsel faced substantial risk representing the Settlement Class. They worked on a fully contingent basis, investing over 105,000 hours of labor through July 31, 2024 and advancing over $13 million in out-of-pocket costs without any guarantee of success. They did so despite this litigation having no pre-ordained path to a recovery. Indeed, Class Counsel faced off against well-funded and entrenched opponents represented by *at least thirty* of the most high-profile defense firms in the country.

[1] *See Burnett* Doc. 1487.
[2] *See Burnett* Doc. 1460; 1520.

Class Counsel are a diverse group of well-respected antitrust, complex litigation, and trial lawyers who spearheaded the litigation. In doing so, Class Counsel were not able to rely on any governmental prosecutions or on preexisting litigation by other private attorneys. These Settlements are the independent product of their wholly contingent, risky, costly, and time-intensive work seeking a recovery against Defendants, not the work of anyone else.

This Circuit's precedent applied to the facts here support Class Counsel's requests for attorneys' fees representing one-third of the settlement fund and for reimbursement of case expenses. In the Eighth Circuit, a fee based on a percentage of the fund recovered is the favored approach for calculating attorney's fees in contingent representation, including class actions. The percentage-of-the-fund approach aligns Class Counsel's interests with those of the class because the greater the recovery Class Counsel obtains, the greater the fee to which Class Counsel is entitled. It incentivizes counsel to continue pursuing additional claims beneficial to the class even where, as here, counsel have already obtained substantial recoveries for the class. And it also avoids disincentivizing early settlements that may be benefit the class.

For these reasons, Class Counsel respectfully request that the Court approve a fee of one-third of the Settlement Fund, reimbursement of current expenses in the amount of $13,147,775.19 that have not already been reimbursed in prior settlements, and service awards of $10,000 to each of the new *Gibson* Settlement Class Representatives.

FACTUAL BACKGROUND

A background of the litigation and Settlements is well-known to the Court and can be found in Plaintiffs' motions for preliminary settlement approval (*Burnett* Doc. 1192 at ECF 8-19; ECF 1371; *Gibson* Docs. 161, 294, 303). The Settlements are non-reversionary meaning the entire amount is for the benefit of the class and upon approval no amount will revert to the Settling Defendants regardless of the claims' submitted. Moreover, the Settlements include substantial

practice change relief aimed at ending the Defendants' support for the challenged restraints, including their enforcement of the Mandatory Offer of Compensation Rule. To achieve these results for the Class, Class Counsel performed more than 105,000 hours of work through July 31, 2024 across of all four of their litigations and invested over $13 million of their own money. Counsel continues to work on behalf of the Class even after these settlements.

I. CLASS COUNSEL PERFORMED EXTRAORDINARY WORK AND ASSUMED SIGNIFICANT RISK ON A CONTINGENT BASIS ON BEHALF OF THE SETTLEMENT CLASS TO OBTAIN THE SETTLEMENTS.

Plaintiffs allege that the National Association of Realtors and other entities who agreed to engage in anticompetitive conduct inflating broker commissions, including by following and enforcing NAR's Mandatory Offer of Compensation Rule and associated restraints promulgated by NAR and its members. Many of these Defendants fought the litigation at every conceivable step.[3] To date, Defendants in *Gibson*, *Umpa*, *Moehrl* and *Burnett* have been represented by at least thirty defense firms – including many of the most highly-regarded firms in the world. Dirks Dec. at ¶ 13. These firms have extensively litigated the cases, filing jurisdictional challenges, motions to compel arbitration, motions to dismiss, *Daubert* motions, challenges to class certification, summary judgment motions, several appeals, and—in the case of Keller Williams, NAR and HomeServices—even a jury trial. *Id.* at ¶¶ 14, 20.

Moreover, in undertaking this substantial commitment on behalf of the Settlement Class, Class Counsel assumed significant risk. There was no roadmap of previous cases or settlements, and no assistance from governmental entities or regulators through parallel litigation. *Id.* at ¶ 17.

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[3] *See generally* Declaration of Eric L. Dirks ("Dirks Decl.") for an overview of the procedural history and efforts to reach the Settlements. Attached as Ex. 1. Also attached are the declarations of Michael S. Ketchmark (Ex. 2), Brandon J.B. Boulware (Ex. 3), Steve W. Berman (Ex. 4), Marc M. Seltzer (Ex. 5), Robert A. Braun (Ex. 6).These declarations cover many of the same topics set out in the Dirks Decl. as well as each firm's individual lodestar and expense amounts.

Despite the odds, Class Counsel achieved tremendous success. They obtained favorable rulings on key issues including on class certification, summary judgment, and *Daubert*. *Id.* at ¶¶ 14, 20. However, these successes required years of briefing, reviewing a universe of millions of pages of documents, retention of at least 20 experts and consultants, and approximately 180 depositions to achieve this result. *Id.* at ¶ 15-16. Reflecting these efforts, *Burnett*, *Moehrl*, *Umpa*, and *Gibson* have over 2,400 docket entries as of the date of this filing.

Moreover, Plaintiffs' Counsel did not stop with their trial victory in *Burnett*. They worked to maximize the recovery for the Class by filing the *Gibson* and *Umpa* complaints against additional Defendants. The *Moehrl* and *Burnett* actions originally included claims against five defendant families on behalf of home sellers who listed their properties on 24 covered MLSs. The *Gibson* case, by named Plaintiffs Don Gibson, Lauren Criss, John Meiners, and Daniel Umpa, advances similar claims against additional Defendants on behalf of a nationwide class of home sellers.[4] The six law firms appointed Co-Lead Class Counsel in *Moehrl* and *Burnett* also represent Plaintiffs and the putative class in the consolidated *Gibson* action. The Court appointed them as Interim Co-Lead Class Counsel in this case, with responsibility "for any settlement negotiations with Defendants." (Doc. 180). The Court also appointed these six firms as Co-Lead Counsel for the Settlement Classes in this case. *See* Doc. 163, 297, 348.

With their successful track record, Class Counsel bring substantial knowledge and expertise to the prosecution of the *Gibson* action. Plaintiffs and their counsel have worked diligently to advance the litigation in *Gibson*. Prior to filing these actions, class counsel undertook

[4] The cases were originally filed as two related actions, *Gibson, et al. v. NAR, et al.*, Case No. 4:23-CV-788-SRB ("*Gibson*") on October 31, 2023, and *Umpa v. NAR, et al.*, Case No. 4:23-CV-945-SRB ("*Umpa*") on December 27, 2023. On April 23, 2024, the Court granted Plaintiffs' motion to consolidate the *Gibson* and *Umpa* matters and to file a consolidated class action complaint under the *Gibson* caption. *Gibson* Docs. 145–146; *Umpa* Docs. 245–246.

significant research into the Settling Defendants, their participation in NAR, their enforcement of the Mandatory Offer of Compensation Rule, and their market share and presence. Counsel reviewed publicly available information, including SEC filings, company websites, third party websites, YouTube videos, and other sources in order to investigate the connection between these companies and the practices found to be antitrust violations in *Burnett*. (Dirks Decl. ¶ 9). Plaintiffs and Class Counsel then filed detailed complaints against the *Gibson* Defendants and have diligently prosecuted the case. Class Counsel have worked cooperatively, including moving to consolidate the *Gibson* and *Umpa* complaints for purposes of efficiency. Class Counsel also handled various early steps in the case, including negotiating a scheduling order, preparing ESI and protective orders, and serving and responding to discovery; and they are in the process of responding to numerous motions to dismiss.

ARGUMENT

I. THE REQUESTED ATTORNEY'S FEES ARE REASONABLE UNDER THE FACTS AND CIRCUMSTANCES PRESENTED HERE.

Under well-established Eighth Circuit law, a fee equal to one-third of the Settlement Fund should be approved.

A. Contingent Fees Are Awarded Using the Percentage-of-the-Fund Approach.

Courts typically use the "percentage-of-the-fund method" to award attorneys' fees from a common fund. *See, e.g.*, *Rawa v. Monsanto Co.*, 934 F.3d 862, 870 (8th Cir. 2019). "In the Eighth Circuit, use of a percentage method of awarding attorney fees in a common-fund case is not only approved, but also 'well established,'" *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 991 (D. Minn. 2005) (quoting *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999)), or even "preferable,'" *Barfield v. Sho-Me Power Elec. Co-op.*, No. 11-CV-4321, 2015 WL 3460346, at *3 (W.D. Mo. June 1, 2015) (quoting *West v. PSS World Med., Inc.*,

No. 13-CV-574, 2014 WL 1648741, at *1 (E.D. Mo. Apr. 24, 2014)). The percentage method aligns the interests of the attorneys and the class members by incentivizing counsel to maximize the class's recovery. *See Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 245 (8th Cir. 1996) ("[T]he Task Force [established by the Third Circuit] recommended that the percentage of the benefit method be employed in common fund situations.") (citing *Court Awarded Attorneys Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 255 (3rd Cir. 1985)).[5] The Court should therefore use the percentage approach to award fees in this case.

B. A Fee Equal to One-Third of the Fund is Reasonable.

This Court and other courts within the Eighth Circuit confirm that one-third of the common fund is an appropriate amount for class counsels' fees in complex class actions, including antitrust litigation. Eighth Circuit and Missouri courts "have frequently awarded attorney fees between twenty-five and thirty-six percent of a common fund in other class actions." *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017) (quoting *In re Xcel*, 364 F. Supp. 2d at 998); *see also Rawa*, 934 F.3d at 870 ("courts have frequently awarded attorneys' fees ranging up to 36% in class actions") (quoting *Huyer*, 849 F.3d at 399); *Yarrington v. Solvay Pharm., Inc.*, 697 F. Supp. 2d 1057, 1064 (D. Minn. 2010) (holding fee award of 33% reasonable); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (affirming fee award representing 36% of the settlement fund as reasonable)); *In re Xcel*, 364 F.Supp.2d at 998 (collecting cases demonstrating that district courts routinely approve fee awards between 25% and 36%).

Just recently, this District approved one-third of the fund in a settlement valued at $325 million. *See Rogowski v. State Farm Life Ins. Co.*, No. 22-CV-203, 2023 WL 5125113, *4-5 (W.D.

[5] In contrast, undue focus on hours or hourly rates "creates an unanticipated disincentive to early settlements, tempts lawyers to run up their hours, and compels district courts to engage in a gimlet-eyed review of line-item fee audits." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (cleaned up).

Mo. April 18, 2023). Thus, judges in the Western District of Missouri and the Eighth Circuit often apply the one-third-of-the-fund fee calculation, even to large settlements.

In doing so, courts typically consider some or all of the relevant factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974). *See In re Target Corp. Customer Data Security Breach Litig.*, 892 F.3d 968, 977 (8th Cir. 2018). The *Johnson* factors are:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

In re Target, 892 F.3d at 977 n.7. To be sure, "[m]any of the *Johnson* factors are related to one another and lend themselves to being analyzed in tandem." *Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d 848, 886 (S.D. Iowa 2020). Therefore, courts in the Eighth Circuit often focus on the most relevant *Johnson* factors in evaluating fee requests. *See Huyer*, 849 F.3d at 398–400 (affirming trial court's award of one-third of the common fund after review of Johnson factors 1-5 only); *In re Xcel*, 364 F. Supp. 2d at 993; *Tussey v. ABB, Inc.*, No. 06-CV-4305, 2019 WL 3859763, at *2 (W.D. Mo. Aug. 16, 2019); *Yarrington*, 697 F. Supp. 2d at 1062; *Hardman v. Bd. of Educ. of Dollarway, Arkansas Sch. Dist.*, 714 F.2d 823, 825 (8th Cir. 1983). The *Johnson* factors favor Plaintiffs request here. *See, e.g.,* Declaration of Professor Robert H. Klonoff ("Klonoff Decl."), Exhibit 7 at ¶¶ 24, 34, 39.

1. Class Counsel worked on a contingent basis, despite the numerous risks and time commitments. (Factors 1, 4, 6-7 and 10)

Here, Class Counsel's time and labor invested was substantial and necessarily precluded other work. Dirks Decl. at ¶¶ 17-18. Prosecuting the Litigation required over $90,000,000 in lodestar through July 31, 2024. Dirks Decl. at ¶ 43. In addition to the substantial number of hours

it took to reach the Settlements, Class Counsel were also required to expend $13,147,775.19 of their own money toward the litigation through July 31, 2024, with more bills coming due every day. Dirks Decl. at ¶ 48. All that work, which precluded other less-risky employment, was the result of Class Counsels' efforts undertaken without any guarantee of payment. Moreover, the litigation faced low odds of early settlements because they challenged practices that were central to the real estate brokerage industry. *See, e.g., How the $1.8 Billion Real-Estate Commissions Lawsuit Came to Be*, Wall Street Journal, November 26, 2023 ("Antitrust cases almost always settle before trial, giving attorneys some assurance they will get paid something. But in this case, the damages were so high and the threat to the industry so existential that plaintiff attorneys thought it unlikely NAR would settle."). Indeed, from the outset, NAR took the position that the cases were "baseless." *See, e.g., Realtor Group Moves to Dismiss Class Action Lawsuit Alleging Collusion,* Forbes, May 21, 2019 ("According to John Smaby, president of NAR, all three claims have no merit. 'In today's complex real estate environment, REALTORS and Multiple Listing Services promote a pro-consumer, pro-competitive market for home buyers and sellers, contrary to the baseless claims of these class action attorneys,' he said. 'Our filing today shows the lawsuit is wrong on the facts, wrong on the economics and wrong on the law.'").

"Courts have recognized that the risk of receiving little or no recovery is a major factor in awarding attorney fees." *Yarrington*, 697 F. Supp. 2d at 1062 (quoting *In re Xcel*, 364 F. Supp. 2d at 994); Theodore Eisenberg & Geoffrey Miller, *Attorney Fees In Class Action Settlements: An Empirical Study*, 1 J. Emp. L. Studies 27, 27, 38 (2004) ("Fees are also correlated with risk: the presence of high risk is associated with a higher fee, while low-risk cases generate lower fees . . . . [This] is widely accepted in the literature."). "Unless that risk is compensated with a commensurate award, no firm, no matter how large or well-financed, will have the incentive to consider pursuing

a case such as this." *Tussey*, 2019 WL 3859763, at *3. "Courts agree that a larger fee is appropriate in contingent matters where payment depends on the attorney's success." *Been v. O.K. Industries, Inc.*, No. 02-CV-285, 2011 WL 4478766, at *9 (E.D. Okla. Aug. 16, 2011). And critically, "[t]he risks plaintiffs' counsel faced must be assessed as they existed in the morning of the action, not in light of the settlement ultimately achieved at the end of the day." *In re Xcel,* 364 F. Supp. 2d at 994.

This was the riskiest litigation at least some of Class Counsel have ever prosecuted, due both to the possibility of no recovery and the investment of time and money required to pursue the litigation and reach settlements or other judgment against entrenched defendants. Dirks Decl. at ¶ 22; *generally* Exhibits 1-6; *see also Caligiuri v. Symantec Corp.*, 855 F.3d 860, 866 (8th Cir. 2017) (affirming fee award where lower court reasoned, in part, that "[p]laintiffs' counsel, in taking this case on a contingent fee basis, was exposed to significant risk"); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 17-md-2800, 2020 WL 256132, at *33 (N.D. Ga. Mar. 17, 2020) ("This action was prosecuted on a contingent basis and thus a larger fee is justified."). And that risk continued to grow throughout the years of litigation through trial, with every hour of work and every dollar of expenses compounding the risk to Class Counsels' investment. Dirks Decl. at ¶ 22. The riskiness of the cases is also confirmed by dearth of similar cases filed by other attorneys until after the *Burnett* trial verdict and the decision by attorneys in the few cases that were filed to "slow-track" them (avoiding a significant investment) pending the outcome of the Class Counsel's Litigation. In sum, "the extraordinary level of work and result achieved here in the face of enormous risk warrants a substantial fee percentage." Klonoff Decl. at ¶ 88.

2. The claims were difficult to prosecute. (Factor 2)

Because antitrust claims are especially complex, expensive, and difficult to prosecute, courts have recognized that antitrust settlements attorneys' fees equal to one-third of the fund are

often appropriate in antitrust suits. *See In re Peanut Farmers Antitrust Litig.*, No. 19-CV-00463, 2021 WL 9494033, at *6 (E.D. Va. Aug. 10, 2021) ("[A]n award of one-third is also common in antitrust class actions.") (citing cases);[6] *In re Urethane Antitrust Litig.*, No. 04-CV-1616, 2016 WL 4060156, at *5 (D. Kan. July 29, 2016) (awarding one-third of $835 million settlement, noting "a one-third fee is customary"); *In re Flonase Antitrust Litig*., 291 F.R.D. 93, 100, 106 (E.D. Pa. 2013) (awarding one-third of the settlement fund as attorneys' fees in which court relied upon the fact that class counsel had litigated a number of hotly contested *Daubert* challenges). *See also* Klonoff Decl. at ¶¶ 41.

Here it is undeniable that the antitrust claims at issue in the litigation were challenging to prosecute. As the Court saw, no stone has been left unturned by numerous Defendants and challenges have been made at every stage (*i.e.* motions to dismiss, motions for summary judgment, *Daubert* motions, class certification, efforts to appeal from class certification orders, appeals on arbitration issues, and trial). *See* Dirks Decl. at ¶¶ 14, 20. The case also required extensive discovery, including well over 100 depositions, the production and review of millions of pages of documents, and dozens of expert reports.

3. Class Counsel's reputation and skillful resolution of the Litigation supports the award. (Factors 3 and 9)

Courts often judge class counsel's skill against the "quality and vigor of opposing counsel . . . ." *In re Charter Commc'ns, Inc.*, MDL No. 1506 All Cases, No. 02-CV-1186, 2005 WL 4045741, at *29 (E.D. Mo. June 30, 2005) (citing *In re IBP, Inc. Sec. Litig.*, 328 F. Supp. 2d 1056, 1064 (D.S.D. 2004)).

[6] And observing that "[o]ther courts have determined that a higher percentage rate is appropriate where discovery has been completed and the case is ready for trial." *Id.*

Here, Class Counsel faced off against no fewer than *thirty* highly-respected law firms over the course of the litigation. Dirks Decl. at ¶ 13. Although Class Counsel's team includes some of the country's most accomplished class action and trial lawyers, Defendants also hired some of the country's most prominent defense attorneys and firms. This weighs heavily in favor of the requested award. *See* Klonoff Decl. at ¶¶ 56-58.

Class Counsel in their own right are well-known on both a national level and local level. *See generally* Exhibits 1-6. Indeed, trial counsel for the *Burnett* case was named as the most recent Missouri Lawyer of the Year. *See Ketchmark named Lawyer of the Year*, Missouri Lawyers Weekly, December 7, 2023. And Class Counsel for the *Moehrl* case have been repeatedly recognized for their skill and expertise in antitrust litigation. *See, e.g.*, Berman Dec. at ¶ 2; Seltzer Dec. at ¶ 3; Braun Dec. at ¶ 2.

4. The percentage requested is supported by other awards under the facts and circumstances of this Litigation. (Factors 5 and 12)

In the Eighth Circuit, courts have "frequently awarded attorneys' fees ranging up to 36% in class actions." *Huyer*, 849 F.3d at 399.[7] Courts have recognized that prosecution of antitrust claims should result in a one-third-of-the-fund fee award. *See In re Peanut Farmers*, 2021 WL 9494033, at *6 ("[A]n award of one-third is also common in antitrust class actions.") (citing cases); *In re Urethane*, 2016 WL 4060156, at *5 (awarding one-third of $835 million antitrust settlement, noting "a one-third fee is customary").

Moreover, the requested one-third fee award is equal to or less than what the actual named plaintiffs—those with the most on the line and most involved in the case—agreed to at the outset

[7] *See also supra* pp. 6-7.

of the case. The class representatives agreed to maximum fees between 33.3% and 35%. Dirks Decl. at ¶ 29; Berman Dec. at ¶ 6.

These factors also support Plaintiffs' request. Klonoff Decl. at ¶¶ 60-61, 77-78.

5. The amount involved and results obtained for the Settlement Class given the risks of the Litigation support the percentage requested. (Factor 8)

Here, the Fund is pure cash and non-reversionary; so, the Settlements, plus interest earned until distribution, requires no further valuation. In requesting a fee as a percentage of the Fund, Class Counsel necessarily seeks a fee proportionate to the degree of monetary success obtained.

Equally important, the Settlements include significant injunctive relief which requires the Settling Defendants, among other things, to not enforce the Mandatory Offer of Compensation Rule and to train their agents that commissions are negotiable. *See also National Association of Realtors Verdict Will Send "Shock Waves" Through the Industry,* The Wall Street Journal, November 1, 2023 ("There is no question that Tuesday's nearly $1.8 billion verdict against the National Association of Realtors and brokerage firms is going to send shock waves through the industry. Commissions have stayed pretty stable at about 5% to 6% of the sales price for decades now, despite major technological upheaval in the industry. We may finally start to see those costs for home buyers and sellers go down quite a bit."); *Examining Some of the Big Changes Coming to Real Estate Commissions*, National Public Radio, August 16, 2024 ("Over time, home buyers and sellers are expected to save tens of billions of dollars a year in lower commissions"). The value of this non-monetary relief to consumers is substantial in itself and provides additional justification for the requested fee. *See* Klonoff Decl. at ¶¶ 96-98.

This factor supports a contingency percentage of one-third, particularly given the benefits achieved. Importantly, success—including "exceptional success"—is not measured solely by the maximum damages alleged but must be evaluated against any "unusually difficult or risky

circumstances and the size of plaintiffs' recovery." *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1204–05 (S.D. Fla. 2006). Here, the request is supported by both the size of the recovery and the results obtained as compared to the risk of a lesser recovery or none at all. And rather than stop at the *Burnett* and *Moehrl* defendants, Class Counsel continued to prosecute these joint and several liability claims against additional Defendants in *Gibson* and *Umpa*. Thus, these and any future settlements or judgments will also benefit the Class.

C. The Requested Fee Is Reasonable Under a Lodestar Crosscheck.

Although a lodestar crosscheck is "not required" in the Eighth Circuit, *Keil v. Lopez*, 862 F.3d 685, 701 (8th Cir. 2017); *PHT Holdings II, LLC v. N. Am. Co. Life & Health Ins.*, 2023 WL 8522980, at *7 (S.D. Iowa Nov. 30, 2023)[8]—performing such a crosscheck here confirms that the requested fee is reasonable and should be approved. As noted above, Class Counsel have spent over 105,000 hours through July 31, 2024 in *Gibson*, *Umpa*, *Burnett*, and *Moehrl*. These hours result in an overall lodestar through July 31, 2024 of $**90,853,364**. Dirks Decl. at ¶ 43.

In performing a lodestar crosscheck in litigation involving multiple settlements and multiple cases, the appropriate method is to consider the "holistic approach." *See* Klonoff Decl. at ¶¶ 104-09; *see also In re Capacitors Antitrust Litig.*, 2018 WL 4790575, at *6 (N.D. Cal. Sept. 21, 2018) ("courts typically base fee awards in subsequent settlements on all work performed in the case," based on the reality—applicable here—that "the total work performed by counsel from inception of the case makes each settlement possible."); *In re Automotive Parts Antitrust Litig.*, 2020 WL 5653257, at *3 n.5 (E.D. Mich. Sept. 23, 2020) ("In calculating the lodestar for purposes

[8] "'[T]o overly emphasize the amount of hours spent on a contingency fee case would penalize counsel for obtaining an early settlement and would distort the value of the attorneys' services.'" *Rawa*, 934 F.3d at 870 (quoting *In re Charter Commc'ns*, 2005 WL 4045741, at *18). *Cf. In re T-Mobile Customer Data Security Breach Lit.*, No. 23-2744, 2024 WL 3561874, at *7 (8th Cir. July 29, 2024 (observing a crosscheck is not required but can be warranted "when a megafund case settles quickly").

of the cross-check, it would be impractical to compartmentalize and isolate the work that . . . Class Counsel did in any particular case at any particular time because all of their work assisted in achieving all of the settlements and has provided and will continue to provide a significant benefit to all of the . . . classes.").

The Court previously approved a fee of one-third of the Anywhere, RE/MAX and Keller Williams Settlement. *Burnett*, 2024 WL 2842222, at *17 (W.D. Mo. May 9, 2024). When those prior settlements are added to the present settlements, the total monetary settlement value is $319,100,000. One-third of this combined amount is $106,366,667. Thus, the combined fee request, to date, constitutes a 1.17 Multiplier on their time. Such a multiplier is well within the range of reasonableness. *See* Klonoff Dec. at ¶¶ 29, 122; *Rawa*, 934 F.3d at 870 (observing a lodestar multiplier of 5.3 is within the bounds of reasonableness); *Huyer v. Buckley*, 849 F.3d 395, 399–400 (8th Cir. 2017) (observing lodestar multipliers of up to 5.6 times class counsel's lodestar to be in the reasonable range for a lodestar crosscheck); *In re T-Mobile Customer Data Security Breach Litigation*, No. 23-2744, 2024 WL 3561874, at *6 (8th Cir. July 29, 2024) (observing that in a case that settled early in the litigation, a multiplier of 5.3 is on the "high" side of reasonableness) (citing *Rawa*, 934 F.3d at 870)); *In re Charter Commc'ns, Inc., Sec. Litig.*, No. 4:02-cv-1186-CAS, 2005 WL 4045741, at *18 (E.D. Mo. Jun. 30, 2005) (finding 5.61 lodestar multiplier reasonable); *In re Syngenta AG MIR 162 Corn Litig.*, 2019 WL 1274813, at *5 (D. Kan. Mar. 20, 2019) ("a multiplier of 3 is well within the range allowed in other cases involving large settlements"). Thus, by this Court's and the Eighth Circuit's own standards, Plaintiffs' request of fees of one-third of the fund is reasonable.

II. THE COURT SHOULD APPROVE CLASS COUNSEL'S REQUEST FOR REIMBURSEMENT OF REASONABLY INCURRED EXPENSES.

"Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionately by those class members who benefit by the settlement." *Yarrington*, 697 F. Supp. 2d at 1067 (quoting *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996)). Under the Settlements, Class Counsel are entitled to recover their expenses. The costs and expenses through July 31, 2024 were reasonable and necessary in order to reach these Settlements. Dirks Decl. ¶¶ 48-49; *see also* Exhibits 2-6. The total costs associated with the Litigation through July 31, 2024 is $13,147,775.19. Of this, $12,923,266.48 was already awarded by the Court in conjunction with the Anywhere, RE/MAX and Keller Williams settlements. As a result, Plaintiffs are requesting reimbursement of the additional expenses that have not already been awarded.

The largest components of these costs is for experts, depositions, class notice and administration, mediations, and online research. *See Tussey*, 2019 WL 3859763, at *5 ("Reimbursable expenses include many litigation expenses beyond those narrowly defined 'costs' recoverable from an opposing party under Rule 54(d), and includes: expert fees; travel; long-distance and conference telephone; postage; delivery services; and computerized legal research.") (*citing* Alba Conte, 1 Attorney Fee Awards § 2:19 (3d ed.))). All of the expenses submitted were reasonable and necessary expenses in such a large litigation. The Court should thus approve Class Counsel's expense reimbursement request to the extent the costs have not been awarded under prior settlements.

III. THE COURT SHOULD APPROVE THE REQUESTED SERVICE AWARDS.

Courts routinely approve service awards to compensate class representatives for the

services they provide and the risks they incur on behalf of the class. The factors for deciding whether the service awards are warranted are: "(1) actions the plaintiffs took to protect the class's interests, (2) the degree to which the class has benefited from those actions, and (3) the amount of time and effort the plaintiffs expended in pursuing litigation." *Caligiuri*, 855 F.3d at 867.

Here, Plaintiffs seek a service award of $10,000 per *Gibson* Settlement Class Representative. The Court already awarded Service awards to *Burnett* and *Moehrl* class representatives, so this request applies only to the new *Gibson* named plaintiffs.[9] The *Gibson* Settlement Class Representatives are performing important work on the case, including time-consuming gathering of facts and documents and assisting Class Counsel with the specifics of their transactions. Dirks Decl. at ¶ 52. That work materially advanced the litigation and protected the Settlement Class's interests. *Id.* Indeed, without their time and effort, these Settlements would have been impossible. Finally, the requested service awards are consistent with other awards approved in the Eighth Circuit. *Tussey*, 850 F.3d 951, 961–62 (8th Cir. 2017) (approving $25,000 service awards); *Rogowski*, 2023 WL 5125113, *6 (approving $25,000 service awards for named plaintiffs); *Wolfert v. UnitedHealth Group, Inc.*, No. 08-CV-01643 (E.D. Mo. Aug. 21, 2009), ECF No. 38 at 4–5 (approving a service award of $30,000).

Accordingly, Plaintiffs' request falls within a fair range of service awards. The Court should therefore approve the requested service awards for each Settlement Class Representative.[10]

CONCLUSION

Class Counsel respectfully request that the Court approve the requested fee of one-third of

[9] The request is less than for the *Burnett* and *Moehrl* class representatives because while these representatives are in the process of responding to discovery, their involvement is at an earlier stage.

[10] To the extent a Settlement is reached with the additional defendants, Plaintiffs may seek additional service awards for class representatives who further participated in the Litigation.

the Settlement Fund, reimbursement of current expenses in the amount of $13,147,775.19 that have not already been reimbursed in prior settlements and service awards of $10,000 to each of the new *Gibson* Settlement Class Representatives.

Dated: August 20, 2024

Respectfully submitted by:

COHEN MILSTEIN SELLERS & TOLL PLLC
/s/ Robert A. Braun
Benjamin D. Brown (*pro hac vice*)
Robert A. Braun (*pro hac vice*)
Sabrina Merold (*pro hac vice*)
1100 New York Ave. NW, Fifth Floor
Washington, DC 20005
Telephone: (202) 408-4600
bbrown@cohenmilstein.com
rbraun@cohenmilstein.com
smerold@cohenmilstein.com
Daniel Silverman (*pro hac vice*)
769 Centre Street
Suite 207
Boston, MA 02130
Telephone: (617) 858-1990
dsilverman@cohenmilstein.com

HAGENS BERMAN SOBOL SHAPIRO LLP
Steve W. Berman (*pro hac vice*)
1301 Second Avenue, Suite 2000
Seattle, WA 98101
Telephone: (206) 623-7292
steve@hbsslaw.com

Rio S. Pierce (*pro hac vice*)
715 Hearst Avenue, Suite 202
Berkeley, CA 94710
Telephone: (510) 725-3000
riop@hbsslaw.com

Nathan Emmons (Mo. Bar. No. 70046)
Jeannie Evans (*pro hac vice*)
455 North Cityfront Plaza Drive, Suite 2410
Chicago, IL 60611
Telephone: (708) 628-4949

WILLIAMS DIRKS DAMERON LLC

/s/ Eric L. Dirks
Eric L. Dirks MO # 54921
Michael A. Williams MO # 47538
Matthew L. Dameron MO # 52093
Eric L. Dirks MO # 54921
1100 Main Street, Suite 2600
Kansas City, MO 64105
Tele: (816) 945 7110
Fax: (816) 945-7118
mwilliams@williamsdirks.com
matt@williamsdirks.com
dirks@williamsdirks.com

BOULWARE LAW LLC
Brandon J.B. Boulware MO # 54150
Jeremy M. Suhr MO # 60075
1600 Genessee Street, Suite 956A
Kansas City, MO 64102
Tele: (816) 492-2826
Fax: (816) 492-2826
brandon@boulware-law.com
jeremy@boulware-law.com
erin@boulware-law.com

KETCHMARK AND MCCREIGHT P.C.
Michael Ketchmark MO # 41018
Scott McCreight MO # 44002
11161 Overbrook Rd. Suite 210
Leawood, Kansas 66211
Tele: (913) 266-4500
mike@ketchmclaw.com
smccreight@ketchmclaw.com

TAB 36A

[Submitting Counsel on Signature Page]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re LIDODERM ANTITRUST LITIGATION	Master File No. 14-md-02521-WHO MDL No. 2521
THIS DOCUMENT RELATES TO: END-PAYOR ACTIONS	**ORDER [AS MODIFIED] GRANTING END-PAYOR CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS**

On March 20, 2018, End-Payor Plaintiffs,[1] on behalf of themselves and the End-Payor Class, entered into separate settlement agreements with (a) defendant Endo Pharmaceuticals, Inc. ("Endo"); (b) defendants Teikoku Pharma USA, Inc. and Teikoku Seiyaku Co., Ltd. (together, "Teikoku"); (c) defendants Actavis, Inc. (f/k/a Watson Pharmaceuticals, Inc.), Watson Laboratories, Inc., and Actavis plc (together, "Watson" and together with Endo and Teikoku, "Defendants") (the "Settlement Agreements"). The Court preliminarily approved the Settlements on May 1, 2018, and the settlements have now been granted final approval.

The Court has considered End-Payor Class Counsel's Motion for an Award of Attorneys' Fees, Expenses, and Service Awards, including all arguments and briefing presented and any opposition thereto, as well as any objections to the requests.

The Court **GRANTS** the motion and **ORDERS** as follows:

1. Terms capitalized in this Order and not otherwise defined herein have the same meanings as those used in the Settlement Agreements and exhibits thereto.

I. Attorneys' Fees

2. Class counsel[2] requests the payment of attorneys' fees equal to one-third of the settlement amounts ($34,916,000), plus proportionate interest from the Settlement Fund. This amount represents a 1.37 multiplier on class counsel's reported lodestar. In support of their request, each firm submitted a declaration that (1) identifies the attorneys and staff members

[1] Allied Services Division Welfare Fund, City of Providence, International Union of Operating Engineers Local 49 Health and Welfare Fund, International Union of Operating Engineers Local 132 Health and Welfare Fund, Iron Workers District Council of New England Welfare Fund, NECA-IBEW Welfare Trust Fund, United Food and Commercial Workers Local 1776 & Participating Employers Health and Welfare Fund, Welfare Plan of the International Union of Operating Engineers Locals 137, 137A, 137B, 137C, 137R, and Ottavio Gallotto.

[2] Cohen Milstein Sellers & Toll PLLC; Girard Gibbs LLP; Heins Mills & Olson, P.L.C.; Joseph Saveri Law Firm, Inc.; Hilliard & Shadowen LLP; Miller Law LLC; Motley Rice LLC; Robbins Geller Rudman & Dowd LLP; Cohen, Placitella & Roth, P.C.; Freed Kenner London & Millen LLC; Glancy Prongay & Murry LLP; Hach Rose Schirripa & Cheverie LLP; Kohn, Swift & Graf, P.C.; Krause, Kalfayan, Benink & Slavens, LLP; Labaton Sucharow LLP; Law Offices of Robert W. Sink; Lockridge Grindal Nauen P.L.L.P.; Meredith & Narine; Pomerantz LLP; Shepherd, Finkelman, Miller & Shah, LLP; Spector Roseman & Kodroff, P.C.; Weinstein Kitchenoff & Asher LLC; and Wexler Wallace LLP.

who worked on the case and the tasks they performed, (2) describes the amount of time spent by each of the firm's attorneys and staff members, and the hourly rates for each of them, and (3) breaks down the amount billed by each attorney or staff member for specific tasks.

3. Pursuant to Federal Rule of Civil Procedure 23(h), a "court may award reasonable attorneys' fees" to plaintiffs' counsel in class action cases. "[C]ourts have an independent obligation to ensure that the award, like the settlement itself, is reasonable[.]" *In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). "Where a settlement produces a common fund for the benefit of the entire class, courts have discretion to employ either the lodestar method or the percentage-of-recovery method." *Id.* at 942. "Though courts have discretion to choose which calculation method they use, their discretion must be exercised so as to achieve a reasonable result." *Id.* The Court finds that class counsel's requested fee is reasonable under either approach and awards class counsel one-third of the settlement amounts ($34,916,000, plus a proportional share of interest from the Settlement Fund). Co-Lead Counsel shall allocate the awarded attorneys' fees among class counsel.

A. The Lodestar Method

4. The lodestar figure is calculated by multiplying the number of hours reasonably spent by a reasonable hourly rate. *Bluetooth*, 654 F.3d at 941. Courts may "adjust [the lodestar figure] upward or downward by an appropriate positive or negative multiplier reflecting a host of reasonableness factors." *Id.* at 941-42 (citation omitted). Class counsel spent 51,668.35 hours prosecuting this litigation on behalf of the End-Payor Class with a resulting lodestar of $25,560,049.50. Class counsel's requested fee award of one-third of the settlement amounts represents a modest upward adjustment of 1.37 on their lodestar.

5. Class counsel's lodestar reflects time that was necessarily and reasonably expended for the benefit of the End-Payor Class. Co-Lead Counsel Girard Gibbs, Heins Mills, and Cohen Milstein performed the significant majority of the work in this matter. Non-lead firms carried out a limited number of non-duplicative tasks at Co-Lead Counsel's direction, primarily reviewing documents produced by Defendants and responding to discovery served by Defendants on their clients. In addition, Co-Lead Counsel undertook significant efforts to

increase efficiency and avoid duplication. The record also reflects that Co-Lead Counsel worked cooperatively with counsel for the direct purchaser and opt-out plaintiffs.

6. The second part of the lodestar calculation is multiplying the hours spent by a "reasonable hourly rate for the region and the experience of the lawyer." *Bluetooth*, 654 F.3d at 941. Class counsel's historic rates—which range from $350 to $1,050 for partners and senior counsel, $300 to $675 for associates, and $100 to $400 for paralegals and other litigation staff (including senior cases managers)—meet both criteria. The requested rates are consistent with rates approved in recent antitrust class actions in this district. *E.g. In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.* ("*NCAA*"), 2017 WL 6040065, at *8 (N.D. Cal. Dec. 6, 2017) (approving hourly rates for partners of $578 to $1,035 and rates for associates of $295 to $635); *In re High-Tech Employee Antitrust Litig.*, 2015 WL 5158730, at *9 (N.D. Cal. Sept. 2, 2015) (partner rates of $490 to $975, non-partner rates of $310 to $800, and staff rates of $190 to $430). Co-Lead Counsel set an hourly cap of $350 for all time spent on document review (with the exception of Japanese language review, which was capped at $400 per hour). Class counsel's declarations also provided examples of other cases in which their rates have been approved and explain that class counsel assigned tasks to attorneys and staff based on their skills and experience.

7. The Court also finds that the multiplier class counsel request here is warranted. In deciding whether to deviate from the lodestar figure, courts consider "the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues present, and the risk of nonpayment." *Bluetooth*, 654 F.3d at 942 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998)). Each of these factors weighs in favor of a 1.37 multiplier.

8. Class counsel obtained a significant benefit for the End-Payor Class. Defendants will pay a total of $104.75 million in cash to settle EPPs' claims. The End-Payor Class will recover 46% of the highest single damages estimate EPPs were prepared to seek at trial ($229 million). *See Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 964-65 (9th Cir. 2009) (antitrust settlement for 30% of plaintiffs' estimated damages was "fair and reasonable no

matter how you slice it"). Class counsel have reported that they are not aware of any other end-payor pay-for-delay case in federal court since 2005 that has settled for more than $100 million. The size of the recovery here—whether measured in dollars or by reference to percentage-of-damages recovery—warrants the multiplier. *See Nitsch v. DreamWorks Animation SKG Inc.*, 2017 WL 2423161, at *10 (N.D. Cal. June 5, 2017) (awarding a 2.0 multiplier for a 30.5% recovery).

9. Class counsel provided their clients with diligent and skilled representation in this matter. Co-Lead Counsel litigated numerous complex issues and their efforts produced substantial benefits for the End-Payor Class. This case was the first post-*Actavis* pay-for-delay case in the Ninth Circuit, and many of the issues class counsel litigated were matters of first impression in this Circuit. The litigation also involved substantial risk. In the only pay-for-delay case to proceed through trial since *Actavis*, the jury returned a victory for the defendants. *See In re: Nexium (Esomeprazole) Antitrust Litig.*, No. 1:12-md-02409-WGY, ECF No. 1383 (D. Mass. Dec. 5, 2014) (verdict form). In other cases, plaintiffs have lost at summary judgment. *See In re Wellbutrin XL Antitrust Litig. Indirect Purchaser Class*, 868 F.3d 132 (3d Cir. 2017). Obtaining certification of an end-payor class presents challenges that are unique to end-payors.

10. In addition, even if EPPs had prevailed at trial, Defendants were poised to appeal several important decisions, including the Court's certification of the End-Payor Class, its summary judgment order on the relevant market, and its order regarding the appropriate standard for establishing causation at trial. Here, "Class Counsel litigated this action without pay for several years, even though recovery was uncertain." *High-Tech*, 2015 WL 5158730, at *10.

11. Finally, the requested multiplier is within the range of multipliers awarded in the Ninth Circuit. In *Vizcaino v. Microsoft Corporation*, the Ninth Circuit surveyed common fund cases with settlements ranging from $50-200 million and found that multipliers ranged from 1.0-4.0 in the vast majority of cases. 290 F.3d 1043, 1052-54 (9th Cir. 2002). Courts in this district have recently awarded significantly larger multipliers in antitrust cases than the

multiplier requested by class counsel. *E.g.*, *DreamWorks*, 2017 WL 2423161, at *10 (2.0 multiplier).

12. Viewed in light the above factors and awards in other cases, a 1.37 multiplier on class counsel's lodestar is warranted.

B. The Percentage-of-the Recovery Method

13. In the Ninth Circuit, the benchmark for attorneys' fees under a percentage-of-the-recovery method is 25% of the settlement fund. *Bluetooth*, 654 F.3d at 942 (citation omitted). But "[t]he benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (emphasis added). The factors courts consider when determining whether to depart from the 25% benchmark are: "(1) the result achieved; (2) the risk involved in the litigation; (3) the skill required and quality of work by counsel; (4) the contingent nature of the fee; and (5) awards made in similar cases." *Larsen v. Trader Joe's Co.*, 2014 WL 3404531, at *9 (N.D. Cal. July 11, 2014) (citing *Vizcaino*, 290 F.3d at 1048-50). Consideration of these factors weighs in favor of class counsel's requested fee.

The first three factors largely mirror the considerations discussed above with respect to a lodestar multiplier. Just as those factors weigh in favor of a multiplier, they also weigh in favor of a fee award of one-third of the settlements. With respect to the fourth factor, class counsel undertook this matter on an entirely contingent fee basis with no apparently actively litigated, parallel government litigation, and litigated under the demanding rule-of-reason standard. Here, "the public interest is served by rewarding attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk that they might be paid nothing for their work." *Larsen*, 2014 WL 3404531, at *9.

As to the fifth factor, a fee award of one-third is within the range of awards in this Circuit. *See id.*, 2014 WL 3404531, at *9 (citing cases awarding fees of 32% or greater); *In re Pacific Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming award of 33%). Fee

awards of one-third are common in pay-for-delay litigation and were very recently awarded in two such cases. *E.g.*, *In re Aggrenox Antitrust Litig.*, No. 2:14-md-02516-SRU, ECF 821, at 9-10 (July 19, 2018) (awarding 33 1/3%); *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 1:14-md-02503-RJC, ECF 1176, at 5 (July 18, 2018) (fee award of 33 1/3%; 1.08 multiplier); *In re Tricor Indirect Purchaser Antitrust Litig*., No. 1:05-cv-00360-SLR, slip op. at 4, ECF No. 544 (D. Del. Oct. 28, 2009) (fee award of 33⅓% of the $67,500,000 settlement fund; 1.48 multiplier); *In re Relafen Antitrust Litig*., No. 01-cv-12239-WGY, slip op. at 9, ECF No. 459 (D. Mass. Oct 13, 2005) (fee award of 33⅓% of the $67,000,000 settlement fund; 2.02 multiplier).

There is "no rule in the Ninth Circuit that requires a court to decrease the percentage of the fee award as the size of the settlement increases." *In re Toyota Corp. Unintended Marketing, Sales Pracs. and Prods. Liability Litig.*, 2013 WL 12327929, at *34 (C.D. Cal. July 24, 2013) (citing *Vizcaino*, 290 F.3d at 1047). Instead, the size of the fund is simply one factor courts look to when determining a reasonable fee. *Vizcaino*, 290 F.3d at 1047. "[F]ederal district courts across the country have, in the class action settlement context, routinely awarded class counsel fees in excess of the 25% 'benchmark,' even in so-called 'mega-fund' cases." *NCAA*, 2017 WL 6040065, at *5 & n.30 (collecting cases, including those awarding fees of 1/3 of the settlement fund); *see also, e.g.*, *Vizcaino*, 290 F.3d at 1050 (affirming 28% fee with a multiplier of 3.65); *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 WL 4126533, at *6, 10 (N.D. Cal. Aug. 3, 2016) (awarding a fee of 27.5%, which was a 1.96 multiplier). The rationales for awarding fees at or below the 25% benchmark in some cases—*i.e.* to avoid a windfall for class counsel—do not apply here. As detailed above, the hours class counsel reasonably spent on this case and the relevant factors support the requested fee award.

II. Expenses

Class counsel also seeks the payment of $3,948,118.06 in unreimbursed expenses. "Class counsel is entitled to reimbursement of reasonable expenses." *Larsen*, 2014 WL 3404531, at *10 (citing Fed. R. Civ. P. 23(h)). Class counsel seeks the reimbursement of costs reasonably incurred for the prosecution of the litigation on behalf of the End-Payor Class,

including filing fees, computerized research, copies, postage and messenger services, document hosting services, experts, sales data purchased from third-parties, transcripts, translations of documents, case-related travel, and distributing notice of the Court's certification order. The categories of expenses for which class counsel seeks reimbursement are the type routinely charged to clients, and should be reimbursed. *See High-Tech*, 2015 WL 5158730, at *16 (awarding costs for (1) expert witness fees; (2) mediators' fees; (3) document review; (4) court reporting and videographer services; (5) electronic research; (6) copying, mailing, and serving documents; and (7) case-related travel for Plaintiffs, witnesses, experts, and counsel); *In re Media Vision*, 913 F. Supp. 1362, 1367-72 (N.D.Cal.1996) (costs related to experts, photocopying, legal research fees, travel expenses, postage, and filing fees may be reimbursed). Class counsel's request for the reimbursement of their expenses in the amount of $3,948,118.06 is granted.

III. Service Awards

Class counsel also request a service award of $10,000 to each of the nine Class Representatives ($90,000 total, which is .086% of total value of the Settlements). The Court finds that the requested service awards are reasonable. Each Class Representative actively participated in the litigation, including staying abreast of the progress of the case, collecting and produced documents, and responding to interrogatories and, in the case of two of the class representatives, preparing to testify at trial. Awards of $10,000 are frequently awarded to end-payors in pay-for-delay cases. *E.g.*, *Aggrenox*, No. 2:14-md-02516-SRU, ECF 821, at 10; *Solodyn*, No. 1:14-md-02503-RJC, ECF 1176, at 4. The requested awards are also consistent with similar service awards regularly approved in class actions in this district. *E.g. Alvarez v. Farmers Ins. Exchange*, 2017 WL 2214585, at *1 (N.D. Cal. Jan. 18, 2017) (approving nine $10,000 service awards that in the aggregate were 1.8% of the settlement value).

IV. Objection of Pamela Sweeney

Only one individual—Pamela Sweeney—objected to the requested attorneys' fees and expense award. ECF 1035. Ms. Sweeney objects to class counsel's requested fees and expenses as too high, but she "does not cite any record evidence or legal authority in support of her

conclusory argument." *Rikos v. Proctor & Gamble*, 2018 WL 2009681, at *13 (S.D. Ohio Apr. 30, 2018) (overruling objection from Ms. Sweeney). As discussed above, class counsel's requested attorneys' fees and expenses are appropriate and supported by the record. Ms. Sweeney's objection is overruled.

Ms. Sweeney's objection was also untimely. The deadline to submit objections was August 21, 2018 (ECF 1016 at 5) and the postmark date on Ms. Sweeney's objections is August 25, 2018 (ECF 1035-1). While may "refuse to consider" untimely objections and I could reject the objection on this ground, *see In re Yahoo Mail Litig.*, 2016 WL 4474612, at *8 (N.D. Cal. Aug. 25, 2016) (denying untimely objection submitted by Patrick Sweeney) (citation omitted); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 WL 7575004, at *3 (N.D. Cal. Dec. 27, 2011) ("refus[ing] to consider" an untimely objection), I have considered it on its merits and nonetheless overrule it..

V. Payment Schedule

Endo will not make its second and third payments (of $10 million, or 9.5% of the total settlement amount, each) until February 15, 2019 and 2020, respectively. While the first distribution of settlement funds to class members in March 2019 will include Endo's first and second payments, Endo's third payment will not be available for distribution until March 2020.

In light of the staggered nature of Endo's payments, entitlement to attorneys' fees, expense, and service award payments shall occur according to the following schedule:

Event	Date
81% of the Court-awarded attorneys' fees, $3,948,118.06 in expenses, and the service awards may be distributed to Co-Lead Counsel for their allocation of fees and expenses to class counsel and to pay the class representatives their service awards	Thirty days after final approval and the running of any appeal(s) of the settlement approval (*i.e.* settlement "finality," as defined in the Settlement Agreements)
Endo's second payment ($10 million)	By February 15, 2019
9.5% of the court-awarded attorneys' fees may be distributed to Co-Lead Counsel for their allocation of fees to class counsel	Upon Endo's second payment

Event	Date
First distribution of settlement funds to class members	Early March 2019
Endo's third payment ($10 million)	By February 15, 2010
9.5% of the court-awarded attorneys' fees may be distributed to Co-Lead Counsel for their allocation of fees to class counsel	Upon Endo's third payment
Second distribution of settlement funds	Early March 2020

The schedule protects the interests of the End-Payor Class by ensuring that class counsel will receive their awarded fees related to the subsequent Endo payments only after those payments have been received.

IT IS SO ORDERED.

DATED: September 20, 2018

THE HONORABLE WILLIAM H. ORRICK
United States District Court Judge

TAB 36B

[Submitting Counsel on Signature Page]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re LIDODERM ANTITRUST LITIGATION	Master File No. 14-md-02521-WHO MDL No. 2521
THIS DOCUMENT RELATES TO: END-PAYOR ACTIONS	**END-PAYOR CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS** Date: September 12, 2018 Time: 2:00 p.m. Courtroom: 2, 17th Floor Before: Hon. William H. Orrick

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NOTICE OF MOTION AND MOTION

TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that counsel for the End-Payor Class ("class counsel" or "EPP class counsel")[1] will and do hereby move the Court for entry of an Order awarding class counsel one-third of the settlement amounts ($34,916,000), plus proportional interest accrued on the Settlement Fund; reimbursement of $3,647,041.43 in expenses advanced in the course of the litigation; and service awards of $10,000 to each of the End-Payor Plaintiffs ("EPPs").[2]

This Motion is supported by the accompanying Memorandum of Law, the Joint Declaration of End-Payor Plaintiff Co-Lead Counsel and exhibits thereto; and the declarations of Co-Lead Counsel and Liaison counsel, as well as the declarations of additional non-lead firms describing the work performed in the litigation.

[1] Cohen Milstein Sellers & Toll PLLC; Girard Gibbs LLP; Heins Mills & Olson, P.L.C.; Joseph Saveri Law Firm, Inc.; Hilliard & Shadowen LLP; Miller Law LLC; Motley Rice LLC; Robbins Geller Rudman & Dowd LLP; Cohen, Placitella & Roth, P.C.; Freed Kenner London & Millen LLC; Glancy Prongay & Murry LLP; Hach Rose Schirripa & Cheverie LLP; Kohn, Swift & Graf, P.C.; Krause, Kalfayan, Benink & Slavens, LLP; Labaton Sucharow LLP; Law Offices of Robert W. Sink; Lockridge Grindal Nauen P.L.L.P.; Meredith & Narine; Pomerantz LLP; Shepherd, Finkelman, Miller & Shah, LLP; Spector Roseman & Kodroff, P.C.; Weinstein Kitchenoff & Asher LLC; and Wexler Wallace LLP.

[2] Allied Services Division Welfare Fund, City of Providence, International Union of Operating Engineers Local 49 Health and Welfare Fund, International Union of Operating Engineers Local 132 Health and Welfare Fund, Iron Workers District Council of New England Welfare Fund, NECA-IBEW Welfare Trust Fund, United Food and Commercial Workers Local 1776 & Participating Employers Health and Welfare Fund, Welfare Plan of the International Union of Operating Engineers Locals 137, 137A, 137B, 137C, 137R, and Ottavio Gallotto.

MEMORANDUM OF LAW

I. INTRODUCTION

The settlements before the Court will create a fund of over $100 million to reimburse End-Payors for their purchases of branded and generic Lidoderm pain patches at supra-competitive prices. The settlements were reached shortly before jury selection after four years of hard-fought litigation. This Court presided over each step of this litigation, denying Defendants' motions to dismiss, deciding numerous discovery motions and challenges to assertions of attorney-client privilege, granting the motion to certify the EPP class, granting Plaintiffs' motion for summary judgment on relevant market, denying Defendants' motion for summary judgment on causation (which the Court again upheld on a motion for reconsideration), and denying various *Daubert* and *in limine* challenges that threatened to hobble Plaintiffs' case-in-chief at trial. Defendants Endo, Watson, and Teikoku mounted a vigorous defense through highly skilled counsel.

Counsel believe the $104.75 million settlement is the most favorable recovery for end-payors both in absolute and relative terms in similar federal pharmaceutical antitrust litigation in at least the past decade. The End-Payor Class will recover more than 45% of class counsel's highest single damages estimate now, without having to undertake the risks and delay of post-trial appeals. Upon this Court's approval, the money recovered through these settlements will vest in the plaintiff class, and the funds will be promptly distributed to the consumers and third party-payors who make up the class. The Court is thoroughly familiar with the efforts expended on both sides of the litigation, the novelty and complexity of the issues, and the substantial risk that the End-Payor Class and their counsel could come away from this litigation empty-handed.

For the risks undertaken, the resources invested, and the result achieved, EPP class counsel seek an award of attorneys' fees of one-third of the Settlement Fund ($34,916,000), plus proportional interest accrued from the Settlement Fund, representing a 1.37 multiplier on class counsel's lodestar, at the low end of multipliers awarded in this district. The requested fee falls within the range of percentages awarded in the Ninth Circuit for cases involving similar risks and results, and is also consistent with at least two recent awards to end-payor counsel in pay-for-

delay litigation. Class counsel devoted more than 51,000 hours to litigating this case, foregoing other opportunities and assuming the risk of recovering nothing and losing nearly $4 million in expenses advanced to bring this case to trial. Class counsel therefore request that the Court award attorneys' fees of one-third of the settlement amounts, approve the reimbursement of the expenses advanced, and approve incentive awards for each of the EPP class representatives.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The first end-payor complaint in this multidistrict litigation was filed on November 12, 2013. *See United Food and Commercial Workers Local 1776 v. Teikoku Pharma USA, Inc., et al.*, 5:13-cv-05247 (N.D. Cal.). Other complaints followed in this District and others. In the spring of 2014, the Judicial Panel on Multidistrict Litigation centralized all pending Lidoderm actions before this Court. ECF 1. And on May 23, 2014, the Court appointed Girard Gibbs LLP, Heins Mills & Olson, P.L.C., and Cohen Milstein Sellers & Toll PLLC as Interim Co-Lead Counsel; the Joseph Saveri Law Firm, Inc. as Interim Liaison Counsel; and Hilliard & Shadowen LLP, Miller Law LLC, Motley Rice LLC, Robbins Geller Rudman & Dowd LLP, and The Dugan Law Firm, APLC as members of the Executive Committee. ECF 63.

Since that time, Co-Lead Counsel has directed the overall conduct of the litigation and has worked with Liaison Counsel, the Executive Committee, and other plaintiffs' counsel to prosecute the litigation through the eve of trial. A detailed description of the work performed by each firm seeking payment is set forth in Co-Lead Counsel's Joint Declaration and the individual declarations of class counsel submitted herewith. Below is a brief summary of work performed by class counsel during the litigation.

Motions to Dismiss. Following transfer of all pending Lidoderm actions to this Court, the Court consolidated the end-payor actions. EPPs filed a consolidated amended complaint, which Defendants moved to dismiss. ECFs 72, 95. EPPs worked with DPPs to jointly oppose Defendants' arguments, and EPPs separately opposed Defendants' motion concerning EPPs' state law claims. Joint Decl., ¶¶ 15-16. On November 17, 2014, the Court largely denied Defendants' motion and upheld EPPs' claims under the laws of seventeen states. ECF 117.

EPPs subsequently amended their complaint and opposed an additional motion to dismiss state law claims, culminating in the filing of a third amended complaint. ECF 208.

Discovery of Defendants and Non-Parties. The parties began discovery while Defendants' initial motion to dismiss was pending. Joint Decl., ¶ 18. Full discovery commenced once the Court denied Defendants' motion. *Id*., ¶ 19. EPPs, along with DPPs, negotiated an ESI protocol, protective order, various discovery stipulations, and search terms and custodians that Defendants would use to produce responsive documents. *Id*., ¶ 20. EPPs reviewed more than 3.3 million pages of documents produced by Defendants, as well as thousands of additional pages of documents and data produced by non-parties. *Id*., ¶ 28. EPPs also took the lead on Requests for Admission relating to earlier generic launches. *Id*., ¶ 22. EPPs also collaborated with DPPs and the Retailers to depose thirty-two current and former employees of Defendants. *Id*., ¶ 27. To develop the record in relation to end-payors' payment structures and the implied "ascertainability" requirement under Rule 23, EPPs also conducted additional, unique discovery of non-party pharmacy benefits managers (PBMs), resulting in declarations and the production of payment data and rebate contract information from the leading national PBMs. ECF 208.

The parties litigated numerous complex privilege issues in pursuit of their claims, many of which EPPs were primarily responsible for briefing (before this Court and on petitions for writs of mandamus) and arguing. *E.g.* ECFs 227, 269, 276, 345, 359, 364, 377, 398, 399, 401, 402, and 427 (Joint Discovery Letter Briefs); ECFs 536 and 679 (at-issue waiver order and Ninth Circuit denial of petition for interlocutory review); ECFs 367 and 484 (common interest order and Ninth Circuit denial of petition for interlocutory review).

Discovery of Plaintiffs. Defendants served over 100 requests for production of documents, and numerous interrogatories on EPPs. Joint Decl., ¶ 39. EPPs met and conferred with Defendants over the course of several months and successfully overcame Defendants' various motions to compel the production of documents, including Defendants' efforts to compel the production of information related to premiums. ECF 435. EPPs drafted responses to Defendants' contention interrogatories and coordinated with other plaintiffs on their responses as well. Joint Decl., ¶ 44.

Defendants also served Rule 30(b)(6) deposition notices on each EPP, and Co-Lead Counsel prepared for and defended each of those depositions. Joint Decl., ¶ 42.

Defendants' Disqualification Motion. In connection with a dispute concerning Plaintiffs' use of two documents produced by Teikoku, Teikoku moved to disqualify Plaintiffs' counsel. ECF 293. EPP class counsel took the lead in drafting Plaintiffs' opposition (and cross-motion challenging Teikoku's assertion of privilege over the documents in question) and worked with counsel for DPPs to develop the factual record in support of Plaintiffs' arguments. Joint Decl., ¶ 37. The Court denied Defendants' motion on November 25, 2015, and subsequently rejected in part Teikoku's assertion of attorney-client privilege. ECFs 338 and 367.

Class Certification. In summer 2016, EPPs moved for certification of the End-Payor Class. ECF 524. In support of EPPs' motion, Dr. Hal Singer—a leading antitrust economist—submitted a report showing that market power could be established, and that injury and damages to end-payors could be determined on a classwide basis. ECF 524-1. EPPs also retained an expert on the pharmaceutical distribution chain to address ascertainability and "pass on" defenses. ECF 524-2. That report was supported by third-party discovery obtained from the largest PBMs in the country. Joint Decl., ¶ 49. Defendants countered with their own expert economist, a pharmacy payment expert and a market power expert. *Id*., ¶ 50. A heated "battle of the experts" ensued, with multiple depositions of the experts and *Daubert* challenges. *Id*.

On February 21, 2017, the Court granted EPPs' motion and denied Defendants' *Daubert* challenges to EPPs' experts. ECF 670. Defendants filed a petition with the Ninth Circuit seeking interlocutory review under Federal Rule of Civil Procedure 23(f), which EPPs opposed and the Ninth Circuit denied. ECF 756. In summer 2017, EPPs worked with KCC—the notice administrator approved by the Court—to develop and implement a notice program that used a combination of direct and publication notice to reach virtually all third-party payor class members and approximately 80% of consumer class members. ECF 872; *see also* ECF 751 (order approving EPPs' proposed method of distributing notice).

Certain large insurers that had opted-out of the End-Payor Class (and later rejoined the class for purposes of settlement) attempted to also opt out self-funded health and welfare plans for whom the insurers provide administrative services. EPPs filed a motion seeking to preclude the insurers' attempted mass opt-outs of their self-funded plans. ECF 893. The Court granted EPPs' motion. ECF 946.

In addition, EPPs moved for a "set aside" order under which a portion of any recovery obtained by any opt-out would be set aside and considered for payment to class counsel in recognition of the work performed by class counsel that benefited all end-payors, including any opt-outs. Joint Decl., ¶ 56. After briefing and argument, the Court granted EPPs' set-aside motion, marking only the second antitrust case in which such an order has been entered. ECF 828.

Merits Expert Reports. The trial in this case was ultimately set for February 23, 2018. In preparation for trial, EPPs and DPPs retained and worked with more than a dozen experts to prepare reports on a range of topics including patent issues, when generic entry would have been expected to occur absent the settlement, and Watson's manufacturing capabilities. Joint Decl., ¶ 57. EPPs and DPPs collaborated on the depositions of each of Defendants' experts, with EPPs taking the lead on deposing defendants' manufacturing, at-risk and authorized generic launch experts. *Id.*, ¶ 65.

EPPs also worked with Dr. Singer to calculate and prepare merits reports concerning EPPs damages, with Dr. Singer calculating the maximum single damages for the End-Payor Class as $229 million, using the "forecasting" model. *Id.*, ¶ 60. His "backcasting" model, which mirrored the modeling DPPs chose to use, resulted in maximum single damages of $156 million. ECF 776-25 (Singer Reply Rpt.) at 40, Table 2. Defendants' expert calculated the maximum damages for the End-Payor Class as $5.6 million, assuming plaintiffs proved that the patents would not prevent generic entry. ECF 778-5 (Bell Rpt.) at 69.

Summary Judgment. In June 2017, after expert depositions had concluded, the parties filed motions for summary judgment and *Daubert* motions to exclude various experts from testifying at trial. Defendants sought summary judgment on all Plaintiffs' claims on the issue of

causation. ECF 786. With input from the DPPs, EPPs took the lead in drafting Plaintiffs' opposition to Defendants' motion and also argued the motion. Joint Decl., ¶ 69. EPPs also worked with DPPs to prepare successful partial summary judgment motions on the relevant market and the "contract, combination, or conspiracy" prong of Plaintiffs' antitrust claims. ECFs 775.

On November 3, 2017, the Court denied Defendants' summary judgment motion, granted Plaintiffs' motions, and granted in part and denied in part the parties' *Daubert* motions. ECF 900. Defendants later moved for reconsideration of the causation standard that would apply at trial; EPPs took the lead in successfully opposing Defendants' motion. ECF 978.

Trial Preparation. The parties exchanged their initial proposed pretrial materials—including exhibit lists, witness lists, deposition designations, jury instructions, verdict forms—on November 6, 2017. Joint Decl., ¶ 74. EPPs were the primary drafters of large Plaintiffs' portions of the pretrial exchanges. *Id*., ¶ 75. After protracted negotiations, in early December the parties filed their agreed-upon and disputed pretrial submissions. ECFs 929 and 933.

In the months leading up to the February 23, 2018 jury selection, EPP Co-Lead Counsel dedicated themselves to preparing for trial. Joint Decl., ¶ 79. Each of the EPP Co-Lead Counsel was a member of Plaintiffs' joint trial team. *Id*., ¶ 81. EPPs worked with counsel for other Plaintiffs to develop a draft outline of their case-in-chief, designate portions of fact witness depositions for use at trial, and identify documents to be used as exhibits. *Id*., ¶ 80-82.

Settlements. EPPs participated in mediation with Endo and Teikoku before the Hon. Layn Phillips in May 2017 but made only limited progress. *Id*., ¶ 84. Thereafter settlement negotiations took place under the auspices of Chief Magistrate Judge Joseph C. Spero. *Id*. EPPs reached an agreement in principle with Teikoku following an initial settlement conference in December 2017, with Watson following a January 2018 settlement conference, and finally with Endo following a February settlement conference, one week before jury selection. *Id*. EPPs prepared the settlement papers for each of the Endo, Teikoku, and Watson settlements, working with both counsel for Defendants and counsel for the insurer opt-outs represented by the Lowey

Dannenberg firm. *Id.*, ¶ 85. After lengthy negotiations, the parties finalized their settlements and EPPs submitted them for preliminary approval on March 20, 2018. ECF 1005.

In connection with the settlements, EPPs worked with KCC to develop a state-of-the-art notice and claims plan. The long- and short-form notices distributed to class members informed them that class counsel would seek a fee award of up to one-third of the settlement fund, expenses not to exceed $5,000,000, and service awards of $10,000 to each of the Class Representatives. ECF 1014 (long form and short-form notice documents). The notices also provided class members with the August 21, 2018 deadline to object the requested amounts, which is 21 days after the filing of this motion. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 954 (9th Cir. 2015) (approving similar methods of notifying the class of requested fee and expense awards). Class counsel also worked with Dr. Singer to develop an allocation plan that would fairly distribute the settlement proceeds among claimants. ECF 1005-6 (Declaration of Dr. Hal J. Singer).

The Court preliminarily approved the settlements, notice plan, and plan of allocation on May 1, 2018. ECF 1016. EPPs have since worked with KCC to implement the notice plan approved by the Court, as detailed in EPPs motion for final approval.

III. SUMMARY OF REQUESTED FEES, EXPENSES, AND SERVICE AWARDS

As detailed below and in the accompanying declarations, class counsel devoted a total of 51,668.35 hours to this case, with a resulting lodestar of $25,560,049.50. Of the total hours spent, 73.6% was spent by Co-Lead Counsel, 7.9% by Liaison Counsel, and 18.5% by other firms. Each firm's overall lodestar and expenses are listed below:

Firm	Hours	Lodestar
Cohen Milstein Sellers & Toll PLLC (Co-Lead Counsel)	13,594.00	$6,772,990.00
Girard Gibbs LLP (Co-Lead Counsel)	12,146.2	$6,237,297.00
Heins Mills & Olson, P.L.C. (Co-Lead Counsel)	12,270.7	$6,367,266.00
Joseph Saveri Law Firm, Inc. (Liaison Counsel)	4091.0	$1,994,244.50
Hilliard & Shadowen LLP (Executive Committee)	882.8	$362,700.00
Miller Law LLC (Executive Committee)	1,111.0	$423,476.50
Motley Rice LLC (Executive Committee)	18,13.8	$795,609.50
Robbins Geller Rudman & Dowd LLP (Executive Committee)	1,043.9	$429,844.50

Cohen, Placitella & Roth, P.C.	72.1	$49,012.50
Freed Kanner London & Millen LLC	667.5	$235,117.00
Glancy Prongay & Murry LLP	31.0	$22,317.50
Hach Rose Schirripa & Cheverie LLP	1,592.0	$605,232.50
Kohn, Swift & Graf, P.C.	23.4	$14,868.00
Krause, Kalfayan, Benink & Slavens, LLP	170.35	$ 71,697.50
Labaton Sucharow LLP	519.3	$313,413.00
Law Offices of Robert W. Sink	45.1	$31,268.00
Lockridge Grindal Nauen P.L.L.P.	406.7	$251,043.50
Meredith & Narine	6.0	$3,900.00
Pomerantz LLP	481.35	$249,141.50
Shepherd, Finkelman, Miller & Shah, LLP	461.3	$220,631.00
Spector Roseman & Kodroff, P.C.	57.75	$31,015.00
Weinstein Kitchenoff & Asher LLC	20.0	$9,035.00
Wexler Wallace LLP	161.1	$68,929.50

Class counsel respectfully requests the payment of one-third of the settlements amounts ($34,916,000) in attorneys' fees, plus proportionate interest from the Settlement Fund, which represents a 1.37 multiplier on their lodestar. They also request the reimbursement of $3,647,041.43 in unreimbursed expenses.

To facilitate the Court's consideration of class counsel's fee and expense requests, each firm has submitted a declaration that (1) identifies the attorneys and staff members who worked on the case and the tasks they performed, (2) describes the amount of time spent by each of the firm's attorneys and staff members, and the hourly rates for each of them, (3) breaks down the amount billed by each attorney or staff member for specific tasks, and (4) provides an itemization of the expenses incurred by the firm.

Class counsel also requests that each Class Representative receive a service award in the amount of $10,000.

IV. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE

Pursuant to Federal Rule of Civil Procedure 23(h), a "court may award reasonable attorneys' fees" to plaintiffs' counsel in class action cases. "[C]ourts have an independent obligation to ensure that the award, like the settlement itself, is reasonable[.]" *In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). "Where a settlement produces a common fund for the benefit of the entire class, courts have discretion to employ either the

lodestar method or the percentage-of-recovery method." *Id*. at 942. "Though courts have discretion to choose which calculation method they use, their discretion must be exercised so as to achieve a reasonable result." *Id*. Class counsel's requested fee is reasonable under either approach.

A. The Lodestar Method Supports the Requested Attorneys' Fees

The lodestar figure is calculated by multiplying the number of hours reasonably spent by a reasonable hourly rate. *Bluetooth*, 654 F.3d at 941. "There is a strong presumption that the lodestar is a reasonable fee." *Stetson v. Grissom*, 821 F.3d 1157, 1165 (9th Cir. 2016). Courts may, however, "adjust [the lodestar figure] upward or downward by an appropriate positive or negative multiplier reflecting a host of reasonableness factors." *Bluetooth*, 654 F.3d at 941-42 (citation omitted).

Class counsel here spent 51,668.35 hours prosecuting this litigation on behalf of the End-Payor Class with a resulting lodestar of $25,560,049.50. Class counsel's requested fee award of one-third of the settlements amounts ($34,916,000) represents a modest upward adjustment of 1.37 on their lodestar. As explained below, the lodestar is reasonable and the modest enhancement is warranted.

1. The Time Spent by Class Counsel is Reasonable

Class counsel's lodestar reflects time that was necessarily and reasonably spent for the benefit of the End-Payor Class, while also reflecting Co-Lead Counsel's significant efforts to increase efficiency and avoid duplication.

The Court's May 2014 order appointing the leadership for the EPPs vested Co-Lead Counsel with authority for the overall conduct of the case and responsibility for carrying out all major aspects of the litigation. ECF 63. In accordance with that directive, the three Co-Lead Counsel firms conducted the significant majority of the work in this matter, including preparing and responding to written discovery, taking depositions, working with experts, briefing, court appearances, and overall strategy.

Co-Lead Counsel also divided tasks among themselves to further avoid duplication. Joint Decl., ¶ 89. Ms. Sharp (and her colleague Mr. Grzenczyk), for example, took the lead in

much of the legal briefing; Ms. Steiner was in charge of working with EPPs' economic expert, Dr. Hal Singer, and many of plaintiffs' joint experts; and Ms. Robertson oversaw plaintiff and non-party discovery critical to EPPs' class certification motion and related expert work, as well as EPPs' responses to Defendants' discovery requests. *Id*. Ms. Sharp, Ms. Steiner, and Ms. Robertson collaborated on overall case strategy to draw on their collective experience. *Id*. In accordance with the Court's direction at the May 9, 2015 Initial Case Management Conference, Co-Lead Counsel generally limited attendance on internal strategy calls or at court hearings to one attorney per firm (Ms. Sharp, Ms. Steiner, and Ms. Robertson), and otherwise staffed meetings and hearings as leanly as possible but in accordance with the needs of the case and skill set of available attorneys. *Id*. Liaison Counsel supported Co-Lead Counsel on key projects including research in support of EPPs' amended complaint, class certification and *Daubert* briefing and oral argument, legal and factual research in support of Plaintiffs' privilege challenges, pretrial preparations, and oversight of class counsel's time and expense submissions. *Id*. Co-Lead Counsel and Liaison Counsel billed 82% of the total hours billed by all class counsel. *Id*.

Aside from Co-Lead Counsel and Liaison Counsel, 23 firms billed time to this matter (with only 14 firms billing more than $70,000). *Compare with In re Anthem, Inc. Data Breach Litig.*, 2018 WL 1940418, at *7 (N.D. Cal. Apr. 24, 2018) (suggesting a lodestar reduction where 53 firms billed time to the matter). Non-lead firms carried out a limited number of non-duplicative, discrete tasks at Co-Lead Counsel's direction, consisting primarily of conducting document review and working with named plaintiffs. Joint Decl., ¶ 93. Eight non-lead firms (including Liaison Counsel) assisted in reviewing over 3.3 million pages of documents produced by Defendants, and preparing Co-Lead Counsel for the depositions of key fact witnesses. The document review process was closely monitored by Co-Lead Counsel, including weekly conference calls and consistent oversight and adjustment of review strategy to ensure effectiveness and efficiency. *Id*., ¶ 30. In addition, non-lead counsel representing the named plaintiffs provided input into EPPs' responses to discovery requests propounded by Defendants, assisted with the collection of documents from their clients, and assisted in preparing their

clients for their depositions. *Id*., ¶ 93. Non-lead firms also assisted with other discrete tasks at direction of Co-Lead Counsel, such as assisting with non-party discovery and expert discovery, which proved critical to EPPs' class certification efforts. *Id*. Firms other than Co-Lead Counsel and Liaison Counsel billed 84% of their time to document review and discovery of their clients. *Id*. A chart showing the time class counsel spent on specific types of work is included in Paragraph 92 of Co-Lead Counsel's Joint Declaration.

Co-Lead Counsel also collaborated closely with counsel for DPPs to further reduce duplication and increase efficiency. To illustrate:

- DPPs took the lead briefing the at-issue waiver motions before this Court, while EPPs briefed Defendants' unsuccessful appeal. *Id*., ¶ 36.
- EPPs took the lead in Watson and Teikoku meet and confers, joint statements related to discovery and privilege disputes, while DPPs took the lead as to Endo. *Id*., ¶¶ 24-25.
- EPPs took the laboring oar drafting Plaintiffs' opposition to Defendants' summary judgment motion and DPPs took the lead drafting Plaintiffs' summary judgment motion and reply. *Id*., ¶¶ 68-69.
- EPPs and DPPs split the primary responsibility for drafting and responding to *Daubert* motions. *Id*., ¶ 70.
- EPPs took the lead preparing plaintiffs' trial filings, such as deposition designations, jury instructions and statements of disputed and undisputed facts, with DPPs preparing specific portions (such as the proposed Hatch-Waxman and patent jury instructions). *Id*., ¶ 75.
- EPPs took the lead on jury testing in advance of the trial, with DPPs preparing Plaintiffs' exhibit list and objections to Defendants' exhibit list. *Id*., ¶ 83.

EPPs agree with DPPs' assessment that "[c]ounsel for the direct purchaser class and the end[-]payor class enjoyed an exceptionally cooperative relationship in this case that benefited both classes." ECF No. 1024 at 5 n.3 (Declaration of Peter Kohn).

Class counsel also took steps to ensure that the time submitted reflected only work reasonably performed for the benefit of the End-Payor Class. *First*, each firm kept contemporaneous records of their time and was directed to review their daily time records to eliminate inefficiencies. Joint Decl., ¶ 94. Co-Lead Counsel and Liaison Counsel also reviewed the time records. *Id*. Work that did not benefit the End-Payor Class—such as intra-firm

conferences or "read and review" time beyond what is necessary to provide status updates to clients—is not included in class counsel's lodestar. *Id*. *Second*, time related to the JPML transfer motion or the appointment of interim lead counsel was excluded entirely from each firm's lodestar. *Id*. *Third*, each firm's lodestar includes a maximum of only twenty hours for drafting their client's initial complaint; any additional complaint-related time was excluded. *Id*. The number of hours reported is also conservative in that it does not reflect time that class counsel will continue to spend administering the settlements and overseeing the distributions of settlement proceeds, which will not be complete until 2020.

That class counsel spent many thousands of hours litigating this matter is a reflection of the fact that this complex antitrust action proceeded to the eve of trial. The requested hours are reasonable.

2. Class Counsel's Hourly Rates are Reasonable

The second part of the lodestar calculation is multiplying the hours spent by a "reasonable hourly rate for the region and the experience of the lawyer." *Bluetooth*, 654 F.3d at 941. Class counsel's historic rates—which range from $350 to $1,050 for partners and senior counsel, $300 to $675 for associates, and $100 to $400 for paralegals and other litigation staff (including senior cases managers)—meet both criteria.

The hourly rates are consistent with rates approved in recent antitrust class actions in this district. *E.g.*, *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 2017 WL 6040065 ("*NCAA*"), at *8 (N.D. Cal. Dec. 6, 2017) (approving hourly rates for partners of $578 to $1,035 and rates for associates of $295 to $635); *Nitsch v. DreamWorks Animation SKG Inc.*, 2017 WL 2423161, at *9 (N.D. Cal. June 5, 2017) (attorney rates generally between $275 to $750, and rates for the most senior attorneys of $870 to $1,200); *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 WL 4126533, at *7 (N.D. Cal. Aug. 3, 2016) (rates between $350 and $875); *In re High-Tech Empl. Antitrust Litig.*, 2015 WL 5158730, at *9 (N.D. Cal. Sept. 2, 2015) (partner rates of $490 to $975, non-partner rates of $310 to $800, and staff rates of $190 to $430). Ms. Sharp, Ms. Robertson, and Ms. Steiner billed at historic rates ranging from $510 to $700, at the lower end of partner rates recently approved in antitrust cases

this district. Each firm's rates are also its usual and customary rates that were charged by the firm in similar matters in which the firm is paid on a contingent basis, as well as the firm's noncontingent matters. Class Counsel Decls., section II. Each firm's declaration provides examples of courts approving the firm's hourly rates. *Id*.

Class counsel assigned tasks to attorneys and staff based on their skills and experience. *Id*., section I.C. Depositions and expert work were, for example, largely handled by senior attorneys while document review and legal research was conducted by more junior associates. Co-Lead Counsel set an hourly cap of $350 for all time spent on document review, including time spent compiling and preparing "deposition kits."[3] A small number of firms paid contract attorneys to review documents. *Id.* Co-Lead Counsel understands that the use of contract attorneys is an issue of increasing importance to courts. Here, contract attorneys, who were capped at a $350 hourly rate, billed only a small fraction of the time in this case.

While class counsel's lodestar is calculated using historic billing rates, courts in this district have recognized that use of current billing rates for all work is appropriate "'in order to account for the delay . . . in receiving payment.'" *CRT*, 2016 WL 4126533, at *7 (citing *Fischel v. Equitable Life Assur. Soc.*, 307 F.3d 997 (9th Cir. 2002)); *see also Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 740 (9th Cir. 2016) ("'attorneys in common fund cases must be compensated for any delay in payment'" and directing the district court to use current rates or a rate enhancement on remand (quoting *Fischel*, 307 F.3d at 1010)). Applying current rates, class counsel's lodestar would be substantially higher and the requested fee multiplier would be lower.

3. The Requested Multiplier is Warranted

In deciding whether to deviate from the lodestar figure, courts consider "the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues present, and the risk of nonpayment." *Bluetooth*, 654 F.3d at 942 (quoting *Hanlon v. Chrysler*

[3] The only exception was the $400 hourly rate permitted for an experienced Japanese language document reviewer who reviewed and identified key documents produced by Teikoku.

Corp., 150 F.3d 1011, 1029 (9th Cir. 1998)). "Foremost among these considerations, however, is the benefit obtained for the class." *Id*. Each of these factors weighs in favor of class counsel's requested 1.37 multiplier.

First, class counsel obtained a significant benefit for the End-Payor Class. Defendants will pay a total of $104.75 million in cash to settle EPPs' claims. The End-Payor Class will recover 46% of the most favorable single damages estimate EPPs were prepared to seek at trial ($229 million). *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 964-65 (9th Cir. 2009) (antitrust settlement for 30% of plaintiffs' estimated damages was "fair and reasonable no matter how you slice it"); *Edwards v. Nat'l Milk Producers Federation*, 2017 WL 3623734, at *7 (N.D. Cal. June 26, 2017) (that settlement was 30% of estimated indirect purchaser damages "strongly weighs in favor of granting final approval"); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 WL 3648478, at *7 n.19 (N.D. Cal. July 7, 2016) (describing survey of 71 settled cartel cases where weighted mean settlement recovery was 19% of single damages); *In re High-Tech Empl. Antitrust Litig.*, 2015 WL 5159441, at *4 (N.D. Cal. Sept. 2, 2015) (approving total settlements that were 14% of the class damages estimate, and noting that "[d]istrict courts in the Ninth Circuit routinely approve settlements with much larger differences between the settlement amount and estimated damages.").

As shown in the following chart, class counsel have been unable to identify any recent federal pay-for-delay or related drug litigation brought on behalf of end-payors that has settled for more than $100 million. Joint Decl., ¶ 5. As a percentage of the DPPs' recovery, the EPP settlement is likewise unprecedented.

CASE (District and Settlement Year)	**DPP (~MM)**	**EPP (~MM)**	**EPP % of DPP Total**
Lidoderm (N.D. Cal. 2018)	***$166***	***$104.75***	***63%***
Aggrenox (D. Conn. 2018)	$146	$54	37%
Solodyn (D. Mass. 2018)	$77	$45	58%
Skelaxin (E.D. Tenn. 2015)	$73	$9	12%
DDAVP (S.D.N.Y 2013)	$20	$5	25%
Flonase (E.D. Pa. 2013)	$150	$35	23%
Toprol XL (D. Del. 2012)	$20	$11	55%

Wellbutrin SR (E.D. Pa 2011)	$50	$22	44%
Tricor (D. Del. 2009)	$250	$66	26%
Ovcon (D.D.C. 2009)	$22	$13	59%
Terazosin (S.D. Fla. 2005)	$75	$31[4]	41%
Relafen (D. Mass. 2005)	$175	$75[5]	43%
Remeron (D.N.J. 2005)	$75	$36	48%
Paxil (E.D. Pa. 2005)	$150[6]	$65	43%%
Pre-Lidoderm Average (unweighted)			**39%**

Whether measured in dollars or by reference to percentage-of-recovery, the size of the recovery here alone warrants a substantial multiplier. *See Nitsch v. DreamWorks Animation SKG Inc.*, 2017 WL 2423161, at *10 (awarding a 2.0 multiplier for a 30.5% recovery).

Second, class counsel respectfully submits that they provided their clients with diligent and effective representation in this matter, and "did a good job persistently advocating for the best interests of class members, and obtained a very good result for the class[.]" *In re Charles Schwab Corp. Securities Litig.*, 2011 WL 1481424, at *8 (N.D. Cal. Apr. 19, 2011) (awarding a 2.68 multiplier). One example is class counsel's advocacy for the forecasting approach to damages. Had EPPs used the same "backcasting" type model used by DPPs, EPP damages would have been $156 million and the settlement recovery would have been 67% of damages. As noted in the Kohn Decl. at 1 (ECF 1024), the recovery of between 67%-88% of backcasting damages would put this recovery in the top three of percentage-of-damages recoveries for *DPP settlements*, which historically have much higher recoveries as a percentage of damages than EPP cases. Defendants were represented by leading defense firms, including counsel brought in specifically for purposes of trial. Despite the skill of opposing counsel, class counsel obtained favorable rulings on key issues throughout the case, including motions to dismiss, class certification, discovery disputes, summary judgment, and pretrial matters.

[4] Of this amount, $2 million was set aside to pay for the fees, costs, and claims of the state plaintiffs.

[5] This amount includes an $8 million payment to a large non-class group of third-party purchasers.

[6] After accounting for opt-outs, the final settlement amount was $100 million.

Third, this case raised numerous complex and novel issues of law. The Supreme Court issued its decision in *Actavis* in June 2013, shortly before this action commenced in November 2013. This case was the first post-*Actavis* pay-for-delay case filed in the Ninth Circuit, and many of the issues class counsel litigated were matters of first impression in this Circuit. Those issues included the proper standard of proof to apply at summary judgment and trial, an issue on which EPPs led the plaintiffs' briefing efforts. And because this litigation challenged a settlement of a patent litigation, it raised issues at the intersection of antitrust and patent law and often involved complex attorney-client privilege issues. Class counsel, for example, litigated (and prevailed on) disputes involving the common interest privilege and at-issue privilege waivers. Defendants unsuccessfully petitioned the Ninth Circuit to review the Court's order on both of these issues. EPPs took the lead on briefing both appeals. Class counsel's successful litigation of the unique and difficult issues presented in this case also weighs in favor of a multiplier. *Cf. DreamWorks*, 2017 WL 2423161, at *9-10 (awarding a 2.0 multiplier even where a prior case "provided much of the evidence, legal theories, arguments, and prior rulings necessary to litigate this case").

Fourth, this litigation presented a substantial risk of loss at the pretrial stage or at trial. In the only pay-for-delay case to proceed through trial since *Actavis*, the jury returned a victory for the defendants. *See In re: Nexium (Esomeprazole) Antitrust Litig.*, No. 1:12-md-02409-WGY, ECF No. 1383 (D. Mass. Dec. 5, 2014) (verdict form). In other cases, plaintiffs have lost at summary judgment. *See In re Wellbutrin XL Antitrust Litig. Indirect Purchaser Class*, 868 F.3d 132 (3d Cir. 2017) (affirming summary judgment in favor of defendants). Obtaining certification of an end-payor class is also notoriously difficult. As indirect purchasers, EPPs cannot rely on defendants' sales data to create their classwide damages model and must separately model damages for consumers and third-party payors, overcome "pass-on" arguments, account for various categories of payors that defendants argue escaped injury, and demonstrate that their class is ascertainable. These challenges are unique to end-payors and have proved fatal in other end-payor cases. *See Vista Healthplan, Inc. v. Cephalon, Inc.*, 2015 WL 3623005 (E.D. Pa. June 10, 2015) (denying class certification); *In re Skelaxin (Metaxalone)*

Antitrust Litig., 299 F.R.D. 555 (E.D. Tenn. 2014) (same). Even a victory on liability and causation would not have guaranteed a recovery significantly larger than the settlement. If Defendants had persuaded the jury to use a backcasting approach to damages and to adopt a later but-for entry date than the date advocated by EPPs, the maximum EPP damages would $118.75 million.

In addition, had EPPs prevailed at trial, Defendants were poised to appeal several important decisions, including the Court's certification of the End-Payor Class, its summary judgment order on the relevant market, and its order on the appropriate standard for establishing causation at trial. *See* ECF 929 at 25 (reserving appellate rights as to class certification); *id*. at 8 n.5 (same as to market definition); ECF 948 at 2 (arguing that the Court's causation standard "would create an appellate issue that would permeate the entirety of any liability verdict"). Against the backdrop of these risks, "Class Counsel litigated this action without pay for several years, even though recovery was uncertain." *High-Tech*, 2015 WL 5158730, at *10; *see also In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 475 (S.D.N.Y. 1998) ("Antitrust litigation in general, and class action litigation in particular, is unpredictable."). And during the course of the litigation, class counsel incurred more than $2.9 million in out-of-pocket expenses, for which there was no guarantee of reimbursement. Joint Decl., ¶¶ 98, 104.

Finally, the requested multiplier is well within the range of multipliers awarded in the Ninth Circuit. In *Vizcaino v. Microsoft Corporation* the Ninth Circuit surveyed common fund cases with settlements ranging from $50-200 million and found that multipliers ranged from 1.0-4.0 in the vast majority of cases. 290 F.3d 1043, 1052-54 (9th Cir. 2002). Courts in this district have recently awarded significantly larger multipliers in antitrust cases than the 1.37 multiplier requested by class counsel. *E.g. DreamWorks*, 2017 WL 2423161, at *10 (2.0 multiplier); *High-Tech*, 2015 WL 5158730, at *10 (2.2 multiplier after "Class Counsel devoted considerable time and effort litigating this case over a period of four years").

Viewed in light the above factors and awards in other cases, a 1.37 multiplier on class counsel's lodestar is warranted.

B. The Percentage-of-the Recovery Method Supports the Requested Attorneys' Fee Amount

Applying the percentage-of-the-recovery method, EPPs request a fee award of one-third of the settlement fund, including accrued interest. In the Ninth Circuit, the benchmark for attorneys' fees under a percentage-of-the-recovery approach is 25% of the settlement fund. *Bluetooth*, 654 F.3d at 942 (citation omitted). But "[t]he benchmark percentage ***should be*** adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (emphasis added). If the Court were to apply a percentage-of-recovery method here, an upward adjustment is warranted in light of class counsel's efforts, persistence, and the result achieved in this litigation. The factors courts consider when determining whether to depart from the 25% benchmark are: "(1) the result achieved; (2) the risk involved in the litigation; (3) the skill required and quality of work by counsel; (4) the contingent nature of the fee; and (5) awards made in similar cases." *Larsen v. Trader Joe's Co.*, 2014 WL 3404531, at *9 (N.D. Cal. 2014) (citing *Vizcaino*, 290 F.3d at 1048-50).

The first four factors largely mirror the considerations discussed above with respect to a lodestar multiplier. Just as those factors weigh in favor of a multiplier, they also weigh in favor of a fee award of one-third of the settlement fund.[7] "With respect to the first factor, the overall result and benefit to the class from the litigation is the most critical factor in granting a fee award." *Larsen*, 2014 WL 3404531, at *9 (citation omitted). Class counsel recovered 46% of EPPs' most favorable damages estimate, and more than 67% of "backcasting" damages, and "[f]ar lesser results (with 20% recovery of damages or less) have justified upward departures from the 25% benchmark." *NCAA*, 2017 WL 6040065, at *3 & n.14 (collecting cases). Second,

[7] When calculating the percentage, courts should use the gross settlement amount—*i.e.* including amounts that will be used to pay notice and administrative costs and litigation expenses—as the denominator. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 953 (9th Cir. 2015).

the EPPs faced substantial, unique risks throughout the litigation—including previous decisions denying certification of similar end-payor classes, and significant damages modeling challenges. *See* Part IV.A.3, above. Third, overcoming these risks and additional complex risks shared with the other plaintiff groups (including on motions to dismiss, privilege issues, summary judgment, *Daubert* challenges), required skillful and thoughtful representation and close collaboration with DPP counsel. Class counsel are among the most experienced class action and antitrust firms in the country, and their experience and skills were brought to bear to achieve a substantial result in for the End-Payor Class. Fourth, class counsel undertook this matter on an entirely contingent fee basis, with no (or late) parallel government litigation, and litigated under the demanding rule-of-reason standard. In cases like this one, "the public interest is served by rewarding attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk that they might be paid nothing for their work." *Larsen*, 2014 WL 3404531, at *9.

As to the fifth factor, a fee award of one-third of the settlement fund is within the range of awards in this Circuit. *See id*., 2014 WL 3404531, at *9 (citing numerous cases awarding fees of 32% or greater); *In re Pacific Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming award of 33%). *See also In re Vitamins Antitrust Litig.*, 2001 WL 34312839, at *10 (D.D.C. July 16, 2001) (awarding fees of 34% of $359 million settlement fund).

Fee awards of one-third are also commonplace in pay-for-delay litigation and were very recently awarded in two such cases. *E.g. In re Aggrenox Antitrust Litig.*, No. 2:14-md-02516-SRU, ECF 821, at 9-10 (July 19, 2018) (awarding 33 1/3%); *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 1:14-md-02503-RJC, ECF 1176, at 5 (July 18, 2018) (fee award of 33 1/3%; 1.08 multiplier); *In re Tricor Indirect Purchaser Antitrust Litig.*, No. 1:05-cv-00360-SLR, slip op. at 4, ECF No. 544 (D. Del. Oct. 28, 2009) (fee award of 33⅓% of the $67,500,000 settlement fund; 1.48 multiplier); *In re Relafen Antitrust Litig.*, No. 01-cv-12239-WGY, slip op. at 9, ECF No. 459 (D. Mass. Oct 13, 2005) (fee award of 33⅓% of the $67,000,000 settlement fund; 2.02 multiplier).

Moreover, there is "no rule in the Ninth Circuit that requires a court to decrease the percentage of the fee award as the size of the settlement increases." *In re Toyota Corp. Unintended Marketing, Sales Pracs. and Prods. Liability Litig.*, 2013 WL 12327929, at *34 (C.D. Cal. July 24, 2013) (citing *Vizcaino*, 290 F.3d at 1047). Instead, the size of the fund is simply one factor courts can look to when determining a reasonable fee. *Vizcaino*, 290 F.3d at 1047. A presumption that a certain percentage applies based on the size of the settlement fund "flies in the face" of a court's obligation to "consider[] all the circumstances of the case and reach[] a reasonable percentage." *Id*. at 1048; *see also Washington Public Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1298 (9th Cir. 1994) ("courts cannot rationally apply any particular percentage—whether 13.6 percent, 25 percent or any other number—in the abstract, without reference to all the circumstances of the case").

In appropriate circumstances, "federal district courts across the country have, in the class action settlement context, routinely awarded class counsel fees in excess of the 25% 'benchmark,' even in so-called 'mega-fund' cases." *NCAA*, 2017 WL 6040065, at *5 & n.30 (collecting cases, including those awarding fees of 1/3 of the settlement fund); *see also In re Urethane Antitrust Litig.*, 2016 WL 4060156, at *6 (D. Kan. July 29, 2016) ("although a one-third fee would be at the top of the range of awards in megafund cases, that figure does still fall within that range, especially in more recent cases"); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1366 (S.D. Fla. 2011) ("courts nationwide have repeatedly awarded fees of 30 percent or higher in so-called 'megafund' settlements") (collecting cases). For the reasons discussed above, an award above the benchmark is appropriate in this case.

While in some cases, it may be necessary to award a lower percentage to prevent "windfall profits for class counsel *in light of the hours spent on the case*." *Bluetooth*, 654 F.3d at 942 (emphasis added); *see also CRT*, 2016 WL 4126533, at *6 ("the best way to guard against a windfall is first to examine whether a given percentage represents too high of a multiplier of counsel's lodestar"); *Gutierrez v. Wells Fargo Bank, N.A.*, 2015 WL 2438274, at *4 (N.D. Cal. May 21, 2015) (refusing to apply 25% benchmark where result would have been a 10.38 multiplier). This is not one of those cases, however, given the modest multiplier class

counsel seek here. And just as the 25% benchmark is inappropriate in cases where it would result in a windfall, it is equally inappropriate where—as here—it would result in a fee that undercompensates class counsel. *See Six (6) Mexican Workers*, 904 F.2d at 1311 (benchmark should be adjusted where the recovery would be "either *too small or too large* in light of the hours devoted to the case") (emphasis added).

Even when courts have awarded less than 25%, they have regularly awarded lodestar multipliers of 2 or more, which is significantly more than Co-Lead Counsel has requested. *E.g. High-Tech*, 2015 WL 5158730, at *10 (awarding fees of 10.8%, a 2.2 multiplier). And, in light of the work performed and results achieved, courts in "megafund" cases have awarded fees that are both above the 25% benchmark and resulted in a significant multiplier. *E.g. Vizcaino*, 290 F.3d at 1050 (affirming 28% fee and multiplier of 3.65); *CRT*, 2016 WL 4126533, at *6, 10 (awarding a fee of 27.5% and a 1.96 multiplier); *Urethane*, 2016 WL 4060156, at *7 (awarding a fee of one-third, a 3.2 multiplier).

In short, the rationales for awarding fees at or below the 25% benchmark do not apply here. All of the relevant factors support the requested fee award.

V. THE REQUESTED EXPENSES ARE REASONABLE

"Class counsel is entitled to reimbursement of reasonable expenses." *Larsen*, 2014 WL 3404531, at *10 (citing Fed. R. Civ. P. 23(h)); *see also High-Tech*, 2015 WL 5158730, at *16 ("In common fund cases, the Ninth Circuit has stated that the reasonable expenses of acquiring the fund can be reimbursed to counsel who has incurred the expense.") (citing *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977)). Class counsel requests the reimbursement of their out-of-pocket expenses.

Throughout the litigation class counsel contributed to a litigation fund that was used to pay for common expenses such as expert witnesses, deposition transcripts, a document review platform, translations, and IMS transactional data used by EPPs' experts. Joint Decl., ¶ 98. The largest of these expenses were expert fees paid to EPPs' class certification and damages economist, Dr. Hal Singer. *Id.*, ¶ 100. In total, EPPs paid $2,470,935.01 in case-related expenses from the litigation fund. An accounting of the litigation fund expenditures is included in

Paragraph 99 of Co-Lead Counsel's Joint Declaration. Class counsel also incurred $434,313.80 in costs borne by individual firms and not paid out of the litigation fund. *Id*., ¶ 104. These include costs incurred for legal research, travel, postage, copying costs, and filing fees. *Id*., ¶ 105. An accounting of the non-litigation fund expenditures is included in Paragraph 105 of the Joint Declaration.

In addition, EPPs' expense request includes $356,792.62 in out-of-pocket expenses incurred by the Lowey Dannenberg firm that Co-Lead Counsel believe contributed to the result achieved on behalf of the End-Payor Class, consisting primarily of Lowey Dannenberg's contributions to the costs of Plaintiffs' joint experts. Joint Decl., ¶ 108. Class counsel also requests the payment of $385,000 in costs for distribution of notice of the Court's class certification order to the End-Payor Class. *Id*., ¶ 109. While KCC has agreed to carry that cost, it will become immediately due upon final approval and resolution of any appeals. *Id*. In total, class counsel requests the reimbursement of $3,647,041.43 in unreimbursed out-of-pocket expenses, which consists of $2,470,935.01 in expenditures from the litigation fund; $434,313.80 in individual firm expenses; $356,792.62 in expenses incurred by Lowey Dannenberg; and $385,000 for class certification notice.

The categories of expenses for which class counsel seeks reimbursement are the type routinely charged to clients and should be reimbursed. *See High-Tech*, 2015 WL 5158730, at *16 (awarding costs for (1) expert witness fees; (2) mediators' fees; (3) document review; (4) court reporting and videographer services; (5) electronic research; (6) copying, mailing, and serving documents; and (7) case-related travel for Plaintiffs, witnesses, experts, and counsel); *In re Media Vision*, 913 F.Supp. 1362, 1367-72 (N.D. Cal. 1996) (costs related to experts, photocopying, legal research fees, travel expenses, postage, and filing fees may be reimbursed).

VI. THE REQUESTED SERVICE AWARDS ARE REASONABLE

Class counsels' request for a service award of $10,000 to each of the nine Class Representatives ($90,000 total, which is .086% of total value of the Settlements) is also reasonable. Each Class Representative actively participated in the litigation, stayed abreast of the progress of the case, collected and produced documents and responded to interrogatories,

and sat and prepared for depositions.[8] Awards of $10,000 are frequently awarded to end-payors in pay-for-delay cases. *E.g.*, *Aggrenox*, No. 2:14-md-02516-SRU, ECF 821, at 10 (awarding $10,000 service awards); *Solodyn*, No. 1:14-md-02503-RJC, ECF 1176, at 4 (same). The requested awards are also consistent with similar service awards regularly approved in class actions in this district. *E.g.*, *Alvarez v. Farmers Ins. Exchange*, 2017 WL 2214585, at *1 (N.D. Cal. Jan. 18, 2017) (approving nine $10,000 service awards that in the aggregate were 1.8% of the settlement value); *In re Animation Workers Antitrust Litig.*, 2016 WL 6663005, at *9 (N.D. Cal. Nov. 11, 2016) (approving $10,000 service awards in a case with $18.95 million settlement fund).

VII. PROPOSED SCHEDULE FOR PAYMENT OF FEES, EXPENSES, AND SERVICE AWARDS

Endo will not make its second and third payments (of $10 million each, or 9.5% of the total settlement amount, each) until February 15, 2019 and 2020, respectively. While Endo's second payment will be included in the first distribution of settlement funds to class members in March 2019, Endo's third payment will not be available for distribution until March 2020.

Class counsel therefore propose that their fees are paid on the same schedule and in the same proportion as the End-Payor Class's recoveries. In other words, class counsel would: (1) receive 81% of the Court-awarded fees upon final approval and settlement finality (accounting for the full payments by Watson and Teikoku, and Endo's payment of one-half of its total settlement amount), (2) receive 9.5% of the Court-awarded attorneys' fees after receipt of Endo's second payment, and (3) receive the remaining 9.5% of the Court-awarded attorneys' fees after receipt of Endo's third payment.

In sum, class counsel propose that attorneys' fees and expense payments occur according to the following schedule:

[8] The sole exception is Ms. Gallotto, who by agreement of the parties instead responded to written questions due to her failing health.

Event	Date
Endo's first payment, Teikoku payment, Watson payment (total: $84.75 million)	Already received
Payment of 81% of the Court-awarded attorneys' fees, $3,647,041.43 in expenses, and service awards	Thirty days after final approval and the running of any appeals (*i.e.* settlement finality)
Endo's second payment ($10 million)	By February 15, 2019
First distribution of settlement funds and payment to class counsel of 9.5% of the court-awarded attorneys' fees	Early March 2019
Endo's third payment ($10 million)	By February 15, 2010
Second distribution of settlement funds and payment to class counsel of 9.5% of the court-awarded attorneys' fees	Early March 2020

The proposed schedule protects the interests of the End-Payor Class by ensuring that class counsel will receive their fee and expense payments on the same schedule that the End-Payor Class receives its recoveries. The schedule also prevents the overpayment of class counsel in the event of non-payment of the second or third Endo payments.

VIII. CONCLUSION

For the foregoing reasons, class counsel requests the Court award one-third of the settlement amounts ($34,916,000) in attorneys' fees, plus proportional interest accrued from the Settlement Fund; award $3,647,041.43 in expenses; and service awards of $10,000 to each of the End-Payor Plaintiffs.

DATED: July 31, 2018

Respectfully submitted,

/s/ *Dena C. Sharp*

Daniel C. Girard (SBN 114826)
Dena C. Sharp (SBN 245869)
Scott Grzenczyk (SBN 279309)
GIRARD GIBBS LLP
601 California Street, 14th Floor
San Francisco, CA 94108

Telephone: (415) 981-4800
Facsimile: (415) 981-4846
Email: dcg@girardgibbs.com
Email: chc@girardgibbs.com
Email: smg@girardgibbs.com

/s/ *Renae D. Steiner*
Renae D. Steiner
Teresa M. Jones
HEINS MILLS & OLSON, P.L.C.
310 Clifton Avenue
Minneapolis, MN 55403
Telephone: (612) 338-4605
Facsimile: (612) 338-4692
Email: rsteiner@heinsmills.com

/s/ *Sharon K. Robertson*
Sharon K. Robertson
Donna M. Evans
COHEN MILSTEIN SELLERS & TOLL PLLC
88 Pine Street, 14th Floor
New York, New York 10005
Telephone: (212) 838-7797
Facsimile: (212) 838-7745
Email: srobertson@cohenmilstein.com
Email: devans@cohenmilstein.com

Co-Lead Counsel for Plaintiffs and the End-Payor Class

Joseph R. Saveri
Joshua P. Davis
Ryan J. McEwan
Kyla Gibboney
JOSEPH SAVERI LAW FIRM, INC.
601 California Street, Suite 1000
San Francisco, California 94108
Telephone: (415) 500-6800
Facsimile: (415) 395-9940
Email: jsaveri@saverilawfirm.com
Email: rmcewan@saverilawfirm.com

Liaison Counsel for Plaintiffs and the End-Payor Class

Steve D. Shadowen
HILLIARD & SHADOWEN LLP
39 West Main Street
Mechanicsburg, PA 17055
Telephone: (855) 344-3298
Email: steve@hilliardshadowenlaw.com

Marvin A. Miller
Lori A. Fanning
MILLER LAW LLC
115 South LaSalle Street, Suite 2910
Chicago, IL 60603
Telephone: (312) 332-3400
Email: mmiller@millerlawllc.com
Email: lfanning@millerlawllc.com

Michael M. Buchman
MOTLEY RICE LLC
600 Third Ave, Suite 2101
New York, New York 10016
Telephone: (212) 577-0051
Facsimile: (212) 577-0054
Email: mbuchman@motleyrice.com

David W. Mitchell
Brian O. O'Mara
ROBBINS GELLER RUDMAN & DOWD LLP
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: (619) 231-1058
Facsimile: (619) 231-7423

Executive Committee for the proposed End-Payor Class

Natalie Finkelman Bennett
SHEPHERD, FINKELMAN, MILLER & SHAH, LLP
35 E. State Street
Media, PA 19063
Telephone: (610) 891-9880
Facsimile: (610) 891-9883
Email: nfinkelman@sfmslaw.com

Jeremy A. Lieberman
POMERANTZ LLP
600 Third Avenue
New York, NY 10016
Telephone: (212) 661-1000
Facsimile: (917) 463-1044
Email: jalieberman@pomlaw.com

Lee Albert
GLANCY BINKOW & GOLDBERG LLP
122 East 42nd Street, Suite 2920
New York, NY 10168
Telephone: (212) 682-5340
Facsimile: (212) 884-0988
Email: lalbert@glancylaw.com

Michael Coren
COHEN PLACITELLA & ROTH, P.C.
Two Commerce Square, Suite 2900
2001 Market Street
Philadelphia, P A 19103
Telephone: (215) 567-3500
Email: jgoldberg@cprlaw.com

Ralph B. Kalfayan
KRAUSE, KALFAYAN, BENINK & SLAVENS
550 West C Street, Suite 530
San Diego, California 92101
Telephone: (619) 232-0331
Facsimile: (619) 232-4019
Email: rkalfayan@kkbs-law.com

Jeffrey L. Kodroff
SPECTOR ROSEMAN KODROFF & WILLIS, P.C.
1818 Market Street, Suite 2500
Philadelphia, PA 19103
Telephone: (215) 496-0300
Facsimile: (215) 496-6611
Email: jkodroff@srkw-law.com

Robert W. Sink
LAW OFFICES OF ROBERT W. SINK
1800 J.F.K. Blvd., 14th Floor
Philadelphia, PA 19103

Telephone: (215) 995-1000
Email: rsink@sinklawoffices.com

William E. Hoese
KOHN, SWIFT & GRAF, P.C.
One South Broad Street, Suite 2100
Philadelphia, PA 19106
Telephone: (215) 238-1700

Robert S. Kitchenoff
WEINSTEIN KITCHENOFF & ASHER LLC
1845 Walnut Street, Suite 1100
Philadelphia, PA 19103
Telephone: (215) 545-7200
Email: Kitchenoff@wka-law.com

Krishna B. Narine
MEREDITH & NARINE
100 Broad Street, Suite 905
Philadelphia, PA 19110
Telephone: (215) 564-5182
Email: knarine@m-npartners.com

William H. London
FREED KANNER LONDON & MILLEN, LLC
2201 Waukegan Road, Suite 130
Bannockburn, IL 60015
Telephone: (224) 632-4500
Email: blondon@fklmlaw.com

Gregory S. Asciolla
LABATON SUCHAROW LLP
140 Broadway
New York, NY 10005
Telephone: (212) 907-0700
Fax: (212) 818-0477
Email: gasciolla@labaton.com

Karen Hanson Riebel
Heidi M. Silton
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401-2159
Telephone: (612) 339-6900

Email: khriebel@locklaw.com
Email: hmsilton@locklaw.com

Frank R. Schirripa
HACH ROSE SCHIRRIPA & CHEVERIE LLP
185 Madison Ave
New York, New York 10016
Telephone: (212) 213-8311
Email: fschirripa@hrsclaw.com

Kenneth A. Wexler
WEXLER WALLACE LLP
55 W. Monroe St., Suite 330
Chicago, IL 60603
Tel: (312) 346-2222
Fax: (312) 346-0022
Email: kaw@wexlerwallace.com

Additional Plaintiffs' Counsel

ATTESTATION

I, Dena C. Sharp, am the ECF User whose identification and password are being used to file End-Payor Class Counsel's Motion for an Award of Attorneys' Fees, Expenses, and Service Awards. Pursuant to Civil L.R. 5-1(i)(3), I attest under penalty of perjury that concurrence in this filing has been obtained from all counsel.

DATED: July 31, 2018

/s/ *Dena C. Sharp*
Dena C. Sharp

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2018, I electronically filed the foregoing document using the CM/ECF system, which will send notification of such filing to all counsel of record registered in the CM/ECF system.

/s/ *Dena C. Sharp*

TAB 37A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEC 07 2017

Laydon v. Mizuho Bank, Ltd., et al.	No. 12-cv-3419 (GBD)
Sonterra Capital Master Fund Ltd., et al. v. UBS AG, et al.	No. 15-cv-5844 (GBD)

~~[PROPOSED]~~ ORDER GRANTING CLASS COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES

This matter came for a duly-noticed hearing on December 7, 2017 (the "Fairness Hearing"), upon Class Counsel's Motion for Award of Attorneys' Fees ("Fee Application") in the related actions captioned *Laydon v. Mizuho Bank, Ltd., et al.*, No. 12-cv-3419 (GBD) (S.D.N.Y.) ("*Laydon*") and *Sonterra Capital Master Fund Ltd., et al. v. UBS AG, et al.*, No. 15-cv-5844 (GBD) (S.D.N.Y.) ("*Sonterra*") (collectively, the "Actions"). The Court has considered the Fee Application and all supporting and other related materials, including the matters presented at the Fairness Hearing. Due and adequate notice of: (1) the Stipulation and Agreement of Settlement with Deutsche Bank AG and DB Group Services (UK) Ltd. (collectively, "Deutsche Bank") entered into on July 21, 2017; and (2) the Stipulation and Agreement of Settlement with JPMorgan Chase & Co., JPMorgan Chase Bank, National Association, and J.P. Morgan Securities plc (collectively, "JPMorgan") entered into on July 21, 2017 (collectively, the "Settlements")[1] having been given to the Settlement Class Members, the Fairness Hearing having been held, and the Court having considered all papers filed and proceedings held herein and otherwise being fully informed in the premises and good cause appearing therefore,

[1] Unless otherwise defined herein, all capitalized terms used have the meanings set forth and defined in the Settlements.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. This Court has personal jurisdiction over Plaintiffs, Deutsche Bank and JPMorgan (the "Parties") and all Settlement Class Members and subject matter jurisdiction over the Actions to approve the Settlements and all exhibits attached thereto;

2. Notice of the Fee Application was provided to potential Settlement Class Members in a reasonable manner, and such notice complies with Rule 23(h)(1) of the Federal Rules of Civil Procedure and due process requirements;

3. Plaintiffs' Counsel is hereby awarded attorneys' fees in the amount of $34,880,000.00 (approximately 23.57% of the total Settlement Funds), plus interest at the same rate as earned by the Settlement Funds, which shall be paid out of the Settlement Funds;

4. In accordance with the Court's August 29, 2012 Order (*Laydon v. Mizuho Bank, Ltd., et al.*, No. 12-cv-3419, ECF No. 99, at paragraph 1(j)), Class Counsel is hereby authorized to allocate the attorneys' fees among Plaintiffs' Counsel in a manner in which, in Class Counsel's judgment, reflects the contributions of such counsel to the prosecution and settlement of the Actions;

5. In making this award of attorneys' fees, the Court has considered and found that:

   a. Plaintiffs' Counsel have prosecuted the Actions and achieved the Settlements with skill, perseverance, and diligent advocacy;

   b. The Actions involve numerous complex factual and legal issues and were actively litigated and, in the absence of a settlement, would have involved lengthy proceedings with uncertain resolution of the numerous complex factual and legal issues;

   c. Had Plaintiffs' Counsel not achieved the Settlements, a risk would remain that Plaintiffs and the Settlement Class may have recovered less or nothing from Deutsche Bank and JPMorgan;

   d. Public policy considerations support the requested fee, as only a small

number of firms have the requisite expertise and resources to successfully prosecute cases such as the Actions;

e. Notice was disseminated stating that Class Counsel would be moving for attorneys' fees in the amount of one-fourth of the Settlement Funds; and

f. The amount of attorneys' fees awarded is fair, reasonable, appropriate and consistent with the awards in similar cases, and represents a reasonable percentage of the Settlement Funds, in view of the applicable legal principles and the particular facts and circumstances of the Actions.

6. In the event that the Settlements are terminated or the Effective Date does not occur in accordance with the terms of the Settlements, this Order shall be null and void, of no further force or effect, and without prejudice to any of the Parties, and may not be introduced as evidence or used in any actions or proceedings by any Person against the Parties;

7. Pursuant to Section 5(D) of the Deutsche Bank Settlement Agreement and JPMorgan Settlement Agreement, this fee award is independent of the Court's consideration of the fairness, reasonableness, and adequacy of the Settlements and is also independent of the Court's consideration of the proposed Plan of Allocation; and

8. The fees awarded herein may be paid to Plaintiffs' Counsel from the Settlement Funds immediately upon entry of this Order, subject to the terms, conditions, and obligations of the Settlements which terms, conditions, and obligations are incorporated herein.

IT IS SO ORDERED.

This 7th day of December, 2017.

George B. Daniels

Honorable George B. Daniels
United States District Judge

TAB 37B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Laydon v. Mizuho Bank, Ltd., et al.	No. 12-cv-3419 (GBD)
Sonterra Capital Master Fund Ltd., et al. v. UBS AG, et al.	No. 15-cv-5844 (GBD)

MEMORANDUM OF LAW IN SUPPORT OF
CLASS COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES

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Pursuant to this Court's September 14, 2017 superseding order preliminarily approving Settlements with Deutsche Bank[1] and JPMorgan[2], Plaintiffs,[3] through Lowey Dannenberg, P.C. ("Class Counsel") respectfully move under Rule 23(h) of the Federal Rules of Civil Procedure for an award of attorneys' fees of $34.88 million, or approximately 23.57% of the $148 million common fund established by Plaintiffs' settlements with Deutsche Bank and JPMorgan in the related cases *Laydon v. Mizuho Bank, Ltd., et al.,* No. 12-cv-3419 (GBD) ("*Laydon*") and *Sonterra Capital Master Fund, Ltd., et al, v. UBS AG et al.*, No. 15-cv-5844 (GBD) ("*Sonterra*"). The requested fees are consistent with the negotiated fee agreement with CalSTRS, one of the largest public pension systems in the world. Further, the fees are within the percentage found reasonable in this circuit and are less than the total lodestar incurred in litigating these cases to date.

INTRODUCTION

Class Counsel has been litigating on behalf of investors in Euroyen-Based Derivatives as sole Lead Counsel for over five-and-a-half years on a fully-contingent basis. Taking on 44 of the world's largest financial institutions regarding the manipulation of Yen-LIBOR and Euroyen TIBOR, Class Counsel has achieved significant results, including a total of $206 million in monetary compensation and valuable cooperation, while facing many of the top antitrust lawyers in the country and the vast resources of their clients.

Class Counsel's ability to successfully recover for the Settlement Class is a testament to the quality of the work and resources devoted to these massive cases, which included multiple amended pleadings, more than 15 motions and 50 separate memoranda, and almost eleven million pages in

[1] "Deutsche Bank" means Deutsche Bank AG and DB Group Services (UK) Ltd.

[2] "JPMorgan" means JPMorgan Chase & Co., JPMorgan Chase Bank, National Association, and J.P. Morgan Securities plc. Together, JPMorgan and Deutsche Bank are referred to as the "Settling Defendants."

[3] Plaintiffs are Jeffrey Laydon, Sonterra Capital Master Fund, Ltd. ("Sonterra"), Hayman Capital Master Fund, L.P. and Japan Macro Opportunities Master Fund, L.P. (collectively, "Hayman"), and California State Teachers' Retirement System ("CalSTRS"). Unless otherwise noted, ECF citations are to the docket in the *Sonterra* Action, and internal citations and quotation marks are omitted. Unless otherwise defined, capitalized terms herein have the same meaning as in the Deutsche Bank Settlement Agreement and JPMorgan Settlement Agreement. ECF Nos. 338-1; 338-2.

discovery. The *Laydon* Third Amended Complaint's ("TAC") (*Laydon*, ECF No. 580) and *Sonterra* Amended Class Action Complaint's (ECF No. 121) detailed allegations describing, *inter alia*, the structure of Defendants' conspiracy and its economic impact on the Euroyen-Based Derivatives market represent just a portion of the effort expended to date.

The Plan of Allocation is similarly representative of the effort expended. Class Counsel developed this data-driven approach over several months with one of the leading commodities manipulation experts, advancing all associated costs. Class Counsel deployed cutting-edge document review technology and a team specially trained in analyzing transactional data to mine the necessary records from the millions of documents that Defendants produced in the *Laydon* Action. This process was time-consuming, but invaluable and resulted in a damages model capable of fairly allocating settlement funds.

Having worked diligently for more than five-and-a-half years and having received fees representing only a fraction of the professional services provided to date, Class Counsel should now be awarded a fair and reasonable fee of $34.88 million, or approximately 23.57% of the monetary value of the settlement amounts. This request is objectively fair and reasonable because it is consistent with the graduated fee scale that Plaintiff CalSTRS negotiated with Class Counsel before joining this case. *See* Part I.A *infra*. The request is also qualitatively reasonable because it satisfies all six *Goldberger* factors used to evaluate attorneys' fees in this Circuit (*see* Part I.C-D *infra*) and is consistent with fee awards in other similarly complex class actions. *See* Part I.B *infra*.

Class Counsel does not seek reimbursement for the $223,272.66 in out-of-pocket expenses incurred since September 1, 2016. These expenses, described in the accompanying declaration of Geoffrey M. Horn ("Horn Decl."), and those of additional Plaintiffs' Counsel,[4] were incurred for

[4] *See* Declaration of Benjamin M. Jaccarino, Esq. (Lovell Stewart Halebian Jacobson LLP); Declaration of Todd A. Seaver, Esq. (Berman Tabacco); Jennifer W. Sprengel, Esq. (Cafferty Clobes Meriwether & Sprengel LLP); and Linda Nussbaum, Esq. (Nussbaum Law Group, P.C.).

the Class's benefit and predominantly consist of discovery costs, expert work, mediation, travel, and research expenses. These expenses have been paid or will be paid from the litigation expense fund established by this Court's prior order approving settlements with Citibank, N.A., Citigroup Inc., Citibank Japan Ltd., Citigroup Global Markets Japan Inc. (collectively, "Citi") and HSBC Holdings plc, HSBC Bank plc (collectively, "HSBC"). *See* ECF No. 297 ¶ 3.

THE WORK UNDERTAKEN BY CLASS COUNSEL

These additional settlements in *Laydon* and *Sonterra* are the products of the continued investigation, diligence and skill of some of the country's most experienced commodity manipulation lawyers and experts. Class Counsel has continued to shoulder the financial risk of litigating these actions and has continued to productively use its resources to generate beneficial results for Plaintiffs and the Class. The work undertaken for the Class is fully described in previous filings with the Court (see ECF Nos. 188-89, 261-63, 278-79, 281-87, 337-38) and the accompanying declaration of Vincent Briganti ("Briganti Decl."). Below is a summary of that work, with attention on the efforts undertaken since September 1, 2016.

A. Initial Case Investigation and the *Laydon* Complaints

Class Counsel began investigating the alleged manipulative conduct in the Euroyen-Based Derivatives market more than five years ago, after UBS revealed it had entered the Department of Justice's "ACPERA"[5] leniency program by self-reporting criminal cartel activity involving Yen-LIBOR and Euroyen TIBOR. *See* Briganti Decl. ¶¶ 2-3.

Class Counsel filed the initial Class Action Complaint ("CAC") (*Laydon,* ECF No. 1) on behalf of Jeffrey Laydon on April 30, 2012, asserting claims under the Sherman Act, Commodity Exchange Act ("CEA"), and several states' laws against twenty-five Defendants that were members of the Yen-LIBOR and/or Euroyen TIBOR panels. *Id.* ¶ 4. In June 2012, Barclays became the first

[5] Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. 108-237.

Defendant to settle with global regulators. *Id.* ¶ 10. Class Counsel filed the First Amended Complaint ("FAC") on December 3, 2012. The FAC incorporated information from Barclays' government settlements and expanded the CAC's allegations by more than 100 pages with 48 charts, graphs, and tables reflecting new economic evidence from a leading expert in benchmark manipulation retained by Class Counsel. *Id.* ¶ 11. Based on information from UBS's and RBS's government settlements, Class Counsel filed an enhanced Second Amended Complaint ("SAC"), replete with detailed allegations describing a conspiracy to manipulate Yen-LIBOR, Euroyen TIBOR, and the prices of Euroyen-Based Derivatives, including the Euroyen TIBOR futures contracts that Plaintiff Laydon traded on the Chicago Mercantile Exchange ("CME"). *Id.* ¶¶ 12-14.

Defendants filed thirteen separate memoranda of law in support of their motions to dismiss the SAC on June 14, 2013. *Id.* ¶ 17. Class Counsel filed an omnibus opposition to Defendants' motions to dismiss the SAC on August 13, 2013. *Id.* After a full day of oral argument on March 5, 2014, the Court granted-in-part and denied-in-part Defendants' motion to dismiss on March 28, 2014, dismissing Plaintiff's antitrust claims but sustaining CEA claims. *Id.* ¶ 19.

Class Counsel moved for leave to amend and filed a Proposed Third Amended Complaint ("PTAC") on June 17, 2014. *Id.* ¶ 21. The PTAC reflected Class Counsel's continuing investigation and sought to add four newly-identified Defendants. It also sought to add two named plaintiffs, Oklahoma Police Pension & Retirement System ("OPPRS") and Stephen Sullivan ("Sullivan") who transacted in Euroyen-Based Derivatives directly with several Defendants. *Id.* ¶ 22. The PTAC included new claims for breach of the implied covenant of good faith and fair dealing, and renewed claims for unjust enrichment based on these direct dealings. *Id.* The PTAC also added claims for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") based in part on Defendant Rabobank's traders' recent guilty pleas to wire fraud in connection with the manipulation of Yen-LIBOR and Euroyen TIBOR. *Id.* ¶ 23.

On August 7, 2014, fourteen Defendants filed eight new motions to dismiss the SAC under Rule 12(b)(2), arguing that the Supreme Court's seven-month old decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), created a previously-unavailable personal jurisdiction defense. *Id.* ¶ 24. Class Counsel opposed these motions arguing, *inter alia*, that Defendants had waived their personal jurisdiction defenses by not raising them sooner. *Id.* ¶ 26.

Defendants filed their opposition to Plaintiff's motion for leave to amend four days later. *Id.* ¶ 25. While Class Counsel was preparing Plaintiff's response, CalSTRS retained Class Counsel to prosecute claims based on its Euroyen-Based Derivatives transactions with certain Defendants. *Id.* ¶ 27. As described fully in the accompanying declaration of CalSTRS's general counsel, Brian J. Bartow, before joining the case, CalSTRS negotiated a graduated fee schedule with Class Counsel that provided for a 25% fee on the first $100 million recovered, 23% on the next $200 million recovered, and lower fee percentages on subsequent amounts added to the common fund. *See* Declaration of Brian J. Bartow ("Bartow Decl."), ¶ 7. The fee agreement also limited the amount of fees Class Counsel could request to 3.5 times the aggregate lodestar of all Plaintiffs' Counsel. *Id.* Class Counsel then drafted detailed allegations, including examples of how Defendants' misconduct impacted CalSTRS's transactions. These new allegations were included with Plaintiff's reply brief to avoid the need for an additional round of motion to amend briefing. *See* Briganti Decl. ¶ 27.

On March 31, 2015, the Court partially granted Plaintiff's motion for leave to amend the complaint to add the four new Defendants but denied leave to include the new plaintiffs and RICO and state law claims. *Id.* ¶ 28. CalSTRS's request to join the action was also denied but it was permitted to renew its application by letter within 30 days. The Court denied ten Defendants' motions to dismiss the SAC, holding they had waived their personal jurisdiction defenses. *Id.*

B. The Sonterra Complaint

CalSTRS filed a letter motion to intervene in *Laydon* on April 29, 2015. *Id.* ¶ 33. While that motion was pending, Class Counsel initiated the *Sonterra* action on behalf of two U.S.-based investment funds—Sonterra and Hayman Capital Management L.P. ("Hayman Management"). *Id.* ¶ 35. Like CalSTRS, Sonterra and Hayman Management transacted in over-the-counter Euroyen-Based Derivatives, including Yen-LIBOR-based interest rate swaps and Yen foreign exchange forward agreements, directly with several Defendants. *Id.* Class Counsel related this new case to *Laydon* and quickly moved to consolidate the actions as the cases involved overlapping facts, occurrences, and law, and the same Defendants, government settlements, Euroyen-Based Derivatives, and economic evidence of manipulation and price artificiality. *Id.*

The Court addressed both CalSTRS's motion to intervene and the *Sonterra* Plaintiffs' motion to consolidate on October 8, 2015. *Id.* ¶ 38. First, the Court denied Plaintiff's motion to consolidate the *Laydon* and *Sonterra* actions without prejudice, explaining that it would reconsider whether consolidation was appropriate after all Defendants had either answered or filed motions to dismiss in both cases. *Id.* Next, the Court denied CalSTRS's motion to intervene in *Laydon* and instructed CalSTRS to file its own complaint. *Id.* ¶ 39. To avoid unnecessarily spending resources on a new complaint and a round of motion to dismiss briefing, Class Counsel suggested adding CalSTRS to the *Sonterra* action. *Id.* ¶ 39. The Court agreed and ordered the *Sonterra* plaintiffs to file an amended complaint including CalSTRS by December 1, 2015. After a brief extension, amended complaints were filed in *Sonterra* on December 18, 2015. *Id.* ¶ 41.

C. *Laydon* TAC

Plaintiff filed his TAC in *Laydon* on December 18, 2015. *Id.* ¶ 41. Defendants subsequently moved to strike the TAC on the ground that it did not comply with the Court's order granting leave to amend because, *inter alia*, it included claims that were previously dismissed in order to preserve

those claims for appeal. *Id.* ¶ 43. The Court granted this motion, instructing Class Counsel to submit a new PTAC with a letter seeking leave to file that complaint. *Id.* Plaintiff filed his motion for leave to file the new PTAC, which Defendants opposed, arguing that it too violated the Court's order granting leave to amend and that the amendment was futile because it added time-barred claims. *Id.* ¶ 44. The Court granted Plaintiff's motion and Class Counsel filed a new TAC on February 29, 2016. Defendants' subsequent attempts to strike that complaint were denied. *Id.*

Twenty-one Defendants (the "Legacy Defendants") filed 16 answers to the TAC on May 16, 2016 totaling over 2,000 pages. *Id.* ¶ 45. After meeting and conferring with the Legacy Defendants regarding their answers, four Defendants filed amended answers on November 14, 2016. *Id.*

On May 16, 2016, the Legacy Defendants filed a motion to partially dismiss claims in the TAC arising during the last six months of the Class Period (January 1, 2011 through June 30, 2011) as time-barred. *Id.* ¶ 47. After the motion was fully briefed, the Court held oral argument on October 25, 2016. *Id.* The Court granted the Legacy Defendants' motion on May 10, 2017. *Id.*

Also on May 16, 2016, three Defendants added to the TAC ("Newly-Added *Laydon* Defendants") filed motions to dismiss for lack of personal jurisdiction. *Id.* ¶ 46. Plaintiff filed his opposition on July 18, 2016 and the Newly-Added *Laydon* Defendants filed their reply on August 16, 2016. *Id.* After the parties completed briefing, but before oral argument, the Second Circuit decided *Waldman v. Palestine Liberation Org.*, 835 F.3d 317 (2d Cir. 2016). The parties submitted letter briefing on the impact of *Waldman* on the pending motion to dismiss. *Id.* The Court held oral argument on October 25, 2016. *Id.* On March 10, 2017, the Court granted the Newly-Added *Laydon* Defendants' motions to dismiss. *Id.*

Based on the *Waldman* decision, certain Defendants filed motions with the Court seeking revision and relief from the Court's November 10, 2014 and March 31, 2015 Orders finding certain Defendants waived their personal jurisdiction defense, or, alternatively certification of the Orders to

the Second Circuit. *Id.* ¶ 48. Plaintiffs opposed the motions. *Id.* After the motions were fully briefed, the Court denied certain Defendants' motions on May 19, 2017. *Id.*

D. Motion to Dismiss Ruling in the *Sonterra* Action

On February 1, 2016, the *Sonterra* Defendants filed at least five briefs and more than 30 declarations in support of their motions to dismiss arguing, *inter alia*, that the Court should dismiss Plaintiffs' claims for lack of personal jurisdiction, lack of antitrust standing and antitrust injury, and because they involve an extraterritorial application of United States law. *Id.* ¶¶ 49-51. On May 5, 2016, the Court held an all-day oral argument at which Class Counsel delivered a multi-hour presentation in opposition to Defendants' arguments with documentary evidence. *Id.* ¶ 52.

On March 10, 2017, the Court entered a Memorandum Decision and Order, dismissing the *Sonterra* Action against the non-settling Defendants for lack of subject matter jurisdiction and declining to exercise supplemental jurisdiction over the *Sonterra* Plaintiffs' state law claims. *Sonterra Capital Master Fund, Ltd. v. UBS AG*, No. 15-cv-5844, 2017 WL 1091983 (S.D.N.Y. Mar. 10, 2017) (the "Opinion"). In the Opinion, the Court acknowledged that Deutsche Bank and JPMorgan had withdrawn their motions to dismiss. *Id.* at *1 n.1. The Court also entered judgment on the same day, closing the case. Briganti Decl. ¶ 52. Class Counsel filed a timely notice of appeal to the United States Court of Appeals for the Second Circuit. *Id.* ¶ 53. On May 2, 2017, the Second Circuit placed the appeal on its Expedited Calendar, with briefing due June 6, 2017.

The dismissal of the action in its entirety, entry of judgment and appeal created uncertainty among the settling parties about the Court's ability to entertain a motion for seeking approval of the settlements. Briganti Decl. ¶ 54. While Plaintiff drafted its appellate brief, Class Counsel engaged in numerous phone calls with the Settling Defendants regarding the best procedure to follow to obtain preliminary approval of the Settlements. *Id.*

Plaintiffs, with consent from Settling Defendants, filed a motion for an indicative ruling pursuant to Federal Rule 62.1. Briganti Decl. ¶ 54. On May 24, 2017, the Court granted the motion for an indicative ruling under Rule 62.1 in the *Sonterra* Action, indicating that it intended to "amend the Judgment (ECF No. 315) entered in this action on March 10, 2017, pursuant to Federal Rule of Civil Procedure 60, to exclude Deutsche Bank and JPMorgan from the Judgment, and retain and exercise jurisdiction over Deutsche Bank and JPMorgan in order to consider approval in this action [of] their settlements with Plaintiffs." ECF No. 324, at 2; Briganti Decl. ¶ 54.

Class Counsel then filed a motion on consent of Deutsche Bank and JPMorgan for remand pursuant to Fed. R. App. P. 12.1 in the Second Circuit. *Sonterra Capital Master Fund, Ltd., et al. v. UBS AG, et al.*, No. 17-944 (2d Cir. May 25, 2017), ECF No. 140. The Second Circuit granted the motion on June 13, 2017. *Sonterra Capital Master Fund, Ltd., et al. v. UBS AG, et al.*, No. 17-944 (2d Cir. June 13, 2017), ECF No. 151.[6] On June 19, 2017, this Court amended the Judgment to exclude Deutsche Bank and JPMorgan. ECF No. 335, at 2. Finally, Class Counsel filed the preliminary approval motions in both the *Laydon* Action and the *Sonterra* Action (ECF No. 336-39; *Laydon*, ECF No. 773-76), which the Court granted on August 3, 2017 (ECF No. 345; *Laydon*, ECF No. 782). The Court issued a superseding order granting preliminary approval of the Settlements on September 14, 2017. ECF No. 355. While the Settlements are considered, Plaintiffs' appeal is stayed. Briganti Decl. ¶ 54.

E. Discovery Efforts in the *Laydon* Action

Plaintiff served his first discovery request on Defendants in June 2014, shortly after the Court's March 28, 2014 decision in *Laydon*. Briganti Decl. ¶ 55. Immediately, Class Counsel began negotiating for all documents produced by Defendants in the course of global regulatory investigations into Yen-LIBOR and Euroyen TIBOR manipulation. *Id.* These preliminary conferences produced the Joint Initial Report and discovery plan filed on August 4, 2014. *Id.* ¶ 56.

[6] Pursuant to the June 13, 2017 Order, Plaintiffs have been updating the Second Circuit every 30 days on the status of this Court's proceedings consistent with the indicative ruling. *See* Briganti Decl. ¶ 54.

That discovery plan was delayed first by a stay issued on account of Defendants' second Rule 12 motions, then by the Department of Justice's ("DOJ") request that that the Court extend the stay of discovery for at least eight months to protect the ongoing grand jury investigation. *Id.*

Meeting and conferring with Defendants about their responses and objections to Plaintiff's first discovery request lasted months and involved more than 45 conferences with 20 Defendants. By the summer of 2015, the parties had isolated a single issue for resolution by the Court: whether foreign data privacy and bank secrecy laws prohibited disclosure of certain documents. *Id.* ¶ 58. After extensive briefing and expert submissions, Class Counsel defeated certain Defendants' first motion to withhold documents under U.K. data privacy and bank secrecy laws, substantially accelerating discovery. *Id.* ¶ 58. Class Counsel negotiated agreements with certain other Defendants to address data privacy objections. *Id.* ¶¶ 58-59.

Plaintiff served his second discovery request on Defendants between March and July 2016. *Id.* ¶ 60. Plaintiffs met with Defendants concerning objections and responses to the second discovery request beginning in August 2016, holding at least 75 conferences and exchanging numerous letters with individual Defendants over 15 months to address objections, negotiate search terms, address data privacy law objections and reach agreement on the relevant custodians to search. *Id.* ¶ 61. After certain Defendants refused to produce documents held by employees who traded Euroyen-Based Derivatives ("Euroyen-Based Derivatives traders"), Plaintiff asked the Court for a pre-motion conference in advance of moving to compel certain Defendants to produce these documents. *Id.* ¶ 62. After receiving certain Defendants' opposition and holding an oral argument, Magistrate Judge Pitman issued an order requiring these Defendants to produce the non-privileged, responsive documents and communications from 10% of each Defendants' Euroyen-Based Derivatives traders, without prejudice to Plaintiff's right to compel the production of additional

documents from traders. *Id.*; *Laydon*, ECF No. 802. Meet-and-confers continue to this date with every non-settling Defendant to address discovery issues. Briganti Decl. ¶ 63.

Class Counsel leveraged its in-house technological expertise to locally deploy Relativity, a sophisticated document review platform to process, analyze, and review Defendants' productions as soon as possible once the discovery stay expired. *Id.* ¶ 64. In addition to avoiding unnecessary external document hosting costs, a measure projected to save the Class millions of dollars over the course of this litigation, this decision gave Class Counsel unlimited access to Relativity's powerful analytics engine. *Id.* Developing an analytics-based workflow has allowed Class Counsel to effectively manage over 10.8 million pages and over 100,000 audio files that Defendants produced by suppressing duplicates and promoting documents involving key custodians, keywords, and other factors obtained from the litigation. *Id.* As a large number of documents were produced in foreign languages, Class Counsel leveraged the language skills of attorneys at Plaintiffs' Counsel speaking French, German and Japanese and used vendors to translate key documents to further augment Class Counsel's knowledge concerning the scope of Defendants' alleged manipulation. *Id.*

F. Expert Work and Developing a Plan of Allocation

Class Counsel started working with Dr. Craig Pirrong to develop evidence of impact and damages. Class Counsel worked with Dr. Pirrong to develop a model based on actual Euroyen market transactions, determining the amount of artificiality by analyzing the rates Defendants actually paid to borrow Yen during the Class Period in relation to what they reported. Briganti Decl. ¶ 72. This model is being used to carry out the Plan of Allocation and to ensure a fair claims process.

To develop a damages model, Class Counsel used its technological expertise to leverage various datasets, which collectively included millions of records. Class Counsel developed proprietary software to traverse the datasets and extract the appropriate information. *Id.* Class Counsel deputized a separate team to track down all cost of funding data. *Id.* This group utilized

Relativity's analytics tools to segregate documents containing this transactional data and converted thousands of trade confirmations from images and PDFs into a machine-readable database by manually inputting all necessary data fields. *Id.* These additional data points supplemented the transactional records received as settlement cooperation to produce a credible model capable of calculating, on a formulaic basis, the damages suffered by each member of the Class.

G. Mediation and Settlements

Class Counsel achieved Settlements with Deutsche Bank, JPMorgan, HSBC, Citi, and R.P. Martin Holdings Limited and Martin Brokers (UK) Ltd. (collectively "R.P. Martin") after months of arm's-length negotiations, at which counsel on both sides presented the strengths and weaknesses of the claims and defenses. Briganti Decl. ¶¶ 65-70, 76-79. In Deutsche Bank's and HSBC's case, this process culminated in a full-day mediation with CalSTRS present. Briganti Decl. ¶¶ 69, 77; Bartow Decl. ¶ 11; *see also* ECF No. 280 (Bartow Decl.) ¶ 11. As a result, Class Counsel was well informed about the legal risks, factual uncertainties, potential damages, and other aspects of the case when each settlement was executed. Briganti Decl. ¶¶ 68-69, 76.

The Citi and HSBC settlements created a common fund of $58 million. *Id.* ¶ 71. The Deutsche Bank and JPMorgan deals will augment the common fund by an additional $148 million, providing monetary compensation for the Class's otherwise uncompensated injuries and additional transaction data, communications, and other documents that have greatly assisted (and will continue to greatly assist) Class Counsel in prosecuting the case. *Id.* ¶ 81.

Class Counsel retained Kenneth Feinberg, Esq., to oversee the allocation process and ensure a fair and reasonable distribution of settlement funds to Class members. *See* ECF No. 287 (Declaration of Kenneth R. Feinberg) ¶ 11. As part of this process, Class Counsel appointed separate allocation counsel to represent the interests of settlement Class members that transacted in different types of Euroyen-Based Derivatives. *Id.* at ¶ 12. In August 2016, Mr. Feinberg led a two-

day mediation among allocation counsel to determine if any legal discounts should be applied to the value of Class members' claims. *Id.* at ¶ 15.

ARGUMENT

I. CLASS COUNSEL'S FEE REQUEST IS FAIR AND REASONABLE

"Attorneys whose work created a common fund for the benefit of a group of plaintiffs may receive reasonable' attorneys' fees from the fund." *See In re Credit Default Swaps Antitrust Litig.*, No. 13-md-2476, 2016 WL 2731524, at *16 (S.D.N.Y. April 26, 2016) ("*CDS Litig.*"). Courts "may award attorneys' fees in common fund cases under either the 'lodestar' method or the 'percentage of the fund' method" although "the trend in this Circuit is toward the percentage method." *McDaniel v. County of Schenectady*, 595 F.3d 411, 417 (2d Cir. 2010). Class Counsel's request is reasonable under either approach because it: (1) is consistent with the fee schedule that CalSTRS negotiated at arm's-length when it first retained Class Counsel in connection with this action; (2) is within this Circuit's range of "percentage method" fee awards; and (3) satisfies all six factors from *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000) ("*Goldberger*"), including the lodestar "cross-check."

A. The Request is Consistent with the Fee Scale Negotiated by CalSTRS

The touchstone of "reasonableness" when evaluating attorneys' fees is "what a reasonable, paying client would be willing to pay" for counsel's services. *See Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany & Albany Cty. Bd. of Elections,* 522 F.3d 182, 184 (2d Cir. 2008); *see also Goldberger*, 209 F.3d at 52 ("market rates, where available, are the ideal proxy for [class counsel's] compensation."). Consistent with this measure, courts give great weight to negotiated fee agreements between lead plaintiffs and class counsel because they typically reflect actual market rates. *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008) ("In many cases, the agreed-upon fee will offer the best indication of the market rate."). For example, there is a well-

recognized rebuttable "presumption of correctness"[7] given to the terms of an *ex ante* fee agreement between class counsel and lead plaintiffs applied in antitrust cases where the fee was negotiated by a "sophisticated benefits fund with fiduciary obligations to its members and where that fund has a sizeable stake in the litigation." *CDS Litig.*, 2016 WL 2731524, at *16 (citing *Flanagan*, 814 F.3d at 659 and *In re Cendant Corp. Litig.*, 264 F.3d 201, 282 (3d Cir.2001)).

The attorneys' fees requested here are calculated directly from the retainer agreement that CalSTRS negotiated with Class Counsel before moving to join *Laydon* in September 2014. *See* Bartow Decl. ¶ 7. CalSTRS is a "sophisticated benefits fund" with an investment portfolio of approximately $213.5 billion. *Id.* ¶ 4. It is the second-largest pension fund in the United States and the largest educator-only pension fund in the world. *Id.* CalSTRS owes a fiduciary duty to its more than one million members. *Id.* ¶¶ 4-5. This duty not only motivated CalSTRS to negotiate at arm's-length a fair and reasonable fee arrangement with Class Counsel, but also to remain an active participant in the litigation. For example, CalSTRS's general counsel Brian Bartow was directly involved in settlement discussions with Deutsche Bank and traveled from California to New York to participate in the parties' January 2017 mediation. *Id.* ¶ 11. CalSTRS's high level of involvement is commensurate with its "sizable stake in the litigation" having engaged in tens of thousands of Euroyen-Based Derivatives transactions with nine Defendants. *Id.* ¶¶ 5, 8-12. CalSTRS's *ex ante* judgment about an appropriate attorneys' fee in this case, therefore, satisfies the three factors the *CDS* court identified and is entitled to a presumption of reasonableness.

Moreover, CalSTRS supports the fee request based on its active monitoring of Class Counsel's work and the results Class Counsel achieved. *Id.* ¶ 16. As a result of its involvement in the case, CalSTRS has an intimate understanding of this litigation's complexity and difficulty. Its *ex post*

[7] *See Flanagan, Lieberman, Hoffman & Swaim v. Ohio Pub. Employees Ret. Sys.*, 814 F.3d 652, 659 (2d Cir. 2016).

support of this fee request demonstrates that it is fair and reasonable. CalSTRS's judgment, expertise and involvement support a presumption of correctness applying to the negotiated fee agreement.

B. Class Counsel's Request is Well Within the Range Used Under the Second Circuit's Preferred Percentage-Based Methodology

The reasonableness of the requested fee is confirmed by cases applying the "percentage method" of fee calculation favored in this Circuit. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) ("The trend in this Circuit is toward the percentage method") (citation omitted); *see also In re Beacon Assoc. Litig.*, No. 09 Civ. 777(CM), 2013 WL 2450960, at *5 (S.D.N.Y. May 9, 2013) (explaining that "percentage of recovery" is "the preferred method of calculating the award for class counsel in common funds cases"). Courts prefer the "percentage method" because it is easy to administer and avoids the "dubious merits of the lodestar approach." *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003); *see also In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 586 (S.D.N.Y. 2008) (noting that it absolves district courts from taking on the cumbersome task of computing a lodestar); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 485 (S.D.N.Y. 1998) ("*NASDAQ III*") (noting that the percentage method is easy to administer). It also "aligns the interests of the class and its counsel" while incentivizing "the efficient prosecution and early resolution of litigation." *Hall v. Children's Place Retail Stores Inc.*, 669 F. Supp. 2d 399, 401 (S.D.N.Y. 2009) (citation omitted). Furthermore, the reasonableness of the requested fee can be ensured by cross-checking the percentage fee against counsel's lodestar. *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 667-68 (S.D.N.Y. 2015). *See* Part I.D, *infra*.

Pursuant to the graduated fee structure with CalSTRS, Class Counsel requests approximately 23.57% of the common fund, reflecting the blended average of 25% on $42 million (the remaining balance under the first $100 million threshold)[8] and 23% on $106 million. This

[8] *See* Bartow Decl. ¶ 7. Previous settlements with Citi and HSBC totaled $58 million, of which the Court awarded 25% ($14.5 million) as attorneys' fees. *See* ECF No. 296 ¶ 3.

percentage is well within the range of reasonable attorneys' fees approved in other complex class actions in this Circuit. *See, e.g., City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM)(GWG), 2014 WL 1883494, at *10-12 (S.D.N.Y. May 9, 2014) (awarding 33% in attorneys' fees); *In re Amaranth Natural Gas Commodities Litig.*, No. 07 Civ. 6377 (SAS), 2012 WL 2149094, at *2 (S.D.N.Y. Jun. 11, 2012) (awarding 33.33% attorneys' fees in a complex CEA class action); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393 (S.D.N.Y. 1999) (awarding 27.5% attorneys' fees in a complex CEA and RICO class action). It is particularly significant that the fee here is a lesser percentage than many of the approved fees in complex common fund class actions where "courts have sometimes awarded contingency fees exceeding 30% of the overall fund." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 447 n.11 (E.D.N.Y. 2014) ("*Interchange Fee Litig.*").

C. The Requested Fees are Supported by the *Goldberger* Factors

The requested fees are supported by the application of the six-factor reasonableness test set forth in *Goldberger*. Under that standard, courts must consider: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation . . . ; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger,* 209 F.3d at 50. As the time and labor Class Counsel expended is detailed above (*see supra* at 3-13) and in the supporting declarations, factors 2 through 6 will be addressed.

1. The Risk of the Litigation

The risk of the litigation is the preeminent *Goldberger* factor. *See Interchange Fee Litig.*, 991 F. Supp. 2d at 440 ("The most important *Goldberger* factor is often the case's risk"); *Goldberger,* 209 F.3d at 54 ("We have historically labeled the risk of success as 'perhaps the foremost' factor to be considered in determining whether to award an enhancement.") (citation omitted). While all cases involve some level of risk, this case involved a particularly high level of risk for several reasons.

Risk of Prosecuting the Case as Sole Lead Counsel: Class Counsel is the sole Lead Counsel bringing claims on behalf of the Euroyen-Based Derivatives investors represented here. The choice to litigate against 44 of the world's largest financial institutions, which have significant resources and could continue this case for years at the trial and appellate levels, presented a substantial risk that Class Counsel was and remains prepared to shoulder. *See Meredith Corp.*, 87 F. Supp. 3d at 670 (noting "substantial risk" where counsel bore the "risk of defeat").

Risk of Establishing Liability: When *Laydon* and *Sonterra* were filed, no court had ruled that conspiring to fix LIBOR was an antitrust violation. In fact, Defendants argued (and several courts in this District agreed) that, because of the allegedly "cooperative" nature of the LIBOR rate-setting process, manipulating LIBOR did not cause antitrust injury. Class Counsel litigated this case for more than four years before the Second Circuit rejected Defendants' competing arguments and validated Plaintiffs' legal theory that fixing Yen-LIBOR and Euroyen TIBOR, which serve as a component of price in the derivatives Plaintiffs traded, is a *per se* antitrust violation. *See Gelboim v. Bank of America Corporation*, 823 F.3d 759 (2d Cir. 2016). Further, prior to the recent decision in *Sonterra Capital Master Fund Ltd. v. Credit Suisse Group AG*, no court in this District had ruled that foreign-based financial institutions who conspire to manipulate "IBOR" rates are subject to personal jurisdiction when they trade derivatives with investors in the United States that are priced based on those manipulated rates. No. 15-cv-00871, 2017 WL 4250480, at *50 (S.D.N.Y. Sept. 25, 2017). Additionally, this Court dismissed the *Sonterra* Action, finding Plaintiffs lacked standing. ECF Nos. 314, 335. This decision is currently on appeal to the Second Circuit.

Risk of Establishing Damages: There were also risks associated with establishing a class-wide damages model. *See In re Platinum and Palladium Commodities Litig.,* No. 10 CV 3617, 2014 WL 3500655, at *12 (S.D.N.Y. July 15, 2014) ("[I]n any market manipulation or antitrust case, [p]laintiffs face significant challenges in establishing liability and damages."). For example, Plaintiffs' case

depended on showing what Yen-LIBOR and Euroyen TIBOR would have been absent Defendants' alleged manipulation. While both rates are intended to reflect Defendants' cost of borrowing Yen in the interbank money market, data reflecting these funding transactions is not public and was unavailable at the start of the litigation. Class Counsel had to develop the data necessary to build a credible damages model through settlements and discovery. *See supra* at 11-12.

In spite of these risks, Plaintiffs' Counsel took this case on a fully-contingent basis, with Class Counsel itself devoting more than 70,000 hours and a substantial percentage of the firm's resources to litigating this case for over five-and-a-half years. As Judge Gleeson aptly noted: "Counsel should be rewarded for undertaking [the above noted risks] and for achieving substantial value for the class. If not for the attorneys' willingness to endure for many years the risk that their extraordinary efforts would go uncompensated, the settlement would not exist." *Interchange Fee Litig.*, 991 F. Supp. 2d at 441.

2. The Magnitude and Complexity of the Case

"Class actions have a well-deserved reputation as being most complex," *NASDAQ III*, 187 F.R.D. at 477, with antitrust and commodities cases standing out as some of the most "'complex, protracted, and bitterly fought.'" *Meredith Corp.*, 87 F. Supp. 3d at 670 (citations omitted); *see also In re Platinum and Palladium Commodities Litig.,* 2014 WL 3500655 at *12 (noting that commodities cases are "complex and expensive" to litigate); *In re Vitamin C Antitrust Litig.*, No. 06 MD 1738 (BMC)(JO), 2012 WL 5289514, at *4 (E.D.N.Y. Oct. 23, 2012). This case is no exception.

Complexity: *Laydon* and *Sonterra* involve a conspiracy among multiple banks and interdealer brokers to fix Euroyen-Based Derivatives prices over a five-and-a-half year Class Period through multiple means, including, *inter alia*: (1) making false Yen-LIBOR and Euroyen TIBOR submissions; (2) "spoofing" the market with false bids and offers; (3) sending fake run-throughs with artificial Yen cash prices; (4) publishing false rates on electronic screens maintained by interdealer brokers;

and (5) rewarding co-conspirators through an intricate kickback and bribery system. *Laydon*, ECF No. 580 (TAC) ¶¶ 31-33, 387, 715, 965. *See Wal-Mart Stores*, 396 F.3d. at 122 (noting that the case was particularly large and complicated as it involved nearly every U.S. bank and over five million class members). Defendants often used multiple means at the same time to achieve the goal of their conspiracy. *See*, *e.g.*, *Laydon*, ECF No. 580 ¶¶ 647-654 (describing the "Turn Campaign"). The amount of work required to reverse-engineer the inner workings of a cartel with this level of sophistication was "extraordinary" in both its "complexity and scope" and required Class Counsel to master the properties of complex financial instruments and markets by working with seasoned experts. *See In re Holocaust Victim Assets Litig.*, No. CV 06-0983 (FB)(JO), 2007 WL 805768, at *46 (E.D.N.Y. Mar. 15, 2007).

Magnitude: This is a massive case. Over the course of five-and-a-half years of litigation involving 44 Defendants, the parties in *Laydon* and *Sonterra* have produced hundreds of docket entries associated with four amended complaints, including more than 50 memoranda and reply memoranda of law in support of and in opposition to at least 15 motions to dismiss as well as 16 answers. There have been numerous contentious discovery objections, including, *inter alia*, to the relevant time period, phases of discovery, foreign bank secrecy and data privacy laws, and confidentiality and privilege objections. These objections have led to more than 120 meet-and-confers, three discovery motions, and dozens of letters. The scope of discovery produced to date is just as large. The *Laydon* Defendants have now produced close to eleven million pages of documents, including over one hundred thousand audio files, and transaction records from hundreds of custodians. This number is likely to grow as certain Defendants have yet to produce the majority of documents from their Yen-LIBOR and Euroyen-TIBOR submitters and Euroyen-Based Derivatives traders, and well as certain documents pursuant to foreign data privacy laws. The global

nature, duration, size of the case, complexity of the financial instruments, and sophistication and the depth of the conspiracy weigh heavily in favor of approving the requested fee.

3. Quality of Representation

"[T]he quality of representation is best measured by results," *Goldberger*, 209 F.3d at 55, which are evaluated in light of "the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 141 (S.D.N.Y. 2008).

Results Obtained: The settlements reached so far provide significant value to the Class. A total of $206 million in monetary compensation has been obtained from Deutsche Bank, JPMorgan, Citi and HSBC. Class Counsel's ability to recover for the Class highlights the extraordinary nature of the results reached here. These funds will provide Class members with an immediate recovery and ensure funding of the litigation so that Class Counsel can continue to pursue claims against the remaining Defendants in the *Laydon* and *Sonterra* actions.

Beyond monetary compensation, Class Counsel also secured significant cooperation from the Settling Defendants. *See supra* at 12; Briganti Decl. ¶¶ 67, 71, 81. The R.P. Martin deal also produced one of the most valuable pieces of information obtained to date—the "BOSS" transaction database—which contained millions of records, including the "wash trades" R.P. Martin brokered on behalf of Defendants UBS, RBS, and JPMorgan. *See, e.g.*, ECF No. 580 (TAC) ¶¶ 392-94. The transaction data and information contained in Defendants' documents produced so far have helped Class Counsel specifically identify the names of Yen traders and submitters who were active participants in the alleged manipulation and aided the development of a class-wide damages model and Plan of Allocation. *See supra* at 11-12.

The value of this non-monetary compensation and result obtained by Class Counsel is further highlighted by Plaintiffs' settlement with HSBC. Documents obtained as settlement cooperation from R.P. Martin played a crucial role in Class Counsel's negotiations and the eventual

mediation with HSBC, allowing them to present a compelling case on liability at the mediation that would have been impossible using only public documents.

Background of Lawyers Involved: Class Counsel has extensive experience prosecuting some of the largest commodities manipulation cases, including what were at the time, the first, second, third, and fourth largest class action recoveries in the history of the CEA.[9] This includes specific expertise in benchmark manipulation as demonstrated by Class Counsel's current tenure as lead counsel in cases alleging anticompetitive and manipulative conduct for several "IBOR" rates and the London Silver Fix.[10] Additional examples of Class Counsel's more than 50 years of experience with complex litigation are detailed in Lowey's firm resume.[11]

Another consideration for assessing the quality of the representation is "[t]he quality of the opposing counsel" in the case. *See Maley v. Del Global Techns. Corp.*, 186 F. Supp. 2d. 358, 373 (S.D.N.Y. 2002). The valuable settlement that Class Counsel secured cannot be understated given the caliber of defense counsel in this action. *See Meredith Corp.*, 87 F. Supp. 3d at 670 (noting that counsel's achievement in "obtaining valuable recompense . . . for its clients is particularly noteworthy given the caliber and vigor of its adversaries"); *NASDAQ III*, 187 F.R.D. at 488 (approving attorneys' fee award where defendants were represented by "several dozen of the nation's biggest and most highly regarded defense law firms."). The fact that Class Counsel was able to successfully prosecute this action for five-and-a-half years against such formidable opponents further reflects the quality of representation provided.

[9] ECF No. 338-7, at 2-4.

[10] *See, e.g.*, *Sonterra Capital Master Fund Ltd. et al. v. Credit Suisse Group AG et al.*, No. 15-cv-871 (SHS) (S.D.N.Y.) (Swiss franc LIBOR); *Sullivan et al. v. Barclays PLC et al.*, No. 13-cv-2811 (PKC) (S.D.N.Y.) (Euribor); and *In re: London Silver Fixing Ltd., Antitrust Litig.*, No. 14-md-2573 (VEC) (S.D.N.Y.).

[11] ECF No. 338-7.

4. The Fee is Reasonable in Relation to the Settlements

Courts evaluate the requested fee in relation to the settlement by looking to "comparable cases" for "guideposts." *See Interchange Fee Litig.*, 991 F. Supp. 2d at 443-44 (evaluating a fee request in case where a class of merchants alleged that large credit card companies and banks conspired to fix certain rules and fees against other "large class cases with court-set fees"). This approach prevents "unwarranted disparities in outcomes" and provides greater predictability for counsel. *Id.* at 446-47. The fee requested here is reasonable in relation to the settlement for at least two reasons:

First, Class Counsel's request for a blended average of approximately 23.57% of the common fund comes directly from the graduated fee scale that CalSTRS negotiated before joining the action. *See* Bartow Decl. ¶ 7. This satisfies a key legal "guidepost" that Judge Gleeson identified in large class action cases—that "the percentage of the fund awarded should scale back as the size of the fund increases"—and supports the reasonableness of Class Counsel's request. *See Interchange Fee Litig.*, 991 F. Supp. 2d at 444.

Second, the graduated fee CalSTRS negotiated is between the fees that were approved in two recent "guidepost" cases. *See id.* at 443. For example, in both *CDS Litig.*, 2016 WL 2731524, at *17 n.24, and *Interchange Fee Litig.*, 991 F. Supp. 2d at 445, courts in this District approved fee awards in large class cases based on a graduated fee scale. The fee agreement approved in *Interchange Fee Litig.*, awarded counsel an average percentage fee of 23.9% for the first $200 million recovered, greater than the blended average fee of 23.57% requested here.[12] The requested fee is reasonable in relation to the settlement achieved here and compares favorably to other concrete "guideposts" such as the fees awarded in analogous cases.

[12] In *CDS Litig.*, the court approved a fee award based on a graduated fee structure that started with payment of 18% of the first $200 million of the common fund as attorneys' fees. 2016 WL 2731524, at *17

5. Public Policy Supports Approval

Had Class Counsel not taken on the risk of this lawsuit in April 2012, before any Defendant had entered into government settlements, the Class would have been left without recompense for their losses. Despite the subsequent government investigations and certain Defendants' admissions of wrongdoing, investors who were actually harmed by the alleged conspiracy would not have received any money at all. *See e.g., In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 352 (S.D.N.Y. 2014) ("providing lawyers with sufficient incentive to bring common fund cases that serve the public interest") (citations omitted).

Public policy encourages enforcement of the antitrust laws through private civil suits to deter infringing conduct in the future. *See Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983) ("This Court has emphasized the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws."). Awarding a reasonable percentage of the common fund further ensures that Class Counsel retains the ability and incentive to pursue antitrust violations through trial, at their own expense and while recovery is uncertain. *See Goldberger*, 209 F.3d at 51 ("There is . . . commendable sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest.").

D. The Lodestar Cross-Check Supports the Requested Fee

Class Counsel's fee request is also reasonable under the lodestar method, which has "fallen out of favor because it encourages bill-padding and discourages early settlements." *In re Colgate-Palmolive*, 36 F. Supp. 3d at 353. In light of these deficiencies, courts in this Circuit have determined that the lodestar "works best as a sanity check to ensure that an otherwise reasonable percentage fee would not lead to a windfall," for example, if the multiplier is too large and "grossly disproportionate to the percentage fee award . . . ." *Id.* There is no windfall here.

First, in negotiating a graduated fee scale, CalSTRS capped any fee request by Class Counsel to 3.5 times the aggregate lodestar incurred by Plaintiffs' Counsel in the case. As with the percentage fee method, this negotiated rate should be given great weight in evaluating attorneys' fees. *Alderman v. Pan Am World Airways*, 169 F.3d 99, 103 (2d Cir. 1999) ("[A] court should seek to enforce the parties' intentions in a contingent fee agreement, as with any contract."). Plaintiffs' Counsel have spent 105,775.61 hours working on *Laydon* and *Sonterra* as of September 30, 2017, for an aggregate lodestar of $54,532,316.55. *See* Briganti Decl. ¶ 90. The blended average of the 23.57% or $34.88 million fee requested, when combined with the $14.5 million fee previously received, only compensates Plaintiffs' Counsel for approximately 91% of their aggregate lodestar and does not implicate the 3.5 times multiplier cap in the CalSTRS's agreement, demonstrating that a full fee will not result in an "unwarranted windfall." In continuing their work to prosecute the cases since Plaintiffs settled with Citi and HSBC, and in achieving the settlements with Deutsche Bank and JPMorgan, Plaintiffs' Counsel have worked 36,749.75 hours, reflecting a lodestar value of $17,447,929.00. *Id.* ¶¶ 83, 86-89. The product of Plaintiffs' Counsel's continued diligence is evident in the settlements with Deutsche Bank and JPMorgan totaling $148 million, which is more than 2.5 times larger than the Citi and HSBC settlements.

Second, the 3.5 times multiplier CalSTRS negotiated is reasonable because it is consistent with the range of multipliers approved in this and other circuits. *See, e.g.*, *CDS Litig.*, 2016 WL 2731524, at *17 (approving a lodestar of "just over 6" in a complex antitrust class action); *Beckman v. KeyBank N.A.,* 293 F.R.D. 467, 481 (S.D.N.Y. 2013) (approving a multiplier of 6.3 in class action, explaining that "[c]ourts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers."); *Maley*, 186 F. Supp. 2d at 371 (holding that a 4.65 lodestar multiplier is modest, fair, and reasonable); *see also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052 (9th Cir. 2002) (listing nationwide class action settlements where the lodestar multiplier ranged up to 8.5).

The Court should approve the requested fee as the parties intended a lodestar multiplier of no more than 3.5 and this intended multiplier is lower than that in similarly complex class action cases.

II. CLASS COUNSEL'S EXPENSES

"An attorney who has created a common fund . . . is entitled to reimbursement of reasonable expenses from that fund." *City of Omaha Police & Fire Ret. Sys. v. LHC Grp.*, No. 12 cv 1609, 2015 WL 965696, at *11 (W.D. La. Mar. 3, 2015); *see also In re Arakis Energy Corp. Sec. Litig.*, No. 95 CV 3431(ARR), 2001 WL 1590512, at *17 n.12 (E.D.N.Y. Oct. 31, 2001) ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course."). As detailed in the accompanying declarations, Plaintiffs' Counsel incurred $223,272.66 in expenses prosecuting this case between September 1, 2016 and September 30, 2017. *See* Briganti Decl. ¶¶ 91-95; Horn Decl. ¶ 6; *see supra* at 2 n.4. This amount is less than the amount listed in the disclosures in the Court-approved notice sent to settlement Class members. *See* Affidavit of Eric J. Miller, Ex. A, Mailed Notice at 8. These expenses, as well as $28,464.69 in unreimbursed expenses accrued prior to September 1, 2016 and previously disclosed to the Court, have or will be paid from the litigation fund established upon the entry of the Citi and HSBC settlements. Briganti Decl. ¶¶ 96-97.

These costs and expenses were "incidental and necessary to the representation of the Class," and should be reimbursed. *See Carpenter v. Paige Hospitality Grp., LLC*, No. 13-cv-4009(GBD), 2015 U.S. Dist. LEXIS 82771, at *5 (S.D.N.Y. June 2, 2015). The majority of the expenses incurred in this matter involve discovery costs, expert work, research, mediation, and travel expenses for the meetings and mediations that resulted in settlement. Since September 1, 2016, $157,711.45 (or 70.6% of the Plaintiffs' Counsel's total costs) went towards hosting and utilizing Relativity software for discovery and towards expert and mediation services. As the litigation fund is not yet depleted, no further reimbursement for expenses is requested at this time.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court approve Plaintiffs' application for attorneys' fees in the amount set forth above.

Dated: October 31, 2017
White Plains, New York

LOWEY DANNENBERG, P.C.

By: */s/ Vincent Briganti*

Vincent Briganti
Geoffrey M. Horn
Peter D. St. Phillip
44 South Broadway, Ste. 1100
White Plains, New York 10601
Tel.: 914-997-0500
Fax: 914- 997-0035
vbriganti@lowey.com
ghorn@lowey.com
pstphillip@lowey.com

Class Counsel

Joseph J. Tabacco, Jr.
Todd A. Seaver
BERMAN TABACCO
44 Montgomery Street, Ste. 650
San Francisco, CA 94104
Tel.: 415-433-3200
Fax: 415-433-6282

Patrick T. Egan
BERMAN TABACCO
One Liberty Square
Boston, MA 02109
Telephone: 617-542-8300
Facsimile: 617-542-1194

Christopher Lovell
Gary S. Jacobson
LOVELL STEWART HALEBIAN JACOBSON LLP
61 Broadway, Suite 501
New York, NY 10006
Tel.: 212-608-1900
Fax: 212-719-4677

Jennifer W. Sprengel
Anthony F. Fata

CAFFERTY CLOBES MERIWETHER & SPRENGEL LLP
150 S. Wacker, Suite 3000
Chicago, IL 60606
Tel.: 312-782-4880
Fax: 312-782-4485

Patrick E. Cafferty
CAFFERTY CLOBES MERIWETHER & SPRENGEL LLP
220 Collingwood Drive, Suite 130
Ann Arbor, MI 48103
Tel.: 734-769-2144

Linda Nussbaum
Bart Cohen
Susan Schwaiger
NUSSBAUM LAW GROUP, P.C.
1211 Avenue of the Americas, 40th Floor
New York, NY 10036
Tel.: 917-438-9102

Additional Counsel for Plaintiffs

TAB 38A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEPHEN SULLIVAN, WHITE OAK FUND LP, CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM, SONTERRA CAPITAL MASTER FUND, LTD., FRONTPOINT PARTNERS TRADING FUND, L.P., AND FRONTPOINT AUSTRALIAN OPPORTUNITIES TRUST on behalf of themselves and all others similarly situated, Plaintiffs, *- against -* BARCLAYS PLC, BARCLAYS BANK PLC, BARCLAYS CAPITAL INC., BNP PARIBAS S.A., CITIGROUP, INC., CITIBANK, N.A., COÖPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., CRÉDIT AGRICOLE S.A., CRÉDIT AGRICOLE CIB, DEUTSCHE BANK AG, DB GROUP SERVICES UK LIMITED, HSBC HOLDINGS PLC, HSBC BANK PLC, ICAP PLC, ICAP EUROPE LIMITED, J.P. MORGAN CHASE & CO., JPMORGAN CHASE BANK, N.A., THE ROYAL BANK OF SCOTLAND PLC, SOCIÉTÉ GÉNÉRALE SA, UBS AG AND JOHN DOE NOS. 1-50, Defendants.	Docket No. 13-cv-02811 (PKC)

PKC

~~[PROPOSED]~~ ORDER GRANTING CLASS COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES

This matter came for a duly-noticed hearing on May 17, 2019 (the "Settlement Hearing"), upon Class Counsel's Motion for Award of Attorneys' Fees and Reimbursement of Expenses ("Fee and Expense Application") in the above-captioned action (the "Action"). The Court has considered the Fee and Expense Application and all supporting and other related materials, including the matters presented at the Settlement Hearing. Due and adequate notice of the Settlement Agreement Between Plaintiffs, Citi and JPMorgan entered into on November 21, 2018 (the "Settlement")[1]

[1] Unless otherwise defined herein, all capitalized terms used have the meanings set forth and defined in the Settlement.

having been given to the Settlement Class Members, the Settlement Hearing having been held, and the Court having considered all papers filed and proceedings held herein and otherwise being fully informed in the premises and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. This Court has personal jurisdiction over Plaintiffs, Citi and JPMorgan (the "Parties") and all Settlement Class Members and subject matter jurisdiction over the Action to approve the Settlement and all exhibits attached thereto;

2. Notice of the Fee and Expense Application was provided to potential Settlement Class Members in a reasonable manner, and such notice complies with Rule 23(h)(1) of the Federal Rules of Civil Procedure and due process requirements;

3. Plaintiffs' Counsel is hereby awarded attorneys' fees in the amount of 19 % of the total Settlement Fund ($ 34,675,000.00), plus interest for the same time period and at the same rate as earned by the Settlement Fund, which shall be paid out of the Settlement Fund; PKC

4. Class Counsel is hereby authorized to allocate the attorneys' fees among Plaintiffs' Counsel in a manner in which, in Class Counsel's judgment, reflects the contributions of such counsel to the prosecution and settlement of the Action;

5. In making this award of attorneys' fees, the Court has considered and found that:

a. Plaintiffs' Counsel have prosecuted the Action and achieved the Settlement with skill, perseverance, and diligent advocacy;

b. The Action involves numerous complex factual and legal issues and was actively litigated and, in the absence of a settlement, would have involved lengthy proceedings with uncertain resolution of the numerous complex factual and legal issues;

c. Had Plaintiffs' Counsel not achieved the Settlement, a risk would remain that Plaintiffs and the Settlement Class may have recovered less or nothing from Citi and

JPMorgan;

d. Public policy considerations support the requested fee, as only a small number of firms have the requisite expertise and resources to successfully prosecute cases such as the Action;

e. Notice was disseminated stating that Class Counsel would be moving for attorneys' fees in the amount of 19% of the Settlement Fund; and

f. The amount of attorneys' fees awarded is fair, reasonable, appropriate and consistent with the awards in similar cases, and represents a reasonable percentage of the Settlement Fund, in view of the applicable legal principles and the particular facts and circumstances of the Action.

6. In the event that the Settlement is terminated or the Effective Date does not occur in accordance with the terms of the Settlement, this Order shall be null and void, of no further force or effect, and without prejudice to any of the Parties, and may not be introduced as evidence or used in any actions or proceedings by any Person against the Parties;

7. Pursuant to Sections 8 and 31 of the Settlement Agreement, this fee award is independent of the Court's consideration of the fairness, reasonableness, and adequacy of the Settlement and is also independent of the Court's consideration of the Plan of Allocation; and

8. The fees awarded herein may be paid to Plaintiffs' Counsel from the Settlement Fund immediately upon entry of this Order, subject to the terms, conditions, and obligations of the Settlement which terms, conditions, and obligations are incorporated herein.

IT IS SO ORDERED.

This 17th day of May, 2019.

Honorable P. Kevin Castel
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEPHEN SULLIVAN, WHITE OAK FUND LP, CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM, SONTERRA CAPITAL MASTER FUND, LTD., FRONTPOINT PARTNERS TRADING FUND, L.P., AND FRONTPOINT AUSTRALIAN OPPORTUNITIES TRUST on behalf of themselves and all others similarly situated, Plaintiffs, *- against -* BARCLAYS PLC, BARCLAYS BANK PLC, BARCLAYS CAPITAL INC., BNP PARIBAS S.A., CITIGROUP, INC., CITIBANK, N.A., COÖPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., CRÉDIT AGRICOLE S.A., CRÉDIT AGRICOLE CIB, DEUTSCHE BANK AG, DB GROUP SERVICES UK LIMITED, HSBC HOLDINGS PLC, HSBC BANK PLC, ICAP PLC, ICAP EUROPE LIMITED, J.P. MORGAN CHASE & CO., JPMORGAN CHASE BANK, N.A., THE ROYAL BANK OF SCOTLAND PLC, SOCIÉTÉ GÉNÉRALE SA, UBS AG AND JOHN DOE NOS. 1-50, Defendants.	Docket No. 13-cv-02811 (PKC)

PKC

~~[PROPOSED]~~ ORDER
GRANTING CLASS COUNSEL'S MOTION FOR REIMBURSEMENT OF EXPENSES

This matter came for a duly-noticed hearing on May 17, 2019 (the "Settlement Hearing"), upon Class Counsel's Motion for Award of Attorneys' Fees and Reimbursement of Expenses ("Fee and Expense Application") in the above-captioned action (the "Action"). The Court has considered the Fee and Expense Application and all supporting and other related materials, including the matters presented at the Settlement Hearing. Due and adequate notice of the Settlement Agreement Between Plaintiffs, Citi and JPMorgan entered into on November 21, 2018 (the "Settlement")[1]

[1] Unless otherwise defined herein, all capitalized terms used have the meanings set forth and defined in the Settlement.

having been given to the Settlement Class Members, the Settlement Hearing having been held, and the Court having considered all papers filed and proceedings held herein and otherwise being fully informed in the premises and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. This Court has personal jurisdiction over Plaintiffs, Citi and JPMorgan (the "Parties") and all Settlement Class Members and subject matter jurisdiction over the Action to approve the Settlement and all exhibits attached thereto;

2. Notice of the Fee and Expense Application was provided to potential Settlement Class Members in a reasonable manner, and such notice complies with Rule 23(h)(1) of the Federal Rules of Civil Procedure and due process requirements;

3. Plaintiffs' Counsel is hereby awarded expenses in the amount of $1,074,649.83 plus interest for the same time period and at the same rate as earned by the Settlement Fund, which shall be paid out of the Settlement Fund;

4. In the event that the Settlement is terminated or the Effective Date does not occur in accordance with the terms of the Settlement, this Order shall be null and void, of no further force or effect, and without prejudice to any of the Parties, and may not be introduced as evidence or used in any actions or proceedings by any Person against the Parties;

5. Pursuant to Sections 8 and 31 of the Settlement Agreement, this expense award is independent of the Court's consideration of the fairness, reasonableness, and adequacy of the Settlement and is also independent of the Court's consideration of the Plan of Allocation and award of attorneys' fees;

6. The expenses awarded herein may be paid to Plaintiffs' Counsel from the Settlement Fund immediately upon entry of this Order, subject to the terms, conditions, and obligations of the Settlement which terms, conditions, and obligations are incorporated herein;

7. Class Counsel is hereby authorized to allocate the expenses among Plaintiffs' Counsel in a manner in which, in its judgment, reflects the costs and expenses incurred in the prosecution and settlement of the Action.

IT IS SO ORDERED.

This 17th day of May, 2019.

Honorable P. Kevin Castel
United States District Judge

TAB 38B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEPHEN SULLIVAN, WHITE OAK FUND LP, CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM, SONTERRA CAPITAL MASTER FUND, LTD., FRONTPOINT PARTNERS TRADING FUND, L.P., AND FRONTPOINT AUSTRALIAN OPPORTUNITIES TRUST on behalf of themselves and all others similarly situated, Plaintiffs, - against - BARCLAYS PLC, BARCLAYS BANK PLC, BARCLAYS CAPITAL INC., BNP PARIBAS S.A., CITIGROUP, INC., CITIBANK, N.A., COÖPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., CRÉDIT AGRICOLE S.A., CRÉDIT AGRICOLE CIB, DEUTSCHE BANK AG, DB GROUP SERVICES UK LIMITED, HSBC HOLDINGS PLC, HSBC BANK PLC, ICAP PLC, ICAP EUROPE LIMITED, J.P. MORGAN CHASE & CO., JPMORGAN CHASE BANK, N.A., THE ROYAL BANK OF SCOTLAND PLC, SOCIÉTÉ GÉNÉRALE SA, UBS AG AND JOHN DOE NOS. 1-50, Defendants.	Docket No. 13-cv-02811 (PKC) ECF Case

MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSMENT OF EXPENSES

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Pursuant to this Court's December 4, 2018 Order,[1] Class Counsel respectfully move pursuant to Rule 23(h) of the Federal Rules of Civil Procedure for an award of 19% ($34.675 million) in attorneys' fees from the $182,500,000 common fund established by Plaintiffs'[2] settlement with Citi[3] and JPMorgan[4] (the "Settlement") and reimbursement of $1,074,649.83 in litigation expenses. Plaintiffs do not seek incentive awards at this time but reserve the right to seek incentive awards at the time of distribution or if there is another settlement in this Action.

INTRODUCTION

The requested fee is fair and reasonable for multiple reasons. First, the fee request is objectively fair and reasonable because it is the agreed-upon percentage CalSTRS negotiated in retaining Class Counsel prior to CalSTRS' participation in the Action. *See also Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany and Albany Cty. Bd. of Elections,* 522 F.3d 182, 184 (2d Cir. 2008) (a "reasonable" fee reflects "what a reasonable, paying client would be willing to pay" for counsel's services); *see* Part I.A. *infra*. The CalSTRS fee agreement, as detailed below, features declining percentages of attorneys' fees as the size of the recovery from inception increases. Courts give great weight to negotiated fee agreements, recognizing a rebuttable "presumption of correctness" where the terms are negotiated by a "sophisticated benefits fund"—such as CalSTRS—"with fiduciary obligations to its members and . . . a sizeable stake in the litigation." *In re Credit Default Swaps Antitrust Litig.*, No. 13-md-2476, 2016 WL 2731524, at *16 (S.D.N.Y. April 26, 2016)

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[1] Order Preliminarily Approving Proposed Settlement with JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., Citigroup Inc. and Citibank, N.A., Scheduling Hearing for Final Approval Thereof, and Approving the Proposed Form and Program of Notice to the Class (S.D.N.Y. Dec. 19, 2018), ECF No. 454.

[2] "Plaintiffs" are Stephen Sullivan, White Oak Fund LP, California State Teachers' Retirement System ("CalSTRS"), Sonterra Capital Master Fund, Ltd., FrontPoint Partners Trading Fund, L.P., and FrontPoint Australian Opportunities Trust ("FrontPoint"). Unless otherwise defined, capitalized terms herein have the same meaning as in the Settlement Agreement. ECF No. 452-1.

[3] "Citi" means Citigroup Inc. and Citibank, N.A.

[4] "JPMorgan" means JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. Together, Citi and JPMorgan are referred to as the "Settling Defendants."

("*CDS Litig.*") (quoting *Flanagan, Lieberman, Hoffman & Swaim v. Ohio Pub. Employees Ret. Sys.*, 814 F.3d 652, 659 (2d Cir. 2016)).

Second, in addition to CalSTRS' *ex ante* negotiation of the fee, CalSTRS regularly monitored Class Counsel's time and efforts, participated in the prosecution of the claim, and observed first-hand the risks of continued prosecution, skillfulness of Class Counsel's efforts, and quality of their work in obtaining the Settlement. Based upon these factors, CalSTRS also now offers well-informed, *post hoc* support for the requested fee. Declaration of Brian J. Bartow ("Bartow Decl.") ¶¶ 10-29.

Third, the requested fee is fair and reasonable because, if granted, the resulting risk multiplier (approximately 1.54) will be far less than the 3.5 cap on the risk multiplier negotiated by CalSTRS. *See id.* ¶ 7. In this context, the negotiated fee is an "ideal proxy" for the fee that should be awarded. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). The requested fee fully satisfies all six *Goldberger* factors used to evaluate attorneys' fees in this Circuit. *See* Part I.B-D *infra.*

Fourth, in performing substantial services under time pressures, Class Counsel faced greater risks in prosecuting the claims against the Settling Defendants than against the other Settling Defendants.[5] For example, Citigroup was never charged by any governmental body with wrongdoing concerning Euribor. JPMorgan had not been charged when the case was commenced. JPMorgan still disputes the subsequent government charges and continue to contest the fine assessed against it. Despite these greater risks, the percentage of the Settlement which Class Counsel have requested is significantly less than that which was awarded with respect to the recovery from the Other Settling Defendants. This is due directly to the constraints of the declining fee schedule which CalSTRS negotiated with Class Counsel.

[5] The "Other Settling Defendants" are Barclays plc, Barclays Bank plc and Barclays Capital Inc. ("Barclays"), Deutsche Bank AG and DB Group Services (UK) Ltd. ("Deutsche Bank"), HSBC Holdings plc, and HSBC Bank plc. ("HSBC").

Relatedly, the Settlement submitted for final approval increases the total amount of compensation recovered for the Class by almost 60% to $491,500,000. It is rare, to say the least, for a class action in which no competing applications for lead counsel are made, to produce settlements of almost half a billion dollars. But the complexity and high risks in prosecuting these complex claims deterred any competing class action from being filed.

To achieve this extraordinary result, Plaintiffs' Counsel spent close to 140,000 total hours litigating this case, including over 31,000 hours just since February 28, 2018 (the cutoff date in Class Counsel's last fee motion, *see* ECF No. 403) to take this case from the start of discovery to deep into the class certification process. The collective work of Plaintiffs' Counsel throughout this action was essential in developing the detailed factual record necessary to certify a class in a conspiracy case of this scale given the tight 16-month timeline ordered by this Court. *See* ECF Nos. 337, 377, 398. To achieve this Settlement, Plaintiffs' Counsel had to develop, under time pressure, evidence against each of these Defendants at a tremendous cost, including substantial attorney time and the assistance of four economists, two consulting firms, and an Euribor and Euro interbank market expert.

Class Counsel dispatched teams of attorneys, including those with specialized experience in derivatives data, to analyze hundreds of thousands of documents and transaction records received as cooperation from the Other Settling Defendants to effectively negotiate the scope of discovery during the meet and confer process with JPMorgan and Citi. This proved to be extremely challenging and required navigating both complex issues of foreign data privacy law, as the relevant documents and transaction records were located all over the world, as well as the logistical challenges associated with differences in how data was stored and formatted by each Defendant.

Next, Class Counsel had to synthesize all the information gathered, with the help of leading economists and former traders, into a cohesive set of evidence to prove Plaintiffs' case on a class-

wide basis. This exercise proved essential in developing the economic models and analyses that Class Counsel believes show, among other things, that the Defendants' alleged conspiracy to manipulate Euribor had a common impact on the Class. The resulting data was invaluable to Plaintiffs' class certification experts in drafting their initial reports, responding to JPMorgan and Citi's expert's opinions, and preparing for depositions. Both class certification experts were ultimately deposed by Defendants, following over a week of intensive preparation by Class Counsel.

The challenges presented by the compressed timeline in this case only increased when—just one month before Plaintiffs were due to serve their class certification expert reports—Judge Buchwald issued the first class certification decision in a benchmark interest rate case. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d 430 (S.D.N.Y. 2018) ("*LIBOR VII*"). Plaintiffs' Counsel immediately began analyzing this several hundred page decision and worked to ensure that the approach taken in this case would satisfy *LIBOR VII*'s class certification "roadmap."

Class Counsel engaged in on and off settlement discussions with JPMorgan and Citi. Such negotiations were hard-fought and continued for over nine months while the parties actively litigated liability and class certification issues. Indeed, settlement talks broke down in late 2017, only to be reinitiated later once discovery was underway, and *LIBOR VII* had been decided. Throughout the process, Class Counsel drafted multiple mediation briefs and attended several full-day mediation sessions, each of which was personally attended by Plaintiff CalSTRS's General Counsel. *See* Joint Declaration of Vincent Briganti and Christopher Lovell ("Joint Decl.") ¶¶ 53-60.

While Class Counsel exerted substantial effort to achieve the Settlement, Class Counsel's proposed 19% fee request is *lower* than the 22.24% fee request awarded in connection with the Barclays, Deutsche Bank and HSBC settlements. *See* ECF No. 425.

Additionally, Class Counsel seeks reimbursement for $1,074,649.73 in out-of-pocket expenses incurred since the inception of the case. These expenses, described in the accompanying

declarations of Geoffrey M. Horn ("Horn Decl."), Christopher M. McGrath ("McGrath Decl."), and those of additional Plaintiffs' Counsel,[6] were incurred for the Class's benefit and predominantly consisted of expert work, mediation, travel and discovery-related costs.

WORK PERFORMED BY CLASS COUNSEL

A. The Retainer Agreement Negotiated by CalSTRS with Class Counsel

CalSTRS is the largest educator-only pension fund in the world and the second largest pension fund in the United States, with more than 950,000 members and beneficiaries, and an investment portfolio currently valued at $226.5 billion. Bartow Decl. ¶ 4. A sophisticated market participant with a keen interest in protecting its members and ensuring financial markets are free from manipulative and anticompetitive forces, CalSTRS' regular practice prior to entering a complex litigation is to negotiate a retainer agreement with a contingent fee structure. *Id.* ¶ 7. In this case, recognizing the attendant risks of the litigation, CalSTRS negotiated a graduated fee structure that provides for a fee of 23% for the common fund on the first $100 million recovered, 22% on the next $200 million recovered, 19% on the next $200 million recovered and a lower fee percentage on any recoveries above $500 million. *Id.*

B. The Review by CalSTRS' General Counsel of Class Counsel's Work

Since 2014, CalSTRS has been an active and engaged named Plaintiff, involved in nearly every aspect of the litigation. *See* Bartow Decl. ¶ 10. For example, Class Counsel collaborated with CalSTRS' staff to understand the impact of Euribor manipulation on CalSTRS' investments and draft allegations for the Third Amended Complaint. Joint Dec. ¶ 6. CalSTRS reviewed all significant pleadings and briefings. *Id.*.; Bartow Decl. ¶ 11. It also regularly received updates concerning

[6] "Plaintiffs' Counsel" includes Class Counsel and Berman Tabacco; Glancy Prongay & Murray LLP ("Glancy"); Kirby McInerney LLP ("Kirby"); Cafferty Clobes Meriwether & Sprengel LLP ("Cafferty"); and Nussbaum Law Group ("NLG"). The Declarations of Todd A. Seaver (Berman Tabacco); David E. Kovel (Kirby); Jennifer W. Sprengel (Cafferty); and Linda Nussbaum (NLG) accompany this motion. Glancy previously provided the Declaration of Lee Albert in support of Class Counsel's previous Motion for Award of Attorneys' Fees and Reimbursement of Expenses in connection with the Barclays, Deutsche Bank and HSBC settlements. ECF No. 407.

substantive legal issues, litigation and settlement strategy, and reviewed detailed time records. Bartow Decl. ¶ 24. CalSTRS' General Counsel has scrutinized every aspect of Class Counsel's work and independently concluded that it supports both the motion for final approval and the requested award of attorneys' fees. *See id.* ¶¶ 28-29.

C. Class Counsel's Review Under Time Pressure of the Documents

The Court's April 10, 2017 Scheduling Order placed discovery in this complex antitrust case on a compressed timeline. *See* ECF No. 337. Citi and JPMorgan were to produce their full regulatory productions by June 9, 2017, document requests to be served by August 1, 2017, and depositions to begin in December 2017. *Id.* The initial expert discovery deadline was June 28, 2018, later extended to August 10, 2018. *Id.*; *see also* ECF No. 398. All fact discovery was to be completed by December 4, 2018. ECF No. 337.

Plaintiffs' Discovery Efforts

To achieve maximum results in minimal time, Class Counsel deployed all of its resources, human and technological, to obtaining and analyzing all available documents and data from Citi, JPMorgan and Other Settling Defendants. Joint Decl. ¶ 18. Class Counsel reviewed over one million pages of documents, and tens of thousands of audio files and other data. *Id.* ¶ 32.

Lowey leveraged in-house technological expertise to locally deploy Relativity, a sophisticated document review platform. Developing an analytics-based workflow enabled Lowey to greatly reduce the hours required for review and to prioritize the most relevant files. *Id.* ¶ 21. Additionally, Lowey avoided unnecessary document hosting costs by deploying Relativity locally. *Id.* Lovell used sophisticated document review software to exploit potential key terms through smart searches, "relational searching" and other analytic tools. These tools identified relevant documents, followed themes and dates of conversations, and cross-referenced and matched them to significant individuals. Lovell identified over 1,400 potential instances of agreement or manipulation, over 400

instances of potential admissions of manipulation, and over 100,000 relevant documents. *Id.* ¶ 22.

Cooperation from the previously settling defendants was valuable in assisting Class Counsel to quickly analyze Citi's and JPMorgan's productions. The instances of manipulation found in the Barclays and Deutsche Bank productions enabled Class Counsel to make targeted searches of Citi's and JPMorgan's productions to assess each Settling Defendant's alleged involvement with particular cartel members and on particular dates. *Id.* ¶ 24.

Equally important, information from Barclays' and Deutsche Bank's productions helped Class Counsel negotiate the scope of Settling Defendants' productions. *Id.* ¶ 25. Class Counsel aggressively pursued issues in regular, extensive meet and confers until they were satisfactorily resolved. *Id.* In addition, after Citi served its initial production, which was to have consisted of all documents previously produced to regulators relating to Euribor manipulation, Class Counsel identified that Citi's production had been limited to documents dated within the Class Period. *Id.* ¶ 26. Class Counsel took the position that the Court's order imposed no such limitation. After several months and additional meet and confers, Citi ultimately agreed to and did produce the remaining regulatory materials in March 2018. *Id.* In October 2017, Class Counsel requested that Citi provide organizational charts relating to the relevant Euribor traders and submitters. *Id.* ¶ 27. After renewing its request in February 2018, Class Counsel received organizational charts from Citi in April 2018. *Id.* As part of a separate October 2017 meet and confer, Class Counsel requested from both Citi and JPMorgan documents reflecting risk analyses, exposure reports and profit and loss statements relevant to the Euribor manipulation. *Id.* ¶ 28. After additional negotiations, JPMorgan produced its profit and loss reports in March 2018. Citi provided exposure reports and profit and loss statements in April 2018. *Id.*

One-third of JPMorgan's documents and more than 90% of Citi's documents were produced in 2018, including during the months leading up to service of the expert reports. *Id.* ¶ 33.

Class Counsel pored over the Settling Defendants' production, reviewing almost 30,000 documents, consisting of 134,000 pages and more than one gigabyte of data consisting of hundreds of thousands of transactions. *Id.* Some of these documents and data were subject to foreign data privacy laws that required Class Counsel to develop creative solutions with Citi and JPMorgan to ensure necessary documents could be produced. *Id.* ¶ 29. Upon receiving data productions, Class Counsel had to synthesize data sets that were stored differently due to applicable data privacy laws and the use of differing computer programs and systems. *Id.* ¶¶ 29, 35.

Plaintiffs served their Rule 30(b)(6) Notices upon Settling Defendants, seeking targeted information on topics including policies and procedures concerning the trading of Euribor Products, Euribor submission or the fixing of Euribor; violations of such policies and procedures; whether position reports were made available to traders; compensation structure for relevant individuals; and financial reports. *Id.* ¶¶ 36-37. After extensive negotiations with Settling Defendants, Plaintiffs agreed to accept written answers to a number of the topics in their Rule 30(b)(6) Notices. Citi and JPMorgan produced 120 pages of answers. *Id.* ¶¶ 37-38. Class Counsel reviewed these responses and followed up with additional questions for Citi and JPMorgan where needed. *Id.* ¶ 38.

To complement the insights gained from its discovery work, Lowey sent lawyers to observe the trial in the United Kingdom involving current and former employees of Barclays and Deutsche Bank accused of manipulating Euribor. Lowey attorneys and investigators were able to quickly analyze evidence and testimony for new areas of investigation and report back to the teams stateside conducting the day-to-day discovery work. *Id.* ¶ 31.

With the help of experts, Class Counsel identified the relevant sources of transaction data to develop a class-wide model of price impact of Euribor manipulation. *Id.* ¶ 35. The transaction data provided critical information about the size of Citi's and JPMorgan's Euribor Products positions, and therefore their alleged motivations on any particular day to move Euribor in their favor. *Id.* The

first challenge was to get a near-uniform set of data that could be used to compare positions within and across banks. *Id.* Class Counsel combed through the productions to find the appropriate data set for their experts, and when such data set was missing, renewed requests with the producing party or obtained alternate data sources. *Id.*

As discovery progressed, Class Counsel began preparing witness lists, correlating witnesses to significant documents. *Id.* ¶ 34. Teams of attorneys also identified documents to support Class Counsel's experts' analyses, including Defendants' codes of conduct, and relevant industry-wide statistics and practices. *Id.*

Plaintiffs' Responsive Discovery Efforts

Class Counsel performed its prosecutorial work while also complying with its own discovery obligations. Class Counsel worked closely with CalSTRS and FrontPoint to identify documents responsive to Settling Defendants' requests. *Id.* ¶ 39.

Lowey worked with former FrontPoint personnel to identify and collect relevant documents, involving both a hard copy and electronic review of documents and data stored at an offsite physical location. *Id.* ¶¶ 40-41. Lowey reviewed boxes of documents held in storage for information responsive to Settling Defendants' document requests and interrogatories. *Id.* ¶ 41. Additionally, Class Counsel took forensic images of FrontPoint hard drives and uploaded over 457,000 documents of potentially relevant documents to Relativity. *Id.* ¶ 42. Attorneys then performed targeted searches of key dates, personnel and transactions to identify responsive documents. *Id.* Between January 31, 2018 and June 12, 2018, over 44,000 pages of FrontPoint documents were produced to Settling Defendants. *Id.* ¶ 43. Lowey also began preparing a witness to serve as the FrontPoint Rule 30(b)(6) corporate representative. *Id.*

Class Counsel and Berman Tabacco engaged in ongoing discussions with CalSTRS' in-house portfolio managers to collect responsive transactional data and respond to the questions raised by

the data. Joint Decl. ¶ 44; Bartow Dec. ¶ 14. In addition, CalSTRS built a historical document repository to collect potentially responsive documents. Joint Decl. ¶ 44; Bartow Dec. ¶ 15. Class Counsel and Berman Tabacco reviewed numerous documents and produced approximately 5,000 pages. Joint Decl. ¶ 44.

In total, FrontPoint and CalSTRS produced 3,901 documents, totaling more than 49,000 pages. *Id.* ¶ 45. Class Counsel responded to Citi and JPMorgan's ongoing inquiries regarding Plaintiffs' document productions and specific interrogatory responses through early July 2018, via multiple meet-and-confer calls and written correspondence. *Id.*

D. Development of the Class-Wide Models of Alleged Violative Conduct and Price Impact and Preparation of Class Certification Reports

Even before all the necessary data and documents were available, Class Counsel engaged in comprehensive discussions with industry and economic experts to outline a strategy for class certification. Class Counsel decided to use two experts to develop reports relating to (1) Settling Defendants' alleged violations of customs and standards in the euro-denominated interbank loan market and the Euribor-based derivatives market, and (2) common impact and common proof of damages. *Id.* ¶ 46.

To assist the expert preparing the report on Settling Defendants' alleged violations of market customs and standards, Class Counsel provided relevant policy and procedure guides produced by Citi and JPMorgan, as well as related communications. *Id.* ¶ 47. These documents were used to support his ultimate opinion. *Id.* Class Counsel reviewed his report several times, with a particular eye toward identifying and addressing any potential *Daubert* concerns. *Id.*

Plaintiffs' second expert elected to employ a benchmark comparison approach to attempt to demonstrate how Plaintiffs could show common impact and common proof of damages. *Id.* ¶ 48. Class Counsel obtained nearly a decade's worth of historical Euribor submissions data and benchmark data that could be used to demonstrate the artificiality caused by Euribor manipulation.

Id. Plaintiffs' expert recommended applying a regression analysis of the relationship between Euribor and the benchmark during the alleged manipulated and unmanipulated periods to assess where artificiality could be objectively observed. *Id.* To ensure that this model was defensible, Lovell researched the use of regression analysis in expert reports and identified the commonly accepted characteristics of such analysis. *Id.* Lovell also researched the use of control periods in expert analysis to understand the standards applied to such data. *Id.* This research helped Class Counsel to ensure the expert report properly framed the inquiry and would ultimately be deemed reliable. *Id.*

E. The Depositions of Plaintiffs' Experts and Defendants' Expert Report

Citi and JPMorgan deposed Plaintiffs' expert witnesses during two separate all-day depositions. Class Counsel prepared and defended each witness at the depositions. *Id.* ¶ 50.

Following service of Plaintiffs' expert reports on April 23, 2018, Class Counsel conducted deposition preparation for Plaintiffs' experts prior to their respective June 1, 2018 and June 8, 2018 deposition dates. Class Counsel spent more than a week total with each expert examining them about the contents of his report and posing difficult hypotheticals and questions which Class Counsel believed the experts would likely face. *Id.* ¶ 51.

After their depositions, Plaintiffs' experts assisted Class Counsel both in formulating rebuttal expert reports and with preparations to depose Settling Defendants' expert. *Id.* ¶ 52.

F. Mediation Briefs and Settlement Negotiations with Citi and JPMorgan

Citi first approached Plaintiffs regarding a potential settlement in 2015. Joint Decl. ¶ 53. On June 4, 2015, Class Counsel met with Citi's counsel for preliminary settlement discussions, which continued over the next several months. *Id.* Plaintiffs described their analysis of the developing case law in benchmark litigation actions, and how such law supported their arguments. Citi repeatedly asserted that it was not liable for the alleged misconduct. *Id.* By October 2016, the parties' negotiations had stalled. *Id.*

On April 28, 2017, Plaintiffs, Citi, and JPMorgan informed the Court of their agreement to pursue private mediation. *Id.* ¶ 54. The parties selected nationally recognized mediator David Geronemus, Esq. *Id.* On November 21, 2017, Mr. Geronemus held an in-person mediation session between Plaintiffs, Citi, and JPMorgan. Brian J. Bartow, CalSTRS' General Counsel, also attended. *Id.* This first mediation session ended in an impasse. *Id.* ¶ 56.

Following the exchange of expert reports and the depositions of Plaintiffs' experts, but before Citi and JPMorgan's expert was deposed, the parties met again on July 11 and 12, 2018 for a second and third mediation session with Mr. Geronemus. *Id.* ¶ 57. Mr. Bartow again traveled to New York to attend. *Id.* ¶ 60. Class Counsel now had expert reports developed both by Plaintiffs and Settling Defendants, a well-developed discovery record from Citi and JPMorgan, and analysis of recent cases evaluating similar claims. *Id.* Plaintiffs' experts also attended the mediations in July 2018 to provide advice and rebut Citi and JPMorgan's expert analyses. *Id.*

In preparation for the July 11-12 mediation, Class Counsel prepared and served a comprehensive mediation statement that presented a data-driven analysis allegedly linking Citi and JPMorgan to the manipulation of Euribor. *Id.* ¶ 58. This mediation statement built on all of the work Class Counsel performed in discovery and in preparation of the expert reports. *Id.*

The mediation statement also previewed Plaintiffs' forthcoming motion to certify the Class and described in detail how the Class met requirements for certification under Rule 23. *Id.* ¶ 59. In particular, Class Counsel's analysis concluding that Plaintiffs satisfied the requirements for class certification was based on the then-recent decision in *LIBOR VII*. *LIBOR VII* confirmed, among other things, that finding proof of a conspiracy to manipulate LIBOR was a *per se* antitrust violation subject to common proof among class members, 299 F. Supp. 3d. at 590, and netting issues did not cause individual questions to predominate over common questions. *Id.* at 594-95. Class Counsel also explained why other aspects of *LIBOR VII* did not apply in this Action.

G. After an Impasse During the Mediation, the Parties Reach a Settlement Number Just as the Deposition of Defendants' Expert Is About to Start

However, despite the progress made during the third mediation session, by its conclusion on July 12, 2018, the parties were still at an impasse. Joint Decl. ¶ 62. Class Counsel informed Citi and JPMorgan that they intended to continue with the deposition of Citi and JPMorgan's expert witness on July 17, 2018 at 9:30 a.m. While Class Counsel prepared for the deposition and consulted with Plaintiffs' experts on strategy, the parties agreed to continue negotiations on their own. *Id.* ¶¶ 63-64. Plaintiffs, Citi, and JPMorgan resumed negotiating on Friday, July 13, 2018, continuing until 9:30 a.m. on Tuesday, July 17, 2018, when Plaintiffs, Citi, and JPMorgan reached an agreement in principle to settle the case, just minutes before the start of the deposition. *Id.* ¶¶ 64-65.

H. Class Counsel's Additional Work Needed to Produce the Settlement

Between late July 2018 and October 4, 2018, Plaintiffs and Settling Defendants further engaged in difficult negotiations over, among other items, the availability, scope and timing of cooperation, and access to witnesses. *Id.* ¶ 66. Plaintiffs and Settling Defendants worked collaboratively and creatively to resolve their disputes. *Id.*

On October 4, 2018, counsel for Plaintiffs, Citi, and JPMorgan signed a Term Sheet. *Id.* ¶ 67. In addition to paying $182,500,000 to Plaintiffs and the Class, Citi and JPMorgan agreed to provide cooperation that may assist with reinstituting the claims against Defendants previously dismissed from this Action on personal jurisdiction grounds. *See* ECF No. 452-1 (Settlement Agreement) at 16-21. On October 5, 2018, the Parties reported to the Court that a settlement had been reached. Joint Decl. ¶ 68. Following additional weeks of arm's-length negotiations, Class Plaintiffs and Settling Defendants executed the Settlement Agreement on November 21, 2018. *Id.* ¶ 69.

While Class Counsel's work since February 28, 2018 (the cutoff date for Plaintiffs' last fee motion, *see* ECF No. 403) was integral in achieving the Settlement, it built upon Class Counsel's previous work, described in the declarations filed in connection with prior settlements. *See* ECF

Nos. 403-04, 411. Class Counsel's earlier efforts laid the foundation for this Settlement.

ARGUMENT

I. CLASS COUNSEL'S FEE REQUEST IS FAIR AND REASONABLE

"[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also CDS Litig.*, 2016 WL 2731524, at *16 (quoting *Victor v. Argent Classic Convertible Arbitrage Fund L.P.*, 623 F.3d 82, 86 (2d Cir. 2010)). Courts "may award attorneys' fees in common fund cases under either the 'lodestar' method or the 'percentage of the fund' method" although "the trend in this Circuit is toward the percentage method." *McDaniel v. County of Schenectady*, 595 F.3d 411, 417 (2d Cir. 2010) (citing *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005)). Class Counsel's attorneys' fee request is reasonable under either approach because it: (1) is consistent with the fee schedule CalSTRS negotiated at arm's-length when it first retained Class Counsel; (2) is within the range of "percentage method" fee awards made in this Circuit; and (3) satisfies all six *Goldberger* factors, including the lodestar "cross-check." *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000).

A. The Fee Request Is Determined by the Fee Scale Negotiated by CalSTRS and Class Counsel's Work Has Been Reviewed and Approved by CalSTRS

The touchstone of "reasonableness" when evaluating attorneys' fees is "what a reasonable, paying client would be willing to pay" for counsel's services. *See Arbor Hill*, 522 F.3d at 184 n.2; *see also Goldberger*, 209 F.3d at 52 ("market rates, where available, are the ideal proxy for [class counsel's] compensation."). Courts accordingly give great weight to negotiated fee agreements because they typically reflect actual market rates. *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008) ("In many cases, the agreed-upon fee will offer the best indication of a market rate."). For example, there is "a well-recognized rebuttable 'presumption of correctness' given to the terms of an *ex ante* fee agreement between class counsel and lead plaintiffs" applied in antitrust cases where the

fee was negotiated by a "sophisticated benefits fund with fiduciary obligations to its members and where that fund has a sizeable stake in the litigation." *CDS Litig.*, 2016 WL 2731524, at *16 (quoting *Flanagan*, 814 F.3d at 659); *see also In re Cendant Corp. Litig.*, 264 F.3d 201, 282 (3d Cir. 2001).

The attorneys' fees requested are calculated directly from the retainer agreement that CalSTRS negotiated with Class Counsel before joining the Action in September 2014. *See* Bartow Decl. ¶¶ 6-7; Joint Decl. ¶ 73. CalSTRS is a large and sophisticated benefits fund with a reputation for striving to protect its members' interests. CalSTRS is very experienced with class action litigation. Accordingly, CalSTRS' negotiation with Class Counsel of the declining percentage fee, constitutes "an ideal proxy for [Class Counsel] compensation." *Goldberger,* 209 F.3d at 52.

Second, CalSTRS' General Counsel has reviewed Class Counsel's time on a monthly basis, and actively observed as well as participated in the prosecution of the claims here. Bartow Decl. ¶ 24; Joint Decl. ¶ 75. Based upon Mr. Bartow's knowledge of the risks of continued prosecution and the skillfulness of Class Counsel's prosecution of the claims in light of those risks, Mr. Bartow has also submitted a declaration supporting the requested fee. Bartow Decl. ¶¶ 24-25. CalSTRS' *ex ante* judgment about the attorneys' fees in this case, as well as CalSTRS' *post hoc* support, after all the facts were known of the actual fee request, amply exceed the factors identified by the *CDS* court to create a presumption of reasonableness here.

Third, the CalSTRS retainer agreement further limits any fee to Class Counsel to a risk multiplier of 3.5. Class Counsel respectfully submits that this cap by CalSTRS is a strong indication of the appropriate risk multiplier. In fact, the risk multiplier if the fee request is awarded will be substantially less than 3.5 regardless of how it is calculated. *See* Part I.D. *infra.*

B. Class Counsel's Request is Well Within the Range Used Under the Second Circuit's Preferred Percentage-Based Methodology

The reasonableness of the requested fee is confirmed by cases applying the "percentage method" of fee calculation favored in this Circuit. *See Wal-Mart Stores*, 396 F.3d at 121 ("The trend in

this Circuit is toward the percentage method"); *see also In re Beacon Assoc. Litig.*, No. 09 Civ. 777(CM), 2013 WL 2450960, at *5 (S.D.N.Y. May 9, 2013) (explaining that "percentage of recovery" is "the preferred method of calculating the award for class counsel in common fund cases"). Courts prefer the "percentage method" because it is easy to administer and avoids the "dubious merits of the lodestar approach." *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003); *see also In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 485 (S.D.N.Y. 1998) ("*NASDAQ III*") (noting that the percentage method is easy to administer). It also "aligns the interests of the class and its counsel" while incentivizing "the efficient prosecution and early resolution of litigation." *Hall v. Children's Place Retail Stores Inc.*, 669 F. Supp. 2d 399, 401 (S.D.N.Y. 2009) (citation omitted).

Pursuant to the graduated fee structure with CalSTRS, Class Counsel requests 19% of the $182,500,000 common fund. This percentage is well within the range of reasonable attorneys' fees approved in complex class actions in this Circuit, including other "IBOR" cases.[7] The fee here is a considerably lesser percentage than many approved fees in complex common fund class actions where "courts have sometimes awarded contingency fees exceeding 30% of the overall fund." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 447 n.11 (E.D.N.Y. 2014) ("*Interchange Fee Litig.*").[8] The percentage is also less than the percentage award in connection

[7] *See, e.g.*, Order Granting Class Counsel's Motion for Award of Attorneys' Fees, *Laydon v. Mizuho Bank, Ltd., et al.,* No. 12-cv-3419 (GBD) (S.D.N.Y Dec. 7, 2017), ECF No. 388 ("*Laydon* Fee Order") and Order Granting Class Counsel's Motion for Award of Attorneys' Fees, *Sonterra Capital Master Fund, Ltd., et al, v. UBS AG et al.*, No. 15-cv-5844 (GBD) (S.D.N.Y Dec. 7, 2017), ECF No. 837 ("*Sonterra* Fee Order") (awarding 23.57% of the $148 million common fund in cases settling manipulation claims relating to Yen-LIBOR and Euroyen TIBOR pursuant to CalSTRS' retainer with Class Counsel); *City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM)(GWG), 2014 WL 1883494, at *10-12 (S.D.N.Y. May 9, 2014) (awarding 33% of a $15 million common fund in attorneys' fees in a securities fraud class action); *In re Amaranth Natural Gas Commodities Litig.*, No. 07 Civ. 6377 (SAS), 2012 WL 2149094, at *2 (S.D.N.Y. Jun. 11, 2012) (awarding 30% of a $77.1 million common fund as attorneys' fees in a complex CEA class action); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393 (S.D.N.Y. 1999) (awarding 27.5% of the $116.6 million common fund as attorneys' fees in complex class action).

[8] A recent study collecting empirical evidence of attorneys' fees in class action settlements likewise supports the requested fee. *See* Eisenberg, Miller & Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 952 (2017) (finding that in 19 antitrust settlements between 2009 and 2013 with a mean recovery of $501.09 million and a median recovery of $37.3 million, the mean and median fee percentages were 27% and 30%).

with the Barclays, Deutsche Bank and HSBC settlements. *See* ECF No. 425; *see also In re Interpublic Sec. Litig.,* No. 02 Civ.6527(DLC), 2004 WL 2397190, at *12 (S.D.N.Y. Oct. 26, 2004) ("Graduated fees scales recognize both the benefit to the class and the investment of effort by counsel").

C. The Requested Fees are Supported by the *Goldberger* Factors

The requested fees are supported by the application of the six-factor reasonableness test set forth in *Goldberger*.[9] The first factor, the time and labor expended by Class Counsel, is detailed above and in the supporting declarations; factors 2 through 6 are addressed below.

1. The Risk of the Litigation

The risk of the litigation is the preeminent *Goldberger* factor. *See Interchange Fee Litig.*, 991 F. Supp. 2d at 440 ("The most important *Goldberger* factor is often the case's risk"); *see also In re AOL Time Warner, Inc. Sec. and ERISA Litig.*, No. 12 Civ. 5575 (SWK), MDL 1500, 2006 WL 3057232, at *15 (S.D.N.Y. Oct. 26, 2006) (the judiciary's focus is on "fashioning a fee" that encourages lawyers to "undertake future risks for the public good"); *Goldberger,* 209 F.3d at 54 ("We have historically labeled the risk of success as 'perhaps the foremost' factor to be considered in determining whether to award an enhancement.") (citation omitted). The claims against Citi and JPMorgan were particularly high risk in comparison to claims previously settled.

Risk of Prosecuting the Case as Class Counsel: When this Action was initiated, it was unclear whether a private right of action was available under antitrust laws. The risks of dismissal of private antitrust claims were realized in multiple cases shortly after filing this case. *See, e.g., In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 688 (S.D.N.Y. 2013) ("*LIBOR I*").

Plaintiffs' antitrust claims survived here because the Second Circuit's decision in *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 771-75 (2d Cir. 2016), vacated the prior consensus that private

[9] Courts evaluating whether a fee is "reasonable" must consider: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation. . .; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger,* 209 F.3d at 50.

plaintiffs did not have antitrust claims for benchmark rate manipulation. *See Sullivan v. Barclays plc*, No. 13-cv-2811, 2017 WL 685570, at *13 (S.D.N.Y. Feb. 21, 2017). When *Gelboim* was decided, Class Counsel had already been prosecuting these claims in high risk conditions for thirty-nine months. *Gelboim* did not, however, mitigate other risks such as personal jurisdiction and the inherent difficulty of litigating against some of the world's largest financial institutions with the financial resources and ability to prolong this case for years.

Due to these high risks and despite the presence of an ACPERA applicant, no companion or tag along class actions were filed. Accordingly, Class Counsel assumed all of the foregoing risks alone, bearing the costs and potential loss on a contingent basis. *See In re Remeron Direct Purchaser Antitrust Litig.*, No. Civ. 03-0085 (FSH), 2005 WL 3008808, at *14 (D.N.J. Nov. 9, 2005) (identifying "the uncertain nature of the fee, the wholly contingent outlay of large out-of-pocket sums by plaintiffs, and the fact that the risk of failure and nonpayment in an antitrust case are extremely high" as risks in an antitrust class action.).

Risk of Establishing Liability: As set forth above, there were serious risks that this case would be dismissed at the pleading stage. Even after prevailing on Citi and JPMorgan's motion to dismiss, challenges remained and in some ways were amplified. These antitrust claims involving foreign conduct are inherently complex, particularly where, as here, there are no regulatory settlements to support liability. Class Counsel invested substantial time and resources to identify ways to link Citi and JPMorgan to the conspiracy. Class Counsel also had to parse technical financial language and identify patterns and campaigns used to manipulate Euribor, involving multiple banks over extended time periods.

These risks were magnified with the dismissal of the other Defendants, who might otherwise have produced helpful documents. This information deficit was partly mitigated by the cooperation

provided by Barclays, Deutsche Bank and HSBC, but nevertheless the case was made more difficult by not being able to simultaneously prosecute Citi and JPMorgan's co-conspirators.

Risk of Establishing Damages: Citi and JPMorgan would have argued that the total damages for which they were liable was but a small fraction of the settlement payment they ultimately agreed to make. In addition, there were risks associated with establishing a class-wide damages model. *See In re Platinum and Palladium Commodities Litig.,* No. 10 CV 3617, 2014 WL 3500655, at *12 (S.D.N.Y. July 15, 2014) ("[I]n any market manipulation or antitrust case, [p]laintiffs face significant challenges in establishing liability and damages."). For example, Plaintiffs' case depended on showing what Euribor would have been absent manipulation. Euribor is intended to reflect the cost of borrowing Euros in the interbank money market. Class Counsel, with the assistance of its experts, had to show that the Euribor was not reflective of such borrowing costs. Plaintiffs' experts opined on whether there were violations of the customs and standards in the relevant markets, and on how common impact and common proof of damages could be used to calculate class-wide damages. *See* Joint Decl. ¶ 46. These opinions were thoroughly scrutinized when Citi and JPMorgan deposed Plaintiffs' experts, and would have been further tested in Settling Defendants' rebuttal expert report had the Settlement not been reached. *See* Joint Decl. ¶¶ 51-52. While Class Counsel is confident in its position that class-wide damages could be determined, there is always uncertainty where a battle of experts is involved. *Chatelain v. Prudential-Bache Sec., Inc.,* 805 F. Supp. 209, 214 (S.D.N.Y. 1992) (noting the complexities of calculating damages in class actions); *Maley v. Del Glob. Techs. Corp.,* 186 F. Supp. 2d 358, 372 (S.D.N.Y. 2002) (citing *Chatelain* and stating the complex issue of calculating damages incurred by the Class requires a battle of the experts).

2. The Magnitude and Complexity of the Case

"Class actions have a well deserved reputation as being most complex," *NASDAQ III*, 187 F.R.D. at 477, with antitrust and commodities cases standing out as some of the most "'complex,

protracted, and bitterly fought.'" *Meredith Corp. v. SESAC LLC*, 87 F. Supp. 3d 650, 670 (S.D.N.Y. 2015) (citations omitted); *see also In re Platinum and Palladium Commodities Litig.,* 2014 WL 3500655 at *12 (noting that commodities cases are "complex and expensive" to litigate); *In re Vitamin C Antitrust Litig.*, No. 06 Md. 1738 (BMC)(JO), 2012 WL 5289514, at *4 (E.D.N.Y. Oct. 23, 2012). This case is no exception.

Complexity: This case involves a conspiracy among multiple banks and interdealer brokers to fix Euribor and Euribor-based derivatives prices over a Class Period of five years and nine months through multiple means, including, *inter alia*: (1) making false Euribor submissions; (2) "pushing cash" with manipulative transactions; (3) "spoofing" the market with false bids and offers; and (4) sharing proprietary information. ECF No. 174 (Fourth Amended Class Action Complaint) ¶ 18. The amount of work required to understand the inner workings of a cartel with this level of sophistication was "extraordinary" in both its "complexity and scope" and required Class Counsel to master the properties of complex financial instruments and markets. *See In re Holocaust Victim Assets Litig.*, No. CV 06-0983 (FB)(JO), 2007 WL 805768, at *46 (E.D.N.Y. Mar. 15, 2007).

Magnitude: This is a massive case. Over the course of six years of litigation involving up to 20 Defendants, the parties have produced hundreds of docket entries associated with four amended complaints and motions to transfer venue, reconsider orders, and issue a request to obtain documents via The Hague Convention. The motion to dismiss briefing involved a total of 6 memoranda of law, 19 declarations, numerous exhibits, and 14 letter briefs discussing decisions issued after the motion had been fully briefed. There have been hundreds of thousands of documents, spreadsheets and audio files produced, and thousands of hours of work spent on understanding all of this information. Even more documents may still be produced as a result of the settlement cooperation to be provided by Citi and JPMorgan. The global nature, duration, size of the

case, complexity of the financial instruments, and sophistication and the depth of the conspiracy weigh heavily in favor of approving the requested fee.

3. Quality of Representation

"[T]he quality of representation is best measured by results," *Goldberger*, 209 F.3d at 55, which are evaluated in light of "the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 141 (S.D.N.Y. 2008).

Results Obtained: The settlements reached so far provide significant value to the Class. $309,000,000 has already been obtained from Barclays, Deutsche Bank and HSBC, in and of itself an extraordinary result by Class Counsel. The Settlement with Citi and JPMorgan will add $182,500,000, bringing the total funds available to the Class to $491,500,000. These funds will provide Class members with an immediate recovery.

The size of the Settlement Fund may continue to grow if Plaintiffs' claims against previously dismissed Defendants are reinstated. In negotiating the Settlement, Class Counsel secured significant cooperation from the Settling Defendants. *See supra* at 13. This cooperation was a significant source of contention during the preparation of the Settlement Agreement. Rather than relenting on the need for cooperation in light of the fact that the final two live Defendants were settling, Class Counsel acted in the best interests of the Class and protected Plaintiffs' potential ability to pursue claims against the dismissed Defendants.

Background of Lawyers Involved: Class Counsel has extensive experience prosecuting some of the largest commodities manipulation cases, including what were at the time, the first, second, third, and fourth largest class action recoveries in the history of the CEA.[10] This includes specific expertise in benchmark manipulation as demonstrated by Class Counsel's current tenure as lead counsel in cases alleging anticompetitive and manipulative conduct for several "IBOR" rates

[10] *See* ECF Nos. 452-6 (attaching Lowey's firm resume), 452-7 (attaching Lovell's firm resume).

and the London Silver Fix.[11] Additional examples of Class Counsel's more than 50 years of experience with complex litigation are detailed in Class Counsel's resumes.

Another consideration for assessing the quality of the representation is "[t]he quality of the opposing counsel" in the case. *See Maley*, 186 F. Supp. 2d. at 373. The valuable settlement that Class Counsel secured cannot be understated given the caliber of defense counsel in this action. *See Meredith Corp.*, 87 F. Supp. 3d at 670 (noting that counsel's achievement in "obtaining valuable recompense . . . for its clients is particularly noteworthy given the caliber and vigor of its adversaries"); *NASDAQ III*, 187 F.R.D. at 488 (approving attorneys' fee award where defendants were represented by "several dozen of the nation's biggest and most highly regarded defense law firms."). The fact that Class Counsel successfully prosecuted this action for more than six years against such formidable opponents further reflects the quality of representation provided.

4. *The Fee is Reasonable in Relation to the Settlements*

Courts evaluate the requested fee in relation to the settlement by looking to "comparable cases" for "guideposts." *See Interchange Fee Litig.*, 991 F. Supp. 2d at 443-44 (evaluating a fee request against other "large class cases with court-set fees"). The fee requested here is reasonable in relation to the settlement for at least two reasons:

First, Class Counsel's request for 19% of the common fund comes directly from the graduated fee scale that CalSTRS negotiated before joining the action. *See* Bartow Decl. ¶ 6-7. This satisfies a key legal "guidepost" that Judge Gleeson identified in large class action cases—that "the percentage of the fund awarded should scale back as the size of the fund increases." *See Interchange Fee Litig.*, 991 F. Supp. 2d at 444.

[11] *See, e.g.*, *Sonterra Capital Master Fund Ltd. et al. v. Credit Suisse Group AG et al.*, No. 15-cv-871 (SHS) (S.D.N.Y.) (Swiss franc LIBOR); *Laydon v. Mizuho Bank, Ltd., et al.*, No. 12-cv-3419 (GBD); and *In re: London Silver Fixing Ltd., Antitrust Litig.*, No. 14-md-2573 (VEC) (S.D.N.Y.).

Second, the graduated fee CalSTRS negotiated is less than the fee approved in connection with the prior $309 million settlement in this Action (22.24%) and the fees awarded in the recent *Laydon* and *Sonterra* settlements. *See Laydon* Fee Order ¶ 3; *Sonterra* Fee Order ¶ 3. Other courts in this District have approved fee awards in large antitrust class cases based on a graduated fee scale. *See CDS Litig.*, 2016 WL 2731524, at *17 n.24; *Interchange Fee Litig.*, 991 F. Supp. 2d at 445; *In re Interpublic Sec. Litig.,* 2004 WL 2397190, at *12 ("Graduated fees scales recognize both the benefit to the class and the investment of effort by counsel"). The requested fee is reasonable in relation to the settlement achieved here and compares favorably to other concrete "guideposts" such as the fees awarded in analogous cases.

5. *Public Policy Supports Approval*

Had Class Counsel not taken on the risk of this lawsuit in February 2013, the class of investors in Euribor Products would have been left without recompense for their losses. Despite the subsequent government investigations and certain Defendants' admissions of wrongdoing, many investors who were harmed by Defendants' conspiracy would not have received any money at all. *See, e.g.*, *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 352 (S.D.N.Y. 2014) ("providing lawyers with sufficient incentive to bring common fund cases . . . serve[s] the public interest") (citations omitted). None of the regulator's fines or settlements were allocated to private investors.

Public policy encourages enforcement of the antitrust laws through private civil suits to deter infringing conduct in the future. *See Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983) ("This Court has emphasized the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws."). Awarding a reasonable percentage of the common fund further ensures that Class Counsel retains the ability and incentive to pursue antitrust violations at their own expense even when recovery is uncertain. *See Goldberger*,

209 F.3d at 51 ("There is . . . commendable sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest.").

D. The Lodestar Cross-Check Supports the Requested Fee

Class Counsel's fee request is also reasonable under the lodestar method, which has "fallen out of favor . . . because it encourages bill-padding and discourages early settlements." *In re Colgate-Palmolive*, 36 F. Supp. 3d at 353. Courts in this Circuit have determined that the lodestar "works best as a sanity check to ensure that an otherwise reasonable percentage fee would not lead to a windfall," for example, if the multiplier is "grossly disproportionate to the percentage fee award . . . ." *Id.* There is no windfall here.

In negotiating a graduated fee scale, CalSTRS capped any fee request by Class Counsel to 3.5 times the aggregate lodestar. As with the percentage fee method, this negotiated rate should be given great weight in evaluating attorneys' fees. *Alderman v. Pan Am World Airways*, 169 F.3d 99, 103 (2d Cir. 1999) ("[A] court should seek to enforce the parties' intentions in a contingent fee agreement, as with any contract."). Plaintiffs' Counsel have spent 139,185.78 hours working on *Sullivan* as of February 28, 2019, for an aggregate lodestar of $66,910,561.30. *See* Joint Decl. ¶ 86. The $34.675 million fee requested, when combined with the previously-awarded fee of $68,710,000 million, compensates Plaintiffs' Counsel for approximately 155% of their aggregate lodestar and constitutes a 1.55 multiplier. This is far less than the negotiated risk multiplier cap in the CalSTRS's fee agreement, demonstrating that the full fee will not result in an "unwarranted windfall." *Goldberger v. Integrated Res., Inc.*, 209 F.3d at 49.[12]

[12] This method of calculation of the risk multiplier is appropriate under the CalSTRS fee agreement. Under such agreement, the total recovery from inception to date is used to determine the declining percentage fee that may be requested, *i.e.*, the agreement's frame of reference is to look at the case as an integrated whole. Similarly, in calculating the risk multiplier, the facts since inception should be examined as an integrated whole. That is, the reasonableness of Class Counsel's declining percentage fee should be judged by adding that fee to the earlier fee and then comparing the sum total of the total lodestar since inception.

Second, the 3.5 times multiplier CalSTRS negotiated is reasonable because it is consistent with the range of multipliers approved in this and other circuits.[13] The Court should approve the requested fee as the parties intended a lodestar multiplier of no more than 3.5 and this intended multiplier is lower than that in similarly complex class action cases.

II. CLASS COUNSEL'S EXPENSES ARE REASONABLE

"An attorney who has created a common fund . . . is entitled to reimbursement of reasonable litigation expenses from that fund." *City of Omaha Police & Fire Ret. Sys. v. LHC Grp.*, No. 12 cv 1609, 2015 WL 965696 at *11 (W.D. La. March 3, 2015); *see also In re Arakis Energy Corp. Sec. Litig.*, No. 95 CV 3431(ARR), 2001 WL 1590512, at *17 n.12 (E.D.N.Y. Oct. 31, 2001) ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course."). Plaintiffs' Counsel incurred $1,074,649.73 in expenses from March 1, 2018 to the present. *See* Joint Decl. ¶ 88. This amount is well below the $1.3 million Class Counsel advised in the Court-approved notice sent to Settlement Class Members. *See* ECF No. 452-3 at 7.

These costs and expenses were "incidental and necessary to the representation of the [C]lass," and should be reimbursed. *See Beckman*, 293 F.R.D. at 482. Since February 28, 2018, $841,150.23 (or 78%) of Plaintiffs' Counsel's reimbursable expenses went towards professional, consulting and expert fees, including class certification expert work and settlement mediation.

CONCLUSION

For the foregoing reasons, Class Counsel respectfully requests that the court approve their application for attorneys' fees and costs and incentive awards in the amounts set forth above.

But even if the risk multiplier were calculated solely based on Class Counsel's incremental time since February 28, 2018 and compared to the incremental lodestar compared to the fee request in this application, the risk multiplier would be 2.39. This, also, is far less than the 3.5 cap contained in the CalSTRS fee agreement.

[13] *See, e.g.*, *CDS Litig.*, 2016 WL 2731524, at *17 (approving a lodestar multiplier of "just over 6" in a complex antitrust class action); *Beckman v. KeyBank N.A.,* 293 F.R.D. 467, 481 (S.D.N.Y. 2013) (approving a multiplier of 6.3 in class action, explaining that "[c]ourts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers."); *Maley*, 186 F. Supp. 2d at 371 (holding that a 4.65 lodestar multiplier is modest, fair, and reasonable); *see also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052 (9th Cir. 2002) (listing nationwide class action settlements where the lodestar multiplier ranged up to 8.5).

Dated: March 22, 2019
White Plains, New York

LOWEY DANNENBERG, P.C.

By: */s/ Vincent Briganti*
Vincent Briganti
Geoffrey M. Horn
Peter D. St. Phillip
44 South Broadway, Ste. 1100
White Plains, New York 10601
Tel.: 914-997-0500
Fax: 914- 997-0035
vbriganti@lowey.com
ghorn@lowey.com
pstphillip@lowey.com

LOVELL STEWART HALEBIAN JACOBSON LLP

By: */s/ Christopher Lovell*
Christopher Lovell
Gary S. Jacobson
Benjamin M. Jaccarino
500 5th Avenue, Suite 2440
New York, NY 10036
Tel.: 212-608-1900
Fax: 212-719-4677
clovell@lshllp.com
gsjacobson@lshllp.com
bjaccarino@lshllp.com

Class Counsel

Joseph J. Tabacco, Jr.
Todd A. Seaver
BERMAN TABACCO
44 Montgomery Street, Ste. 650
San Francisco, CA 94104
Tel.: 415-433-3200
Fax: 415-433-6282

Patrick T. Egan
BERMAN TABACCO
One Liberty Square
Boston, MA 02109
Tele.: 617-542-8300
Fax: 617-542-1194

Brian P. Murray
Lee Albert (pro hac vice to be filed)
GLANCY PRONGAY & MURRAY LLP
122 East 42nd Street, Suite 2920
New York, NY 10168
Tel.: 212-682-5340
Fax: 212-884-0988

David E. Kovel
KIRBY McINERNEY LLP
825 Third Avenue
New York, NY 10022
Tel.: 212-371-6600
Fax: 212-751-2540

Additional Counsel for Plaintiffs

TAB 39A

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NORFOLK, VA

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

IN RE PEANUT FARMERS ANTITRUST LITIGATION	Case No. 2:19-cv-00463 **Honorable Raymond A. Jackson** **Honorable Lawrence R. Leonard**

ORDER APPROVING CLASS COUNSEL'S MOTION FOR AWARD FROM THE OLAM AND BIRDSONG SETTLEMENT FUND FOR CURRENT AND ONGOING LITIGATION EXPENSES

THIS CAUSE came before the Court on Class Counsel's Motion for Award from the Olam and Birdsong Settlement Fund for Current and Ongoing Litigation Expenses ("Motion"). The Court, having reviewed all the pleadings relating to the Motion, the exhibits thereto, including Class Counsel's Amended Declaration in Support, and having held a hearing on the matter, hereby:

ORDERS AND ADJUDGES:

1. The Court has approved Plaintiffs' settlement with Defendant Olam Peanut Shelling Company, Inc. in the amount of $7,750,000 and Plaintiffs' settlement with Defendant Birdsong Corporation in the amount of $50,000,000. The total amount of the settlements is $57,750,000, which has been placed in an interest-bearing escrow account ("Settlement Fund").

2. Class Counsel's Motion, as amended by Class Counsel's Amended Declaration in Support, seeks an award of $1,867,926.84 from the Settlement Fund for litigation expenses incurred in this case.

3. Substantial authority supports the use of funds obtained in partial settlements for reimbursement or payment to Class Counsel of expenses incurred in this case. *See In re The Mills Corp. Securities Litig.*, 265 F.R.D. 246, 265 (E.D. Va. 2009) (permitting over $3 million of a partial settlement fund to be used for expenses paid and outstanding costs); *South Carolina*

National Bank v. Stone, et al., 749 F. Supp. 1419, 1434-35 (D.S.C. 1990) (permitting a $200,000 litigation expense fund for past and future costs and expenses from $3,000,000 ice-breaker settlement); *see also, e.g.*, *Newby v. Enron Corp.*, 394 F.3d 296, 302-303 (5th Cir. 2004) (affirming an order providing for a $15 million litigation expense fund from the proceeds of a partial settlement); *In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2011 WL 717519, at *13 (E.D. Mich. Feb. 22, 2011) (permitting $750,000 of a partial settlement to be used for litigation expenses); *In re Microcrystalline Cellulose Antitrust Litig.*, No. 01-111, Final Judgment Order at ¶ 7 (E.D. Pa. June 15, 2005) (O'Neill, J.) (permitting class plaintiffs to use up to $2.5 million of a settlement fund to pay litigation expenses).

4. Class Counsel have paid $793,349.32 for costs and expenses relating to discovery, experts, and trial preparation, and have incurred additional as-yet-unpaid costs of $1,074,577.52 relating to those same categories.

5. The expenses paid and incurred by Class Counsel were reasonable and necessary to the successful prosecution of this Action, which has thus far resulted in the creation of the Settlement Fund.

6. Class Counsel's request for an award of $1,867,926.84 for litigation expenses paid and incurred in this case is hereby granted.

IT IS SO ORDERED.

Dated: April 7, 2021

Honorable Raymond A. Jackson
U.S. District Judge

FILED
AUG 10 2021
CLERK, U.S. DISTRICT COURT
NORFOLK, VA

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

IN RE PEANUT FARMERS ANTITRUST LITIGATION

Case No. 2:19-cv-00463

Honorable Raymond A. Jackson
Honorable Lawrence R. Leonard

ORDER

AND NOW, upon consideration of Plaintiffs' Motion for an Award of Attorneys' Fees and Expenses and for Class Representative Service Awards (the "Motion"), the Memorandum in support thereof, and the declarations and exhibits attached thereto, and following a hearing on the Motion, it is hereby ORDERED that the Motion is GRANTED:

1. Under Fed. R. Civ. P. 23(h), "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." As the Supreme Court recognized, "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The Court has considered the relevant case law and authority and finds that awards of attorneys' fees and reimbursement of litigation costs and expenses to the Plaintiffs and their counsel are appropriate under Fed. R. Civ. P. 23(h) and Fed. R. Civ. P. 54(d)(2).

2. Two methods of calculating attorneys' fees in class actions are: (1) the percentage-of-the-fund method; and (2) the lodestar method. *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 260 (E.D. Va. 2009). The percentage-of-the-fund method involves an award based on a percentage of the Class's recovery, set by the Court based on several factors. *Id.* The lodestar method requires

multiplying the number of hours worked by a reasonable hourly rate, the product of which the Court can then adjust by employing a "multiplier." *Id.*

3. The Supreme Court has suggested that percentage-of-the-fund is the appropriate method for awarding fees under the common fund doctrine. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("[U]nder the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class . . . ."). Most federal courts of appeals have also endorsed the percentage-of-the-fund method as an appropriate method for determining an award of attorneys' fees in common fund cases. "While the Fourth Circuit has not definitively answered this debate, other districts within this Circuit, and the vast majority of courts in other jurisdictions consistently apply a percentage of the fund method for calculating attorneys' fees in common fund cases." *Mills*, 265 F.R.D. at 260; *see, e.g.*, *Manuel v. Wells Fargo Bank, Nat'l Ass'n*, No. 3:14CV238 (DJN), 2016 WL 1070819, at *5 (E.D. Va. Mar. 15, 2016) ("District Courts within this Circuit have also favored the percentage method."); *Krakauer v. Dish Network, L.L.C.*, No. 1:14-cv-333, 2018 WL 6305785, at *2 (M.D.N.C. Dec. 3, 2018) ("District courts in the Fourth Circuit overwhelmingly prefer the percentage method in common-fund cases . . . ."); *Archbold v. Wells Fargo Bank, N.A.*, No. 3:13-CV-24599, 2015 WL 4276295, at *5 (S.D.W. Va. July 14, 2015) ("[T]here is a clear consensus among the federal and state courts, consistent with Supreme Court precedent, that the award of attorneys' fees in common fund cases should be based on a percentage of the recovery."); *Strang v. JHM Mortg. Sec. Ltd. P'ship*, 890 F. Supp. 499, 502 (E.D. Va. 1995) ("Although the Fourth Circuit has not yet ruled on this issue, the current trend among the courts of appeal favors the use of a percentage method to calculate an award of attorneys' fees in common fund cases."); *Jones v. Dominion Res. Servs.*, 601 F. Supp. 2d 756, 758 (S.D.W. Va. 2009) ("The percentage method has overwhelmingly become the preferred method for calculating attorneys'

fees in common fund cases."). These courts recognize that the percentage-of-fund method is "more efficient and less burdensome than the traditional lodestar method, and offers a more reasonable measure of compensation for common fund cases." *Strang*, 890 F. Supp. at 503. It also better aligns the interests of class counsel and class members because it ties the attorneys' fees award to the overall result achieved, rather than hours expended by the attorneys. *Thomas v. FTS USA, LLC*, No. 3:13-cv-825 (REP), 2017 WL 1148283, at *3 (E.D. Va. Jan. 9, 2017), *report and recommendation adopted*, 2017 WL 1147460 (E.D. Va. Mar. 27, 2017); *see also Deem v. Ames True Temper, Inc.*, No. 6:10-CV-01339, 2013 WL 2285972, at *5 (S.D.W. Va. May 23, 2013) ("The percentage method 'is designed to allow courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure.'" (quoting *In re Prudential Ins. Co. Am. Sales Litig.*, 148 F.3d 283, 333 (3d Cir. 1998))). Class Counsel's application for the percentage-of-fund method is therefore consistent with the law in this and other circuits. Thus, the Court will award fees to Plaintiffs' counsel using the percentage-of-fund approach.

4. As explained below, the factors courts consider when assessing percentage-of-fund requests demonstrate the reasonableness of Class Counsel's requested fee, which is further confirmed by cross-checking the requested amount against the calculated lodestar. "In determining the reasonableness of attorneys' fees, courts look at the following factors: (1) the result obtained for the class; (2) the presence or absence of substantial objections by members of the class to the fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by the plaintiffs' counsel; and (7) awards in similar cases." *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d 837, 843 (E.D. Va. 2016). Some district courts in this Circuit have applied a slightly different version of this standard, replacing the sixth factor with public policy

considerations. *See, e.g.*, *In re Celebrex (Celecoxib) Antitrust Litig.*, No. 2:14-CV-00361, 2018 WL 2382091, at *4 (E.D. Va. Apr. 18, 2018); *Mills*, 265 F.R.D. at 261 (citing, *inter alia*, *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000)).

5. There is some disagreement as to whether to apply these seven factors, which were adopted from the Third Circuit, *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 & n.1 (3d Cir. 2000), or the 12-factor test from the Fifth Circuit adopted in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978) (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)).[1] *See Galloway v. Williams*, No. 3:19-CV-470, 2020 WL 7482191, at *5 (E.D. Va. Dec. 18, 2020) (Payne, J.); 5 Newberg on Class Actions § 15:82 (5th ed.) ("The Fourth Circuit utilized the Fifth Circuit's *Johnson* factors in a statutory fee-shifting case, so some district courts have utilized those factors in setting a percentage in common fund cases, while other district courts have used the Second Circuit's *Goldberger* factors and/or the Third Circuit's *Gunter* factors." (footnotes omitted)). However, many of the *Johnson/Barber* factors overlap with factors in the Third Circuit test or are "subsumed in the calculation of the hours reasonably expended and the reasonableness of the hourly rate." *Galloway*, 2020 WL 7482191, at *6, *10-11; *see also Genworth*, 210 F. Supp. 3d at 843 (using the seven-factor Third Circuit test in evaluating the reasonableness of the requested fee and incorporating the *Johnson/Barber* factors into the lodestar cross-check). Notably, "fee award reasonableness factors 'need not be applied in a formulaic way'

[1] The *Johnson/Barber* factors are "(1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases." *Barber*, 577 F.2d at 226 n.28.

because each case is different, 'and in certain cases, one factor may outweigh the rest.'" *Boyd v. Coventry Health Care Inc.*, 299 F.R.D. 451, 463 (D. Md. 2014) (citations omitted). Given the overlap in the factors, a consideration of the relevant factors under any standard supports Class Counsel's requested fee.

Class Counsel Obtained an Excellent Result for the Class

6. "The first and most important factor for a court to consider when making a fee award is the result achieved." *Genworth*, 210 F. Supp. 3d at 843; *see also Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("[T]he most critical factor is the degree of success obtained."); *McKnight v. Circuit City Stores, Inc.*, 14 F. App'x. 147, 149 (4th Cir. 2001) (same). Class Counsel's effective and efficient prosecution of this case through fact and expert discovery, class certification, summary judgment (fully briefed), and trial (fully prepared) resulted in settlements with Olam, Birdsong, and Golden Peanut and the creation of a $102,750,000 Settlement Fund. This is an excellent result for the Class. Not only does it assure that Class members will receive a substantial cash payment to compensate them for their injuries, but it also eliminates the risk of adverse rulings on summary judgment, at trial, or on appeal.

7. Notably, Class Counsel achieved this result without the benefit of a prior governmental investigation. Many antitrust class actions—especially those alleging price-fixing—follow a government investigation, where the risk in bringing related private action is comparatively limited. *See, e.g., In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 460-61 (D.P.R. 2011) (noting that preceding DOJ investigation and FBI raids mitigated counsel's risk); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 147 (S.D.N.Y. 2010) ("Risk is not uniform in all class actions" and for "certain antitrust class actions filed in the wake of a Department of Justice consent decree . . . . the risk is limited."). Class Counsel investigated this

case from the ground up without the benefit of a government investigation, which significantly increased the risk of bringing this action. *See, e.g., In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2008 WL 63269, at *5 (E.D. Pa. Jan. 3, 2008) ("The risk of nonpayment is even higher when a defendants' *prima facie* liability has not been established by the government in a criminal action."). Balanced against the many significant risks and compared to the results achieved in many other price-fixing class action settlements, the settlement value here provides an exceptional result for the Class and supports Class Counsel's request for attorneys' fees.

No Class Member Objected to Class Counsel's Fee Request

8. "A lack of objections by class members as to fees requested by counsel weighs in favor of the reasonableness of the fees." *Genworth*, 210 F. Supp. 3d at 844. The Court-approved notice of the Golden Peanut settlement informed potential Class members that Co-Lead Counsel would request attorneys' fees not to exceed one-third of the Settlement Fund (as well as reimbursement of litigation expenses, and service awards for the Class Representatives). Significantly, not a single Class Member objected to Class Counsel's fee request.

Class Counsel Litigated the Case Skillfully and Efficiently

9. Quality of representation is another significant factor supporting Class Counsel's fee request. As demonstrated by the Court's appointment of Co-Lead Counsel to represent the Class, Class Counsel have substantial experience litigating complex class actions and antitrust cases.[2] Additionally, "the result achieved is the clearest reflection of petitioners' skill and

[2] *See* Memorandum in Support of Plaintiffs' Motion to Appoint Interim Co-Lead Class Counsel and Liaison Counsel, supporting declarations of Brian D. Clark, Kimberly A. Justice, and Wyatt B. Durette, Jr., and firm resumes attached as exhibits thereto (ECF Nos. 44, 44-1 through 44-2 through 44-4 through 44-7).

expertise." *In re Linerboard Antitrust Litig.*, MDL No. 1261, 2004 WL 1221350, at *5 (E.D. Pa. June 2, 2004). The creation of the $102,750,000 Settlement Fund speaks volumes.

10. Further, courts often evaluate the quality of the work performed by plaintiff's counsel in light of the quality of the opposition's representation. *See, e.g.*, *Mills*, 265 F.R.D. at 262 (noting that counsel reached a favorable settlement against "experienced and sophisticated defense attorneys"); *Smith v. Krispy Kreme Doughnut Corp.*, No. 1:05cv00187, 2007 WL 119157, at *2 (M.D.N.C. Jan. 10, 2007) ("Additional skill is required when the opponent is a sophisticated corporation with sophisticated counsel."). Defendants here were represented by highly skilled and experienced antitrust litigators from some of the leading defense law firms in the United States, two of which are ranked among the Vault Law 100 for most prestigious law firms (https://www.vault.com/best-companies-to-work-for/law/top-100-law-firms-rankings). It was in the face of such skilled and vigorous opposition that Class Counsel obtained the benefits for the Class that they did. This factor weighs in favor of the requested fee award.

The Duration and Complexity of this Litigation Supports the Requested Fee

11. Courts recognize that "there are good reasons to award higher-than-typical fees when the issues in a case are particularly 'novel and complex.'" *Good v. W. Virginia-Am. Water Co.*, No. 14-1374, 2017 WL 2884535, at *25 (S.D.W. Va. July 6, 2017). As to the complexity of the case, "'[a]n antitrust class action is arguably the most complex action to prosecute. . . . The legal and factual issues involved are always numerous and uncertain in outcome.'" *Linerboard*, 2004 WL 1221350, at *10 (quoting *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000)).

12. "In evaluating the complexity and duration of the litigation, courts consider not only the time between filing the complaint and reaching settlement, but also the amount of motions

practice prior to settlement and the amount and nature of discovery." *Jones*, 601 F. Supp. 2d at 761. Class Counsel not only worked extremely hard in pursuit of the Class's claims, but did so efficiently, achieving the settlements in less than two years of hard-fought litigation.[3] Since filing this case in September 2019, Class Counsel (1) fully and successfully briefed an opposition to Defendants' joint motion to dismiss, (2) completed all fact and expert discovery under an aggressive schedule, (3) fully and successfully briefed Plaintiffs' class certification motion; (4) fully briefed oppositions to Defendants' summary judgment motions; and (5) were fully prepared to begin a three-week trial. This case's complexity and duration, combined with Class Counsel's vigorous efforts on behalf of the Class, strongly support the reasonableness of Class Counsel's request.

Class Counsel Faced the Risk of Nonpayment

13. Class Counsel undertook this case on a wholly contingent basis and ran a substantial risk of no recovery whatsoever. The risk of receiving little or no recovery, which was magnified here because there was no preceding DOJ investigation or prosecution, is an important factor courts in this Circuit consider when awarding attorneys' fees. *See, e.g.*, *Mills*, 265 F.R.D. at 263 ("[C]ounsel bore a substantial risk of nonpayment . . . . [t]he outcome of the case was hardly a foregone conclusion, but nonetheless counsel accepted representation of the plaintiff and the class on a contingent fee basis, fronting the costs of litigation." (citation omitted)); *Phillips v. Triad Guar. Inc.*, No. 1:09CV71, 2016 WL 2636289, at *6 (M.D.N.C. May 9, 2016) (finding fee award justified where, "Lead Counsel bore the risks involved with surviving dispositive motions,

[3] *See* Dec. 16, 2020 Prelim. Approval Hr'g Tr. 13:25-14:4 ("[T]he Court is aware that there are so many entries in the ECF reflecting the vigorous nature with which [Class Counsel] have pursued this litigation, that the Court has no doubt that counsel has definitely been working this case."); March 25, 2021 Fairness Hr'g Tr. 6:3-4 ("The Court appreciates the efficiency and speed."), 11:19-20 ("I want to thank counsel for efficiently moving through this case . . . .").

obtaining class certification, proving liability, causation, and damages, prevailing with experts, and litigating through trial and possible appeals" knowing "that the only way [they] would be compensated was to achieve a successful result"). In addition to the risk of non-recovery at trial, "any victory at trial in this case would have to withstand appeals which could reverse or limit any award by a jury." *Genworth*, 210 F. Supp. 3d at 844. Courts have also recognized that there is a greater risk of nonpayment where an antitrust class action "did not benefit from the fruits of a prior government investigation," as is the case here. *See Linerboard*, 2004 WL 1221350, at *11. In the face of these risks, Class Counsel vigorously represented Plaintiffs and obtained a substantial recovery on behalf of the Class.

14. Additionally, Class Counsel incurred $1,875,614.86 in total expenses to prosecute the litigation, which would not have been reimbursed absent a successful result. *See Mills*, 265 F.R.D. at 263 (noting uncertainty of the case outcome, defendants' rigorous defense, and that "Lead Counsel devoted thousands of hours on the case and fronted nearly $3 million in costs in the process" to conclude that factor weighed in favor of awarding the requested fee); *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 516 (W.D. Pa. 2003) ("Aside from investing their time, counsel had to front copious sums of money . . . . Thus, the risks that counsel incurred in prosecuting this case were substantial and further support the requested fee award."). The risk of nonpayment weighs heavily in favor of the requested fee award.

Class Counsel Devoted Considerable Time to Prosecute this Action

15. Class Counsel devoted considerable time and effort researching, investigating, and litigating this case. From the time Class Counsel began its investigation through May 31, 2021, Class Counsel devoted 20,866.3 hours to prosecuting this case. This was time that Class Counsel could have spent litigating other matters, which weighs in favor of awarding the requested fees.

See, e.g., *Seaman v. Duke Univ.*, No. 1:15-CV-462, 2019 WL 4674758, at *4 (M.D.N.C. Sept. 25, 2019) (explaining that the "attorneys and staff have worked over 12,500 hours since it began" and "spent over $3 million from their own pockets litigating this case," which "was time and money the attorneys could have directed to other simpler and less risky opportunities" supported the fee request); *Genworth*, 210 F. Supp. 3d at 844-45 (finding that "counsel for plaintiffs devoted an enormous amount of time and effort into this case, totaling more than 66,000 hours and investing more than three million dollars in fees towards consulting experts" to be among the considerations that "support the attorneys' fees award"). The prodigious time and resources Class Counsel committed to this case weigh in favor of the requested fee.

Public Policy Considerations Support the Requested Fee

16. "[A] central factor in fixing the amount of attorneys' fees is to ensure that competent, experienced counsel will be encouraged to undertake the often risky and arduous task of representing a class . . . ." *Mills*, 265 F.R.D. at 260. "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965). In complex cases, fee awards have been enhanced by courts "to provide an incentive for competent lawyers to pursue such actions in the future." *In re Microstrategy, Inc. Sec. Litig.*, 172 F. Supp. 2d 778, 788 (E.D. Va. 2001). Public policy "generally favors attorneys' fees that will induce attorneys to act and protect individuals who may not be able to act for themselves but also will not create an incentive to bring unmeritorious actions." *Jones*, 601 F. Supp. 2d at 765 (citing *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 142 (S.D.N.Y. 2008); *Microstrategy*, 172 F. Supp. 2d at 789 n.36). "The cost and difficulty [of bringing a meritorious complex class action] naturally stands as a deterrent from doing so, and one object of an award of attorneys' fees should be to

counteract this deterrence and incentivize competent attorneys to pursue these cases when necessary." *Mills*, 265 F.R.D. at 263; *see also In re Se. Milk Antitrust Litig.*, No. 2:08-MD-1000, 2013 WL 2155387, at *5 (E.D. Tenn. May 17, 2013) ("[F]ailing to fully compensate class counsel for the excellent work done and the various substantial risks taken would undermine society's interest in the private litigation of antitrust cases."). Public policy considerations support awarding the requested fee.

One-Third of the Settlement Fund is a Typical and Reasonable Fee Award

17. A fee award of one-third of the Settlement Fund reflects a real-world arm's length transaction between the Class and Class Counsel and is a generally accepted percentage in the Fourth Circuit. *In re: Interior Molded Doors Antitrust Litig.*, No. 3:18-cv-00718-JAG (E.D. Va. June 3, 2021); *Seaman*, 2019 WL 4674758, at *3; *In re Titanium Dioxide Antitrust Litig.*, No. 10-CV-00318(RDB), 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013); *In re Polyester Staple Antitrust Litig.*, MDL 3:03CV1516, Order and Final Judgment ¶ 10 (W.D.N.C. June 24, 2008), ECF No. 841; *In re Celebrex (Celecoxib) Antitrust Litig.*, 2018 WL 2382091 (E.D. Va. 2018). It is justified by the remarkable results obtained for the Class and the risks faced by Class Counsel. The fee award requested here is well within the acceptable range of attorneys' fee awards in protracted, complex, and expensive litigation such as this.

18. Class Counsel's fee request is consistent with awards in similar cases. District courts in this Circuit have frequently found a percentage award of one-third of a common fund to be within the range of reasonable percentage awards. *See, e.g.*, *In re: Allura Fiber Cement Siding Litig.*, 2:19-mn-02886-DCN, 2021 WL 2043531, at *4 (D.S.C. May 21, 2021) ("Courts in the Fourth Circuit have held that attorneys' fees in the amount of 1/3 of the settlement fund are reasonable."); *Muhammad v. Nat'l City Mortg., Inc.*, No. 2:07-0423, 2008 WL 5377783, at *6

(S.D.W Va. Dec. 19, 2008) ("[T]he requested award of one-third of the common fund, plus costs, is reasonable under the circumstances of this case."); *Smith*, 2007 WL 119157, at *2 ("In this jurisdiction, contingent fees of one-third . . . are common.").

19. In particular, "[a]n award of one-third is also common in antitrust class actions." *Interior Molded Doors Antitrust Litig.*, No. 3:18-cv-00718-JAG; *Seaman*, 2019 WL 4674758, at *3; *see, e.g., In re Anadarko Basin Oil & Gas Lease Antitrust Litig.*, No. CIV-16-209-HE, 2019 WL 1867446, at *2 (W.D. Okla. Apr. 25, 2019) (awarding one-third of $6,950,000 settlement); *In re Domestic Drywall Antitrust Litig.*, No. 13-MD-2437, 2018 WL 3439454, at *20 (E.D. Pa. July 17, 2018) (awarding one-third of $190,059,056 settlement); *In re: Urethane Antitrust Litig.*, No. 04-1616-JWL, 2016 WL 4060156, at *5 (D. Kan. July 29, 2016) (awarding one-third of $835 million settlement, noting "a one-third fee is customary in contingent-fee cases"); *Standard Iron Works v. ArcelorMittal*, No. 08 C 5214, 2014 WL 7781572, at *3 (N.D. Ill. Oct. 22, 2014) (awarding 33% of $163.9 million settlement); *In re OSB Antitrust Litig.*, 2:06-cv-00826-PD, Order at 3 (E.D. Pa. Dec. 9, 2008), ECF No. 947 (approving requested one-third of $120 million settlement fund).

20. Other courts have determined that a higher percentage rate is appropriate where discovery has been completed and the case is ready for trial. *See Trombley v. Bank of America Corp.*, No. 08-cv-456-JD, 2012 WL 1599041, at *3 n.3 (D.R.I. May 4, 2012) ("Higher percentage rates for attorneys' fees generally are reserved for cases that settle after the completion of formal discovery when the case is close to trial."). Class Counsel reached a settlement with Olam just prior to the close of discovery and reached a settlement with Birdsong *after* the close of discovery and continued preparing for trial against Golden Peanut; and, at the time of the Golden Peanut

settlement, Class Counsel was ready for trial. Accordingly, the one-third award requested by Class Counsel is appropriate.

21. Courts often rely on academic and government reports to determine the "market price" for class action contingent fees. *See, e.g.*, *In re Cabletron Sys., Inc. Sec. Litig.*, 239 F.R.D. 30, 41-42 (D.N.H. 2006) (relying on "comprehensive studies evaluating fee awards in class action cases" and collecting those studies). Relevant here is a study of 40 antitrust class actions. Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. Rev. 879 (2008). The study shows that courts in the majority of antitrust class actions awarded a contingent fee of 30% or more where the recoveries were up to $100 million. *Id.* at 911. The median fee was 33.3% and the average was 28.2%. *Id.* The majority of courts in antitrust class actions where the recoveries ranged from $100 million to $500 million also awarded attorney's fees of 30% or more of the fund. *Id.* A more recent study found the same results. Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 Seattle U. L. Rev. 1269, 1293 (2013) ("[I]n the twenty newer cases counsel tended to recover approximately 30% to 33.3% in cases with recoveries below $100 million and a similar or smaller percentage in cases with recoveries between $100 and $500 million . . . ."). These studies also support Class Counsel's fee request.

A Cross-Check of Class Counsel's Lodestar Confirms the Reasonableness of the Fee Request

22. Although not required, Courts sometimes supplement their analysis of the percentage-of-fund method with the lodestar cross-check. "The purpose of a lodestar cross-check is to determine whether a proposed fee award is excessive relative to the hours reportedly worked by counsel, or whether the fee is within some reasonable multiplier of the lodestar." *Boyd*, 299 F.R.D. at 467. "A lodestar cross-check first computes the plaintiffs' attorneys' reasonable hourly

rate for the litigation and multiplies that rate by the number of hours dedicated to the case," and "then compares that figure with the attorneys' fees award, typically resulting in a positive multiplier." *Genworth*, 210 F. Supp. 3d at 845. When using the lodestar as a cross-check, courts "take a somewhat truncated approach to the lodestar analysis" and "generally do not apply the same scrutiny in a lodestar cross-check as they do when using the lodestar method to calculate the fee." *Thomas*, 2017 WL 1148283, at *6; *see also Jones*, 601 F. Supp. 2d 765 (explaining that when "using the lodestar method as a cross-check," the court "need not apply the 'exhaustive scrutiny' normally required by that method").

23. A lodestar cross-check in this case supports the requested fee. Despite the risks, complexities, and challenges posed by this litigation, Class Counsel invested 20,866.3 hours of attorney and other professional time on behalf of the Class from case inception through May 31, 2021. The work by Class Counsel was non-duplicative and performed at the direction of Co-Lead Counsel, who also audited and confirmed the validity of Class Counsels' time and expense submissions and removed unapproved hours (and hours inconsistent with the Court's fee orders in prior cases) and expenses where appropriate.

24. The historical hourly rates charged by Class Counsel are reasonable, based on each person's position, experience level, and location (and Co-Lead Counsel capped the hourly rate of attorneys conducting first-level document review at $350), and have been approved by multiple courts in similar antitrust class actions. These rates are comparable to the rates charged by other law firms with similar experience, expertise, and reputation, for similar services in the nation's leading legal markets. *See, e.g.*, *Seaman*, 2019 WL 4674758, at *5 (listing comparable rates from national class action firm based in San Francisco). *See, e.g.*, *Seaman*, 2019 WL 4674758, at *5 (listing comparable rates from national class action firm based in San Francisco).

25. Class Counsel's lodestar is $11,716,258.50. Awarding Class Counsel one-third of the Settlement Fund would result in a fee award of $34,250,000, which would be a multiplier of 2.92. Such a multiplier is well within accepted ranges for antitrust class actions generally and is consistent with the fee rulings in similar cases within the Fourth Circuit. Indeed, "[d]istrict courts within the Fourth Circuit have regularly approved attorneys' fees awards with 2–3 times lodestar multipliers." *Genworth*, 210 F. Supp. 3d at 845; *see, e.g.*, *Titanium Dioxide*, 2013 WL 6577029 (court awarded attorneys' fees of one-third of settlement fund, which resulted in a multiplier of 2.39); *In re Massey Energy Co. Sec. Litig.*, 3:12–cv–004560, Order Awarding Attorneys' Fees and Expenses at 2 (S.D.W. Va. June 4, 2014), ECF No. 203 (approving a 2.9 times lodestar multiplier); *Microstrategy*, 172 F. Supp. 2d at 789 (approving a 2.6 times lodestar multiplier); *Deloach v. Philip Morris Cos.*, No. 1:00CV01235, 2003 WL 23094907, at *11 (M.D.N.C. Dec. 19, 2003) (approving a 4.45 times lodestar multiplier); *Seaman*, 2019 WL 4674758, at *6 (approving a 2.89 times lodestar multiplier); *see also Singleton*, 976 F. Supp. 2d at 689 ("Courts have generally held that lodestar multipliers falling between 2 and 4.5 demonstrate a reasonable attorneys' fee."). Further, the Court recognizes that the lodestar figure above does not include the substantial amount of time that Class Counsel will be required to devote to overseeing the claims administration process and the distribution of settlement funds to the Class. These additional hours, for which Class Counsel will not receive any additional compensation from the Settlement Fund, effectively reduce the multiplier, and have been considered by the Court in evaluating the reasonableness of the fee request. Consideration of all the lodestar cross-check factors confirms the reasonableness of the requested fee.

Class Counsel's Request for Reimbursement of Litigation Expenses is Reasonable

26. Class Counsel also request reimbursement of reasonable and necessary litigation

costs in the amount of $7,688.02. As set forth in the Clark Decl., ¶¶ 62-64, invoices for these costs and expenses were received after the filing and amendment of Plaintiffs' initial motion for an award of costs and expenses and thus were not part of the costs and expenses previously awarded by the Court on April 8, 2021. "It is well-established that plaintiffs who are entitled to recover attorneys' fees are also entitled to recover reasonable litigation-related expenses as part of their overall award." *Singleton*, 976 F. Supp. 2d at 689. Such costs may include "those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services." *Spell v. McDaniel*, 852 F.2d 762, 771 (4th Cir. 1988) (internal quotations omitted).

27. The Court concludes that Class Counsel's request for the reimbursement of $7,688.02 in expenses from the Settlement Fund is reasonable and should be approved.

The Requested Service Awards are Reasonable

28. Plaintiffs request approval for a $40,000 service award for each of the six Class Representatives: (1) D&M Farms; (2) Mark Hasty; (3) Dustin Land; (4) Rocky Creek Peanut Farms, LLC; (5) Daniel Howell; and (6) Lonnie Gilbert. "At the end of a successful class action, it is common for trial courts to compensate class representatives for the time and effort they invested to benefit the class." *Reynolds v. Fidelity Invs. Institutional Operations Co.*, 1:18-CV-423, 2020 WL 92092, at *4 (M.D.N.C. Jan. 8, 2020). Service awards are "intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 578 (E.D. Va. 2016) (quoting *Manuel*, 2016 WL 1070819, at *6). Among the factors to be considered in determining the reasonableness of a service award are "the actions the plaintiff has taken to protect the interests

of the class, the degree to which the class has benefited from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Manuel*, 2016 WL 1070819, at *6 (quoting *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)). Service awards are particularly appropriate where, as here, "there was no preceding governmental action alleging a conspiracy and taking a high-profile role threatened to jeopardize class representatives' relationships with their suppliers." *Linerboard*, 2004 WL 1221350, at *18. Moreover, no Class member objected to the requested service awards.

29. Notably, it was the Class Representatives, not a government agency, that helped initiate this case, followed by important assistance in the investigation and prosecution of Plaintiffs' claims against Defendants. Put simply, this case would not exist without the Class Representatives. The Class Representatives spent significant time assisting the litigation of this case. They (1) responded to written discovery and collected, reviewed, and produced documents relating to their claims; (2) prepared for and sat for lengthy depositions by defense counsel; (3) reviewed and approved the complaint and other substantive pleadings; and (4) considered and approved the settlements. The Class Representatives pursued the litigation knowing that Defendants might retaliate against them, thus risking their livelihoods. They assumed this risk and responsibility to benefit the entire Class, even though their claims were not among the largest. *See Archbold*, 2015 WL 4276295, at *6 ("Had the Plaintiff not stepped forward to prosecute these claims, the rest of the class would have received nothing."). By stepping forward and diligently performing their duties as Class Representatives, they have performed a valuable public service that will benefit thousands of peanut farmers.

30. The requested service awards are also in accord with amounts approved in other class action litigations in this Circuit and around the country. *See, e.g., Interior Molded Doors*

Antitrust Litig. (court approved $75,000 service awards to each class representative); *Seaman*, 2019 WL 4674758, at *7 (awarding class representative $125,000); *Celebrex*, 2018 WL 2382091, at *5 (three class representatives each awarded $100,000); *Titanium Dioxide*, 2013 WL 6577029, at *1 (one class representative awarded $125,000 and two class representatives awarded $25,000 each); *see also In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-02555509-LHK, 2015 WL 5158730, at *17 (awarding one class representative $140,000 and four class representatives $100,000 each); *Marchbanks Truck Serv. v. Comdata Network, Inc.*, No. 07-1078-JKG, 2014 WL 12738907, at *3-4 (E.D. Pa. July 14, 2014) (awarding $150,000 to one class representative and $75,000 each to two others).

CONCLUSION

For the reasons stated above, Plaintiffs' Motion for an Award of Attorneys' Fees and Expenses and for Class Representative Service Awards is GRANTED:

(1) Class Counsel are awarded $34,250,000 in attorneys' fees, which is one-third of the $102,750,000 Settlement Fund;

(2) Co-Lead Counsel are authorized to equitably allocate the fee award to Class Counsel in a good-faith manner that reflects Co-Lead Counsel's judgment as to each individual Class Counsel's contribution to the institution, prosecution, and resolution of the litigation.

(3) Class Counsel are awarded $7,688.02 in unreimbursed litigation costs and expenses; and

(4) Each of the Class Representatives listed in Paragraph 28 above shall be awarded a service award in the amount of $40,000.

(5) The Court finding no just reason for delay, this Order shall be entered as of this date pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

Dated: August 10, 2021

Honorable Raymond A. Jackson
U.S. District Judge

TAB 39B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

IN RE PEANUT FARMERS ANTITRUST LITIGATION	No. 2:19-cv-00463-RAJ-LRL

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND FOR CLASS REPRESENTATIVE SERVICE AWARDS

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I. INTRODUCTION

Unlike the many civil antitrust cases that follow Department of Justice ("DOJ") investigations and prosecutions, this case came exclusively from Class Counsel's own extensive, independent investigation into the shelling industry and pricing of raw, harvested runner peanuts ("Runners").[1] Based on their own steam, Class Counsel, in conjunction with Plaintiffs, recovered over $100 million for the Class.

In vigorously litigating this case to its successful conclusion, in the challenging "Rocket Docket" and during the emerging pandemic, Class Counsel incurred significant risk, committing substantial time and money—without any guarantee of recovery. In fact, Class Counsel incurred $1,875,614.86 in out-of-pocket costs and nearly $12 million of attorney and staff time (more than 20,866 hours). Clark Decl. ¶ 54.

Class Counsel's $100 million plus recovery was never foretold. This case was layered with risk from start to finish, beginning with Defendants' motion to dismiss Plaintiffs' complaint. Even before the motion was decided, Class Counsel launched into extensive discovery, subpoenaing phone records, analyzing, producing, and reviewing hundreds of thousands of documents, and engaging experts. Class Counsel did all of that—and more—leading up to Plaintiffs' motion for class certification, another major hurdle Plaintiffs had to overcome. The Court's granting of the class certification motion did not alleviate the risk, as Defendants promptly appealed the Court's certification ruling and filed motions for summary judgment. At no point was this case without substantial risk, making the ultimate $102.75 million recovery an excellent result that will return

[1] "Class Counsel" includes the two firms appointed as Co-Lead Counsel, Lockridge Grindal Nauen PLLP and Freed Kanner London & Millen LLC (hereinafter, "Co-Lead Counsel"), the firm appointed as Liaison Counsel, Durrette, Arkema, Gerson & Gill PC, as well as the other firms representing the Class that assisted with the prosecution of this litigation. *See* Declaration of Brian D. Clark ("Clark Decl."), filed herewith.

substantial monies to the Class.[2]

Plaintiffs obtained the $102.75 million in settlements only after prolonged and difficult negotiations with large and sophisticated Defendants represented by nationally recognized, highly experienced, and well-staffed law firms.[3] Since negotiating and executing the settlements, Co-Lead Counsel (with defense counsel) prepared the settlement agreements, prepared the preliminary approval motions and supporting documents, including the Class notices, and have been supervising the settlement administrator. The work is, of course, not over. Co-Lead Counsel will spend many additional hours preparing for the July 26, 2021 Fairness Hearing and overseeing the processing of claims and distribution of settlement funds to Class members.

Plaintiffs D&M Farms, Mark Hasty, Dustin Land, Rocky Creek Peanut Farms, LLC, Daniel Howell, and Lonnie Gilbert (together, "Class Representatives" or "Plaintiffs"), as representatives of the Class,[4] respectfully move the Court for an Order (1) awarding Class Counsel one-third of the Settlement Fund as attorneys' fees, (2) reimbursing Class Counsel $7,688.02 in

[2] The Court has approved settlements with Defendants Olam Peanut Shelling Company, Inc., and Birdsong Corporation totaling $57,750,000 (ECF No. 590) and has preliminarily approved a settlement with Defendant Golden Peanut Company, LLC in the amount of $45,000,000 (ECF No. 595). If the Court grants final approval for the Golden Peanut settlement, the total settlement amount will be $102,750,000 ("Settlement Fund").

[3] The Golden Peanut settlement was achieved with the assistance of Professor Eric Green, a nationally renowned mediator.

[4] The "Class" is defined as:

> All persons or entities in the United States who sold raw, harvested runner peanuts to any of the Defendants, their subsidiaries or joint-ventures, from January 1, 2014 through December 31, 2019 (the "Class Period"). Specifically excluded from this Class are the Defendants; the officers, directors or employees of any Defendant; any entity in which any Defendant has a controlling interest; and any affiliate, legal representative, heir or assign of any Defendant.

Certification Order at 18. (ECF No. 496).

additional litigation costs and expenses,[5] and (3) awarding each Class Representative a service award of $40,000 for his or its respective contributions to the case, all to be paid from the Settlement Fund.

As discussed more thoroughly below, the record fully supports Class Counsel's request for a fee award of $34,250,000.00, or one-third of the Settlement Fund. Courts in this Circuit regularly award one-third of common funds as attorneys' fees in class action antitrust cases, and all relevant factors favor such an award here. This fee request represents a 2.92 multiple of Class Counsel's lodestar, based on historical hourly rates and time expended through May 31, 2021.[6] The record also shows that the litigation expenses for which Class Counsel seek reimbursement were reasonable and necessary for the prosecution of this case. Finally, the record shows that the Class Representatives have earned the requested service awards.

II. HISTORY OF THE LITIGATION

Plaintiffs are peanut farmers in the United States who sold Runners to peanut shelling companies. Plaintiffs alleged, among other things, that Defendants Golden Peanut, Olam, and Birdsong conspired to depress prices paid to the Class for Runners during the Class Period, in

[5] On April 8, 2021, the Court granted Plaintiffs' initial motion for reimbursement of costs. (ECF No. 591.) The instant motion only seeks an award of expenses not included in the prior costs motion. *See* Clark Decl. ¶¶ 62-64.

[6] Based on prior fee rulings by the Court and the time and expense protocol submitted to the Court in conjunction with the request to appoint lead counsel, Co-Lead Counsel proactively cut more than $280,563.25 Class Counsel time; the inclusion of such time would have resulted in a higher lodestar and a lower multiplier. Clark Decl. ¶ 59. Further, the effective multiplier will decrease as Co-Lead Counsel continue to work towards fully resolving this litigation, including responding to Class member inquiries, and working with the settlement administrator on claims processing and distribution of settlement funds to Class members. None of that time is reflected in the total lodestar amount of $11,716,258.50, and Class Counsel will not be seeking any additional fees from the Settlement Fund in connection with such future work.

violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Defendants vigorously deny these allegations.

A. Complaints and Motions to Dismiss

After conducting an independent investigation, Plaintiffs filed a complaint on September 5, 2019 (ECF No. 1) against Defendants Golden Peanut and Birdsong, which they moved to dismiss (ECF Nos. 47-50). Class Counsel successfully briefed oppositions to the motions to dismiss, which the Court denied on May 14, 2020 (ECF No. 135). Plaintiffs filed a Second Amended Class Action Complaint on May 27, 2020 (ECF No. 148), naming Olam as a Defendant for the first time; all Defendants answered this complaint on June 26, 2020 (ECF Nos. 178-180).

B. Discovery

At the outset of discovery, Class Counsel worked with a firm specializing in technology-assisted methods of review and negotiated a comprehensive protocol for producing electronically stored information; additionally, Class Counsel negotiated and drafted a Stipulated Protective Order governing confidential information. Clark Decl. ¶ 9. Thereafter, Class Counsel drafted and served discovery requests on Defendants and the parties participated in extensive meet-and-confers to negotiate the parameters of the requests; Class Counsel also worked with the Class Representatives to prepare their responses to Defendants' discovery requests. *Id.* Class Counsel also prepared and served discovery requests on various third parties, including telephone service providers and non-party participants in the peanut shelling industry. Class Counsel created, reviewed, and analyzed a database containing more than 1,740,000 documents and other records produced by Defendants and third parties. Further, working with an outside consultant, Class Counsel developed a database of voluminous telephone records to better sift through millions of phone calls for the purpose of culling out the thousands of relevant calls between Defendants. *Id.* ¶¶ 11, 13-15.

Through these databases, Class Counsel learned about numerous inter-Defendant communications relating to Runner pricing and used this information to question deponents from each Defendant.[7] *Id*. ¶ 15. Armed with this valuable information, Class Counsel took thirty-one depositions of defense witnesses and third parties. *Id*. ¶¶ 15-18. Class Counsel also spent a considerable amount of time preparing the six Class Representatives for their depositions and defending same. *Id*. ¶¶ 16-18.

C. Class Certification

In connection with the class certification process, Class Counsel worked extensively with Plaintiffs' economist expert, Dr. Michael A. Williams, in producing three expert reports and defending his deposition. Class Counsel also spent a considerable amount time and effort preparing for and deposing Defendants' three economist experts: Drs. Michelle Burtis, Robert Topel, and Kevin Murphy. *Id*. ¶¶ 21-23. On December 2, 2020, after the parties fully briefed Plaintiffs' class certification motion, the Court certified the case as a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure. (ECF No. 496.)[8]

D. Olam and Birdsong Settlements

In October and November 2020 respectively, Plaintiffs reached settlements with Olam and Birdsong totaling $57,750,000. *Id.* ¶¶ 33-34. On December 23, 2020, the Court entered orders

[7] Class Counsel's extensive work with the databases was also invaluable to their efforts to oppose Defendants' summary judgment motions, as well as settlement negotiations.

[8] On December 16, 2020, Golden Peanut petitioned the United States Court of Appeals for the Fourth Circuit for permission to appeal the Certification Order under Fed. R. Civ. P. 23(f), and Plaintiffs filed their opposition on December 28, 2020. On January 27, 2021, the Fourth Circuit deferred ruling on the petition, but ordered formal briefing of the appeal. *Golden Peanut Co., LLC v. D&M Farms*, No. 20-00502 (4th Cir. Jan. 27, 2021), ECF No. 30. Pending approval of the Settlement Agreement, Golden Peanut filed a motion with the Fourth Circuit requesting that its appeal be stayed, which the Fourth Circuit granted on February 26, 2021. *Golden Peanut Co., LLC v. D&M Farms*, No. 20-00502 (4th Cir. Feb. 26, 2021), ECF No. 40.

preliminarily approving the Olam and Birdsong settlements, certifying Olam and Birdsong Settlement Classes, and authorizing dissemination of notice to the Olam and Birdsong Settlement Classes, as well as notice to potential members of the litigation Class certified in the Court's December 2, 2020 order regarding class certification. (ECF Nos. 514-515.) On March 25, 2021, the Court held a Fairness Hearing to determine whether to finally approve the Olam and Birdsong settlements, and whether to grant Class Counsel's initial request for reimbursement of litigation costs and expenses. (ECF No. 586.) On April 5, 2021, the Court entered a Memorandum Opinion and Order granting final approval to the Olam and Birdsong settlements. (ECF No. 590.)[9]

E. Trial Preparation and Summary Judgment

Throughout nearly all of 2020 (during a global pandemic), Class Counsel devoted an enormous amount of time and expense preparing for a January 19, 2021 trial and opposing summary judgment. Clark Decl. ¶¶ 25-28, 30-32. Trial preparation was not minimized by the Olam and Birdsong settlements, because at trial Plaintiffs would need to prove the entire conspiracy against remaining Defendant Golden Peanut. *Id*. ¶ 31. On December 7, 2020, the Court notified the parties that the trial would be postponed but explicitly instructed the parties to continue litigating the case. And that is precisely what Class Counsel did. The following provides a summary of the work Class Counsel did in connection with trial preparation and summary judgment:

- Worked extensively with a jury consultant to prepare for and conduct a mock trial before multiple jury panels;

[9] Class Counsel did not request attorneys' fees or service awards for the Class Representatives at the time they sought preliminary or final approval of the Olam and Birdsong settlements, but did request reimbursement of litigation costs and expenses. On April 8, 2021, the Court entered an order granting Class Counsel's motion for litigation costs and expenses. (ECF No. 591.) At this time, Class Counsel seek only a small amount of additional expenses incurred that were not addressed by the Court's April 8, 2021 Order.

- Prepared briefs in opposition to Defendants' joint motion for summary judgment and Golden Peanut's subsequent motion for summary judgment;
- Prepared a brief in opposition to Defendants' *Daubert* motion to exclude Dr. Williams' testimony;
- Prepared briefs in support of and in opposition to more than fifteen motions *in limine*;
- Prepared a lengthy pretrial statement and met and conferred with Golden Peanut counsel regarding same;
- Reviewed deposition transcripts, designated portions for use at trial, and exchanged same with Golden Peanut's counsel;
- Prepared video deposition clips for use at trial;
- Designated potential trial exhibits and coordinated with Golden Peanut's counsel to negotiate admissibility of approximately 2,500 such exhibits;
- Drafted proposed *voir dire* questions; and
- Drafted proposed jury instructions.

Id. ¶ 32.

F. Golden Peanut Settlement

On March 4, 2021, Plaintiffs reached a settlement with Golden Peanut for $45,000,000. *Id.* ¶ 41. On April 23, 2021, the Court preliminarily approved the settlement with Golden Peanut and scheduled a Fairness Hearing for July 26, 2021 to determine whether to finally approve the Golden Peanut settlement, and whether to grant Class Counsel's request for attorneys' fees, litigation costs and expenses, and service awards to the Class Representatives. (ECF No. 595.)

G. Work Related to the Settlements

In addition to the litigation work described above, Class Counsel did the following on behalf of the Class in connection with the three settlements:

- Over several months, negotiated with counsel for Olam, Birdsong, and Golden Peanut, and worked with them to prepare and execute the settlement agreements (Clark Decl. ¶¶ 33-34, 39-41);

- Conducted a bidding process to select a claims administrator and worked with the claims administrator to establish a settlement website for the benefit of the Class (*id*. ¶ 35);

- Selected an escrow agent and prepared and executed the necessary paperwork to facilitate settlement payments (*id*. ¶¶ 33-35, 41);

- Prepared Plaintiffs' motions for preliminary approval and final approval, and supporting papers regarding the Olam and Birdsong settlements, including the related notice papers and proposed orders, and presented those motions to the Court (*id*. ¶¶ 33-38);

- Engaged experienced and renowned mediator Eric Green of Resolutions, LLC, and prepared for and participated in an all-day mediation, which resulted in the settlement with Golden Peanut (*id.* ¶¶ 39-40); and

- Prepared Plaintiffs' motions for preliminary approval and final approval, and supporting papers regarding the Golden Peanut settlement, including the related notice papers and proposed orders, and presented those motions to the Court. *Id*. ¶¶ 41, 44-46).

H. Motion for Attorneys' Fees and Expenses and for Class Representative Service Awards

In its order preliminarily approving the settlement with Golden Peanut, the Court approved the dissemination of notice to Class members (the "Notice"). As required by Fed. R. Civ. P. 23(h), the Notice (copy attached as Exhibit 9) informed Class members that Co-Lead Counsel would request attorneys' fees not to exceed one-third of the Settlement Fund, reimbursement of litigation expenses, and service awards for the Class Representatives for each Class Representative. *See* Notice (Question 14). The Notice explains how Class members can object to Plaintiffs' fee, expense, and service award requests. *Id.* (Question 18). The deadline for objections is July 13, 2021; thus far, no objections have been filed.[10]

Consistent with the Notice provided to Class members (by mail, email, and publication), Class Counsel seeks attorneys' fees in the amount of one-third of the Settlement Fund, or $34,250,000.00, an award of unreimbursed costs and expenses, and service awards for each of the

[10] After the applicable deadline has passed and prior to the Fairness Hearing, Co-Lead Counsel will file a report with the Court on any objections.

Class Representatives in the amount of $40,000.[11] As set forth below, Plaintiffs' request for attorneys' fees, expense reimbursement, and service awards for the Class Representatives is reasonable and should be approved.

III. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE UNDER CONTROLLING LAW.

A. The Settlements Create a Common Fund from Which Percentage-of-the-Fund Is the Appropriate Method for Awarding Attorneys' Fees.

Under Fed. R. Civ. P. 23(h), "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." As the Supreme Court recognized, "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The common fund doctrine is based on the inherent powers of the federal court to "prevent . . . inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." *Id.*

Two methods of calculating attorneys' fees in class actions are: (1) the percentage-of-the-fund method; and (2) the lodestar method. *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 260 (E.D. Va. 2009). The percentage-of-the-fund method involves an award based on a percentage of the Class's recovery, set by the court based on several factors. *Id*. The lodestar method requires multiplying the number of hours worked by a reasonable hourly rate, the product of which the Court can then adjust by employing a "multiplier." *Id.*

The Supreme Court has suggested that the percentage-of-the-fund is the appropriate

[11] Plaintiffs are also seeking an award of litigation costs and expenses in the amount of $7,688.02. This is the amount of costs and expenses that were not included in Plaintiffs' initial cost and expense motion (ECF No. 529) and awarded by the Court in its April 8, 2021 Order (ECF No. 591).

method for awarding fees under the common fund doctrine. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("[U]nder the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class . . . ."). Most federal courts of appeals have also endorsed the percentage-of-the-fund method as an appropriate method for determining an award of attorneys' fees in common fund cases.[12]

"While the Fourth Circuit has not definitively answered this debate, other districts within this Circuit, and the vast majority of courts in other jurisdictions consistently apply a percentage of the fund method for calculating attorneys' fees in common fund cases." *Mills*, 265 F.R.D. at 260; *see, e.g., Manuel v. Wells Fargo Bank, Nat'l Ass'n*, No. 3:14CV238 (DJN), 2016 WL 1070819, at *5 (E.D. Va. Mar. 15, 2016) ("District Courts within this Circuit have also favored the percentage method."); *Krakauer v. Dish Network, L.L.C.*, No. 1:14-cv-333, 2018 WL 6305785, at *2 (M.D.N.C. Dec. 3, 2018) ("District courts in the Fourth Circuit overwhelmingly prefer the percentage method in common-fund cases . . . ."); *Archbold v. Wells Fargo Bank, N.A.*, No. 3:13-CV-24599, 2015 WL 4276295, at *5 (S.D.W. Va. July 14, 2015) ("[T]here is a clear consensus among the federal and state courts, consistent with Supreme Court precedent, that the award of attorneys' fees in common fund cases should be based on a percentage of the recovery."); *Strang v. JHM Mortg. Sec. Ltd. P'ship*, 890 F. Supp. 499, 502 (E.D. Va. 1995) ("Although the Fourth Circuit has not yet ruled on this issue, the current trend among the courts of appeal favors the use

[12] *See, e.g., Heien v. Archstone*, 837 F.3d 97, 100 (1st Cir. 2016); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 49-50 (2d Cir. 2000); *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821-22 (3d Cir. 1995); *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 515-16 (6th Cir. 1993); *Rawa v. Monsanto Co.*, 934 F.3d 862, 870 (8th Cir. 2019); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047-50 (9th Cir. 2002); *Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994); *Camden I. Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1268-70 (D.C. Cir. 1993).

of a percentage method to calculate an award of attorneys' fees in common fund cases."); *Jones v. Dominion Res. Servs.*, 601 F. Supp. 2d 756, 758 (S.D.W. Va. 2009) ("The percentage method has overwhelmingly become the preferred method for calculating attorneys' fees in common fund cases.").[13]

These courts recognize that the percentage-of-the-fund method is "more efficient and less burdensome than the traditional lodestar method, and offers a more reasonable measure of compensation for common fund cases." *Strang*, 890 F. Supp. at 503. It also better aligns the interests of class counsel and class members because it ties the attorneys' fees award to the overall result achieved, rather than hours expended by the attorneys. *Thomas v. FTS USA, LLC*, No. 3:13cv825 (REP), 2017 WL 1148283, at *3 (E.D. Va. Jan. 9, 2017), *report and recommendation adopted*, 2017 WL 1147460 (E.D. Va. Mar. 27, 2017); *see also Deem v. Ames True Temper, Inc.*, No. 6:10-CV-01339, 2013 WL 2285972, at *5 (S.D.W. Va. May 23, 2013) ("The percentage method 'is designed to allow courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure.'" (quoting *In re Prudential Ins. Co. Am. Sales Litig.*, 148 F.3d 283, 333 (3d Cir. 1998))).

"Some courts incorporate the lodestar analysis into the percentage method by cross-checking the lodestar calculation against the percentage calculation." *Thomas*, 2017 WL 1148283, at *4 (citing *Jones*, 601 F. Supp. 2d at 759; Manual for Complex Litigation § 14.122 (4th ed. 2004)). The lodestar calculation "adds an extra layer of assurance as to reasonableness by ensuring that 'the fee award is still roughly aligned with the amount of work the attorneys contributed.'" *Id.* (quoting *Jones*, 601 F. Supp. 2d at 759).

[13] *See, also,* Brian T. Fitzpatrick, *The Conservative Case for Class Actions*, p. 92, FN. 38 (2019) ("Today, most judges use the percentage method").

Class Counsel's application for the percentage-of-fund method is therefore consistent with the law in this and other circuits. As explained below, the factors courts consider when assessing percentage-of-fund requests demonstrate the reasonableness of Class Counsel's requested fee, which is further confirmed by cross-checking the requested amount against the calculated lodestar.

B. Class Counsel's Fee Request Is Fair and Reasonable Under Fourth Circuit Authority.

"In determining the reasonableness of attorneys' fees, courts look at the following factors: (1) the result obtained for the class; (2) the presence or absence of substantial objections by members of the class to the fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by the plaintiffs' counsel; and (7) awards in similar cases." *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d 837, 843 (E.D. Va. 2016). Some district courts in this Circuit have applied a slightly different version of this standard, replacing the sixth factor with public policy considerations. *See, e.g.*, *In re Celebrex (Celecoxib) Antitrust Litig.*, No. 2:14-CV-00361, 2018 WL 2382091, at *4 (E.D. Va. Apr. 18, 2018); *Mills*, 265 F.R.D. at 261 (citing, *inter alia*, *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000)).

There is some disagreement as to whether to apply these seven factors, which were adopted from the Third Circuit, *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 & n.1 (3d Cir. 2000), or the 12-factor test from the Fifth Circuit adopted in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978) (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)).[14] *See Galloway v. Williams*, No. 3:19-CV-470, 2020 WL 7482191, at *5 (E.D. Va. Dec.

[14] The *Johnson*/*Barber* factors are "(1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time

18, 2020) (Payne, J.); 5 Newberg on Class Actions § 15:82 (5th ed.) ("The Fourth Circuit utilized the Fifth Circuit's *Johnson* factors in a statutory fee-shifting case, so some district courts have utilized those factors in setting a percentage in common fund cases, while other district courts have used the Second Circuit's *Goldberger* factors and/or the Third Circuit's *Gunter* factors." (footnotes omitted)). However, many of the *Johnson/Barber* factors overlap with factors in the Third Circuit test or are "subsumed in the calculation of the hours reasonably expended and the reasonableness of the hourly rate." *Galloway*, 2020 WL 7482191, at *6, *10-11; *see also Genworth*, 210 F. Supp. 3d at 843 (using the seven-factor Third Circuit test in evaluating the reasonableness of the requested fee and incorporating the *Johnson*/*Barber* factors into the lodestar cross-check). Notably, "fee award reasonableness factors 'need not be applied in a formulaic way' because each case is different, 'and in certain cases, one factor may outweigh the rest.'" *Boyd v. Coventry Health Care Inc*., 299 F.R.D. 451, 463 (D. Md. 2014) (citations omitted). Given the overlap in the factors, a consideration of the relevant factors under any standard supports Class Counsel's requested fee.

1. Class Counsel Obtained an Excellent Result for the Class.

"The first and most important factor for a court to consider when making a fee award is the result achieved." *Genworth*, 210 F. Supp. 3d at 843; *see also Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("[T]he most critical factor is the degree of success obtained."); *McKnight v. Circuit City Stores, Inc*., 14 F. App'x. 147, 149 (4th Cir. 2001) (same).

Class Counsel's effective and efficient prosecution of this case through fact and expert discovery, class certification, summary judgment (fully briefed), and the completion of trial

limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases." *Barber*, 577 F.2d at 226 n.28.

preparation resulted in settlements totaling $102,750,000, by any measure an excellent result for the Class. Not only does it assure that Class members will receive a substantial cash payment to compensate them for their injuries, but it also eliminates the risk of adverse rulings on summary judgment, at trial, or on appeal. For example, although Plaintiffs presented evidence, including numerous communications between Defendants' employees relating to the Runner pricing, from which they believe a jury could infer a conspiracy, Defendants argued that the depressed Runner prices they offered to farmers were instead a consequence of the 2014 Farm Bill. Defendants asserted that the Farm Bill incentivized farmers to grow more peanuts, which led to an oversupply of Runners and naturally resulting lower prices; in other words, Defendants claimed that the decrease in pricing was not caused by antitrust violations but was the result of natural market conditions created by the Farm Bill. Any or some combination of rulings in Defendants' favor on these issues could have resulted in Plaintiffs and the Class receiving no compensation whatsoever.[15] Under these circumstances, the settlements are an excellent result for the Class.

Notably, Class Counsel achieved this result without the benefit of a prior governmental investigation. Many antitrust class actions—especially those alleging price-fixing—follow a government investigation, where the risk in bringing related private action is comparatively limited. *See, e.g.*, *In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 460-61 (D.P.R. 2011) (noting that preceding DOJ investigation and FBI raids mitigated counsel's risk); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 147 (S.D.N.Y. 2010) ("Risk is not uniform in all class actions" and for "certain antitrust class actions filed in the wake of a Department of Justice consent decree . . . . the risk is limited."). Class Counsel investigated this case from the ground up without

[15] Although the Court denied Defendants' *Daubert* motion, Golden Peanut's motion to reconsider the Court's *Daubert* ruling was pending at the time the parties agreed to a settlement in principle.

the benefit of a government investigation, which significantly increased the risk of bringing this action. *See, e.g.*, *In re Auto. Refinishing Paint Antitrust Litig*., MDL No. 1426, 2008 WL 63269, at *5 (E.D. Pa. Jan. 3, 2008) ("The risk of nonpayment is even higher when a defendants' *prima facie* liability has not been established by the government in a criminal action.").

Balanced against the many significant risks, and compared to the results achieved in many other price-fixing class action settlements, the settlement value here provides an exceptional result for the Class and supports Class Counsel's request for attorneys' fees.

2. To Date No Class Member Has Objected to Class Counsel's Fee Request.

"A lack of objections by class members as to fees requested by counsel weighs in favor of the reasonableness of the fees." *Genworth*, 210 F. Supp. 3d at 844. As noted above, the Court-approved notice of the Golden Peanut settlement informed Class members that Co-Lead Counsel would request attorneys' fees not to exceed one-third of the Settlement Fund (as well as reimbursement of litigation expenses, and service awards for the Class Representatives). Although the deadline for objections to the Golden Peanut settlement and Class Counsel's fee request has not yet passed, it is notable that no objections have been received thus far, and not a single Class member objected to the Olam and Birdsong settlements.[16]

3. Class Counsel Are Skilled and Efficient Litigators.

The quality of the representation is another significant factor supporting Class Counsel's fee request. *See id.* ("The skill required in complex cases such as this involving massive discovery efforts and complicated issues of fact and law also weighs in favor of supporting the substantial attorneys' fees award in this case."). Class Counsel have substantial experience litigating complex

[16] The deadline for objections is July 13, 2021. Co-Lead Counsel will inform the Court of any objections in advance of the Fairness Hearing.

class actions and antitrust cases.[17] Additionally, "the result achieved is the clearest reflection of petitioners' skill and expertise." *In re Linerboard Antitrust Litig.*, MDL No. 1261, 2004 WL 1221350, at *5 (E.D. Pa. June 2, 2004). The creation of the $102,750,000 Settlement Fund speaks volumes.

Further, courts often evaluate the quality of the work performed by plaintiff's counsel in light of the quality of the opposition's representation. *See, e.g.*, *Mills*, 265 F.R.D. at 262 (noting that counsel reached a favorable settlement against "experienced and sophisticated defense attorneys"); *Smith v. Krispy Kreme Doughnut Corp.*, No. 1:05cv00187, 2007 WL 119157, at *2 (M.D.N.C. Jan. 10, 2007) ("Additional skill is required when the opponent is a sophisticated corporation with sophisticated counsel."). Defendants here were represented by highly skilled and experienced antitrust litigators from some of the leading defense law firms in the United States, two of which are ranked among the Vault Law 100 for most prestigious law firms (https://www.vault.com/best-companies-to-work-for/law/top-100-law-firms-rankings). It was in the face of such skilled and vigorous opposition that Class Counsel obtained the benefits for the Class that they did. This factor weighs in favor of the requested fee award.

4. The Duration and Complexity of This Litigation Supports the Requested Fee.

Courts recognize that "there are good reasons to award higher-than-typical fees when the issues in a case are particularly 'novel and complex.'" *Good v. W. Virginia-Am. Water Co.*, No. 14-1374, 2017 WL 2884535, at *25 (S.D.W. Va. July 6, 2017). As to the complexity of the case, "'[a]n antitrust class action is arguably the most complex action to prosecute. . . . The legal and

[17] *See* Memorandum in Support of Plaintiffs' Motion to Appoint Interim Co-Lead Class Counsel and Liaison Counsel, supporting declarations of Brian D. Clark, Kimberly A. Justice, and Wyatt B. Durette, Jr., and firm resumes attached as exhibits thereto (ECF Nos. 44, 44-1 through 44-2 through 44-4 through 44-7).

factual issues involved are always numerous and uncertain in outcome.'" *Linerboard*, 2004 WL 1221350, at *10 (quoting *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000)).

"In evaluating the complexity and duration of the litigation, courts consider not only the time between filing the complaint and reaching settlement, but also the amount of motions practice prior to settlement and the amount and nature of discovery." *Jones*, 601 F. Supp. 2d at 761. As this Court noted, Class Counsel not only worked extremely hard in pursuit of the Class's claims, but did so efficiently, achieving the settlements in less than two years of hard-fought litigation.[18] Since filing this case in September 2019, Class Counsel (1) fully and successfully briefed Defendants' joint motion to dismiss, (2) completed all fact and expert discovery under an aggressive schedule, (3) successfully briefed Plaintiffs' class certification motion; (4) fully briefed oppositions to Defendants' summary judgment motions; and (5) were fully prepared to begin a three-week trial. This case's complexity and duration strongly support the reasonableness of Class Counsel's request.

5. Class Counsel Faced the Risk of Nonpayment.

Class Counsel undertook this case on a wholly contingent basis and ran a substantial risk of no recovery whatsoever. The risk of receiving little or no recovery—which was magnified here because there was no preceding DOJ investigation or prosecution—is an important factor courts in this Circuit consider when awarding attorneys' fees. *See, e.g.*, *Mills*, 265 F.R.D. at 263 ("[C]ounsel bore a substantial risk of nonpayment . . . . [t]he outcome of the case was hardly a

[18] *See* Dec. 16, 2020 Prelim. Approval Hr'g Tr. 13:25-14:4 ("[T]he Court is aware that there are so many entries in the ECF reflecting the vigorous nature with which [Class Counsel] have pursued this litigation, that the Court has no doubt that counsel has definitely been working this case."); March 25, 2021 Fairness Hr'g Tr. 6:3-4 ("The Court appreciates the efficiency and speed."), 11:19-20 ("I want to thank counsel for efficiently moving through this case . . . .").

foregone conclusion, but nonetheless counsel accepted representation of the plaintiff and the class on a contingent fee basis, fronting the costs of litigation." (citation omitted)); *Phillips v. Triad Guar. Inc.*, No. 1:09CV71, 2016 WL 2636289, at *6 (M.D.N.C. May 9, 2016) (finding fee award justified where, "Lead Counsel bore the risks involved with surviving dispositive motions, obtaining class certification, proving liability, causation, and damages, prevailing with experts, and litigating through trial and possible appeals" knowing "that the only way [they] would be compensated was to achieve a successful result"). In addition to the risk of non-recovery at trial, "any victory at trial in this case would have to withstand appeals which could reverse or limit any award by a jury." *Genworth*, 210 F. Supp. 3d at 844. Courts have also recognized that there is a greater risk of nonpayment where an antitrust class action "did not benefit from the fruits of a prior government investigation," as is the case here. *See Linerboard*, 2004 WL 1221350, at *11. In the face of these risks, Class Counsel vigorously represented Plaintiffs and obtained a substantial recovery on behalf of the Class.

Additionally, Class Counsel incurred $1,875,614.86 in total expenses to prosecute the litigation, which would not have been reimbursed absent a successful result. *See Mills*, 265 F.R.D. at 263 (noting uncertainty of the case outcome, defendants' rigorous defense, and that "Lead Counsel devoted thousands of hours on the case and fronted nearly $3 million in costs in the process" to conclude that factor weighed in favor of awarding the requested fee); *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 516 (W.D. Pa. 2003) ("Aside from investing their time, counsel had to front copious sums of money . . . . Thus, the risks that counsel incurred in prosecuting this case were substantial and further support the requested fee award."). The risk of nonpayment weighs heavily in favor of the requested fee award.

6. Class Counsel Necessarily Devoted 20,866.3 Hours Prosecuting this Action.

Class Counsel devoted considerable time and effort researching, investigating, and litigating this case. Clark Decl. ¶¶ 5, 8-46. As set forth in the accompanying Clark Declaration (and Class Counsel declarations attached as Exhibits 3-8), through May 31, 2021, Class Counsel devoted 20,866.3 hours to prosecuting this case, resulting in a total lodestar of $11,716,258.50. *Id*. ¶ 54. Additionally, more than 556.5 hours were devoted to this case by Class Counsel but are not being submitted for the lodestar calculation consistent with the Court's rulings in prior cases (and the time and expense protocol put into place by Co-Lead Counsel). *Id*. ¶ 59. Class Counsel could have spent those attorney hours litigating other matters, which weighs in favor of awarding the requested fees. *See, e.g.*, *Seaman v. Duke Univ.*, No. 1:15-CV-462, 2019 WL 4674758, at *4 (M.D.N.C. Sept. 25, 2019) (explaining that the "attorneys and staff have worked over 12,500 hours since it began" and "spent over $3 million from their own pockets litigating this case," which "was time and money the attorneys could have directed to other simpler and less risky opportunities" supported the fee request); *Genworth*, 210 F. Supp. 3d at 844-45 (finding that "counsel for plaintiffs devoted an enormous amount of time and effort into this case, totaling more than 66,000 hours and investing more than three million dollars in fees towards consulting experts" to be among the considerations that "support the attorneys' fees award"). The prodigious time and resources Class Counsel committed to this case weigh in favor of the requested fee.

7. Public Policy Considerations Support the Requested Fee.

"[A] central factor in fixing the amount of attorneys' fees is to ensure that competent, experienced counsel will be encouraged to undertake the often risky and arduous task of representing a class . . . ." *Mills*, 265 F.R.D. at 260. "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws."

Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965). In complex cases, fee awards have been enhanced by courts "to provide an incentive for competent lawyers to pursue such actions in the future." *In re Microstrategy, Inc. Sec. Litig.*, 172 F. Supp. 2d 778, 788 (E.D. Va. 2001). Public policy "generally favors attorneys' fees that will induce attorneys to act and protect individuals who may not be able to act for themselves but also will not create an incentive to bring unmeritorious actions." *Jones*, 601 F. Supp. 2d at 765 (citing *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 142 (S.D.N.Y. 2008); *Microstrategy*, 172 F. Supp. 2d at 789 n.36). "The cost and difficulty [of bringing a meritorious complex class action] naturally stands as a deterrent from doing so, and one object of an award of attorneys' fees should be to counteract this deterrence and incentivize competent attorneys to pursue these cases when necessary." *Mills*, 265 F.R.D. at 263; *see also In re Se. Milk Antitrust Litig.*, No. 2:08-MD-1000, 2013 WL 2155387, at *5 (E.D. Tenn. May 17, 2013) ("[F]ailing to fully compensate class counsel for the excellent work done and the various substantial risks taken would undermine society's interest in the private litigation of antitrust cases."). Public policy considerations support awarding the requested fee.

8. One-Third of the Settlement Fund Is a Typical and Reasonable Fee Award for Cases Similar to this One.

A fee award of one-third of the Settlement Fund reflects a real-world arm's length transaction between the Class and Class Counsel and is a generally accepted percentage in the Fourth Circuit, as evidenced by Judge Gibney's recent ruling in the similar nationwide price-fixing class action *In re: Interior Molded Doors Antitrust Litig.*, No. 3:18-cv-00718-JAG (E.D. Va. June 3, 2021), in which he awarded class counsel attorneys' fees of one-third of a $61,600,000 settlement, plus interest (a copy of the order is attached as Clark Decl. Ex. 10); *see also Seaman*, 2019 WL 4674758, at *3; *In re Titanium Dioxide Antitrust Litig.*, No. 10-CV-00318(RDB), 2013

WL 6577029, at *1 (D. Md. Dec. 13, 2013); *In re Polyester Staple Antitrust Litig.*, MDL 3:03CV1516, Order and Final Judgment ¶ 10 (W.D.N.C. June 24, 2008) (a copy of the order is attached as Clark Decl. Ex. 11. Here, the requested fee award is 1) well within the acceptable range of attorneys' fee awards in protracted, complex, and expensive litigation such as this, and 2) justified by the remarkable results obtained for the Class and the risks faced by Class Counsel.

Class Counsel's fee request is consistent with awards in similar cases. District courts in this Circuit have frequently found a percentage award of one-third of a common fund to be within the range of reasonable percentage awards. *See, e.g.*, *In re: Allura Fiber Cement Siding Litig.*, 2:19-mn-02886-DCN, 2021 WL 2043531, at *4 (D.S.C. May 21, 2021) ("Courts in the Fourth Circuit have held that attorneys' fees in the amount of 1/3 of the settlement fund are reasonable."); *Muhammad v. Nat'l City Mortg., Inc.*, No. 2:07-0423, 2008 WL 5377783, at *6 (S.D.W Va. Dec. 19, 2008) ("[T]he requested award of one-third of the common fund, plus costs, is reasonable under the circumstances of this case."); *Smith*, 2007 WL 119157, at *2 ("In this jurisdiction, contingent fees of one-third . . . are common.").

In particular, "[a]n award of one-third is also common in antitrust class actions." *Seaman*, 2019 WL 4674758, at *3; *see, e.g.*, *In re: Interior Molded Doors Antitrust Litig.*, No. 3:18-cv-00718-JAG (awarding one-third of $61,600,000 settlement); *In re Anadarko Basin Oil & Gas Lease Antitrust Litig.*, No. CIV-16-209-HE, 2019 WL 1867446, at *2 (W.D. Okla. Apr. 25, 2019) (awarding one-third of $6,950,000 settlement); *In re Domestic Drywall Antitrust Litig.*, No. 13-MD-2437, 2018 WL 3439454, at *20 (E.D. Pa. July 17, 2018) (awarding one-third of $190,059,056 settlement); *In re: Urethane Antitrust Litig.*, No. 04-1616-JWL, 2016 WL 4060156, at *5 (D. Kan. July 29, 2016) (awarding one-third of $835 million settlement, noting "a one-third fee is customary in contingent-fee cases"); *Standard Iron Works v. ArcelorMittal*, No. 08 C 5214,

2014 WL 7781572, at *3 (N.D. Ill. Oct. 22, 2014) (awarding 33% of $163.9 million settlement); *In re OSB Antitrust Litig.*, 2:06-cv-00826-PD, Order at 3 (E.D. Pa. Dec. 9, 2008), ECF No. 947 (approving requested one-third of $120 million settlement fund), attached as Clark Decl. Ex. 12.

As shown in the following chart, recent antitrust class actions in this Circuit have awarded one-third of the common fund in attorneys' fees.

Case	Settlement Amount	Attorney Fee Award	Percentage Fee Award
In re: Interior Molded Doors Antitrust Litig., No. 3:18-cv-00718-JAG (E.D. Va. June 3, 2021)	$61.6 million	$20.53 million	33 1/3%
Seaman v. Duke University, 2019 WL 4674758 (M.D.N.C. Sept. 25, 2019)	$54.5 million	$18.16 million	33 1/3%
In re Celebrex (Celecoxib) Antitrust Litig., 2018 WL 2382091 (E.D. Va. 2018)	$94 million	$30.72 million	33 1/3%
In re Titanium Dioxide Antitrust Litig., 2013 WL 6577029 (D. Md. Dec. 13, 2013)	$163.5 million	$54.5 million	33 1/3%
In re Polyester Staple Antitrust Litig., MDL 3:03CV1516, Order and Final Judgment ¶ 10 (W.D.N.C. June 24, 2008)	$33M	$10.89M	33%

Additionally, "[t]he percentage-of-the-fund method of awarding attorneys' fees in class actions should approximate the fee which would be negotiated if the lawyer were offering his or her services in the private marketplace." *In re Remeron Direct Purchaser Antitrust Litig.*, No. CIV.03-0085 FSH, 2005 WL 3008808, at *16 (D.N.J. Nov. 9, 2005). "Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation." *Id.*; *see also Montague v. Dixie Nat'l Life Ins. Co.*, No. 3:09-00687-JFA, 2011 WL 3626541, at *3 (D.S.C. Aug. 17, 2011) ("A 33% fee award from the common fund in this case is consistent with

what is routinely privately negotiated in contingency fee litigation.").[19] Given that "a one-third contingency is standard in individual litigation; in antitrust litigation, a higher contingency would be reasonable, given the complexities and risks involved." *Mylan Pharm., Inc. v. Warner Chilcott Pub. Ltd. Co.*, No. CV 12-3824, 2014 WL 12778314, at *7 (E.D. Pa. Sept. 15, 2014). Consideration of the awards in similar cases supports the requested award of one-third of the Settlement Fund.

Other courts have determined that a higher percentage rate is appropriate where discovery has been completed and the case is ready for trial. *See Trombley v. Bank of America Corp.*, No. 08-cv-456-JD, 2012 WL 1599041, at *3 n.3 (D.R.I. May 4, 2012) ("Higher percentage rates for attorneys' fees generally are reserved for cases that settle after the completion of formal discovery when the case is close to trial.").[20] Class Counsel reached settlements with Olam and Birdsong *after* the close of discovery and continued preparing for trial against Golden Peanut; and, at the time of the Golden Peanut settlement, Class Counsel was ready for trial. Accordingly, the one-third award requested by Class Counsel is appropriate.

C. A Cross-Check of Class Counsel's Lodestar Confirms the Reasonableness of the Fee Request.

Courts often supplement their analysis of the percentage-of-fund method with the lodestar

[19] A one-third fee is a standard percentage in many fee agreements, including large, complex non-class cases. *See* Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks,* 65 Fordham L. Rev. 247, 248 (1996) (noting that "standard contingency fees" are "usually thirty-three percent to forty percent of gross recoveries"); *see also Blum,* 465 U.S. at 903 (Brennan, J., concurring) ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.").

[20] *See also Puerto Rican Cabotage*, 815 F. Supp. 2d at 463 ("[T]he Court maintains that attorneys' fee awards reasonably close to 33 1/3% should be reserved for cases which actually proceed to trial or settle on the eve of trial. The instant case did not even reach the discovery phase much less approach a trial date."); *In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094, 1113 (D. Kan. 2018) ("The Court finds that a one-third fee is customary in contingent-fee cases (factor 5), or is even on the low side, as that figure is often higher in complex cases or cases that proceed to trial.").

cross-check. "The purpose of a lodestar cross-check is to determine whether a proposed fee award is excessive relative to the hours reportedly worked by counsel, or whether the fee is within some reasonable multiplier of the lodestar." *Boyd*, 299 F.R.D. at 467. "A lodestar cross-check first computes the plaintiffs' attorneys' reasonable hourly rate for the litigation and multiplies that rate by the number of hours dedicated to the case," and "then compares that figure with the attorneys' fees award, typically resulting in a positive multiplier." *Genworth*, 210 F. Supp. 3d at 845. When using the lodestar as a cross-check, courts "take a somewhat truncated approach to the lodestar analysis" and "generally do not apply the same scrutiny in a lodestar cross-check as they do when using the lodestar method to calculate the fee." *Thomas*, 2017 WL 1148283, at *6; *see also Jones*, 601 F. Supp. 2d 765 (explaining that when "using the lodestar method as a cross-check," the court "need not apply the 'exhaustive scrutiny' normally required by that method").

A lodestar cross-check in this case supports the requested fee. Despite the risks, complexities, and challenges posed by this litigation, Class Counsel invested 20,866.3 hours of attorney and other professional time on behalf of the Class from case inception through May 31, 2021. (Clark Decl. ¶ 54; Clark Decl. Exs. 2-9). The work by Class Counsel was non-duplicative and performed at the direction of Co-Lead Counsel, who also audited and confirmed the validity of Class Counsels' time and expense submissions and removed unapproved hours (and hours inconsistent with the Court's fee orders in prior cases) and expenses where appropriate. *Id*. at ¶¶ 50, 52, 59.

The historical hourly rates charged by Class Counsel are reasonable, based on each person's position, experience level, and location (and Co-Lead Counsel capped the hourly rate of attorneys conducting first-level document review at $350), and have been approved by multiple

courts in similar antitrust class actions. (Clark Decl. ¶¶ 49-50).[21] These rates are comparable to the rates charged by other law firms with similar experience, expertise, and reputation, for similar services in the nation's leading legal markets. *See, e.g.*, *Seaman*, 2019 WL 4674758, at *5 (listing comparable rates from national class action firm based in San Francisco).[22]

Based on Class Counsel's lodestar of $11,716,258.50, one-third of the Settlement Fund would result in a fee award of $34,250,000, which would be a multiplier of 2.92. Such a multiplier is well within accepted ranges for antitrust class actions generally, and is consistent with the fee rulings in similar cases within the Fourth Circuit. Indeed, "[d]istrict courts within the Fourth Circuit have regularly approved attorneys' fees awards with 2–3 times lodestar multipliers."

[21] Co-Lead Counsel elected to use lower, historical rates even though cases in the Fourth Circuit have deemed it appropriate to use current rates to account for the risk and delay in payment. *See Daly v. Hill*, 790 F.2d 1071, 1081 (4th Cir. 1986); *Reaching Hearts Int'l, Inc. v. Prince George's Cty.*, 478 F. App'x 54, 60 (4th Cir. 2012).

[22] Co-Lead Counsel recognize that in some instances, Class Counsel's rates may be higher than the prevailing rates in Norfolk, Virginia. While a reasonable hourly rate is generally calculated by looking at the local market rates, in cases involving "complex issues requiring specialized experience"—such as this case—"it is reasonable to look beyond local rates in calculating the reasonable rate for a lodestar comparison." *Seaman*, 2019 WL 4674758, at *5; *see also Sims v. BB&T Corp.*, 15-cv-732, 2019 WL 1993519, at *2 (M.D.N.C. May 6, 2019) (stating that "a national market rate is appropriate for matters involving complex issues requiring specialized expertise"); *Kruger v. Novant Health, Inc.*, 1:14CV208, 2016 WL 6769066, at *4 (M.D.N.C. Sept. 29, 2016) ("This court finds the relevant market rate for cases such as the present case to be a nationwide market rate."). Class Counsel's hourly rates reflect their national class action practices specializing in complex, high-risk antitrust cases and are the rates they customarily charge in these types of cases. *See Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 689 n.12 (D. Md. 2013) (finding hourly rates to be reasonable because, "while somewhat high for this district, [they] are within a reasonable range for firms with national class action practices"). Class Counsel's rates also likely compare favorably with those of Golden Peanut's and Olam's lead counsel, global law firms Kirkland & Ellis LLP and Latham & Watkins, LLP, based in Chicago and San Francisco respectively. *See, e.g.*, First Interim Fee Appl. of Kirkland & Ellis at 9-10 & 62, *In re: Barneys New York, Inc.*, No. 19-cv-36300 (S.D.N.Y. Bankr. Nov. 18, 2019), ECF No. 534 (listing average hourly rates for Kirkland & Ellis in bankruptcy matter as $1,332 for partner and $877 for associate, describing these rates as "equivalent to the hourly rates and corresponding rate structure used by K&E for other restructuring matters, as well as similar complex . . . litigation matters," and stating that "[t]he rates and rate structure reflect that such . . . complex matters are national in scope and typically involve great complexity, high stakes, and severe time pressures").

Genworth, 210 F. Supp. 3d at 845; *see, e.g.*, *Titanium Dioxide*, 2013 WL 6577029 (court awarded attorneys' fees of one-third of settlement fund, which resulted in a multiplier of 2.39); *In re Massey Energy Co. Sec. Litig.*, 3:12–cv–004560, Order Awarding Attorneys' Fees and Expenses at 2 (S.D.W. Va. June 4, 2014), ECF No. 203 (approving a 2.9 times lodestar multiplier); *Microstrategy*, 172 F. Supp. 2d at 789 (approving a 2.6 times lodestar multiplier); *Deloach v. Philip Morris Cos.*, No. 1:00CV01235, 2003 WL 23094907, at *11 (M.D.N.C. Dec. 19, 2003) (approving a 4.45 times lodestar multiplier); *Seaman*, 2019 WL 4674758, at *6 (approving a 2.89 times lodestar multiplier); *see also Singleton*, 976 F. Supp. 2d at 689 ("Courts have generally held that lodestar multipliers falling between 2 and 4.5 demonstrate a reasonable attorneys' fee."). Further, the lodestar figure above does not include the substantial amount of time that Class Counsel will be required to devote to overseeing the claims administration process and the distribution of settlement funds to the Class. These additional hours, for which Class Counsel will not receive any additional compensation from the Settlement Fund, effectively reduce the multiplier, and should be considered in evaluating the reasonableness of the fee request.

Consideration of all the lodestar cross-check factors confirms the reasonableness of the requested fee.

IV. CLASS COUNSEL'S REQUEST FOR REIMBURSEMENT OF LITIGATION EXPENSES IS REASONABLE.

Class Counsel also request reimbursement of reasonable and necessary litigation costs in the amount of $7,688.02. As set forth in the Clark Decl., ¶¶ 62-64, $3,052.78 of these costs relate to three invoices that were received after the filing and amendment of Plaintiffs' initial motion for an award of costs and expenses and thus were not part of the costs and expenses previously awarded by the Court on April 8, 2021. The remaining $4,635.24 in costs relate to expenses paid directly by Class Counsel firms after the cut-off date for firm-specific costs that were included in

Plaintiffs' first request for reimbursement. *Id*.

"It is well-established that plaintiffs who are entitled to recover attorneys' fees are also entitled to recover reasonable litigation-related expenses as part of their overall award." *Singleton*, 976 F. Supp. 2d at 689. Such costs may include "those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services." *Spell v. McDaniel*, 852 F.2d 762, 771 (4th Cir. 1988) (internal quotations omitted).

Class Counsel's request for the reimbursement of $7,688.02 in expenses from the Settlement Fund is reasonable and should be approved.

V. THE REQUESTED SERVICE AWARDS ARE REASONABLE.

Plaintiffs also request approval for a $40,000 service award for each of the six Class Representatives. "At the end of a successful class action, it is common for trial courts to compensate class representatives for the time and effort they invested to benefit the class." *Reynolds v. Fidelity Invs. Institutional Operations Co.*, 1:18-CV-423, 2020 WL 92092, at *4 (M.D.N.C. Jan. 8, 2020). Service awards are "intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 578 (E.D. Va. 2016) (quoting *Manuel*, 2016 WL 1070819, at *6). Among the factors to be considered in determining the reasonableness of a service award are "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefited from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Manuel*, 2016 WL 1070819, at *6 (quoting *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)). Service awards are particularly appropriate where, as here, "there was no preceding governmental action alleging a conspiracy and taking a high-profile role threatened to jeopardize class representatives' relationships with their suppliers."

Linerboard, 2004 WL 1221350, at *18.

Here, in a unique circumstance, it was the Class Representatives, not a government agency, that helped initiate this case, followed by important assistance in the investigation and prosecution of Plaintiffs' claims against Defendants. Put simply, this case would not exist without the Class Representatives, all of whom spent significant time assisting this case. They (1) responded to written discovery and collected, reviewed, and produced documents relating to their claims; (2) prepared for and sat for lengthy depositions by defense counsel; (3) reviewed and approved the complaint and other substantive pleadings; and (4) considered and approved the settlements. Clark Decl. ¶¶ 65-75. The Class Representatives pursued the litigation knowing that Defendants might retaliate against them, thus risking their livelihoods. They assumed this risk and responsibility to benefit the entire Class, even though their claims were not among the largest. *See Archbold*, 2015 WL 4276295, at *6 ("Had the Plaintiff not stepped forward to prosecute these claims, the rest of the class would have received nothing."). By stepping forward and diligently performing their duties as Class Representatives, they have performed a valuable public service that will benefit thousands of peanut farmers.

The requested service awards are also in accord with amounts approved in other class action litigations in this Circuit and around the country, including most recently in the *Interior Molded Doors Antitrust Litig.*, where Judge Gibney approved $75,000 service awards to each class representative. *See* Clark Decl. Ex. 10. *See, e.g.*, *Seaman*, 2019 WL 4674758, at *7 (awarding class representative $125,000); *Celebrex*, 2018 WL 2382091, at *5 (three class representatives each awarded $100,000); *Titanium Dioxide*, 2013 WL 6577029, at *1 (one class representative awarded $125,000 and two class representatives awarded $25,000 each); *see also In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-02555509-LHK, 2015 WL 5158730, at *17 (awarding one class

representative $140,000 and four class representatives $100,000 each); *Marchbanks Truck Serv. v. Comdata Network, Inc.*, No. 07-1078-JKG, 2014 WL 12738907, at *3-4 (E.D. Pa. July 14, 2014) (awarding $150,000 to one class representative and $75,000 each to two others).

VI. CONCLUSION

For the reasons discussed above, Plaintiffs respectfully request that the Court: (1) award Class Counsel one-third of the Settlement Fund as attorneys' fees; (2) order reimbursement of litigation expenses incurred by Class Counsel in the amount of $7,688.02; and (3) award each Class Representative a service award of $40,000.

Dated: June 7, 2021

/s/ Kevin J. Funk
Wyatt B. Durrette, Jr. (VSB No. 04719)
Kevin J. Funk (VSB No. 65465)
DURRETTE, ARKEMA, GERSON & GILL PC
Bank of America Center
1111 East Main Street, 16th Floor
Richmond, VA 23219
Tel: (804) 775-6900
Fax: (804) 775-6911
wdurrette@dagglaw.com
kfunk@dagglaw.com

Brian D. Clark (MN No. 00390069)
(admitted *pro hac vice*)
W. Joseph Bruckner (MN No. 0147758)
(admitted *pro hac vice*)
Simeon A. Morbey (MN No. 0391338)
(admitted *pro hac vice*)
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401
Tel: (612) 339-6900
Fax: (612) 339-0981
bdclark@locklaw.com
wjbruckner@locklaw.com
samorbey@locklaw.com

Kimberly A. Justice (PA No. 85124)
(admitted *pro hac vice*)
Jonathan M. Jagher (PA No. 204721)
(admitted *pro hac vice*)
FREED KANNER LONDON & MILLEN LLC
923 Fayette Street
Conshohocken, PA 19428
Tel: (610) 234-6487
Fax: (224) 632-4521
kjustice@fklmlaw.com
jjagher@fklmlaw.com

William H. London (IL No. 6196353)
(admitted *pro hac vice*)
Michael E. Moskovitz (IL No. 6237728)
(admitted *pro hac vice*)
Brian M. Hogan (IL No. 6286419)
(admitted *pro hac vice*)
FREED KANNER LONDON & MILLEN LLC
2201 Waukegan Road, #130
Bannockburn, IL 60015
Tel: (224) 632-4500
Fax: (224) 632-4521
blondon@fklmlaw.com
mmoskovitz@fklmlaw.com
bhogan@fklmlaw.com

Jeffrey J. Corrigan (NY No. 2372654)
(admitted *pro hac vice*)
Jeffrey L. Spector (PA No. 207208)
(admitted *pro hac vice*)
SPECTOR ROSEMAN & KODROFF, P.C.
Two Commerce Square
2001 Market Street, Suite 3420
Philadelphia, PA 19103
Tel.: (215) 496-0300
Fax: (215) 496-6611
jcorrigan@srkattorneys.com
jspector@srkattorneys.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will automatically email notification of such filing to all counsel of record.

To the best of my knowledge, there are no other attorneys or parties who require service by U.S. Mail.

Dated: June 7, 2021

/s/ Kevin J. Funk

Kevin J. Funk (VSB No. 65465)
DURRETTE, ARKEMA, GERSON & GILL PC
1111 East Main Street, 16th Floor
Richmond, VA 23219
Tel: (804) 775-6900
Fax: (804) 775-6911
Email: kfunk@dagglaw.com

Liaison Counsel for Plaintiffs and the Class

CERTIFICATE OF SERVICE

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To the best of my knowledge, there are no other attorneys or parties who require service by U.S. Mail.

/s/ Kevin J. Funk
Kevin J. Funk (VSB No. 65465)
DURRETTE, ARKEMA, GERSON & GILL PC
1111 East Main Street, 16th Floor
Richmond, Virginia 23219
Tel: (804) 775-6900
Fax: (804) 775-6911
kfunk@dagglaw.com

TAB 40A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: AUTOMOTIVE PARTS ANTITRUST LITIGATION	:	Master File No. 12-md-02311
PRODUCT(S):	:	
AUTOMOTIVE WIRE HARNESSES	:	2:12-cv-00102
HEATER CONTROL PANELS	:	2:12-cv-00402
BEARINGS	:	2:12-cv-00502
ANTI-VIBRATION RUBBER PARTS	:	2:13-cv-00802
WINDSHIELD WIPERS	:	2:13-cv-00902
RADIATORS	:	2:13-cv-01002
STARTERS	:	2:13-cv-01102
AUTOMOTIVE LAMPS	:	2:12-cv-01202
IGNITION COILS	:	2:13-cv-01402
HID BALLASTS	:	2:12-cv-01702
ELECTRONIC POWERED STEERING ASSEMBLIES	:	2:13-cv-01902
FAN MOTORS	:	2:13-cv-02102
FUEL INJECTION SYSTEMS	:	2:13-cv-02202
POWER WINDOW MOTORS	:	2:13-cv-02302
VALVE TIMING CONTROL DEVICES	:	2:13-cv-02502
WINDSHIELD WASHERS	:	2:13-cv-02802
CONSTANT VELOCITY JOINT BOOT PRODUCTS	:	2:14-cv-02902
SPARK PLUGS	:	2:15-cv-03002
SHOCK ABSORBERS	:	2:16-cv-03302
BODY SEALING PRODUCTS	:	2:16-cv-03402
INTERIOR TRIM	:	2:16-cv-03502
BRAKE HOSES	:	2:16-cv-03602
EXHAUST SYSTEMS	:	2:16-cv-03702
CERAMIC SUBSTRATES	:	2:16-cv-03802
MINIMODULES	:	2:17-cv-04302
SIDE DOOR LATCHES	:	2:17-cv-13005
This Document Relates to:	:	Hon. Marianne O. Battani
AUTOMOBILE DEALERSHIP ACTIONS	:	

ORDER REGARDING AUTO DEALERS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND A SET ASIDE FOR FUTURE LITIGATION EXPENSES FROM ROUND THREE SETTLEMENTS

The above matter came before the Court on the Auto Dealers' motion for an award of attorneys' fees, reimbursement of litigation expenses, and a set aside for future litigation expenses relating to a third round of Auto Dealer settlements ("Round Three settlements").

The Court has reviewed the memorandum submitted by the Auto Dealers in support of their motion and has also reviewed the various declarations and submissions relating to that motion. The Court held a hearing on September 26, 2018 and appearances were noted on the record.

Based on the record and proceedings before the Court, it is hereby **ORDERED:**

1. The Court has considered the relevant case law and authority and finds that awards of attorneys' fees and reimbursement of expenses to the Auto Dealers and their counsel are appropriate under Fed. R. Civ. P. 23(h) and Fed.R.Civ.P. 54(d)(2). Notice of the request for fees and reimbursement of expenses was provided to the potential class members via direct and published notice and a settlement web site that identified and provided copies of relevant documents and pleadings.

2. The Court has considered the reaction of the class members to this fee request and request for reimbursement of expenses.

3. The Court engages in a two-part analysis when assessing the reasonableness of a petition seeking an award of attorneys' fees. *In re Cardinal Health Ins. Sec. Litig.*, 528 F.Supp.2d 752, 760 (S.D. Ohio 2007). The Court first determines the method of calculating the attorneys' fees: it applies either the percentage of the fund approach or the lodestar method. *Id.*; *Van Horn v. Nationwide Prop. & Cas. Inc. Co.*, 436 F. App'x 496, 498 (6th Cir. 2011).

4. The Court has the discretion to select the appropriate method for calculating attorneys' fees "in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them." *Rawlings v. Prudential-Bache Properties, Inc.*,

9 F.3d 513, 516 (6th Cir. 1993). In common fund cases, the award of attorneys' fees need only "be reasonable under the circumstances." *Id.*, 9 F.3d at 516. The Court has also analyzed and weighed the six factors described in *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188 (6th Cir. 1974).

5. The Court will award fees to the Auto Dealers using the percentage-of-the-fund approach. This method of awarding attorneys' fees is preferred in this district because it eliminates disputes about the reasonableness of rates and hours, conserves judicial resources, and aligns the interests of class counsel and the class members. *Rawlings,* 9 F.3d at 515; *In re Packaged Ice Antitrust Litig.*, 08-MDL-01952, 2011 WL 6209188, at *16 (E.D. Mich. Dec. 13, 2011); *Delphi*, 248 F.R.D. at 502; *Cardinal*, 528 F.Supp.2d at 762 (the Sixth Circuit has "explicitly approved the percentage approach in common fund cases."); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 2014 WL 2946459, *1 (E.D. Tenn. Jun. 30, 2014).

6. The Court **GRANTS** the Auto Dealers' request for reimbursement of past litigation expenses in the amount of $358,125.09**.** The past litigation expenses incurred in specific parts cases involved in these settlements, as set forth in the declarations submitted by counsel for the Auto Dealers, shall be deducted from the settlement funds available in those cases. The past litigation expenses incurred in the general prosecution of the cases with settlements currently before the Court shall be reimbursed on a *pro rata* basis from each of the settlements.

7. The Court **GRANTS** the Auto Dealers' request to establish a fund for future litigation expenses in the amount of **$3,455,423.97**. The money used to create the future litigation fund shall also be deducted from the settlements on a *pro rata* basis. As indicated in the memorandum submitted in support of this motion, the future litigation expenses will only be used in the cases at issue in the settlements currently before the Court. If the future

litigation fund is not fully used, the money shall be returned to the members of those settlement classes that contributed to the future litigation fund. However, if this fund or the earlier litigation funds approved by the Court are not fully used, counsel for the Auto Dealers are awarded a fee of 30 percent of the unused funds when those funds are disbursed to class members. *See* 2:12-cv-00101-MOB-MKM (ECF Doc. No. 495, para. 22).

8. The Court authorizes class counsel for the Auto Dealers to pay the costs of the settlement notice and claims administration (being handled by Gilardi & Co.) from the settlement funds on a *pro rata* basis.

9. Counsel for the Auto Dealers request a fee award of 30 percent of the settlement funds remaining after the future litigation fund and the cost of class notice and claim administration have been deducted. The award requested is within the range of fee awards made by courts in this Circuit. *In re Prandin Direct Purchaser Antitrust Litig.*, 2015 WL 1396473 (E.D. Mich. Jan. 20, 2015) (awarding one-third of the fund); *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *19; *Skelaxin*, 2014 WL 2946459, at *1; *In re Se. Milk Antitrust Litig.*, 2013 WL 2155387, at *8 (E.D. Tenn. May 17, 2013); *Thacker v. Chesapeake Appalachia*, L.L.C., 695 F. Supp. 2d, 521, 528 (E.D. Ky. 2010); *Bessey v. Packerland Plainwell, Inc.*, No. 4:06-CV-95, 2007 WL 3173972, at *4 (W.D. Mich. 2007); *Delphi*, 248 F.R.D. at 502-03; *In re National Century Financial Enterprises, Inc. Investment Litig.*, 2009 WL 1473975 (S.D. Ohio, May 27, 2009); *Kogan v. AIMCO Fox Chase, L.P.*, 193 F.R.D. 496, 503 (E.D. Mich. 2000).

10. Other federal courts have approved fees in this range in complex antitrust class action litigation and this Court has used that percentage, or more, for other fee awards in this MDL. *See* 2:12-cv-00101-MOB-MKM (ECF Doc. No. 495, para. 22) (30 percent); 2:12-cv-00102-MOB-MKM (ECF Doc. No. 401, para. 11) (33 percent).

11. The Court has considered the six *Ramey* factors in weighing a fee award to counsel for the Auto Dealers: (1) the value of the benefits rendered to the class; (2) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (3) whether the services were undertaken on a contingent fee basis; (4) the value of the services on an hourly basis [the lodestar cross-check]; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel on both sides. *Ramey*, 508 F.2d at 1194–97.

12. The Court has carefully analyzed the Round Three settlements and the *Ramey* factors and concludes that the factors are met and justify a fee award to counsel for the Auto Dealers. The settlements total more than $115 million and provide substantial cash and non-monetary benefits including cooperation from the settling defendants and injunctive relief prohibiting certain conduct. Counsel has worked on a contingent basis and the results of this litigation have never been certain. The legal and factual issues are complicated and the parties have zealously asserted their claims and defenses. Given the length and tenacity of this litigation, the Court is satisfied that the Round Three settlements were the result of arms' length and good faith negotiations between informed and experienced counsel. Some of the settlements were only reached with the assistance of mediators and multiple mediation sessions.

13. Courts in the Sixth Circuit weigh "society's stake in rewarding attorneys [who obtain favorable outcomes for a class] in order to maintain an incentive to others," and counsel's success in complex antitrust litigation "counsels in favor of a generous fee." *Cardizem*, 218 F.R.D. at 534 (internal quotation marks omitted). The substantial Auto Dealer recoveries to-date serve a strong public policy of holding accountable those who violate United States antitrust laws, thereby promoting fair competition and pricing. *See* 2:12-cv-00103-MOB-MKM (ECF Doc. No. 578, para. 13).

14. This is an extremely complex litigation with more than 160 defendants and over 40 different Auto Dealer class actions involving different parts, different groups of alleged conspirators, and different time periods. Some of the defendants were indicted and pleaded guilty to antitrust violations while others were not indicted, did not plead guilty, or did not pay fines to a governmental entity. All defendants have vigorously disputed the applicability of Federal Rule 23 to litigated classes and have denied that the Auto Dealers sustained an antitrust injury.

15. Working on a contingent basis, counsel for the Auto Dealers have skillfully guided the cases before the Court in this motion to substantial settlements. When the Round Three settlements are added to the first two rounds of Auto Dealer settlements approved by the Court, nearly $300 million has been recovered for the benefit of the Auto Dealer settlement class members.

16. The *Ramey* factors and a cross-check of the lodestar incurred by counsel for the Auto Dealers indicate that the fee requested constitutes fair and reasonable compensation for the risks assumed, the work done, and the benefits achieved for the members of the settlement classes. The lodestar currently totals $70,237,227.70 when using counsel's current customary rates.

17. When performing the lodestar cross-check, the Court reviewed the hourly rates of Auto Dealer counsel and find that they are reasonable for attorneys with specialized experience in bringing antitrust cases. "A reasonable hourly rate is determined according to the prevailing market rates in the relevant community. To ascertain that community, district courts 'are free to look to a national market, an area of specialization market, or any other market they believe appropriate to fairly compensate particular attorneys in individual cases." *Ford v. Fed.-Mogul Corp.*, No. 2:09-cv-14448, 2015 U.S. Dist. LEXIS 3399, at *2-3 (E.D. Mich. Jan. 7, 2015) (quoting *McHugh v. Olympia*

Entm't, Inc., 37 F. App'x 730, 740 (6th Cir. 2002)). Even if counsel's "requested rates are high for this district. . . Class Counsel should be compensated at rates that reflect their skill and their success." *Schumacher v. AK Steel Corp. Ret. Accumulation Pension Plan*, 995 F. Supp. 2d 835, 847 (S.D. Ohio 2014).

18. The rates used by Auto Dealer counsel in this MDL are well within the parameters of reasonableness. In national markets, "partners routinely charge between $1,200 and $1,300 an hour, with top rates at several large law firms exceeding $1,400.[1] In specialties such as "antitrust and high-stakes litigation and appeals . . . [f]or lawyers at the very top of those fields, hourly rates can hit $1,800 or even $1,950." *Id.* Some "difference makers" in the most complex fields, including antitrust litigation, even charge $2,000 an hour.[2] This Court has recognized that rates in this matter "are well in line with the market, with recent reports explaining that senior lawyers at top law firms routinely charge well over $1,000." *See, e.g.,* 2:12-cv-00103-MOB-MKM (Doc. No. 578) at 7.

19. Interim Co-Lead Counsel for the Auto Dealers performed a thorough analysis of the Auto Dealers' attorneys' time submissions and have, in this motion and in prior motions, provided the Court with detailed information supporting their lodestar. The rates are justified by the many years of experience, expertise, and results in prosecuting antitrust class actions. Counsel for the Auto Dealers achieved excellent results while litigating claims against Defendants that are represented by some of the most skilled and prominent antitrust defense lawyers in the world.

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[1] *See* Sara Randazzo & Jacqueline Palank, *Legal Fees Cross New Mark: $1,500 an Hour*, The Wall Street Journal (Feb. 16, 2016), https://www.wsj.com/articles/legal-fees-reach-new-pinnacle¬1-500-an-hour-1454960708; see also Martha Neil, *Top partner billing rates at BigLaw firms approach $1,500 per hour*, ABA Journal (Feb. 8, 2016), http://www.abajournal.comnews/article/toppartner billing rates at biglaw firms nudge 1500 per hour.

[2] *See* Natalie Rodriguez, *Meet the $2,000 An Hour Attorney: What it Takes to Earn Top Dollar in the Rate-Crunch Era*, Law360, June 11, 2016, https://www.1aw360.com/in-depth/articles/804421 ("[E]arlier this year, BTI Consulting Group found that a handful of in-house counsel had paid as much as $2,000 per hour, after discounts, to attorneys in the past year. Several other in-house counsel, meanwhile, had paid highs of $1,900 per hour or $1,800 per hour.")

20. The Court **GRANTS** an award of attorneys' fees to counsel for the Auto Dealers in the amount of **$33,317,881.00**. These attorneys' fees, shall be paid on a *pro rata* basis from the net settlement funds available for each Round Three settlement currently before the Court.

21. Using the lodestar cross-check methodology and reviewing the total fees awarded with the lodestar generated on these cases from the inception of the litigation to June 30, 2018, the 30 percent fee awarded results in a lodestar multiplier of 1.09 when using counsel's customary rates. This modest multiplier is well within, if not below, the range of reasonable multipliers awarded in similar contingent fee cases. *See, e.g., In re Cardinal Health Ins. Sec. Litig.*, 528 F. Supp. 2d at 767-68 (approving multiplier of 6, and observing that "[m]ost courts agree that the typical lodestar multiplier" on a large class action "ranges from 1.3 to 4.5"); *In re Prandin Direct Purchase Antitrust Litig.*, 2015 WL 1396473, at *4 (3.01 multiplier). This fee award is reasonable in light of the complexity of this litigation, the results achieved for the class members, the risks assumed by counsel for the Auto Dealers, and the work remaining to be done on these cases and for which fees may or may not be available.

22. Interim Co-Lead Counsel for the Auto Dealers are authorized to allocate the attorneys' fees and expenses awarded herein among counsel who performed work on behalf of the Auto Dealers in accordance with Interim Co-Lead Counsel's assessment of each firm's contribution to the prosecution of the cases involved in the settlements.

IT IS SO ORDERED.

Date: November 5, 2018

s/Marianne O. Battani
MARIANNE O. BATTANI
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Order was served upon counsel of record via the Court's ECF System to their respective email addresses or First Class U.S. mail to the non-ECF participants on November 5, 2018.

s/ Kay Doaks
Case Manager

TAB 40B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: AUTOMOTIVE PARTS ANTITRUST LITIGATION	:	Master File No. 12-md-02311
PRODUCT(S):	:	
AUTOMOTIVE WIRE HARNESSES	:	2:12-cv-00102
HEATER CONTROL PANELS	:	2:12-cv-00402
BEARINGS	:	2:12-cv-00502
ANTI-VIBRATION RUBBER PARTS	:	2:13-cv-00802
WINDSHIELD WIPERS	:	2:13-cv-00902
RADIATORS	:	2:13-cv-01002
STARTERS	:	2:13-cv-01102
AUTOMOTIVE LAMPS	:	2:12-cv-01202
IGNITION COILS	:	2:13-cv-01402
HID BALLASTS	:	2:12-cv-01702
ELECTRONIC POWERED STEERING ASSEMBLIES	:	2:13-cv-01902
FAN MOTORS	:	2:13-cv-02102
FUEL INJECTION SYSTEMS	:	2:13-cv-02202
POWER WINDOW MOTORS	:	2:13-cv-02302
VALVE TIMING CONTROL DEVICES	:	2:13-cv-02502
WINDSHIELD WASHERS	:	2:13-cv-02802
CONSTANT VELOCITY JOINT BOOT PRODUCTS	:	2:14-cv-02902
SPARK PLUGS	:	2:15-cv-03002
SHOCK ABSORBERS	:	2:16-cv-03302
BODY SEALING PRODUCTS	:	2:16-cv-03402
INTERIOR TRIM	:	2:16-cv-03502
BRAKE HOSES	:	2:16-cv-03602
EXHAUST SYSTEMS	:	2:16-cv-03702
CERAMIC SUBSTRATES	:	2:16-cv-03802
MINIMODULES	:	2:17-cv-04302
SIDE DOOR LATCHES	:	2:17-cv-13005
This Document Relates to:	:	Hon. Marianne O. Battani
AUTOMOBILE DEALERSHIP ACTIONS	:	

AUTO DEALERS' MEMORANDUM IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND SET ASIDE FOR FUTURE LITIGATION EXPENSES FROM ROUND THREE SETTLEMENTS

Gerard V. Mantese (P34424)
Mantese Honigman, P.C.
1361 E. Big Beaver Road
Troy, MI 48083
Telephone: (248) 457-9200 Ext. 203
gmantese@manteselaw.com

Interim Liaison Counsel For The Automobile Dealer Plaintiffs

Jonathan W. Cuneo
Cuneo Gilbert & LaDuca, LLP
4725 Wisconsin Ave., NW
Suite 200
Washington, DC 20016
Telephone: (202) 789-3960
jonc@cuneolaw.com

Don Barrett
Barrett Law Group, P.A.
P.O. Box 927
404 Court Square
Lexington, MS 39095
Telephone: (662) 834-2488
dbarrett@barrettlawgroup.com

Shawn M. Raiter
Larson King, LLP
2800 Wells Fargo Place
30 East Seventh Street
St. Paul, MN 55101
Telephone: (651) 312-6500
sraiter@larsonking.com

Interim Co-Lead Counsel for Automobile Dealer Plaintiffs

Statement of the Issues Presented

1. Should counsel for the Auto Dealers, who obtained more than $115 million in this group of Auto Dealer class settlements, be awarded a portion of those settlements for attorneys' fees?

   Yes

2. Should counsel for the Auto Dealers be reimbursed the out-of-pocket expenses they paid in pursuing the cases in which settlements have been presented?

   Yes

3. Should a portion of the settlement funds be set aside for future expenses incurred on behalf of the Auto Dealers in the cases involved in these settlements?

   Yes

Controlling or Most Apposite Authorities

Blum v. Stenson, 465 U.S. 886, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984)

Boeing Co. v. Van Gemert, 444 U.S. 472, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980)

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Background

Counsel for the Auto Dealers have negotiated and presented to the Court a third group ("Round Three") of settlements totaling more than $115 million. These settlements represent another substantial step to concluding this litigation: the settlements cover 23 Defendant groups and 25 different parts. By the time this motion is heard, eligible Auto Dealers will have received their payments from the Round One and Round Two settlements. Remarkably, some Auto Dealer class members have *already* received Round One settlement payments of more than $1 million dollars.

Like the first groups of Auto Dealer settlements, the Round Three settlements also provide significant non-cash benefits, such as fulsome cooperation from the settling Defendants and injunctive relief against most settling defendants prohibiting anti-competitive behavior. All of the net proceeds from the Round Three settlements will be paid to eligible new car automobile dealerships—there is no reversion to Defendants or *cy pres* payments to third-party charities.

Counsel for the Auto Dealers have zealously pursued this complex antitrust litigation and the Defendants have mounted aggressive defenses. The Defendants resolutely maintain that the Auto Dealers did not suffer an antitrust injury and that, even if they did, litigation classes cannot be certified. The Round Three settlements provide substantial benefits to Auto Dealer class members and are remarkable in light of the complexity of this litigation.

Pursuant to Rules 23(h) and 54(d)(2) of the Federal Rules of Civil Procedure, Interim Co-Lead Counsel for the Auto Dealers submit this motion in support of their request for: (1) reimbursement of litigation expenses already incurred in the cases in the Round Three settlements; (2) leave to set aside three percent of the settlement funds for future litigation expenses; and (3) an award of attorneys' fees of $33,626,155 from the settlements (30 percent of the net settlement proceeds).

Factual and Procedural Background

A. Disbursement of Round One and Round Two Settlements.

The primary aim of these actions is the recovery and reimbursement of overcharges that Auto Dealers paid as a result of the antitrust violations alleged in the complaints. Counsel for the Auto Dealers, working with the claim administrator and the court-appointed allocation consultant, have already disbursed the Round One settlement funds to eligible Auto Dealers. (Raiter Decl.) Some Round One settlement payments exceeded $1 million, the highest being more than $3 million. (Raiter Decl.)

Counsel for the Auto Dealers expect that the Round Two settlement payments will be disbursed to eligible Auto Dealers in August 2018. (Raiter Decl.) The Round Two payments should be roughly twice as large as payments made in Round One. *Id.*

B. Settlements Achieved Since the Round Two Final Approvals.

Since the Round Two final approvals, the Court has granted preliminary approval for Auto Dealer settlements with 23 Defendant groups covering 25 different parts. These settlements provide substantial cash benefits, injunctive relief as to most of the Round 3 settling Defendants, and valuable cooperation while the Auto Dealers continue to prosecute their remaining claims in this MDL. The settlements included in Round Three total more than $115 million and are set out below, grouped by the parts case at issue:

Auto Dealer Round Three Settlements			
Automotive Parts Case	**Settling Defendant Group**	**Amount Settled**	**Settlement Amount**
Anti-Vibration Rubber Parts	Yamashita	$1,920,000.00	$22,125,255.47
	Toyo	$10,845,255.47	
	Bridgestone	$9,360,000.00	

Automotive Lamps	Mitsuba	$76,381.91	$6,914,575.91
	Koito	$6,838,194.00	
Automotive Constant Velocity Joint Boot Products	Toyo	$554,744.53	$554,744.53
Bearings	NTN	$2,076,000.00	$15,787,206.00
	JTEKT	$13,711,206.00	
Body Sealings	NRC	$11,880,000.00	$11,880,000.00
Brake Hoses	Hitachi Metals	$360,000.00	$360,000.00
Ceramic Substrates	NGK	$3,840,000.00	$3,840,000.00
Electronic Powered Steering Assemblies	Yamada	$744,000.00	$2,086,261.34
	JTEKT	$1,288,794.00	
	Mitsuba	$53,467.34	
Exhaust Systems	Eberspächer	$432,000.00	$432,000.00
Fan Motors	Mitsuba	$1,157,185.93	$1,157,185.93
Fuel Injection Systems	Aisan	$1,440,000.00	$2,788,816.88
	Mitsuba	$435,376.88	
	Bosch	$913,440.00	
Heater Control Panels	Alps	$1,020,000.00	$1,020,000.00
HID Ballasts	Koito	$421,806.00	$421,806.00
Ignition Coils	Diamond Electric	$1,704,000.00	$1,704,000.00
Interior Trim	INOAC	$780,000.00	$780,000.00
Power Window Motors	Mitsuba	$6,057,085.43	$6,057,085.43
Radiators	Mitsuba	$1,157,185.93	$1,157,185.93
Shock Absorbers	HIAMS	$4,200,000.00	$4,200,000.00

Side-Door Latches and Latch Minimodules	Kiekert	$720,000.00	$720,000.00
Spark Plugs, Standard Oxygen Sensors, Air Fuel Ratio Sensors	Bosch	$9,157,632.00	$9,157,632.00
Starters	Bosch	$328,416.00	$3,314,948.66
	Mitsuba	$2,986,532.66	
Valve Timing Control Devices	Aisin Seiki	$5,880,000.00	$5,880,000.00
Windshield Washer Systems	Mitsuba	$488,844.22	$488,844.22
Windshield Wiper Systems	Mitsuba	$10,387,939.70	$10,548,451.70
	Bosch	$160,512.00	
Wire Harness Systems	Tokai Rika	$240,000.00	$1,804,800.00
	G.S. Electech	$960,000.00	
	Chiyoda	$604,800.00	
		Total	**$115,180,799.90**

The total money recovered in Auto Dealer settlements in Round One ($58,947,900.00), Round Two ($124,730,927.00), and Round Three ($115,180,799.90) is $298,859,626.00.[1] Counsel for the Auto Dealers have presented additional settlements for preliminary approval and continue to negotiate and finalize new agreements with Defendants who have not yet settled. (Raiter Decl.) These settlements will be presented to the Court as Round Four Auto Dealer settlements. *Id.*

[1] As of July 31, 2018, the Round Three settlement funds had earned interest totaling $847,659.26 and had paid taxes and tax preparation fees of $135,850 for a net gain of $711,809.26 (Raiter Decl.)

C. Counsel for Auto Dealers Have Devoted Significant Resources to Obtain the Auto Dealer Settlements in this Litigation.

1. The Complexity of this Litigation.

The Department of Justice ("DOJ") has described its investigation of the bid-rigging and price-fixing conspiracies at issue here as the largest criminal investigation it has ever undertaken. The DOJ has collected from certain Defendants fines totaling billions of dollars. The conduct involves a large number of parts, affected models, and conspiring participants. Most of the Defendant groups have had one or more of their employees or corporate affiliates convicted of a serious crime in the United States, Europe, and/or Asia. The 160 Defendants include well-known companies that are dominant players in their industries. There are 41 separate antitrust class actions alleging distinct violations of antitrust and/or consumer protection laws, making this a decidedly complex litigation.

Although the DOJ has prosecuted the criminal aspects of the price-fixing and bid rigging, it did not seek restitution for those injured by the conduct. The guilty pleas specifically note that "[i]n light of the availability of civil causes of action, which potentially provide for a recovery of multiple actual damages, the recommended sentence does not include a restitution order . . ." *See, e.g.,* Plea Agreement, Mitsuba Corp., *United States v. Mitsuba Corp.*, No. 2:13-cr-20712, para. 10(c), ECF Doc. No. 10 (E.D. Mich. 2013). Without these actions, Auto Dealers would have been left without a remedy unless they each decided to sue more than 160 defendants in dozens of individual cases.

2. The Time and Resources Devoted to Achieve These Settlements.

Antitrust litigation is inherently risky, with high stakes, and the outcome of this litigation has never been certain. From the outset, counsel for the Auto Dealers worked on a contingent basis to advance the claims of automobile dealerships authorized by OEMs to sell new vehicles. While working efficiently, counsel for the Auto Dealers could not have effectively represented these class members without the commitment of a substantial amount of time, effort, and money.

The Auto Dealers asserted damage claims under the laws of 30 states and the District of Columbia, as well as a federal claim for injunctive relief. Some states permit indirect purchaser actions under state antitrust laws; others permit them under state consumer protection laws; and others permit them under general laws of restitution. Nearly every Defendant moved to dismiss the Auto Dealers' claims, while others challenged personal jurisdiction. For the most part, the Auto Dealers prevailed on those motions.

Some of the attorneys for the Auto Dealers worked full-time on this litigation. It has been and will continue to be a huge undertaking as the cases progress through discovery, to class certification, and then to trial if necessary. Counsel for the Auto Dealers have performed the following type of work to advance the cases in the Round Three settlements:

- Research and investigation of the automotive parts supply industry and the sale of new vehicles through franchised automotive dealerships;
- Collecting information from a variety of sources, including the DOJ indictments, guilty pleas, and evidence that Defendants produced;
- Extensive research of the various aspects of the antitrust and other laws of more than 30 states and the District of Columbia, and drafting and editing dozens of initial and amended complaints;
- Analyzed and prepared liability and damages claims against more than 160 Defendants;
- Collecting and analyzing information and discovery including voluminous discovery produced by the Defendants and third parties, such as the OEMs;
- Consultation with economic and other liability and damages experts;
- Communicating and working with experts to develop appropriate damages methodologies in preparation for class certification and class-wide damages calculations for use at trial;
- Drafting and negotiating key case-management documents, protocols, and stipulations;
- Review, in conjunction with the other plaintiff groups, of millions of pages of foreign-language and translated documents produced by the Defendants;

- Receipt of cooperation materials from amnesty applicants, and attending in-person proffers from amnesty applicants who disclose the details of the conspiracies;

- Drafting, preparing for, and arguing numerous oppositions to motions to dismiss;

- Drafting and opposing numerous discovery motions, motions to quash, and other discovery sought by the Defendants from the Auto Dealers;

- Negotiating dealership and discovery issues with defense counsel including innumerable meet-and-confer sessions, each of which required substantial preparation;

- Preparing correspondence with respect to timing, stipulations, and case planning issues;

- Corresponding and attending calls with dealership co-counsel regarding client discovery and trial preparation issues;

- Obtaining and analyzing documents and data from over 40 class representative dealerships, including many in-person trips to the dealerships;

- Locating, review, redaction, and production of nearly 1 million pages of documents from class representative dealerships;

- Exchanging information and coordinating with end-payor, direct purchaser, truck and equipment dealers, City of Richmond, California, Florida, and Ford counsel regarding various issues;

- Attending calls and meetings to help formulate OEM subpoenas and discovery from third-parties;

- Responding to hundreds of discovery emails from Defendants demanding Auto Dealer discovery;

- Innumerable telephone calls with Defendants regarding Auto Dealer discovery and motion practice before the Special Master and appeals to Judge Battani;

- Exchanging information and conferring with counsel for the other Plaintiff groups regarding various discovery, procedural, and substantive issues;

- Attending MDL status conferences and motions with Judge Battani and conferences and motions with the discovery Special Master;

- Preparing for, traveling to, and attending more than 140 depositions of third-party automobile dealerships and class representative dealerships;

- Preparing for, traveling to, and attending more than 190 depositions of Defendants and their representatives;

- Preparing, through Japanese-speaking attorneys, key deposition outlines and strategy used by all Plaintiffs' groups in this litigation;

- Preparing for class certification motions by analyzing thousands of pages of depositions, thousands of pages of key discovery, working with experts, analyzing relevant case law, and drafting pleadings;

- Performing all the tasks necessary to reach more than 60 settlements, including formulating demands, negotiating, in some cases mediation, dozens of in-person meetings, exchange of drafts, preparing escrow agreements;

- Drafting settlement agreements, preliminary approval motions, and in some cases attend and argue preliminary approval motions;

- Analyzing discovery and materials received from cooperating Defendants and working with the special allocation consultant to develop allocation plans for each of the dozens of parts for which Auto Dealer settlements have been reached;

- Receiving cooperation materials from settling Defendants, attend in-person proffers from settling Defendants who disclose the details of the conspiracies, and review and analyze cooperation materials from settling Defendants and incorporate that information into the ongoing case strategy; and

- Drafting notices, claim forms, and other settlement-related documents and consult with the special allocation consultant and claims administrator

(*See generally*, Raiter Decl.)

The Auto Dealers were the primary target of Defendants' discovery efforts and have responded to countless discovery requests relating to nearly every aspect of an automobile dealer's business. Counsel for the Auto Dealers weathered ongoing motions to compel, meet and confers, and innumerable communications from defense counsel about the Auto Dealers and their data, documents, and information. Defendants sought documents and data located on any computer, database, or back-up tape anywhere in the dealerships, as well as hard copy documents located throughout the dealerships. Defendants also sought documents and other electronic data from the automobile dealership class representatives, including: (1) invoices documenting new car purchases;

(2) hundreds of fields of dealership management system (DMS) data; (3) data from back-up media going back to 1999; (4) monthly OEM financial statements submitted by dealers to the OEMs for 15 years; and (5) documents located in OEM portals showing monetary and non-monetary incentives, promotions and rebates offered to customers purchasing new cars and showing incentives, promotions and rebates offered to the dealers and advertisements showing special offers, promotions and incentives on new car purchases advertised to customers. (Raiter Decl.)

Over the Auto Dealers' objections, the Defendants insisted on taking an unlimited number of depositions of non-party automobile dealerships. The Court granted the Defendants' request and Defendants took more than 100 such depositions. (Raiter Decl.) Counsel for the Auto Dealers prepared for and attended these depositions, while at the same time defending the depositions of the Auto Dealer class representatives. *Id.* Defendants conducted approximately 140 depositions of class representative and third-party Auto Dealers in this litigation. *Id.*

Counsel for the Auto Dealers also invested considerable time, effort, and money in the prosecution of discovery and liability claims against the Defendants. This work included the review, translation, and analysis of millions of pages of documents Defendants produced to the DOJ and to the Plaintiffs in this litigation. Several Japanese-speaking attorneys for the Auto Dealers prepared and led the deposition questioning of Defendant representatives and received numerous informal witness statements from cooperating and settling Defendants. Counsel for the Auto Dealers received, analyzed, and put to use in the litigation the documents and other information received from the settling and cooperating Defendants. Finally, counsel for the Auto Dealers worked with their experts to prepare the opinions and economic models used to support class certification, damages, and at trial. (Raiter Decl.)

3. The Auto Dealers' Unique Position in this Litigation.

Because of their role as intermediate indirect purchasers, the Auto Dealers shouldered the

burden of a disproportionate amount of discovery aimed at them by the Defendants. The Defendants sought discovery regarding both the Auto Dealers' claims and antitrust injury and the injury claimed by the End Payors. (Raiter Decl.) Since the Auto Dealer class representatives run businesses and generate financial and other records that Defendants believe are relevant to damage and pass on issues, the Auto Dealers were targeted for discovery that in reality related to the End Payors' claims. *Id.* The Auto Dealers were, and are, the primary focus of the Defendants' discovery relating to the transfer of antitrust overcharges through the indirect purchaser chain. As will be discussed in greater detail below, this required a substantial amount of work by counsel for the Auto Dealers that was not directly proportional to the settlements achieved for the Auto Dealers' benefit.

D. The Settlements Were Reached After Arms-Length Negotiation and Adversarial Proceedings.

In this group of settlements, the Auto Dealers seek final approval of settlements with 23 different Defendants and their affiliates. The Round Three settlements involve Auto Dealer claims covering 25 different parts and total more than $115 million. The Round Three settlements at issue in this motion are listed by Defendant and by part in Appendix A to this brief.

The Round Three settlements are the result of substantial litigation and negotiations by experienced counsel. Some of the Defendants involved in these settlements were at the forefront of the defense of the Auto Dealer claims and had mounted vigorous defenses. The settlements were reached through lengthy negotiations and in each case, counsel was armed with transactional data, documents produced in discovery, cooperation materials, and a strong understanding of the claims and defenses. (Raiter Decl.) A number of the settlements were only reached after mediation, sometimes involving multiple sessions, with the Court-appointed mediators. *Id.*

Attorneys' Fees and Expenses Standard of Review.

Rule 23(h) of the Federal Rules of Civil Procedure provides that "[i]n a certified class action, the court may award reasonable attorney's fees and non-taxable costs that are authorized . . . by law." District courts may award reasonable attorneys' fees and expenses from the settlement of a class action upon motion under Fed. R. Civ. P. 54(d)(2) and 23(h). The court engages in a two-part analysis when assessing the reasonableness of a petition seeking an award of attorneys' fees. *In re Cardinal Health Inc. Sec. Litig.,* 528 F. Supp. 2d 752, 760 (S.D. Ohio 2007). The court first determines the method of calculating the attorneys' fees: it applies either the percentage of the fund approach or the lodestar method. *Id.; Van Horn v. Nationwide Prop. and Cas. Inc. Co.,* 436 F. App'x 496, 498 (6th Cir. 2011). The court will then analyze and weigh the six factors described in *Ramey v. Cincinnati Enquirer, Inc.,* 508 F.2d 1188 (6th Cir. 1974).

The "percentage of the fund" fee award sought by counsel for the Auto Dealers is supported by Sixth Circuit precedent, *see Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993), and the amount sought is well within the range of fee awards made by courts in this and other Circuits. *See, e.g.*, *In re Prandin Direct Purchaser Antitrust Litig.*, No. 2:10-CV-12141-AC-DAS, 2015 WL 1396473 (E.D. Mich. Jan. 20, 2015) (awarding one-third of the fund). The court has the discretion to select the appropriate method for calculating attorneys' fees "in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them." *Rawlings*, 9 F.3d at 516. In common fund cases, the award of attorneys' fees need only "be reasonable under the circumstances." *Id.*

Argument

I. The Court Should Reimburse Class Counsel for Unreimbursed Past Expenses and Should Approve a Set Aside for Future Litigation Expenses.

Since the Court's orders regarding expenses related to the Round One and Round Two settlements, counsel for the Auto Dealers have incurred and paid expenses that were not reimbursed

through those orders and were not reimbursed from those future expense funds. Counsel for the Auto Dealers seek reimbursement for those costs. Counsel for the Auto Dealers also request that three percent of the Round Three settlements be set aside for future litigation expenses for the cases included in those settlements.

A. Reimbursement of Costs Already Incurred.

The future litigation funds previously allowed by the Court have been used to fund ongoing litigation expenses for the parts cases in the Round One and Round Two settlement groups. (Declaration of Marie Thomas; Raiter Decl.) Because some of the settlements in Round Three involve parts for which no prior settlements had been reached (and hence no future expense funds were created), counsel for the Auto Dealers have paid the expenses required to advance the litigation for the different parts / cases not involved in the Round One and Round Two settlements. *Id.* Having achieved the settlements currently before the Court, counsel for the Auto Dealers should be reimbursed the litigation expenses incurred in the settled cases for which a future expense fund was not previously established.

Unreimbursed litigation expenses incurred in the cases involved in the settlements should be awarded to counsel for the Auto Dealers. *See, e.g.*, Fed. R. Civ. P. 23(h); *In re Delphi Corp. Sec. Derivative & ERISA Litig*, 248 F.R.D. 483, 504 (E.D. Mich. 2008) ("Under the common fund doctrine, class counsel are entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and in obtaining settlement, including expenses incurred in connection with document production, consulting with experts and consultants, travel and other litigation-related expenses." (Citation and internal quotation marks omitted.)); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 535 (E.D. Mich. 2003); *B & H Med., L.L.C. v. ABP Admin., Inc.,* No. 02–73615, 2006 WL 123785, at *3 (E.D. Mich. Jan.13, 2006).

Counsel for the Auto Dealers have paid $**358,125.09** in litigation expenses in the Round Three cases for which a future expense fund was not established. (*See* Thomas Decl.; Raiter Decl.; Declarations of Don Barrett, Jonathan Cuneo, Gerard Mantese, Dewitt Lovelace, Tom Thrash, John Kakinuki, Charles Barrett, Brian Herrington, and Pierce Gore). These costs included expenses related to: (1) experts, (2) document review, gathering, hosting, and production, (3) mediator expenses, (4) domestic and international travel, and (5) other reasonable litigation expenses. *Id.* These unreimbursed expenses are properly awarded, on a *pro rata* basis, from the Round Three settlements.

B. Future Litigation Expenses.

Auto Dealers also request approval to set aside a portion of the Round Three settlement proceeds to be used for future litigation expenses in the claims remaining against the non-settling Defendants, to be used in the parts cases included in the Round Three settlements. The requested set aside is three percent of the settlements ($**3,455,423.97**), which would be deducted on a *pro rata* basis from the settlements. Money that is not used for future expenses would be distributed to eligible settlement class members. A chart that illustrates the proposed *pro rata* reduction of the past and future expenses from the settlements at issue is provided with this brief as Appendix A.

The Court has granted similar requests by the Auto Dealer, End Payors, and Direct Purchasers. Allowing a portion of the settlement funds to be used for future expenses is a well-accepted practice. *See*, *e.g., In re Packaged Ice Antitrust Litig.*, 08-MD-01952, 2011 WL 717519, at *13-14 (E.D. Mich. Feb. 22, 2011) (approving class counsel's request to use proceeds from early settlement to pay litigation expenses); *see also* MANUAL (Fourth) at § 13.21 ("[p]artial settlements may provide funds needed to pursue the litigation . . . . "); *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003) (concluding that a partial "settlement provides class plaintiffs with an immediate financial recovery that ensures funding to pursue the litigation against the non-settling

defendants"); *Newby v. Enron Corp.*, 394 F.3d 296, 302-03 (5th Cir. 2004) (affirming 37.5 percent set aside for establishment of a $15 million litigation expense fund from the proceeds of a partial settlement); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 584 F. Supp. 2d 697, 702 (M.D. Pa. 2008) (approving request to set aside to pay outstanding and future litigation costs); *In re WorldCom, Inc. Sec. Litig.*, No. 02 CIV 3288 (DLC), 2004 WL 2591402, at *22 (S.D.N.Y. Nov. 12, 2004) (creating a $5 million fund for the continuation of litigation against non-settling defendants); *In re California Micro Devices Sec. Litig.*, 965 F.Supp. 1327, 1337 (N.D. Cal. 1997) (approving 7.9 percent of approximately $19 million settlement fund for future litigation expenses).

The size and complexity of this litigation has necessitated very significant expenses, and, as the remaining cases progress to class certification, the expenses—particularly those associated with experts—will increase exponentially. In antitrust cases, experts typically create economic and damages models that describe the mechanisms and impact of the anti-competitive behavior. Given the scope and complexity of the issues in these cases, counsel for the Auto Dealers expect that the cost of this work by their experts will be millions of dollars. (Raiter Decl.)

The Auto Dealers will also incur additional costs related to ongoing discovery. These costs include the significant expense of hosting and reviewing documents and data, interviews of cooperating witnesses, travel expenses, research, and experts. (Raiter Decl.) The Auto Dealers may also need to seek class certification, issue class notice, and proceed to trial against some of the remaining Defendants. Counsel for the Auto Dealers therefore believe that the amount they are requesting be set aside for future expenses is reasonable.

III. The Court Should Award Attorneys' Fees to Counsel for the Auto Dealers.

The Round Three settlements total more than $115 million for the benefit of the Auto Dealers. Counsel for the Auto Dealers litigated these cases on a contingent basis, some for more than six years, and have spent tens of thousands of hours in the cases in which settlements have

been reached. Although the Court awarded fees from the first settlement groups, the work done by counsel for the Auto Dealers still exceeds the fees awarded. Counsel for the Auto Dealers request an interim award of attorneys' fees based on the work done to achieve the Round Three settlements, which includes work performed prior to the Auto Dealers' first settlement groups.

Fee awards for settlements are appropriate in large-scale litigation in which settlements are reached periodically. *See In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 JG VVP, 2011 WL 2909162, at *5–7 (E.D.N.Y. July 15, 2011) (interim fee award granted); *In re Sterling Foster & Company, Inc. Sec. Litig.*, 238 F. Supp. 2d 480, 484-85, 489-90 (E.D.N.Y. 2002) (interim attorneys' fees awarded). Counsel for the Auto Dealers have litigated these cases for six years and will continue to vigorously represent the interests of the dealership class members. An award of fees on these settlements is appropriate. *See In re Air Cargo Shipping Serv. Litig.* , No. 06-md-1775, 2015 WL 5918273 (E.D.N.Y. Oct. 9, 2015) (awarding fourth round of interim fees); *In re Diet Drugs Prod. Liab. Litig.*, No. 1203, 2002 WL 32154197, at *12 (E.D. Pa. Oct. 3, 2002) (awarding an interim fee after four years of litigation, noting that "to make them wait any longer for at least some award would be grossly unfair").

A. The Court Should Again Use the Percentage-of-the-Fund Approach.

The Supreme Court recognizes that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980); *see also Delphi*, 248 F.R.D. at 502. When calculating attorneys' fees under the common fund doctrine, "a reasonable fee is based on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 900 n.16, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984).

The Court has used the percentage-of-the-fund approach and counsel for the Auto Dealers request that the same method be applied to this group of settlements. Courts in this Circuit prefer

this method of awarding attorneys' fees because it eliminates disputes about the reasonableness of rates and hours, conserves judicial resources, and aligns the interests of class counsel and the class members. *See, e.g.*, *Rawlings,* 9 F.3d at 515; *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *16; *In re Delphi*, 248 F.R.D. at 502; *In re Cardinal*, 528 F. Supp. 2d at 762 (the Sixth Circuit has "explicitly approved the percentage approach in common fund cases"); *In re Skelaxin (Metaxalone) Antitrust Litig.*, No. 2:12-CV-83, 2014 WL 2946459, at *1 (E.D. Tenn. June 30, 2014) ("the lodestar method is cumbersome; the percentage-of-the-fund approach more accurately reflects the result achieved; and the percentage-of-the-fund approach has the virtue of reducing the incentive for plaintiffs' attorneys to over-litigate or 'churn' cases.") (citations omitted).

The lodestar method, on the other hand, "has been criticized for being too time-consuming of scarce judicial resources," as it requires that courts "pore over time sheets, arrive at a reasonable hourly rate, and consider numerous factors in deciding whether to award a multiplier." *Rawlings,* 9 F.3d at 516-17. *In re Cardizem Antitrust Ltig.,* 218 F.R.D. at 532 ("the lodestar method is too cumbersome and time-consuming of the resources of the Court" and "more importantly, the `percentage of the fund' approach more accurately reflects the result achieved."); *see* also *Fournier v. PFS Invs., Inc.*, 997 F.Supp. 828, 831-32 (E.D. Mich. 1998) (the percentage of recovery method "allows for a more accurate approximation of a reasonable award of fees.").

Moreover, "[w]ith the emphasis it places on the number of hours expended by counsel rather than the results obtained, it also provides incentives for overbilling and the avoidance of early settlement." *In re Cardizem Antitrust Litig.*, 218 F.R.D. at 517; *see also* Manual for Complex Litigation (Third) § 24.12 at 189 (West 1995). There is a "'trend towards adoption of a percentage-of-the-fund method in [common fund] cases.'" *In re Delphi*, 248 F.R.D. at 502 (quoting *Rawlings*, 9 F.3d at 516-517).

B. The Fee Requested by Counsel for the Auto Dealers is Appropriate.

The Court is well-versed with the complexity of this litigation; on the cases included in these settlements, counsel for the Auto Dealers worked for more than six years and dedicated more than 119,000 hours of work from attorneys, paralegals, law clerks, and other processionals.[2] Interim Co–Lead Counsel coordinated the efforts of counsel representing the Auto Dealers to maximize efficiency and to avoid duplicative efforts and unnecessary billing. (Raiter Decl.) They also monitored counsel to avoid unauthorized work and have been mindful of the Auto Dealers' role in this litigation and the potential recoveries for their clients. *Id.*

Counsel for the Auto Dealers request that the Court award fees totaling 30 percent of the settlement funds remaining after the deduction of: (1) notice and administration costs, and (2) costs set aside for future litigation expenses.[3] Reasonable fee awards generally range from 20 to 50 percent of the common fund. *In re Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig.,* 137 F.Supp.2d 1029, 1046 (S.D. Ohio 2001); *In re Cincinnati Gas & Elec. Co. Sec. Litig.,* 643 F. Supp. 148, 150 (S.D. Ohio 1986); Alba Conte & Herbert Newberg, *Newberg on Class Actions* (4th ed. 2002), §14:6 at 551 ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.").

Courts in the Sixth Circuit routinely approve attorneys' fees in antitrust class actions of one-

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[2] *See* Declarations of Jonathan Cuneo, Don Barrett, Shawn Raiter, Gerard Mantese, Dewitt Lovelace, Tom Thrash, John Kakinuki, Charles Barrett, Brian Herrington, and Pierce Gore.

[3] Although not sought here, precedent supports applying the selected percentage to the settlement fund *before* deducting the litigation costs and expenses from the funds. *See, e.g., In re Sulzer Orthopedics, Inc.,* 398 F.3d 778, 780-82 (6th Cir. 2005) (affirming fee awards from a common benefit fund based on the gross settlement amount); *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *17 ("The fee percentage is applied to the settlement fund before the separate award of litigation costs and expenses are deducted from the fund."); *In re Delphi*, 248 F.R.D. at 505 (attorneys' fees awarded on gross settlement fund); *In re Cardizem Antitrust Litig.*, 218 F.R.D. at 531–535 (awarding costs in addition to percentage of the fund fee).

third of the common fund created for the settlement class. *In re Packaged Ice Antitrust Litig.,* 2011 WL 6209188, at *19; *Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d, 521, 528 (E.D. Ky. 2010); *Bessey v. Packerland Plainwell, Inc.*, No. 4:06-CV-95, 2007 WL 3173972, at *4 (W.D. Mich. 2007); *Delphi*, 248 F.R.D. at 502-03; *In re National Century Financial Enterprises, Inc. Investment Litig.*, 2009 WL 1473975 (S.D. Ohio May 27, 2009); *New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 635 (W.D. Ky. 2006) ("[A] one-third fee from a common fund case has been found to be typical by several courts.') (citations omitted), *aff'd*, 534 F.3d 508 (6th Cir. 2008)*; Kogan v. AIMCO Fox Chase, L.P.,* 193 F.R.D. 496, 503 (E.D. Mich. 2000). For example, in *Prandin*, the court awarded one-third of a $19 million settlement fund and in *Skelaxin*, 2014 WL 2946459, at *1, the court awarded one-third of a $73 million settlement fund, finding that a "counsel fee of one-third is fair and reasonable and fully justified" and "within the range of fees ordinarily awarded." *See also In re Se. Milk Antitrust Litig.*, No. 2:07-CV 208, 2013 WL 2155387, at *8 (E.D. Tenn. May 17, 2013) (one-third fee from settlements totaling $158.6 million and finding that 33 percent "is certainly within the range of fees often awarded in common fund cases both nationwide and in the Sixth Circuit").[4]

[4] The same is true in other districts. *See Standard Iron Works v. Arcelormittal*, 2014 WL 77815572, at *1 (N.D. Ill. Oct. 22, 2014) (attorneys' fee award of one-third of $163.9 million settlement); *In re Fasteners Antitrust Litig.*, No. CIV.A. 08-MD-1912, 2014 WL 296954, at *7 (E.D. Pa. Jan. 27, 2014) ("Co-Lead Counsel's request for one third of the settlement fund is consistent with other direct purchaser antitrust actions."); *In re Titanium Dioxide Antitrust Litig.*, No. 10-CV-00318 RDB, 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) (one-third fee from $163.5 million fund); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 748-52 (E.D. Pa. 2013) (noting that "in the last two-and-a-half years, courts in eight direct purchaser antitrust actions approved one-third fees" and awarding one-third fee from $150 million fund); *Heekin v. Anthem, Inc.*, No. 1:05-CV-01908-TWP, 2012 WL 5878032 (S.D. Ind. Nov. 20, 2012) (awarding one-third fee from $90 million settlement fund); *In re Ready-Mixed Concrete Antitrust Litig.*, No. 1:05-CV-00979-SEB, 2010 WL 3282591, at *3 (S.D. Ind. Aug. 17, 2010) (approving one-third fee); *Williams v. Sprint/United Mgmt. Co.*, No. CIV. 03-2200-JWL, 2007 WL 2694029, at *6 (D. Kan. Sept. 11, 2007)(awarding fees equal to 35 percent of $57 million common fund); *Lewis v. Wal-Mart Stores, Inc.*, No. 02-CV-0944 CVE FHM, 2006 WL 3505851, at *1 (N.D. Okla. Dec. 4, 2006) (awarding one-third of the settlement fund and noting that a "one-third [fee] is relatively standard in lawsuits that settle before trial."); *In re AremisSoft Corp., Sec., Litig.*, 210 F.R.D. 109, 134 (D.N.J. 2002) ("Scores of cases exist where fees were awarded in the one-third to

Fee awards of more than one-third are also common. *See*, *e.g.*, *In re Combustion, Inc.*, 968 F. Supp. 1116, 1133, 1142 (W.D. La. 1997) (awarding fee of 36 percent and noting that "50 percent of the fund is the upper limit on a reasonable fee award from a common fund . . . . [D]istrict courts in the Fifth Circuit have awarded percentages of approximately one-third contingency fee"); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (fee of 36 percent); *Waters v. Intern. Precious Metals Corp.*, 190 F.3d 1291, 1292-94 (11th Cir. 1999); *In re Vitamins Antitrust Litig.*, 2001 WL 34312839, at *10 (D.D.C. 2001) (awarding one-third of $359 million antitrust recovery, which is "within the fifteen to forty-five percent range established in other cases."); *In re Ampicillin Antitrust Litig.*, 526 F. Supp. 494, 498 (D.D.C. 1981) (awarding fee of 45 percent).

Although the settlements benefitting the Auto Dealers are substantial, the Court should not apply a reduced fee percentage simply because the recoveries have grown. *See In re Se. Milk Antitrust Litig.*, 2013 WL 2155387 (stating that "the Court has not found any Sixth Circuit case endorsing [a reduced percentage] approach."). Numerous courts have criticized the "mega fund" approach because it may provide an incentive for counsel to settle early and for less money. *See, e.g., In re Cendant Corp. Litig.,* 264 F.3d 201, 284 n. 55 (3d Cir. 2001) ("[The megafund] position. . . has been criticized by respected courts and commentators, who contend that such a fee scale often gives counsel an incentive to settle cases too early and too cheaply.") (citation omitted); *Allapattah Services, Inc. v. Exxon Corp.,* 454 F. Supp. 2d 1185, 1213 (S.D. Fla. 2006) ("By not rewarding Class Counsel for the additional work necessary to achieve a better outcome for the class, the sliding scale approach creates the perverse incentive for Class Counsel to settle too early for too little."); *In re TFT-LCD (Flat Panel) Antitrust Litig.,* No. 07-md-01827 SI, 2013 WL 1365900, at *8 (N.D. Cal. Apr. 3, 2013) (awarding 28.6 percent of $1.082 billion settlement fund and expressly rejecting the suggestion that fees should be reduced based on the "mega fund" concept).

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one-half of the settlement fund.") (citations omitted); *Moore v. United States*, 63 Fed. CI. 781, 787 (2005) ("one-third is a typical recovery").

Many courts have awarded fees greater than 30 percent even for recoveries much larger than those made here by the Auto Dealers. *See, e.g., Allapattah,* 454 F. Supp. 2d at 1210-11 (awarding 31.5 percent of a $1.06 billion settlement fund and citing fourteen cases involving settlement funds between $40-$696 million with fee awards between 25 percent and 35 percent of the fund); *In re Cathode Ray Tube Antitrust Litig.,* No. C-07-5944-JST, 2016 U.S. Dist. LEXIS 102408, at *56 (N.D. Cal. Aug. 3, 2016) (awarding 27.5 percent of $576 million settlement fund); *In re IPO Secs. Litig.,* 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding 33-1/3 percent of a $510,253,000 settlement fund); *In re Checking Account Overdraft Litig.,* 830 F. Supp. 2d 1330, 1358 (S.D. Fla. 2011) (awarding 30 percent of $410 million settlement fund); *In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25067, at *6 (awarding 34.06 percent of $359 million settlement fund).

The 30 percent attorney fee award being sought is fair and reasonable in light of the work performed by counsel for the Auto Dealers, the results achieved, and the work undertaken. Since 2011, some of the attorneys for the Auto Dealers worked full-time on this litigation. As described earlier in this brief, counsel for the Auto Dealers have performed, and continue to perform, an enormous amount of work to achieve the settlements and to move these cases to conclusion. (Raiter Decl.)[5]

This litigation is much more complex than typical antitrust class actions. The DOJ describes its investigation of the bid-rigging and price-fixing conspiracies at issue here as the largest criminal cartel it has ever uncovered. The litigation involves at least 41 automotive component parts, many

[5] In the Round One fee approval, the Court awarded counsel for the Auto Dealers one-third of the net settlement funds. *See* Order Regarding Auto Dealers' Motion for an Attorney of Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards, No. 2:12-md-00102-MOB-MKM, ECF Doc. No. 401 (E.D. Mich. 2015). In the Round Two fee approval, the Court awarded 20 percent and reserved awarding an additional 10 percent that is being held escrow. *See* Order Regarding Auto Dealers' Motion for an Attorney of Attorneys' Fees, Reimbursement of Litigation Expenses, and a Set Aside for Future Litigation Expenses, No. 2:12-md-00102-MOB-MKM, ECF Doc. No. 188 (E.D. Mich. 2016).

hundreds of affected vehicle models, and more than 160 foreign and domestic Defendants. There are 41 separately filed Auto Dealer class cases within this MDL. The Auto Dealers asserted claims under federal and state antitrust, consumer protection, and unjust enrichment laws. As indirect purchasers, their claims for damages and restitution are based on the laws of approximately thirty states and the District of Columbia.

The Auto Dealers' position in the distribution chain made them targets of discovery for both their own claims and for the claims of the End Payors. The Auto Dealers' position as intermediate indirect purchaser creates complex liability, damage, and class certification issues. *In re Flat Panel Antitrust Litig.,* 2013 U.S. Dist. LEXIS 49885, at *70; s*ee also In re Cathode Ray Tube (CRT) Antitrust Litig.,* MDL No. 1917, 2013 U.S. Dist. LEXIS 137945, at *65 (N.D. Cal. June 20, 2013) (recommending class certification for indirect purchasers and noting that the plaintiffs "still have the burden of demonstrating that there is a reasonable method for determining on a class-wide basis whether and to what extent that overcharge was passed on to each of the indirect purchasers at all levels of the distribution chain.") (internal quotation marks omitted); *In re Cardizem Antitrust Litig.,* 218 F.R.D. at 533 (granting indirect purchaser plaintiffs' motion for final approval and for attorneys' fees and noting that plaintiffs "also faced substantial additional difficulties as indirect purchasers.").

The Auto Dealers' role here caused them to carry a disproportionate share of the discovery burden of certain aspects of the indirect purchaser claims. Although the aggregate Auto Dealer settlement recoveries are substantial, they total about one-third of the amounts recovered by the End Payors. The Auto Dealers suggest that this disparity supports consideration by the Court of group-specific analyses of the proper percentage of the recovery for fee awards. When viewed in the context of the work done by counsel for the Auto Dealers and the settlements achieved, the 30 percent fee requested in this motion is fair and reasonable.

C. Consideration of the Factors Used by the Sixth Circuit Supports the Requested Fee Award.

When using the percentage-of-the-fund approach, the Court will consider the six *Ramey* factors: (1) the value of the benefits rendered to the class; (2) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (3) whether the services were undertaken on a contingent fee basis; (4) the value of the services on an hourly basis [the lodestar cross-check]; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel on both sides. *Ramey*, 508 F.2d at 1194-97. When applied here, these factors confirm that the requested fee is fair.

1. Counsel Secured Valuable Benefits for Auto Dealers.

The result achieved for the class members is the principal consideration. *In re Delphi*, 248 F.R.D. at 503. As shown in the documents filed in support of the preliminary approval of the Round Three settlements, counsel for the Auto Dealers achieved excellent recoveries. These are cash settlements coupled with meaningful cooperation and, in many cases, injunctive relief against anti-competitive behavior. The settlement funds total more than $115 million and represent a significant recovery for Auto Dealers that sell new vehicles in the indirect purchaser states.

After the deduction of fees, notice and claims administration costs, and expenses, all of the settlement funds will be paid to eligible dealerships that file a valid claim. None of the money will revert to the settling Defendants or to a *cy pres* designee. Minimum payments of $350 will be made to eligible dealerships that file a claim for new vehicles and parts purchased in the indirect purchaser states. In addition to the money benefits, the cooperation terms of the settlements provide significant value to Auto Dealers in their prosecution of the claims against non-settling Defendants. With this third round of settlements, approximately $298 million has been recovered to benefit members of the Auto Dealer settlement classes who are eligible to receive money benefits. The

monetary recovery alone is substantial but, when coupled with the cooperation and injunctive relief, the value of these Round Three settlements is considerable.

2. Society Has An Important Stake in Rewarding Attorneys With Reasonable Fees In This Litigation.

There is a "need in making fee awards to encourage attorneys to bring class actions to vindicate public policy (e.g., the antitrust laws) as well as the specific rights of private individuals." *In re Folding Carton Antitrust Litig.*, 84 F.R.D. 245, 260 (N.D. Ill. 1979). Courts in the Sixth Circuit weigh "society's stake in rewarding attorneys who [win favorable outcomes in antitrust class actions] in order to maintain an incentive to others . . . . Society's stake in rewarding attorneys who can produce such benefits in complex litigation such as in the case at bar counsels in favor of a generous fee . . . . Society also benefits from the prosecution and settlement of private antitrust litigation." *In re Cardizem CD Anittrust Litig.*, 218 F.R.D. at 534 (internal quotation marks omitted); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 653-54 (1985); *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co.,* 481 F.2d 1045, 1050 (2d Cir.), *cert. denied*, 414 U.S. 1092 (1973); *Ramey,* 508 F.2d at 1196; *In re Delphi*, 248 F.R.D. at 504; *see also* Declaration of Arthur J. Miller, 2:12-md-02311-MOB-MKM, ECF Doc. No. 1398-1 (E.D. Mich. 2016); Declaration of Frank J. Kelley, 2:12-md-02311-MOB-MKM, ECF Doc. No. 1398-2 (E.D. Mich. 2016). Without the willingness of counsel to assume the risks inherent to these cases (or in other cases of similar magnitude and complexity) the settlement class members would not have recovered anything, let alone the substantial recoveries secured here.

The DOJ did not seek restitution from the settling Defendants. Any recovery for Auto Dealers needed to come through the effort of lawyers working on a contingent basis. The significant expenses, combined with the high degree of uncertainty of ultimate success, make contingent fees a virtual necessity for cases like these. The public interest is served by awarding

compensation in an amount appropriate to encourage skilled attorneys to assume the risks of this type of litigation.

The substantial recoveries counsel for the Auto Dealers have achieved help serve the public policy of holding those who violate antitrust laws in the United States accountable. Society benefits when those who have violated laws fostering fair competition and honest pricing are required to reimburse affected consumers in civil proceedings. *Vendo v. Lektro-Vend Corp.*, 433 U.S. 623, 635 (1977) ("Section 16 undoubtedly embodies congressional policy favoring private enforcement of the antitrust laws, and undoubtedly there exists a strong national interest in antitrust enforcement."); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 122 (2d Cir. 2005) (concluding that it is "especially important to provide appropriate incentives to attorneys pursuing antitrust actions because public policy relies on private sector enforcement of the antitrust laws.")

3. Counsel For the Auto Dealers Have Worked On A Contingent Basis.

Counsel for the Auto Dealers have and will continue to pursue this litigation on a contingent basis. The risk inherent to doing so supports a reasonable fee award from a common fund. *See In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *19 (risk of non-payment a factor supporting the requested fee). The contingency factor "stands as a proxy for the risk that attorneys will not recover compensation for the work they put into a case." *In re Cardinal Health Ins. Sec. Litig.*, 528 F. Supp. 2d at 766. Indeed, "'some courts consider the risk of non-recovery as the most important factor in fee determination.'" *Kritzer v. Safelite Solutions, LLC*, 2012 WL 1945144, at *9 (S.D. Ohio May 30, 2012) (quoting *Cardinal*, 528 F. Supp. 2d at 766). "[W]ithin the set of colorable legal claims, a higher risk of loss does argue for a higher fee." *In re Trans Union Corp. Privacy Litig.*, 629 F. 3d 741, 746 (7th Cir. 2011). "This antitrust litigation, like all litigation of its species, promises to be extremely complex and time intensive and there is no question that if settlement fails, the Defendants will mount a strong defense." *In re Packaged Ice*, 2011 WL 6209188, at *19.

The Sixth Circuit counsels that the specific characteristics of a class action case can govern the appropriateness of a fee award. *Rawlings*, 9 F.3d at 516 (finding that the district court can determine the appropriate method for calculating attorneys' fees in light of the "unique characteristics of class actions"). The legal and factual issues surrounding these cases are extremely complex. Being rewarded only for success in litigation this complex creates a high degree of risk. The substantial risk undertaken by counsel for the Auto Dealers strongly favors the fee requested. *In re Delphi*, 248 F.R.D. at 503-54.

4. The Complexity of the Litigation Supports the Requested Fee.

The Court is well-familiar that "[a]ntitrust class actions are inherently complex . . . ." *In re Cardizem Antitrust Litig.*, 218 F.R.D. at 533; *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *19; *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 639 (E.D. Pa. 2003) ("An antitrust class action is arguably the most complex action to prosecute. The legal and factual issues involved are always numerous and uncertain in outcome.") (citations and internal quotation marks omitted).

Although any antitrust action is complex, the scale of this litigation magnifies that complexity. This litigation is decidedly complex given the numerous conspiracies and parts involved, the international Defendants, and the sheer magnitude of the conduct and regulatory investigations. This factor also supports the fee requested. Defendants focused their discovery efforts on the Auto Dealers and the Court is acquainted with much of the work done by counsel for the Auto Dealers. Responding to Defendants' nearly constant fusillade of discovery required the Auto Dealers and their attorneys to devote an enormous amount of time and resources. Defendants conducted 140 depositions of non-party and class representative Auto Dealers. The calculation of the indirect purchaser damages and the preparation of the expert opinions necessary to calculate and present those damages are extremely complicated.

5. Skill and Experience of Counsel.

The skill and experience of counsel on both sides of the litigation is a factor courts consider in determining a reasonable fee award. *In Re Polyurethane Foam Antitrust Litig.*, No. 1:10 MD 2196, 2015 WL 1639269 at * 7; *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *19. The Court has found that Interim Co-Lead Counsel have the requisite skill and experience in class action and antitrust litigation to serve effectively as class counsel for the Auto Dealers.

In assessing this *Ramey* factor, courts also look to the qualifications of the defense counsel opposing the class. Defense counsel here are also extremely well-qualified and experienced antitrust and class action firms. The Court has seen first-hand the skill of the attorneys and the quality of the work done to represent their respective clients. This factor supports the fee being requested by counsel for the Auto Dealers.

6. A Lodestar Cross-check Confirms that the Requested Fee Is Reasonable.

Some courts apply a lodestar "cross-check" on the reasonableness of the fee calculated as a percentage of the fund. *In re Cardinal Health Ins. Sec. Litig.*, 528 F. Supp. 2d at 764; *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *18. A lodestar cross-check is optional, however, and the Court is not required to engage in a detailed scrutiny of time records. *In re Cardinal Health Ins. Litig.*, 528 F. Supp. 2d at 767. The cross-check does not require mathematical precision and it allows the Court to rely on summaries submitted by the attorneys and not review actual billing records. *In re Prudential Ins. Co. of America Sales Prac. Litig.*, 148 F.3d 283, 342 (3d Cir. 1998). Here, however, the time counsel for the Auto Dealers had to expend confirms that the fee requested is well "aligned with the amount of work the attorneys contributed" to the recovery, and does not constitute a "windfall." *Id.*

To calculate a reasonable fee under the lodestar method, the court determines the base amount of the fee by multiplying the number of hours counsel reasonably expended by their hourly rate. *Isabel v. City of Memphis*, 404 F.3d 404, 415 (6th Cir. 2005). In multi-district cases involving multiple cases and defendants, the courts consider requests for attorneys' fees from partial settlements by looking at all of the work done on those cases to-date. *See, e.g., In re Air Cargo Shipping Servs. Antitrust Litig.*, 2015 WL 5918273 (granting fees from settlements with multiple defendants based on an analysis of all of the work done on the cases); *In re Processed Eggs Prods. Antitrust Litig.*, No. 08-md-2002, 2012 U.S. Dist. LEXIS 160764, at *18 (E.D. Pa. Nov. 9, 2012) (granting motion for attorneys' fees from settlement with single defendant based upon all work on case to-date).

The law firms that have worked to advance the claims of the Auto Dealers have done so under the direction of Interim Co-Lead Counsel for the Auto Dealers. An enormous amount of work has been done. Discovery has been extensive and Defendants were relentless in their pursuit of discovery and motion practice directed at the Auto Dealers. Counsel for the Auto Dealers have received substantial cooperation provided by amnesty applicants and the settling Defendants and are using that information to prosecute the claims against non-settling Defendants. All the while, counsel for the Auto Dealers have been preparing to certify classes and bring any remaining cases to trial.

Counsel for the Auto Dealers have vigorously prosecuted these case but have done so efficiently and without unnecessary duplication. To calculate a lodestar for this optional cross-check, Auto Dealer attorneys and their firms provided declarations that set forth the timekeepers, customary rates, and hours worked to advance the litigation for the Auto Dealers. As shown in those declarations, counsel representing the Auto Dealers and their professional staff have worked more than 119,000 hours in the cases involved in the Round Three settlements (up to July 1, 2018). (*See* Declarations of Don Barrett, Jonathan Cuneo, Shawn Raiter, Gerard Mantese, Dewitt Lovelace,

Tom Thrash, John Kakinuki, Charles Barrett, Brian Herrington, and Pierce Gore).[6] The total lodestar is $70,237,227.70. (Raiter Decl.)

Using the cumulative hours worked for the parts cases included in the Round Three settlements recognizes that the work previously done by counsel for the Auto Dealers applied to and assisted the cases currently before the Court. This Court, and others, has concluded that it is appropriate to count the cumulative lodestar in a cross-check. *See In re Se. Milk Antitrust Litig.*, 2013 U.S. Dist. LEXIS 70167, at *26-27; *Lobatz v. U.S. West Cellular of California, Inc.*, 222 F.3d 1142 (9th Cir. 2000); *see also* 2:12-cv-00103-MOB-MKM, ECF Doc. No. 578, fn. 2 (E.D. Mich. 2017).

The Auto Dealers' lodestar is conservative because it does not include the time spent prosecuting these cases since July 1, 2018 or the time that will continue to be needed to bring the cases to a conclusion. While the hours already worked are substantial, they are reasonable and reflect the challenging nature of the litigation. Defendants are represented by extremely capable counsel who have asserted vigorous defenses. Defendants' efforts have required the Auto Dealers to expend considerable effort and skill in prosecuting these cases.

As the starting point for the lodestar cross-check, the hourly rates of Auto Dealer counsel are reasonable for attorneys with specialized experience in bringing antitrust cases. "A reasonable hourly rate is determined according to the prevailing market rates in the relevant community. To ascertain that community, district courts 'are free to look to a national market, an area of specialization market, or any other market they believe appropriate to fairly compensate particular attorneys in individual cases." *Ford v. Fed.-Mogul Corp.*, No. 2:09-cv-14448, 2015 U.S. Dist. LEXIS 3399, at *2-3 (E.D. Mich. Jan. 7, 2015) (quoting *McHugh v. Olympia Entm't, Inc.*, 37 F. App'x 730, 740 (6th Cir. 2002)). Even if counsel's "requested rates are high for this district. . . Class Counsel should

[6] Counsel have provided declarations and summaries of the time spent on this litigation. Unlike the lodestar-based fee request in *Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299 (6th Cir. 2016), the cross-check used in a percentage-of-the-fund request may be based on summaries of time spent by counsel. *Cardinal*, 528 F. Supp. 2d at 767; *In re Prudential*, 148 F.3d at 342.

be compensated at rates that reflect their skill and their success." *Schumacher v. AK Steel Corp. Ret. Accumulation Pension Plan*, 995 F. Supp. 2d 835, 847 (S.D. Ohio 2014).

The Auto Dealer counsel charging the highest hourly rates are well within the parameters of reasonableness. In national markets, "partners routinely charge between $1,200 and $1,300 an hour, with top rates at several large law firms exceeding $1,400.[7] In specialties such as "antitrust and high-stakes litigation and appeals . . . [f]or lawyers at the very top of those fields, hourly rates can hit $1,800 or even $1,950." *Id.* Some "difference makers" in the most complex fields, including antitrust litigation, even charge $2,000 an hour.[8] This Court has recognized that rates charged by End Payor and Direct Purchaser counsel in this matter, which in some cases significantly exceed those being charged by counsel for the Auto Dealers, "are well in line with the market, with recent reports explaining that senior lawyers at top law firms routinely charge well over $1,000." *See, e.g.,* 2:12-cv-00103-MOB-MKM (Doc. No. 578) at 7.[9]

The requested fee is $33,626,155, which represents 30 percent of the Round Three settlement funds after notice and administration and future litigation expenses have deducted.[10] The

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[7] *See* Sara Randazzo & Jacqueline Palank, *Legal Fees Cross New Mark: $1,500 an Hour*, The Wall Street Journal (Feb. 16, 2016), https://www.wsj.com/articles/legal-fees-reach-new-pinnacle¬1-500-an-hour-1454960708; *see also* Martha Neil, *Top partner billing rates at BigLaw firms approach $1,500 per hour*, ABA Journal (Feb. 8, 2016), http://www.abajournal.comnews/article/toppartner billing rates at biglaw firms nudge 1500 per hour.

[8] *See* Natalie Rodriguez, *Meet the $2,000 An Hour Attorney: What it Takes to Earn Top Dollar in the Rate-Crunch Era*, Law360, June 11, 2016, https://www.1aw360.com/in-depth/articles/804421 ("[E]arlier this year, BTI Consulting Group found that a handful of in-house counsel had paid as much as $2,000 per hour, after discounts, to attorneys in the past year. Several other in-house counsel, meanwhile, had paid highs of $1,900 per hour or $1,800 per hour.")

[9] The use of current rates is appropriate to compensate counsel for inflation and the delay in receipt of the funds. *Missouri v. Jenkins*, 491 U.S. 274, 282-84 (1989); *see also Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 716 (1987). This approach has been approved by the Sixth Circuit Court of Appeals and has been used in the fee awards made in this MDL. *See* 2:12-cv-00103-MOB-MKM, ECF Doc. No. 578, para. 18 (E.D. Mich. 2017).

[10] The calculation is: $112,087,184 X .30 = $33,626,155.

Court previously awarded counsel for the Auto Dealers attorneys' fees of $43,446,364 for the initial two groups of Auto Dealer settlements. Adding that award to the fees sought here results in a total award of $77,072,519. Using that fee award total, and comparing it to the total lodestar for the work done on the cases in the first two rounds of Auto Dealer settlements results in a multiplier of time spent to-date on these cases of 1.09 of the lodestar.[11]

Whether analyzed as a "cross-check" on the percentage-of-the-fund method—or under the lodestar method—the requested fee is reasonable. The requested fee represents a "multiplier" of 1.09 of the lodestar. This multiplier is reasonable and much lower than the multipliers approved in other cases. *See*, *e.g.*, *In re Cardinal Health Ins. Sec. Litig.*, 528 F. Supp. 2d at 767-68 (approving multiplier of 6, and observing that "[m]ost courts agree that the typical lodestar multiplier" on a large class action "ranges from 1.3 to 4.5"); *In re Prandin Direct Purchase Antitrust Litig.*, 2015 WL 1396473, at *4 (3.01 multiplier); see also Order Granting Interim Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Costs and Expenses, No. 2:12-cv-00601-MOB-MKM, ECF Doc. No. 128, para. 19 (awarding direct purchaser fees of 2.09 times the lodestar) (E.D. Mich. 2015); Order granting Direct Purchaser's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Costs and Expenses, No. 2:17-cv-04201-MOB-MKM, ECF Doc. No. 21 (awarding direct purchaser fees of 1.79 times the lodestar) (E.D. Mich. 2018).

Given the excellent results achieved, the complexity of the claims and defenses, the real risk of non-recovery, the formidable defense teams, the delay in receipt of payment, and the substantial experience and skill of counsel, the requested multiplier on the lodestar and the resulting fee is reasonable compensation for the work done by counsel for the Auto Dealers. With no guarantee about the extent of work required to conclude these cases or the fees that will be generated from that work, it is possible that the slightly positive multiplier on the current lodestar will be eroded.

[11] The calculation is $77,072,519 ÷ $70,237,227 = 1.09.

Conclusion

For the foregoing reasons, Interim Co-Lead Counsel for the Auto Dealers respectfully request that the Court grant their motion and award attorneys' fees, reimburse litigation expenses, and allow the creation of a future litigation fund.

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By: s/ Gerard V. Mantese
Gerard V. Mantese (P34424)
MANTESE HONIGMAN, P.C.
1361 E. Big Beaver Road
Troy, MI 48083
Telephone: (248) 457-9200 Ext. 203
Facsimile: (248) 457-9201
gmantese@manteselaw.com

Interim Liaison Counsel for the Automobile Dealer Plaintiffs

Jonathan W. Cuneo
CUNEO GILBERT & LADUCA, LLP
4725 Wisconsin Ave, NW, Suite 200
Washington, DC 20016
Telephone: (202) 789-3960
Facsimile: (202) 789-1813
jonc@cuneolaw.com

Don Barrett
BARRETT LAW GROUP, P.A.
P.O. Box 927
404 Court Square
Lexington, MS 39095
Telephone: (662) 834-2488
Facsimile: (662)834.2628
dbarrett@barrettlawgroup.com

TAB 41A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE MUNICIPAL DERIVATIVES ANTITRUST LITIGATION	)	MDL No. 1950
	)	Master Docket No. 08-02516 (VM)
THIS DOCUMENT RELATES TO:	)	
ALL ACTIONS	)	

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
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ORDER

Upon review of the pleadings submitted to this Court, IT IS HEREBY ORDERED THAT:

1. Class Plaintiffs' Counsel shall receive a total of $33,000,000 in attorneys' fees to be paid out of settlement funds created by six separate settlement agreements reached with defendants: (a) Société Générale, S.A., (b) Natixis Funding Corp., f/k/a IXIS Funding Corp., and before that, f/k/a CDC Funding Corp., (c) Piper Jaffray & Co., (d) George K. Baum & Company, (e) National Westminster Bank plc, and (f) UBS AG (the "Settlements").

2. Class Plaintiffs' Counsel shall be reimbursed $2,484,198.24 in costs and expenses reasonably incurred in the prosecution and settlement of this litigation, to be paid out of the settlement funds created by the Settlements.

3. Class Plaintiffs' current Lead Counsel (consisting of Hausfeld LLP, Boies, Schiller & Flexner LLP, and Susman Godfrey, LLP) shall have the sole authority to allocate and distribute any attorneys' fees and expenses awarded from the Settlements

awarded pursuant to this Order in a manner which, in the opinion of Lead Counsel, fairly compensates the Plaintiffs' Counsel's firms for their services.

4. An incentive award of $18,000, to be drawn equally from each of the funds created by the Settlements ($3,000 from each Settlement per Class Plaintiff), shall be paid to each of the following named Class Plaintiffs: the City of Baltimore, Maryland and the Central Bucks School District.

Dated: ~~May~~ July 8, 2016

SIGNED:

U.S. District Court Judge

TAB 41B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE MUNICIPAL DERIVATIVES ANTITRUST LITIGATION	MDL No. 1950
	Master Docket No. 08-02516 (VM)
THIS DOCUMENT RELATES TO:	
ALL ACTIONS	

CLASS PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES IN CONNECTION WITH THE SETTLEMENTS WITH REMAINING DEFENDANTS SOCIÉTÉ GÉNÉRALE NATIXIS, PIPER JAFFRAY, G.K. BAUM, NATIONAL WESTMINSTER, AND UBS

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I. INTRODUCTION

Class Plaintiffs, by their counsel, submit this memorandum of law in support of their motion for an award of attorneys' fees and reimbursement of costs and expenses upon the successful conclusion of the class action litigation in which Class Counsel has now recovered an additional $100,514,500 (the "Settlement Amount"). The fund was created from six settlements with the Remaining Defendants,[1] who take no position on this fee application. Specifically, Co-Lead Class Counsel Boies, Schiller & Flexner LLP, Hausfeld, LLP, and Susman Godfrey, LLP (collectively, "Lead Counsel") seek an award of $33 million in attorneys' fees to be paid out of the settlement funds created by six separate settlement agreements (the "Settlements", *see* ECF Nos. 1994-1 – 1994-6):

Soc Gen	$25,412,500
Natixis	$28,452,000
Piper	$9,750,000
GK Baum	$1,400,000
Nat West	$3,500,000
UBS	$32,000,000

The settlements with the Remaining Defendants, which are in addition to the $122,813,398.74 recovered for the Class in settlements already approved by the Court, bring this lengthy litigation to an end, and increase the total recovery for the Class in this hard-fought litigation to $223,327,898.74. That recovery has been the product of over 120,000 hours of work by Class Counsel, which at historical rates has produced an attorneys' fee lodestar amount

[1] These are: Société Générale, S.A. ("Soc Gen"), Natixis Funding Corp., f/k/a IXIS Funding Corp., and before that, f/k/a CDC Funding Corp. ("Natixis"), Piper Jaffray & Co. ("Piper"), George K. Baum & Company ("GK Baum"), National Westminster Bank plc ("Nat West"), and UBS AG, ("UBS").

exceeding $47 million, resulting in a low lodestar multiplier of approximately 1.37. As one would expect given the long life of this litigation, adjusting the lodestar to current rates (as the Second Circuit has approved) would substantially increase that figure—likely in excess of $60 million—and result in almost no multiplier at all.

The requested fee award of $33 million, which is less than 33% of the Settlement Amount, would bring the total fees awarded in this case to $64,228,236.17, or approximately 28.76% of the total amount recovered for the Class. The requested fee is well within the range of appropriate awards given the magnitude of relief obtained as a result of this litigation—over the life of this case, almost a quarter of a billion dollars has been obtained for the class of cities and municipalities by Class Counsel. Using lodestar as a cross-check, the requested fee is at the low-end of what courts approve as reasonable.

II. BACKGROUND

A. The Litigation and Prior Settlements

Lead Counsel began investigating the municipal derivatives industry in 2006. This litigation was commenced in March 2008, with the filing of a class action lawsuit by purchasers of municipal derivatives. This antitrust class action alleges that Defendants engaged in a scheme to rig the bids for and prices of municipal derivatives and seeks damages under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, and Section 1 of the Sherman Act, 15 U.S.C. § 1.

On August 27, 2010, Class Plaintiffs entered into a settlement agreement with Morgan Stanley (the "Morgan Stanley Settlement"). Under the terms of the Morgan Stanley Settlement, Morgan Stanley paid a total of $6,500,000—comprised of $4,950,000 in exchange for settlement of the Released Claims, as defined in the Morgan Stanley Settlement, and $1,550,000

to be used for fees and costs, including the costs of sending and administering notice of the settlement into an interest-bearing escrow account for benefit of the Settlement Class. *See* Morgan Stanley Settlement Agreement (ECF No. 1181-1) ¶ 7. Morgan Stanley also agreed to provide substantial assistance to Lead Counsel in connection with the ongoing prosecution of this exceptionally complex antitrust class action. *Id.* ¶ 18. On September 27, 2011, Lead Counsel filed a motion for an award of attorneys' fees and expenses in connection with the Morgan Stanley Settlement, requesting $65,505.83 in legal fees and $1,484,494.17 in expenses and costs. ECF No. 1591. In the accompanying memorandum of law, Lead Counsel reserved the right to ask the Court to consider the benefits to the class conferred by the Morgan Stanley settlement in any fee application made with respect to a subsequent settlement. ECF No. 1592. On October 7, 2011, this Court entered an order awarding Class Counsel $65,505.83 in fees and reimbursing $1,484,494.17 in expenses and costs. ECF No. 1597. The fee award equaled 1% of the common fund. On December 27, 2011, this Court entered an Order and Judgment approving the Morgan Stanley Settlement and settling the action against Morgan Stanley. ECF No. 1666.

On October 21, 2011, Class Plaintiffs entered into a settlement agreement with Wachovia Bank, N.A., (n/k/a Wells Fargo Bank, N.A.), and Wells Fargo & Company (collectively, "Wachovia"). Under the terms of the Wachovia Settlement, Wachovia paid $35,074,074.00, including the costs of sending and administering notice of the Settlement. *See* Wachovia Settlement Agreement (ECF No. 1640-1), at ¶ 1(ff); ECF No. 1759 (adjusting final settlement amount). Wachovia also agreed to provide substantial assistance to Lead Counsel in connection with the ongoing prosecution of this exceptionally complex antitrust class action. Wachovia Settlement Agreement ¶ 25. On November 10, 2011, Class Plaintiffs filed for preliminary approval of the Wachovia Settlement. ECF No. 1638. On February 19, 2013, the

Wachovia Settlement was finally approved by this Court. ECF No. 1759.

On April 18, 2012, Class Plaintiffs entered into a settlement agreement with JPMorgan Chase & Co., J.P. Morgan Securities, Inc. (n/k/a J.P. Morgan Securities LLC), and Bear Stearns & Co., Inc. (n/k/a J.P. Morgan Securities LLC (collectively, "JPMorgan"). Under the terms of the JPMorgan Settlement, JPMorgan paid a total of $42,660,519.83, including the costs of sending and administering notice of the Settlement and accrued interest. *See* JPMorgan Settlement Agreement (ECF No. 1692), at ¶ 1(jj); ECF No. 1745 (adjusting final settlement amount). JPMorgan also agreed to provide substantial assistance to Lead Counsel in connection with the ongoing prosecution of this exceptionally complex antitrust class action. JPMorgan Settlement Agreement ¶ 23. On May 30, 2012, Class Plaintiffs filed for preliminary approval of the JPMorgan Settlement. *See* ECF No. 1690. On June 4, 2012, the JPMorgan Settlement was finally approved by the Court. ECF No. 1745.

On July 23, 2013, Class Plaintiffs entered into a settlement agreement with GE Funding Capital Market Services, Inc., Trinity Funding Co., LLC, and Trinity Plus Funding Co, LLC (collectively, "GE). Under the terms of the GE Settlement, GE paid a total of $18,050,000.00, including the costs of sending and administering notice of the Settlement. *See* GE Settlement Agreement (ECF No. 1825-1), at ¶ 1(gg); ECF No. 1902 (adjusting final settlement amount). GE also agreed to provide substantial assistance to Lead Counsel in connection with the ongoing prosecution of this exceptionally complex antitrust class action. GE Settlement Agreement ¶ 21. On December 6, 2013, Class Plaintiffs filed for preliminary approval of the GE Settlement. ECF No. 1823. On June 6, 2014, the GE Settlement was finally approved by the Court. ECF No. 1902.

On October 18, 2013, Class Plaintiffs entered into a settlement agreement with Bank of

America, N.A. ("BoA"). Under the terms of the BoA Settlement, BoA paid a total of $20,528.804.81, including the costs of sending and administering notice of the Settlement. *See* BoA Settlement Agreement (ECF No. 1823-1), at ¶ 1(gg); ECF No. 1901 (adjusting final settlement amount). BoA also agreed to provide substantial assistance to Lead Counsel in connection with the ongoing prosecution of this exceptionally complex antitrust class action. *Id*. ¶ 21. On December 4, 2013, Class Plaintiffs filed for preliminary approval of the BoA Settlement. ECF No. 1819. On June 6, 2014, the BoA Settlement was finally approved by the Court. ECF No. 1901.

B. The Settlement Agreements with Remaining Defendants

The terms of the Settlement Agreements with the Remaining Defendants were negotiated through extensive meetings and discussions over the course of several months, both directly with defense counsel and also with the assistance of the Honorable Layn Phillips, an experienced mediator. *See* Declaration of Megan Jones in Support of Motion for Preliminary Approval of Settlements with Soc Gen, Natixis, Piper, GK Baum, Nat West, and UBS, (ECF No. 1994) ("Jones Decl."), ¶ 4. During this period of time, there were numerous in-person meetings, telephone calls and email exchanges regarding the settlement terms, including mediation sessions and written briefing with Judge Phillips for UBS, SocGen, Natixis and Piper. *See id*. Lead Counsel analyzed the contested legal and factual issues posed by this litigation, including detailed assessments of the Remaining Defendants' defenses, in order to make well-supported settlement demands. *See id.; see also* Declaration of William Isaacson.

Pursuant to the Settlement Agreements with the Remaining Defendants that were preliminarily approved by this Court (ECF No. 1996), UBS has agreed to pay $32 million; Natixis has agreed to pay $28,452,500; Soc Gen has agreed to pay $25,412,500; Piper has

agreed to pay $9,750,000; NatWest has agreed to pay $3,500,000; and GK Baum has agreed to pay $1,400,000. Five of the Remaining Defendants have also agreed to provide reasonable cooperation, including discovery cooperation, to Lead Counsel—which would be needed if any of these Settlements are not approved or otherwise implemented. In total, the Settlements bring over $100 million in new money for the benefit of the Class.

The proposed settlements, following settlements with Morgan Stanley, JPMorgan, Wachovia, BoA, and GE, offer a path for the final resolution of this hard-fought litigation over a seven-year period. All told, if these Settlements are approved, the class settlements will have secured nearly $225 million for the benefit of the class.

C. Preliminary Approval, Notice, and Claims for Fees and Expenses

The Settlement Agreements provide that Lead Counsel will request the Court to approve any application for attorneys' fees and expenses. *See* ECF Nos. 1994-1 ¶ 24, 1994-2 ¶ 23, 1994-3 ¶ 23, 1994-4 ¶ 21, 1994-5 ¶ 20, and 1994-6 ¶ 23. On February 25, 2016, the Court entered an order conditionally certifying a settlement class and preliminarily approving the settlement with the Remaining Defendants. ECF No. 1996. The Court approved the proposed notice to class members with respect to Remaining Defendants and set a final approval hearing for the settlements on July 8, 2016. ECF No. 2004.

The Court-approved class notice form, distributed to the Class and available on the Municipal Derivatives website, has informed the Class that:

> You are not personally responsible for payment of attorneys' fees or expenses for Class Counsel. Instead, as compensation for their time and the risk in litigating the case on a contingent basis, Class Counsel will ask the Court to approve from the Settlement Amount an interim payment of attorneys' fees, as well as an interim reimbursement for their expenses actually incurred in the prosecution of the litigation. Class Counsel will make a request for fees (**equaling up to 1/3 of the total Settlement Amounts**) and expenses at or before the date for objections on June 20, 2016 (see Question 24), and this request will be made available at the

> Municipal Derivatives Settlement website. Now or at some point in the future, Class Counsel may also ask the Court to approve compensation for the work of the Class Representatives as well, for up to $20,000 each for each settlement.[2]

Lead Counsel's request is in accord with the notice given the class, as it seeks an award of less than one-third of the settlement amounts from by the Remaining Defendants.

To date, no class member has objected to the proposed amount of the fees and costs for Class Counsel. If any such objection is received by the deadline for such objections, Lead Counsel will promptly notify the Court.

III. ARGUMENT

A. The Court May Award Attorneys' Fees and Expenses under the Common Fund Doctrine

In *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980), the Supreme Court recognized that "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *See also Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). Having achieved excellent settlements with all solvent defendants in this case, Lead Counsel respectfully submit that the requested $33 million, which would produce a total fee award of approximately 28.76% of the total amount recovered for the Class, is reasonable and consistent with what is regularly approved in this District.

The courts traditionally have used two methods to evaluate the reasonableness of fee requests in common fund cases: (1) the percentage method, which awards attorneys' fees as a percentage of the benefit created for the class; and (2) the lodestar multiplier approach, which involves multiplying the number of hours expended by counsel by the hourly rate normally

[2] https://municipalderivativessettlement.com/Portals/0/Documents/5067_MUND-2_WEB_Cover%20Ltr-Distrib%20Plan-CFW_v1.pdf Notice Form, Question No. 21 (emphasis added).

charged for similar work by attorneys of comparable skill and experience and then enhancing the resulting lodestar figure by an appropriate multiplier to reflect litigation risk, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other well-recognized factors. *Savoie v. Merchs. Bank*, 166 F.3d 456, 460 (2d Cir. 1999). The Second Circuit has held that district courts may use either the percentage method or the lodestar method, although the trend is toward the percentage method. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005); *see also In re Bisys Sec. Litig.*, No. 04 Civ. 3840 (JSR), 2007 WL 2049726, at *2 (S.D.N.Y. July 16, 2007).[3] Even when not used as the primary means to determine an appropriate fee, "[t]he lodestar method remains highly useful… as a 'cross-check' to further ensure reasonableness." *Id*.; *see also Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000).

Regardless of whether a court applies the percentage method or the lodestar method, its ultimate task is to ensure that the fees awarded are "reasonable" under the circumstances. *Id.* at 47. The determination of "reasonableness" is within the Court's discretion. *Id.*; *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005). The Second Circuit has instructed that, in the exercise of such discretion:

> [D]istrict courts should continue to be guided by the traditional criteria in determining a reasonable common fund fee, including: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations."

Goldberger, 209 F.3d at 50 (citation omitted).

[3] "[T]he percentage approach most closely approximates the manner in which private litigants compensate their attorneys in the marketplace contingency fee model." *In re Lloyd's Am. Trust Fund Litig.*, No. 96- cv- Civ. 1262 (RWS), 2002 WL 31663577, at *26 (S.D.N.Y. Nov. 26, 2002).

Moreover, the Second Circuit has recognized that "market rates, where available, are the ideal proxy for [Plaintiffs' Counsel's] compensation." *Id.* at 52. Thus, the Court should "approximate the reasonable fee that a competitive market would bear." *Johnson v. City of New York*, No. 08-cv-3673 (KAM)(LB), 2010 WL 5818290, at *4 (E.D.N.Y. Dec. 13, 2010) (citing *McDaniel v. County of Schenectady*, 595 F.3d 411, 420 (2d Cir. 2010)); *see also id.* at 422 (district court's focus should be "on mimicking a market").

Lead Counsel submit that the requested award of fees and expenses is reasonable under the percentage method, and when viewed in light of the *Goldberger* factors.

B. Under a Percentage of the Fund Approach, the Requested Fees are Fair and Reasonable

Class Plaintiffs' request for $33 million in attorneys' fees is less than 33% of the Settlement Amount and would produce a total fee award for the life of the case of approximately 28.76% of the total recovery for the Class in this case. Courts in this District routinely award attorneys' fees amounting to one-third of the common fund created. *See, e.g., Anwar v. Fairfield Greenwich Ltd.,* Master File No. 09-cv-118 (VM), 2012 WL 1981505 *3 (S.D.N.Y. Jun 1, 2012) (Marrero, J.) (fee request representing 33% of the settlement fund "is well within the percentage range that courts within the Second Circuit have awarded in other complex litigations"); *In re Marsh ERISA Litig*., 265 F.R.D. 128, 135 (S.D.N.Y. 2010) (one-third of $35 million); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding 33.3% fee of $510 million net settlement recovery); *Maley v. Del Global Tech. Corp.,* 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) (awarding one-third of settlement fund); *Newman v. Caribiner Int'l Inc.*, No. 99 Civ. 2271 (S.D.N.Y. Oct. 19, 2001) (same); *Lemmer v. Golden Books Family Entm't Inc.*, No. 98 Civ. 5748 (S.D.N.Y. Oct. 12, 1999) (same); *Maywalt v. Parker & Parsley Petroleum Co.*, 963 F. Supp. 310, 313 (S.D.N.Y. 1997), *aff'd sub nom., Olick*

v. Parker & Parsley Petroleum Co., 145 F.3d 513 (2d Cir. 1998); *In re Allstar Inns Sec. Litig.*, No. Civ. A. 88CIV 9282, 1991 WL 352491 (S.D.N.Y. Nov. 20, 1991) (35%); *Baron v. Commercial & Indus. Bank of Memphis*, No. 75 Civ. 1274, 1979 U.S. Dist. LEXIS 9380, at *18 (S.D.N.Y. Oct. 3, 1979) (36%). This award is particularly warranted here given the excellent result obtained, and the risks incurred by Class Counsel over nearly a decade of work.

C. The Request Is Reasonable Under the Lodestar "Crosscheck"

A cross-check of the lodestar reported to Lead Counsel confirms the reasonableness of Lead Counsel's percentage request. The lodestar comprises the number of hours devoted by counsel multiplied by the current, non-contingent hourly billing rate of counsel. *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 190 (2d Cir. 2008); *see also In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 985 F. Supp. 410, 414 (S.D.N.Y. 1997). Courts then adjust that lodestar figure (typically by applying a multiplier) to reflect such factors as the risk and contingent nature of the litigation, the results obtained, and the quality of the attorneys' work. *See*, *e.g.*, *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167-69 (3d Cir. 1973). "Where the lodestar fee is used as 'a mere cross-check' to the percentage method of determining reasonable attorneys' fees, 'the hours documented by counsel need not be exhaustively scrutinized by the district court.'" *WorldCom*, 388 F. Supp. 2d at 355 (quoting *Goldberger*, 209 F.3d at 50).

However, since *Goldberger*, courts in this Circuit have recognized the preferability of the percentage of the fund approach. *See, e.g., In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 520 (E.D.N.Y. 2003) *aff'd sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005) (Gleeson, J.) (the percentage of the fund approach "spares the court

and the parties the 'cumbersome, enervating, and often surrealistic process' of lodestar computation" (quoting *Goldberger*, 209 F.3d at 50)).

Over nearly a decade of work on this case, Class Counsel reported and recorded over 120,000 hours of work, representing a lodestar—calculated at **historical** rates—exceeding $47 million.[4] *See* Isaacson Decl. ¶¶ 11-12. Moreover, because Class Counsel's lodestar was calculated at historic rates, it represents a significant discount compared to lodestar calculated at present rates. If calculated at present rates, as controlling precedent favors,[5] that figure would be significantly higher, likely in excess of $60 million, resulting in little or no lodestar multiplier. *Id*. (noting that certain firms' lodestar would rise as much as 24 to 32% if measured at current rates).[6]

"Courts regularly award lodestar multipliers from 2 to 6 times lodestar" in this Circuit, and thus regularly award lodestar multipliers significantly greater than that sought here. *See, e.g., Morris v. Affinity Health Plan, Inc*. 859 F.Supp.2d 611, 623-24 (S.D.N.Y. 2012) (awarding

[4] The contemporaneous records of Class Counsel's time are voluminous, but can be made available to the Court upon request.

[5] "The rates used by the court should be current rather than historic hourly rates." *Reiter v. MTA N.Y.C. Transit Auth.*, 457 F.3d 224, 232 (2d Cir. 2006) (internal quotation marks and citation omitted). *See also, e.g., LeBlanc-Sternberg v. Fletcher*, 143 F. 3d 748 764 (2d Cir. 1998) ("[C]urrent rates, rather than historical rates, should be applied in order to compensate for the delay in payment").

[6] The fact that many who have worked on this case over its long life have changed firms or that, in some cases, firms have closed or merged would complicate the task of accurately computing a lodestar at current rates. To provide a rough yardstick, Lead Counsel have done some limited sampling to estimate the effect of using current, rather than historical, rates for lawyers and firms involved throughout the life of the case. As a result of that analysis, we have determined that the lodestar attributable to the work of Bill Isaacson, of the Boies Schiller firm, would increase approximately 32% if calculated using current rates. The Susman Godfrey firm calculates that its collective lodestar would increase approximately 24% if calculated using current rates. Isaacson Decl. ¶ 11. By this yardstick, for example, a 28% increase would translate to a $60,160,000 lodestar.

lodestar that was "3.04 times their own lodestar, and 2.01 times the total of their lodestar and Plaintiff's Counsel's lodestar combined"); *see also In re EVCI Career Colleges Holding Corp. Sec. Litig.,* Case No. 05 Civ. 10240 (CM), 2007 WL 2230177, at *17 n.7 (S.D.N.Y. July 27, 2007) ("Lodestar multipliers of nearly 5 have been deemed 'common' by courts in this District."); *Maley*, 186 F. Supp. 2d at 369 (awarding fee equal to a 4.65 multiplier as "well within the range awarded by courts in this Circuit and courts throughout the country").

D. The Request Is Reasonable under the *Goldberger* Criteria

As noted above, the Second Circuit has stated that whether the Court uses the percentage method or the lodestar approach, it should consider the following traditional criteria: (1) the time and labor expended by counsel; (2) the risks of the litigation; (3) the magnitude and complexity of the litigation; (4) the requested fee in relation to the settlement; (5) the quality of representation; and (6) public policy considerations. *Goldberger*, 209 F.3d at 50. "In applying these criteria, a Court essentially makes … a qualitative assessment of a fair legal fee under all the circumstances of the case." *Marsh & McLennan*, 2009 WL 5178546, at *15 (citation and internal quotation omitted). An analysis of these factors further demonstrates that Lead Counsel's fee request is reasonable.

1. The Time and Labor Expended by Class Counsel in this Case Support the Fee and Expense Award Requested

The 120,000 hours expended and reported to Lead Counsel, which resulted in substantial Settlements, are plainly reasonable in view of the work performed in this complex antitrust action. *See* Isaacson Decl. ¶ 12. Class Counsel's efforts included, among other things:

- Researching, compiling evidence for, and filing the Consolidated Class Action Complaint and SCAC, which survived Defendants' motion to dismiss.
- Contacting all 20 individuals indicted in connection with the DOJ's prosecution of the municipal derivative industry, as well as other confidential government witnesses.

- Negotiating and obtaining the production of discovery from multiple defendants, resulting in more than 85 separate productions of evidence to Class Plaintiffs.

- Reviewing millions of documents produced by Defendants and conducting 30(b)(6) depositions of several Defendants.

- Organizing and funding a review team to listen, code, summarize, and cross-reference hundreds of thousands of audio files produced by Defendants, including 53,540 audio files produced by Wachovia and more than 200,000 audio files produced by JPMorgan.

- Obtaining witness interviews from many indicted individuals, and taking several of their depositions, including working with star government witness, Douglas Goldberg, to provide a 45 paragraph sworn affidavit detailing Defendants' role in the conspiracy, which was filed with the Court (ECF No. 1960-3).

- Working with industry and economic consultants and experts, including in support of a motion for class certification (which was being prepared at the time the settlements were reached).

- Conducting numerous in-person meetings, telephone call and email exchanges with experienced counsel on both sides regarding the settlement terms over the course of several months.

- Undertaking many steps to ensure that they had all necessary information to advocate for a fair settlement that serves the best interests of the Settlement Class.

- Analyzing all of the contested legal and factual issues posed by the litigation in order to make accurate demands and evaluations of the settling Defendants' positions.

- Engaging in extended arm's-length negotiations, often with the participation of a well-respected former federal judge serving as mediator that led to these settlement agreements.

- Preparing multiple written mediation submissions for each defendant with whom the Class mediated.

- Responding to inquiries from class members and potential class members regarding class settlement and issues and the status of the litigation.

See Isaacson Decl. ¶¶ 5-6 (detailing the work completed by Class Counsel).

The significant time and effort devoted to this case by Lead Counsel, and their commitment to the efficient management of the litigation, support approval of the requested

award.

2. The Risk of the Litigation Supports the Fee and Expense Award Requested

An evaluation of the risks undertaken by Lead Counsel in prosecuting this action also supports the reasonableness of their fee request. "Contingency risk is the principal, though not exclusive, factor courts should consider in their determination of attorneys' fees." *In re Dreyfus Aggressive Growth Mut. Fund Litig.*, No. 98 CV 4318 HB, 2001 WL 709262, at *6 (S.D.NY. June 22, 2001). "It is well-established that litigation risk must be measured as of when the case is filed," not when the fee application is adjudicated. *Goldberger*, 209 F.3d at 55.

The Second Circuit has recognized that "despite the most vigorous and competent of efforts, success is never guaranteed." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974). Moreover, in antitrust class actions in particular, "[t]he risks of establishing liability and damages at trial, and of maintaining the Class throughout the trial . . . militate in favor of approval [of settlement]." *In re Visa Check*, 297 F. Supp. 2d at 511. "In numerous class actions . . . plaintiffs' counsel have expended thousands of hours and advanced significant out-of-pocket expenses and received no remuneration whatsoever." *Marsh & McLennan*, 2009 WL 5178546, at *18 (citing examples of cases dismissed); *see also In re NASDAQ Market-Makers Antitrust Litigation*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998) ("[T]he history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal.").

This case presented risks and uncertainties beyond those typically encountered, which made it uncertain that any recovery, let alone the settlements eventually obtained, would be achieved. For example, Defendants twice moved to dismiss the complaint, achieving limited success the first time. In their second motion to dismiss, Defendants argued that Class Plaintiffs'

claims were time-barred, were inadequately pleaded under *Twombly* standards, and were preempted by IRS regulations under the *Credit Suisse* preemption doctrine. ECF No. 485.

While Class Plaintiffs' case on the merits was strong by the time settlements were reached during 2015 and 2016—due in significant part to Class Counsels' diligent efforts—the relevant date for measuring risk is the date when Class Counsel began. *Goldberger*, 209 F.3d at 55. In 2008, there were no criminal indictments, no criminal convictions and no public trials revealing the results of the government's years of research into these matters.

It is also important that Class Counsel undertook this case on a wholly contingent fee basis, knowing the litigation could last for many years and would (and did) require the expenditure of hundreds of thousands of attorney hours and millions of dollars in expenses, with no guarantee of compensation. *See* Isaacson Decl. ¶ 3. While Class Counsel committed significant resources and funds to the vigorous prosecution of this litigation, Class Counsel has not received any compensation since 2014. "Numerous courts have recognized that the attorney's contingent fee risk is an important factor in determining the fee award." *Prudential*, 985 F. Supp. at 417. This request is inherently reasonable when considered in light of the risks undertaken.

3. The Magnitude and Complexity of the Litigation Supports the Fee and Expense Award Requested

The requested fee award is also reasonable in light of the magnitude and complexity of the litigation. Antitrust price-fixing conspiracy cases are notoriously complex and vigorously contested. *See, e.g., Wal-Mart,* 396 F.3d at 122 (acknowledging the district court's finding that "antitrust cases, by their nature, are highly complex."); *In re Currency Conversion Fee Antitrust Litig.,* 263 F.R.D. 110, 129 (S.D.N.Y. 2009) *aff'd sub nom. Priceline.com, Inc.* v. *Silberman,* 405 F. App'x 532 (2d Cir. 2010) (noting that "antitrust cases are typically complex"); *Weseley,*

711 F. Supp. at 719 (antitrust class actions "are notoriously complex, protracted, and bitterly fought").

This case is no exception. The Third Amended Complaint alleges a bid rigging scheme against sixteen defendants within the municipal derivatives market. Defendants are alleged to have conspired to fix, maintain or stabilize the price of, and to rig bids and allocate customers and markets for, municipal derivatives. The scope of the litigation is illustrated not only by the scope of the pleaded conspiracy, but also by the magnitude of discovery. Defendants produced millions of documents and hundreds of thousands of taped conversations, which required Class Counsel to assemble a squadron of attorneys to review and code.

4. The Settlements Support the Requested Fee Award and Expense Reimbursement

In *Dupler v. Costco*, the court held that "the fact that the requested fee is comparable to fees that courts have found reasonable . . . weighs in favor of the fee's reasonableness." 705 F. Supp. 2d 244 (E.D.N.Y. 2010). As discussed above, the proposed award represents less than one-third of the value of the most recent Settlements, an amount well within the range of fees awarded by courts in this Circuit in similarly-sized class actions.

5. The Quality of the Representation Supports the Fee and Expense Award Requested

The quality of the representation and the standing of Lead Counsel also support the reasonableness of the requested fee. "[P]rosecution and management of a complex national class action requires unique legal skills and abilities." *Edmonds v. United States*, 658 F. Supp. 1126, 1137 (D.S.C. 1987). The Court previously found that Lead Counsel have the requisite qualifications and experience to lead this litigation on behalf the proposed Settlement Class. ECF No. 183.

The high quality of the opposition that Class Counsel faced is a further testament to the quality of Class Counsel's representation. The Remaining Defendants were represented by skilled and highly regarded counsel from prestigious firms with well-deserved reputations for vigorous advocacy in the defense of complex civil cases. Courts have repeatedly recognized that the caliber of the opposition faced by plaintiffs' counsel should be taken into consideration in assessing the quality of the plaintiffs' counsel's performance, and in this case it supports approval of the requested fee. *See*, *e.g.*, *Anwar*, 2012 WL 1981505 at *2 (considering "the quality and vigor of opposing counsel"); *Marsh & McLennan*, 2009 WL 5178546 at *19 (reasonableness of fee was supported by fact that defendants "were represented by first-rate attorneys who vigorously contested Lead Plaintiffs' claims and allegations"); *Marsh ERISA Litig.*, 265 F.R.D. at 148 ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement.").

Lead Counsel also worked cooperatively with the negotiating group of 22 State Attorneys General and achieved two joint settlements on behalf of the Class. This coordinated 22-state and private class settlement was a direct result of Lead Counsel's ability to fashion a creative solution that best served the interests of the Class.

6. Public Policy Considerations Support the Fee and Expense Award Requested

The Supreme Court has long recognized that private actions are an essential supplement to governmental actions to enforce the antitrust law. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) ("private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations"). In furtherance of this important public policy, courts should award fees sufficient to encourage plaintiffs' counsel to bring antitrust class actions that supplement the efforts of the government

regulators. *See, Anwar*, 2012 WL 1981505 at *3 ("Attorneys who take on class action matters on a contingent fee basis, enabling litigants to pool their claims, provide a service to the judicial process."); *Wal-Mart Stores,* 396 F.3d at 122 ("[I]t is especially important to provide appropriate incentives to attorneys pursuing antitrust actions because public policy relies on private sector enforcement of the antitrust laws."); *WorldCom*, 388 F. Supp. 2d at 359 ("In order to attract well-qualified plaintiff's counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives."). Approval of the requested fees and expenses would advance and be fully consistent with these important public policy considerations.

Lead Counsel's requested fees are thus reasonable and should be awarded.

E. Class Counsel's Expenses Should Be Reimbursed

Class Plaintiffs' Counsel also request reimbursement of all unreimbursed litigation costs and expenses incurred during this litigation, which currently total $2,484,198.24. *See* Isaacson Decl. ¶ 4.

The expenses incurred in this litigation are described in the Declaration filed in support of this application. *See* Isaacson Decl. They are the type of expenses typically billed by attorneys to paying clients in the marketplace and include such costs as fees paid to experts, notice costs, computer research, document processing and travel in connection with this litigation. *Anwar*, 2012 WL1981505 at *3 (reimbursing expenses such as "mediation fees, expert witness fees, electronic legal research, photocopying, postage, and travel expenses, each of which is the type 'the paying, arms' length market' reimburses attorneys." (quoting *In re Global Crossing Sec. & ERISA Litig.*,225 F.R.D. 436, 468 (S.D.N.Y.2004)). The fact that Class Counsel were willing to expend their own money, where reimbursement was entirely contingent

on the success of this litigation, evidences that the expenditures were reasonable and necessary. *See* Isaacson Decl. ¶ 3.

"Courts routinely note that counsel is entitled to reimbursement from the common fund for reasonable litigation expenses." *Anwar*, 2012 WL1981505 at *3 (citing *Reichman v. Bonsignore, Brignati & Mazzotta, P.C.*, 818 F.2d 278, 283 (2d Cir. 1987)); *see, e.g.*, *In re Visa Check*, 297 F. Supp. 2d at 525 (noting that it is common practice to grant expense request and awarding $18.7 million in expenses where the "lion's share of these expenses reflects the cost of experts and consultants, litigation and trial support services, document imaging and copying, deposition costs, on-line legal research, and travel expenses."); *In re Arakis Energy Corp. Sec. Litig.,* No.95cv3431 (ARR), 2001 WL 1590512, at *17 n.12 (E.D.N.Y. Oct. 31, 2001) ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course."); *In re Vitamins Antitrust Litig.*, No. 99-197, MDL No. 1285, 2001 U.S. Dist. LEXIS 25067, at *69 (D.D.C. July16, 2001) ("[A]n attorney who has created a common fund for the benefit of the class is entitled to reimbursement of reasonable litigation expenses from that fund. Courts have routinely awarded expenses for which counsel would normally directly bill their clients."). These expenses should be reimbursed here.

F. Lead Counsel Should Be Given Authority to Distribute Attorney's Fees

Lead Counsel also request that the Court authorize them to distribute and allocate any attorneys' fees and expenses awarded from the settlements in a manner which, in the opinion of Lead Counsel, fairly compensates the Class Plaintiffs' counsel's firms for their services, as described in the Isaacson Declaration. *See, e.g., In re Adelphia Comm 'n Corp. Sec. and Derivative Litig.,* No. 03 MDL 1529 (LMM), 2008 WL4128702, at *1-3 (S.D.N.Y. Sept. 3, 2008) (lead counsel allocating fees in the first instance); *In re Vitamins Antitrust Litig.,* 398 F.

Supp. 2d 209, 224 (D.D.C. 2005) (discussing co-lead counsel allocation in the first instance and citing cases). The Court previously granted Lead Counsel authority to distribute fees in connection with the previous settlements. ECF Nos. 1724, 1903. To the extent that there are any disputes that cannot be resolved, the Court has the authority to resolve them.

G. The Named Plaintiffs Should Be Granted Reasonable Incentive Awards

Request is also made for payment out of the settlement funds of incentive compensation awards for the two named plaintiffs in the amount of $18,000 for each of the two class plaintiffs, drawn equally from each fund. *See* Proposed Order. For years, these municipal plaintiffs have been hands-on class representatives and have contributed their time for the benefit of the Class. Unlike the other class members, the City of Baltimore and Central Bucks School District consulted regularly with Lead Counsel concerning the status of the case, the content of the pleadings, and the progress of settlement negotiations. *See* Isaacson Decl. ¶¶ 7-10. They have also collected and produced tens of thousands of documents in response to document requests from Defendants, at significant time and expense. *Id*. The Notice to the Class advised Class members that Class Counsel would apply for such incentive awards. *See* ECF No. 1697-2 Question 21; ECF No. 1705-2 Question 21 ("Now or in the future, Class Counsel may also ask the Court to approve compensation for the work of the Class Representatives as well, for $20,000 each."). To date, no class member has objected to an incentive award being awarded to the named plaintiffs.

"Courts consistently approve awards in class action lawsuits to compensate named plaintiffs for the services they provide and burdens they endure during litigation," and it should do so here. *Anwar*, 2012 WL 1981505 at *3 (awarding $25,000 to class representative); *see also Currency Conversion,* 263 F.R.D. at 131 (awarding $350,000 incentive awards to the

named representatives in class action antitrust lawsuit, ranging from $3,000 to $45,000 per representative); *In re Remeron End-Payor Antitrust Litig.*, No. Civ. 02-2007 FSH, Civ. 04-5126 FSH, 2005 WL 2230314, *15 (D. N.J. Sept. 13, 2005) (granting incentive awards of $30,000 each to two plaintiffs); *In re Linerboard Antitrust Litig.*, No. MDL 1261, Civ. A. 98-5055, Civ A. 99-1000, Civ. A. 99-1341, 2004 WL 1221350, *18 (E.D. Pa. June 2, 2004) (approving $25,000 to each representative of the classes); *Duchene v. Michael Cetta, Inc.,* No. 06 Civ. 4576 (PAC)(GWG), 2009 WL 5841175 *9 (S.D.N.Y. Sept. 10, 2009) (award of $25,000); (award of $25,000); *Dornberger v. Metro. Life Ins. Co*., 203 F.R.D. 118 (S.D.N.Y.2001) (noting case law supports payments of between $2,500 and $85,000 to representative plaintiffs in class actions); *Yap v. Sumitomo Corp. of America*, No. 88 Civ. 700 (LBS), 1991 WL29112, *9 (S.D.N.Y. Feb.22, 1991) ($30,000 incentive awards to the named plaintiffs).

IV. CONCLUSION

For the reasons set forth herein, Lead Counsel respectfully requests that this Court award its requested fees in the amount of $33,000,000, expenses in the amount of $2,484,198.24, and incentive awards in the amounts proposed.

Dated: May 6, 2016

Respectfully submitted,

/s/ Scott E. Gant

William C. Carmody
Seth D. Ard
SUSMAN GODFREY L.L.P.
560 Lexington Avenue, 15th Floor
New York, NY 10022
Telephone: (212) 336-8330
Facsimile: (212) 336-8340

Marc M. Seltzer
SUSMAN GODFREY, L.L.P.
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067-6029
Telephone: (310) 789-3100
Facsimile: (310) 789-3150

Michael D. Hausfeld
Megan E. Jones
HAUSFELD LLP
1700 K Street
NW Washington, DC 20006
Telephone: (202) 540-7200
Facsimile: (202) 540-7201

William A. Isaacson
Jonathan M. Shaw
Scott E. Gant
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Ave, NW
Washington, DC 20015
Telephone: (202) 237-2727
Facsimile: (202) 237-6131

Plaintiffs' Co-Lead Interim Class Counsel

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2016, I caused a true and correct copy of the foregoing instrument to be served via the Electronic Case Filing (ECF) system in the United States District Court for the Southern District of New York, on all parties registered for CM/ECF in the above captioned matter.

/s/ Scott E. Gant
Scott E. Gant

TAB 42A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION

This Document Relates to:

ALL ACTIONS EXCEPT

Jenkins v. Nat'l Collegiate Athletic Ass'n
Case No. 4:14-cv-02758-CW

No. 4:14-md-2541-CW

ORDER GRANTING PLAINTIFFS' AND CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES, EXPENSES AND SERVICE AWARDS

DATE: November 17, 2017
TIME: 9:00 a.m.
DEPT: Courtroom 2, 4th Floor
JUDGE: Hon. Claudia Wilken

COMPLAINT FILED: March 5, 2014

I. BACKGROUND

Plaintiffs seek final approval of a settlement that provides for payment of approximately 50% of the classes' single damages claims after fees and expenses are deducted. The settlement agreement is the result of extensive litigation and arm's-length negotiations between the parties. Defendants agree to pay $208,664,445.00, which (after deduction of fees and expenses) will be disbursed to student-athletes who attended Division I schools that plaintiffs' evidence shows would have awarded the full cost of attendance at those schools ("COA"), but for the NCAA bylaw in effect until January 1, 2015, that capped the maximum grant-in-aid ("GIA") at less than COA. The average recovery for a class member who played his or her sport for four years would be approximately $6,000.[1] After final approval of the proposed settlement, each impacted class member with calculated damages will be mailed a check, with no claim form required and no right of any reversion of funds to defendants.

Plaintiffs' counsel, who have litigated numerous antitrust and other matters against the NCAA over the years, believe this is an exceptional result for the proposed class. As this Court knows, antitrust matters against the NCAA involve unique arguments and have had narrow historical success. And the NCAA has been willing to devote significant resources to vigorously defending them, including on appeal. Thus, not only is the monetary size of the settlement a major benefit to the class, the likelihood of near-term payout is also significant.

Finally, the settlement does not release or bar in any way the class claims for prospective injunctive relief from going forward—and plaintiffs will continue to vigorously pursue them.

Plaintiffs and Class Counsel request: (1) an award of attorneys' fees in the amount of $41,732,889, which is exactly 20% of the $208,664,445 million settlement fund; (2) reimbursement of $3,184,274.38 in expenses and costs plaintiffs' counsel have advanced to date on behalf of the class; and (3) service awards of $20,000 each for the four class representatives.

[1] Since the settlement was reached, many additional schools began paying or stated an intent to pay COA. Eligible class members from these additional COA-paying schools will also receive payment from the settlement fund. As such, the number of class members eligible to receive payment has grown significantly since the settlement was reached.

A. The requested fee of twenty percent of the settlement is fair and reasonable (and even below market) under the percentage-of-the-recovery method.

In the Ninth Circuit, the district court has discretion in a common fund case to choose either the "percentage-of-the-fund" or the "lodestar" method in calculating fees. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015). Regardless of what method is chosen as the primary method to calculate attorneys' fees, the Ninth Circuit encourages district courts to conduct "a cross-check using the other method." *Id.* Plaintiffs' counsel request in the amount of $41,732,889, which is 20% of the $208,664,445 million settlement fund. Applying a lodestar cross-check, this would be a 3.66 multiplier from plaintiffs' counsel's lodestar of $11,398,158.30. The Court finds these fees to be fair and reasonable under either method.

When considering a request for attorneys' fees under the percentage-of-recovery method, the Ninth Circuit has "established a 25 percent 'benchmark' in percentage-of-the-fund cases that can be 'adjusted upward or downward to account for any unusual circumstances involved in [the] case.'"[2] The Ninth Circuit has instructed that although the benchmark of 25 percent "is not per se valid, it is a helpful 'starting point.'"[3] Courts consider the following factors to determine whether to apply either an upward or downward adjustment from that benchmark: (1) the results obtained by counsel; (2) the risks and complexity of issues in the case; (3) whether the attorneys' fees were entirely contingent upon success and whether counsel risked time and effort and advanced costs with no guarantee of compensation; (4) whether awards in similar cases justify the requested fee; and (5) whether the class was notified of the requested fees and had an opportunity to inform the Court of any concerns they have with the request.[4] Each of these factors supports the request for fees of 20 percent.

[2] *Fischel v. Equitable Life Assur. Soc'y of the United States*, 307 F.3d 997, 1006 (9th Cir. 2002) (citation omitted). *See also In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) ("we have allowed courts to award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the lodestar").

[3] *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 955 (9th Cir. 2015) (citation omitted).

[4] *See, e.g.*, *Keller*, 2015 U.S. Dist. LEXIS 114387, at *12-13.

1. The 25% benchmark award is presumptively reasonable, reflecting a market based fee.

Plaintiffs' counsel seek fees that are $10.4 million under the 25% benchmark. "While the benchmark is not per se valid," the Ninth Circuit has recognized that requesting "the 25% benchmark award only" shows the reasonableness of a fee request.[5] As a court in this District recognized, "in most common fund cases, the award exceeds the [25%] benchmark."[6] And this Court has referred to the "the many cases in this circuit that have granted fee awards of 30% or more."[7]

Empirical evidence supports the 20% fee request. A study of attorneys' fees, known as the EMG Study,[8] looked at awards in 458 class actions between 2009 and 2013, finding that 21% was the midpoint for fees where the recovery exceeded $100 million. The largest recoveries, over $100 million, had mean and median fee percentages ranging from 16.6% to 25.5%, depending on the year.[9] Twenty-one percent is the mid-point of that range and below the average award of 22.3% for the highest recoveries (above $67.5 million).[10] The report finds that "[o]n average, fees were 27% of gross recovery during the 2009-2013 period, which is higher than the average fee percentage of 23% that we reported in our analyses of the 1993-2008 period."[11] And of the 53 settlements in this District, the mean and median awards were 26% and 25%, respectively, matching the mean and median percentages found more broadly in the 144 settlements surveyed in the Ninth Circuit.[12] Further, of

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[5] *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 955. *See also Keller v. NCAA*, 2015 U.S. Dist. LEXIS 166546, at *28-29 (N.D. Cal. Dec. 10, 2015) ("A fee award of 30 percent is within the usual range of fee awards that Ninth Circuit courts award in common fund cases.") (citations and internal quotation marks omitted).

[6] *De Mira v. Heartland Empl. Serv.*, 2014 U.S. Dist. LEXIS 33685, at *2 (N.D. Cal. Mar. 13, 2014) (quoting *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008)).

[7] *Vedachalam v. Tata Consultancy Servs., Ltd.*, 2013 U.S. Dist. LEXIS 100796, at *4 (N.D. Cal. July 18, 2013) (awarding 30% fee). This Court cited *In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555, at *18 n.12 (C.D. Cal. June 10, 2005), in which the court noted that more than 200 federal cases awarded fees higher than 30% as of 2005.

[8] Berman Decl., Ex. C (Eisenberg, Miller & Germano, *Attorneys' Fees in Class Actions: 2009-2013*) ("EMG Study") at 8.

[9] *Id.*

[10] *Id.* at 9.

[11] *Id.* at 8.

[12] *Id.* at 11, 12.

the 19 antitrust settlements between 2009 and 2013, with a mean recovery of $501.09 million and a median recovery of $37.3 million, the mean and median fee percentages were 27% and 30%.

2. All relevant circumstances confirm a 20% fee award is reasonable.

a. A 20% fee is justified by the exceptional results achieved.

"The most important factor is the results achieved for the class."[13] Here, the results are exceptional because counsels' efforts created a $208,664,445 fund for the class (nearly 100% single damages at time of settlement and 66% of single damages currently). Far lesser results (with 20% recovery of damages or less) have justified upward departures from the 25% benchmark.[14] The results achieved are even more substantial when considering the actual recovery amounts. The average recovery for a class member who was eligible to receive payment for four years is approximately $6,000, after accounting for the fees and expenses class counsel requests. Importantly, class counsel also negotiated an allocation and payment method whereby, at the time of disbursement, each non-opt-out class member who is entitled to payment will receive payment directly in the mail, without needing to make any showing or do anything further. Plaintiffs' counsel achieved these exceptional raw-dollar, percentage, and per capita results despite facing off against some of the best, and most well-resourced, defense lawyers in the country.[15]

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[13] *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 U.S. Dist. LEXIS 102408, at *63 (N.D. Cal. Aug. 3, 2016).

[14] *See, e.g.*, *id.* at *65 (holding that 20% antitrust recovery in a megafund case warranted "a modest increase over the Ninth Circuit benchmark"); *In re Omnivision Techs.*, 559 F. Supp. 2d at 1046 ("a total award of approximately 9% of the possible damages . . . weighs in favor of granting the requested 28% fee"). In *In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13627, at *28-29 (C.D. Cal. June 10, 2005), the court cited numerous examples, stating that the "the Settlement Fund, as a percentage of recovery, is greater than recoveries obtained in other cases where courts have awarded attorneys' fees of one-third of a common fund. *See, e.g.*, *Medical X-Ray*, 1998 U.S. Dist. LEXIS 14888, 1998 WL 661515, at *7-8 (court increased 25% benchmark to 33.3% where counsel recovered 17% of damages); *Crazy Eddie*, 824 F. Supp. at 326 (court increased 25% benchmark to 33.8% where counsel recovered 10% of damages); *In re General Instr. Sec. Litig.*, 209 F. Supp. 2d 423, 431, 434 (E.D. Pa. 2001) (one-third fee awarded from $48 million settlement fund that was 11% of the plaintiffs' estimated damages); *In re Corel Corp., Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 489-90, 498 (E.D. Pa. 2003) (one-third fee awarded from settlement fund that comprised about 15% of damages); *Cullen*, 197 F.R.D. at 148 (one-third awarded in fees from settlement of class consisting of defrauded vocational students that was 17% of the tuition the class members paid)."

[15] *See De Mira*, 2014 U.S. Dist. LEXIS 33685, at *5-6 (justifying 28% fee award in part because "Defendant was represented by an experienced and well-resourced defense firm. Had Class Counsel failed to vigorously prosecute this case, it is unlikely that this settlement could have been achieved").

b. A 20% fee is justified by the significant risk borne by plaintiffs' counsel and the complexity of issues in this case.

Plaintiffs' counsel faced real risks in pursuing this case, not the least of which was being initially dismissed on the pleadings as a matter of law based on *O'Bannon*. "The risk that further litigation might result in [p]laintiffs not recovering at all, particularly a case involving complicated legal issues, is a significant factor in the award of fees."[16] And although numerous antitrust cases have been brought over the years against the NCAA, seldom if ever has there been a significant monetary award. An "antitrust class action is arguably the most complex action to prosecute. The legal and factual issues involved are always numerous and uncertain in outcome."[17] And it bears noting that the EMG Study looked at average fee awards based on risk, according to the type of litigation. The average fee award for ***low-medium risk*** antitrust cases between 2009 and 2013 was ***24.91%***. This data looking at the risk dimension in antitrust cases reinforces the reasonableness of counsel's 20% fee request.

Just one example of unique complexity in this case was the challenge in obtaining, digesting, and utilizing the data necessary to model impact and damages in this case. Plaintiffs needed to obtain tens of thousands of records from hundreds of different schools. Each school maintained its own data and frequently had different systems and formats for data. Plaintiffs' counsel not only had to identify and get the right data but also had to work with their experts to understand (for their model and class certification arguments) the various financial aid packages and sources of grants.

Along with the data endeavor, counsel had to analyze and understand eligibility rules and definitions, and apply all of this in the context of an NCAA manual the size of a telephone book. These were all very specific factors unique to college athletics that were necessary to develop a reliable working model to both identify class members and calculate damages, as well as present compelling certification arguments.

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[16] *In re Omnivision Techs.*, 559 F. Supp. 2d at 1046-47; *accord In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (holding fees justified "because of the complexity of the issues and the risks").

[17] *In re Optical Disk Drive Prods. Antitrust Litig.*, 2016 U.S. Dist. LEXIS 175515, at *45 (N.D. Cal. Dec. 19, 2016) (internal citation, quotation marks, and ellipses omitted).

c. A 20% fee is justified by the contingent nature of the representation and the efforts and costs expended by plaintiffs' counsel.

The 20% fee request is also reasonable in light of the contingent nature of class counsel's representation; they would only get paid if the classes recovered and only out of the class recovery at that. "Courts have long recognized that the public interest is served by rewarding attorneys who assume representation on a contingent basis with an ***enhanced fee*** to compensate them for the risk that they might be paid nothing at all for their work."[18] "This mirrors the established practice in the private legal market of rewarding attorneys for taking the risk of nonpayment by paying them ***a premium*** over their normal hourly rates for winning contingency cases."[19] And "[c]ontingent fees that may ***far exceed*** the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose."[20]

In short, contingent fees are good for clients and the public alike. In exchange for increased predictability, decreased bean counting, and unlimited protection against downside risks—including the risk of a zero dollar recovery—a client agrees to pay its attorneys an enhanced fee if and only if the client recovers. And because contingent fees are almost always determined as a percentage of the client's recovery, such fees are necessarily aligned with and proportional to the results achieved for that client—in short, the client only pays for what it gets.[21] Lest contingent fees disappear altogether, the law must recognize both sides of the bargain—namely, a significant upside fee for successful contingent representations. If it instead becomes that lawyers must not only bear all of the downside risk but must also do so only for the prospect of being paid what they would have been paid by the hour, the law will discourage sophisticated counsel from pursuing risky representations on behalf of

[18] *Ching v. Siemens Indus.*, 2014 U.S. Dist. LEXIS 89002, at *25 (N.D. Cal. June 27, 2014) (emphasis added).

[19] *Vizcaino II*, 290 F.3d at 1051 (emphasis added).

[20] *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994) (emphasis added).

[21] *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 887 (1987) ("[E]ven uninformed clients can align their attorney's interests with their own by compensating them through a percentage-of-recovery fee formula.").

non-wealthy clients.[22]

Here, counsel for the classes have spent more than three years investigating and litigating this case, without receiving any compensation to do so. Such burdens are significant, even for law firms of the stature of plaintiffs' counsel. For instance, the fact that no money was coming in did not relieve class counsel from having to pay the salaries of the associates and staff working on this case, or from having to cover non-reimbursable overhead expenses like rent. Class counsel floated these expenses while assuming the risk that there might never be ***any*** repayment.[23] They also advanced over $3,184,274.38 in expenses, interest-free, prosecuting this action, including all expert fees and expenses, which are a substantial but necessary burden in any antitrust action. "This substantial outlay, when there is a risk that none of it will be recovered, further supports the award of the requested fees."[24] So a 20% award would reasonably compensate plaintiffs' counsel for carrying the financial burdens of this risky case.[25]

d. A 20% fee accords with fee awards in analogous cases.

An award of 20% of the common fund is consistent with, and within the range of, fee awards out of common funds of comparable size—which is not surprising since the benchmark is 25%. Of course, because "the percentage may be adjusted to account for any unusual circumstances,"[26] it is possible to cite many examples of percentage-of-the-fund awards falling on either side of that benchmark. But "[p]ercentage awards of between 20% and 30% are common"[27] and "in most common

[22] *See Vizcaino II*, 290 F.3d at 1051 ("In common fund cases, 'attorneys whose compensation depends on their winning the case must make up in compensation in the cases they win for the lack of compensation in the cases they lose.'" (citation omitted)).

[23] *See Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376-77 (9th Cir. 1993) ("Class counsel, however, have the case on a contingency. Moreover, it is a double contingency; first, they must prevail on the class claims, and then they must find some way to collect what they win.").

[24] *In re Omnivision Techs.*, 559 F. Supp. 2d at 1047.

[25] *See Torrisi*, 8 F.3d at 1377 ("The 25% contingent fee rewarded class counsel not only for the hours they had in the case to the date of the settlement, but for carrying the financial burden of the case, effectively prosecuting it and, by reason of their expert handling of the case, achieving a just settlement for the class.").

[26] *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997).

[27] *De Mira*, 2014 U.S. Dist. LEXIS 33685, at *3.

fund cases, the award exceeds th[e] benchmark."[28]

In fact, of the three common funds of nearly equivalent size cited by the Ninth Circuit in *Vizcaino II*,[29] ***all three cases awarded fees at or above the 25 percent benchmark***, and ***two of the three awards*** resulted in multipliers exceeding the 3.66 multiplier requested here:

Case	Fund	Fee (%)	Fee ($)	Multiplier
In re Rite Aid Corp. Secs. Litig., 146 F. Supp. 2d 706 (E.D. Pa. 2001)	$193M	25.0%	$48M	4.5-8.5
In re Lease Oil Antitrust Litig., 186 F.R.D. 403 (S.D. Tex. 1999)	$190M	25.0%	$47M	1.4
In re Merry-Go-Round Enters., 244 B.R. 327 (Bankr. D. Md. 2000)	$185M	40.0%	$71M	19.6

Indeed, "federal district courts across the country have, in the class action settlement context, routinely awarded class counsel fees in excess of the 25% 'benchmark,' even in so-called 'mega-fund' cases."[30]

While *Vizcaino II* alone demonstrates that both the requested fee and resultant multiplier is

[28] *Id.* at *2 (alteration in original) (citation and internal quotation marks omitted).

[29] 290 F.3d at 1052 (upholding 28% fee on $97 million settlement fund).

[30] *Allapattah Servs. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1210 (S.D. Fla. 2006) (31.33% fee on $1.075 billion settlement fund); *accord In re Urethane Antitrust Litig.*, 2016 U.S. Dist. LEXIS 99839, at *82 (D. Kan. July 29, 2016) (awarding 33.33% fee on $835 million settlement, noting that "Counsel's expert has identified 34 megafund cases with settlements of at least $100 million in which the court awarded fees of 30 percent or higher"). *See also, e.g.*, *In re Optical Disk Drive Prods. Antitrust Litig.*, 2016 U.S. Dist. LEXIS 175515, at *6 (awarding 25% fee on $124.5 million settlement fund); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 U.S. Dist. LEXIS 102408, at *55-56 (27.5% fee on $576.75 million settlement fund); *In re Polyurethane Foam Antitrust Litig.*, 2015 U.S. Dist. LEXIS 23482 (N.D. Ohio Feb. 26, 2015) (awarding 30% fee on $147.8 million settlement fund); *In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167, 170 (D. Mass. 2014) (28% fee on $325 million settlement fund); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 U.S. Dist. LEXIS 49885, at *72 (N.D. Cal. Apr. 1, 2013) (28.6% fee on $571 million settlement fund); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1366 (S.D. Fla. 2011) (33.3% fee on $510 million settlement fund); *In re Comverse Tech., Inc.*, 2010 U.S. Dist. LEXIS 63342 (E.D.N.Y. June 23, 2010) (25% fee on $225 million settlement fund); *In re Rite Aid Corp. Secs. Litig.*, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (25% fee on $126 million settlement fund, resulting in multiplier of 6.96); *In re Linerboard Antitrust Litig.*, 2004 U.S. Dist. LEXIS 10532 (E.D. Pa. June 2, 2004) (30% fee on $202.5 million settlement fund); *In re Buspirone Antitrust Litig.*, 2003 U.S. Dist. LEXIS 26538 (S.D.N.Y. Apr. 11, 2003) (33.3% fee of a $220 million dollar fund); *In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25067 (D.D.C. July 13, 2001) (34.6% fee on $365 million settlement fund); *In re Ikon Office Sols.*, 194 F.R.D. 166, 170 (E.D. Pa. 2000) (30% fee on $111 million settlement fund); *In re Brand Name Prescription Drugs Antitrust Litig.*, 2000 U.S. Dist. LEXIS 1734 (N.D. Ill. Feb. 9, 2000) (25% fee on $696 million settlement fund); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 395 (S.D.N.Y. 1999) (27.5% fee on $116 million settlement fund).

well within the reasonable range, additional market information further shows that a 20% award is reasonable and within the range of fee awards from analogous cases. As discussed above, the EMG Study reports that the highest decile of recoveries in the study, above $67.5 million, averaged a 22.3% fee award.[31] The largest recoveries in the study, above $100 million, had mean and median fee percentages that ranged from 16.6% to 25.5%, depending on the year.[32] Across all settlements in the study, "[o]n average, fees were 27% of gross recovery during the 2009-2013 period, which is higher than the average fee percentage of 23% that we reported in our analyses of the 1993-2008 period."[33] And of the 53 settlements in the Northern District of California, the mean and median percentages awarded were 26% and 25% respectively, and of the 144 settlements in the Ninth Circuit, the mean and median percentages awarded were also 26% and 25% respectively.[34] The study further reports that 19 antitrust settlements between 2009-2013 had a mean recovery of $501.09 million and a median recovery of $37.3 million, with mean and median percentages awarded of 27% and 30% respectively.[35] In addition, the study reports that "the fee-to-recovery ratio tends to be lower in cases with very large recoveries."[36] Conversely, the study at the same time reports that "higher multipliers are associated with higher recoveries."[37] Here, again, the fact that the average award in mega-fund cases across all subject matters and all locales in 2011 was greater than the 20% fee requested here confirms, like *Vizcaino II* does, that a 20% fee on a recovery of this size is reasonable and well inside the range of fee awards in comparable common fund cases.

e. A 20% fee does not award windfall profits to counsel even if the settlement were deemed a megafund.

In reiterating that any fee award must be reasonable, the Ninth Circuit has remarked that "for example, where awarding 25% of a 'megafund' would yield windfall profits for class counsel in light

[31] See EMG Study at 9-10.
[32] *See id.* at 8.
[33] *Id.*
[34] *Id.* at 11, 12.
[35] *Id.* at 13; *see also In re Auto. Refinishing Paint Antitrust Litig.*, 2008 U.S. Dist. LEXIS 569, at *16 (E.D. Pa. Jan. 3, 2008) ("We have previously noted that is not unusual in antitrust class actions for the attorneys to receive awards for fees in the 30% range.").
[36] EMG Study at 8.
[37] *Id.* at 27.

of the hours spent on the case, courts should adjust the bench-mark percentage or employ the lode-star method instead."[38] As an initial matter, counsel do not seek the benchmark 25% fee, notwithstanding the cases and studies cited in the previous section that would support such a request. And the 20% fee is reasonable. This is not a mass tort or fraud case in which mere disclosure of a government investigation all but guarantees the creation of a megafund, notwithstanding what counsel does or does not do; instead, this case went from zero recovery to megafund ***solely*** because of counsel's efforts and expenditures of expert fees and other expenses.[39] Relatedly, the size of the common fund obtained in this case is not "merely a factor of the size of the class."[40] A megafund was created in this case despite the size of the classes, not because of it. And above-benchmark fees frequently are awarded where megafunds must be shared by hundreds of thousands, if not millions, of class members.[41] Here, there are approximately 53,748 class members.

So while applying the so-called "increase-decrease" principle may be appropriate in certain cases,[42] it is tenuous here, where the size of the fund is not merely a factor of the size of the classes

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[38] *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 942 (citation omitted).

[39] *Accord, e.g.*, *In re Linerboard Antitrust Litig.*, 2004 U.S. Dist. LEXIS 10532, at *51 ("the highly favorable settlement was attributable to the petitioners' skill and it is inappropriate to penalize them for their success"); *In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25067, at *68 ("This Court agrees that it is not fair to penalize counsel for obtaining fine results for their clients.").

[40] *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 943.

[41] *See In re Optical Disk Drive Prods. Antitrust Litig.*, 2016 U.S. Dist. LEXIS 175515, at *36 ($124.5 million settlement for "millions of class members"); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 U.S. Dist. LEXIS 102408, at *1 ($576.75 million settlement for millions of class members); *In re Polyurethane Foam Antitrust Litig.*, 2015 U.S. Dist. LEXIS 23482, at *8 ($147.8 million settlement for "more than 48,000" class members); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 U.S. Dist. LEXIS 49885, at *58 ($571 million settlement fund for "235,808 claimants"); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1366 ($510 million settlement for "approximately 13 million" class members); *In re Comverse Tech., Inc.*, 2010 U.S. Dist. LEXIS 63342, at *5 ($225 million settlement fund for "more than 204,000 potential class members"); *In re Linerboard Antitrust Litig.*, 2004 U.S. Dist. LEXIS 10532, at *18 ($202.5 million settlement for "approximately 80,000 companies"); *In re Ikon Office Sols.*, 194 F.R.D. at 170 ($111 million settlement for more than 200,000 class members); *but see In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25067 ($365 million settlement fund for 4,000 class members).

[42] Many courts are not so sure. As Judge Katz put it in oft-quoted language: "The court will not reduce the requested award simply for the sake of doing so when every other factor ordinarily considered weighs in favor of approving class counsel's request of thirty percent. . . . It is difficult to discern any consistent principle in reducing large awards other than an inchoate feeling that it is simply inappropriate to award attorneys' fees above some unspecified dollar amount, even if all of the other factors ordinarily considered relevant in determining the percentage would support a higher percentage. Such an approach also fails to appreciate the immense risks undertaken by attorneys in

but is instead directly related to the efforts of plaintiffs' counsel, who achieved exceptional, mega-fund results for a relatively discrete set of class members. In so doing, they obtained incidental benefits for the public, expended huge amounts of time and money, and faced considerable risks of non-recovery (and thus non-payment) in pursuing this complex antitrust case against well-financed, top-notch counsel. The 20% fee request is below the market contingency rate, below the Ninth Circuit benchmark rate, and below rates awarded in other megafund cases, and results in a multiplier within the range of multipliers that the Ninth Circuit has deemed reasonable. The 20% fee request is eminently reasonable and justified based on all the circumstances of this case. To nonetheless apply the increase-decrease principle and reduce an otherwise reasonable fee simply because this is a "megafund" case would be unreasonable.

B. Using lodestar as a cross-check further supports the requested fees.

As the Ninth Circuit has explained, "a crosscheck using the lodestar method can confirm that a percentage of recovery amount does not award counsel an exorbitant hourly rate."[43] Here, counsel for plaintiffs have invested $11,398,158.30 in attorneys' and para-professionals' time in this case, and request a 3.66 multiplier, which is well within the range of multipliers awarded in similar cases.

A court may give an upwards adjustment to a lodestar (through a positive multiplier) to reflect "reasonableness" factors, including: (1) the amount involved and the results obtained, (2) the time and labor required, (3) the novelty and difficulty of the questions involved, (4) the skill requisite to perform the legal service properly, (5) the preclusion of other employment by the attorney due to acceptance of the case, (6) the customary fee, (7) the experience, reputation, and ability of the attorneys, and (8) awards in similar cases.[44] These are referred to as *Kerr* "reasonableness" factors after

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prosecuting complex cases in which there is a great risk of no recovery." *In re Ikon Office Sols.*, 194 F.R.D. at 196-97 (citations omitted).

[43] *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 949 (internal quotation marks and citation omitted).

[44] *Id.* at 941-42. The Supreme Court has since called into question the relevance of two of the original *Kerr* factors: the contingent nature of the fee and the "desirability" of the case. *See Resurrection Bay Conserv. All. v. City of Seward*, 640 F.3d 1087, 1095 n.5 (9th Cir. 2011). Other factors such as "time limitations imposed by the client or the circumstances" and "the nature and length of the professional relationship with the client" do not readily apply here.

the Ninth Circuit's opinion in *Kerr v. Screen Extras Guild, Inc*.[45] "Foremost among these considerations, however, is the benefit obtained for the class."[46]

1. Plaintiffs' counsel achieved an exceptional result for the classes.

The first factor, the amount involved and the results for the classes, strongly supports the 20% fee request and the 3.66 multiplier. At the time of settlement, the parties agreed to a fund equaling nearly 100% of single damages according to Dr. Rascher's model.[47] And after settlement, as more class members became eligible to receive payment from the $208 million fund (because their schools agreed to start paying COA), the recovery for all of those eligible class members now stands at 66% of their single damages.[48] If the Court grants class counsel's fee and expense request, class members will receive approximately 50% of their damages, a result almost never achieved in large, complex antitrust cases.[49]

2. Plaintiffs' counsel expended significant resources on behalf of the classes.

Plaintiffs' counsel collectively devoted $11,398,158.30 in attorneys' and para-professionals' time in litigating this matter. They have also spent $3,184,274.38 in expenses in this litigation. This commitment of time, personnel, and money to the classes supports the requested award.

3. This case presented difficult questions, requiring extraordinary skill by plaintiffs' counsel.

The third and fourth *Kerr* factors—the difficulty of the questions presented by the litigation and the skill required to perform the legal services properly—both support the requested award. Plaintiffs' counsel first had to overcome defendants' argument that *O'Bannon* precluded their claim, and then had to present the motion for certification of damage classes so as to overcome this Court's

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[45] 526 F.2d 67, 70 (9th Cir. 1975).

[46] *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 942.

[47] *See* ECF No. 560-4.

[48] This smaller percentage recovery is a function of math—as the number of class members eligible to recover damages from the $209 million goes up, the average *pro rata* recovery goes down. There are few reported cases with sixty-six percent settlement recovery in large antitrust cases.

[49] *See, e.g.*, *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 U.S. Dist. LEXIS 102408, at *65 (holding that 20% antitrust recovery in a megafund case warranted "a modest increase over the Ninth Circuit benchmark"); *In re Omnivision Techs.*, 559 F. Supp. 2d at 1046 ("a total award of approximately 9% of the possible damages . . . weighs in favor of granting the requested 28% fee").

order in *O'Bannon* declining to certify a damages class. And plaintiffs' counsel confronted the difficulties in establishing which schools would have provided COA (and which would not have) in the *but-for* world. In working with an economist to provide a workable, reliable economic model to support these arguments, counsel had to identify, acquire, and understand vast amounts of data, not only to ensure the workability of a reliable antitrust impact and damages model, but also to show the Court an administratively feasible method to identify class members and calculate damages specific to each school and student. And of course, plaintiffs faced the risk of proving liability before even getting a damages award. Counsel performed extensive work in discovery building the liability case to establish that defendants violated the antitrust laws by capping the GIA.

Defendants vigorously opposed plaintiffs at every turn, including on class certification and the merits (with such opposition continuing in the injunctive relief case). Settlement was not reached until class certification had been fully briefed. These issues have required advocacy and skill beyond routine litigation, especially in light of the strength of counsel hired by the multiple defendants in this action.

4. The market rate of antitrust lawyers with the experience of plaintiffs' counsel supports the request.

The hourly rates of plaintiffs' counsel are in line with market rates in this District. The most senior HB attorney on the case, Steve Berman, bills at an hourly rate of $950. Other partners at HB have hourly rates ranging between $578 and $760. Associates at HB billed at hourly rates ranging from $295 to $630.[50] The most senior PSW attorneys on the case—Clifford Pearson and Bruce Simon—billed at hourly rates between $835 and $1,035 over the course of this matter. Another PSW partner billed at between $715 and $870 per hour, while PSW "of counsel" lawyers billed at between $450 and $900 per hour. And PSW associates billed at hourly rates ranging from $350 to $635. Staff and law clerks at PSW billed at hourly rates ranging from between $175 to $225.[51] The two partners at Pritzker Levine who worked on this matter—Elizabeth Pritzker and Jonathan Levine—have an

[50] *See* Berman Decl., Ex. A (setting forth HB hourly rates).
[51] *See* Simon Decl., Ex. B (setting forth PSW hourly rates).

hourly rate of $695 each. The associates and "of counsel" attorney who worked on this matter for Pritzker Levine have hourly rates ranging from $495 to $625.[52]

All of these rates are well within the range of $200 to $1,080 charged by attorneys in California in 2015, as shown by a reputable survey of billing rates.[53]

5. Plaintiffs' counsel by-passed other cases due to their commitment to this case.

Plaintiffs' counsel have dedicated a core team of individuals to the litigation of this action. The consequence of dedicating a team of experienced antitrust attorneys has meant that many of these professionals could not work on other cases. The choice of plaintiffs' counsel to commit a significant number of attorneys almost exclusively to this litigation, forgoing other cases and other projects, further supports the request for fees.

6. The requested fee is reasonable when compared to fees in similar litigation.

The sixth and eighth *Kerr* factors—the customary fee and awards in similar cases—both support the fee request. A 3.66 multiplier for a fee award of 20% is reasonable in light of awards in other cases. In *Vizcaino II*, the Ninth Circuit affirmed a fee award based on a 3.65 multiplier.[54] This is nearly the exact multiplier counsel ask for here. And in another case, the Ninth Circuit affirmed a 6.85 multiplier, holding that it "falls well within the range of multipliers that courts have allowed."[55] Similarly here, a 3.66 multiplier is reasonable, particularly given the difficult nature of this litigation and the fact that the fund equals approximately 66% of class members' damages.

The requested 3.66 multiplier is well within the range of awards in other cases. In *In re Linerboard Antitrust Litigation*,[56] the district court explained that "during 2001-2003, the average multi-

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[52] *See* Pritzker Decl., Ex. 2 (setting forth Pritzker Levine hourly rates).

[53] Berman Decl., Ex. D (2015 NLJ Billing Survey). *See also* Pritzker Decl. ¶ 23.

[54] 290 F.3d at 1050-51; *id.* at 1052-54 (noting district court cases in the Ninth Circuit approving multipliers as high as 6.2, and citing only 3 of 24 decisions with approved multipliers below 1.4).

[55] *Steiner v. Am. Broad. Co.*, 248 F. App'x 780, 783 (9th Cir. 2007). *See also Buccellato v. AT&T Operations, Inc.*, 2011 U.S. Dist. LEXIS 85699, at *4 (N.D. Cal. June 30, 2011) ("The resulting multiplier of 4.3 is reasonable in light of the time and labor required, the difficulty of the issues involved, the requisite legal skill and experience necessary, the excellent and quick results obtained for the Class, the contingent nature of the fee and risk of no payment, and the range of fees that are customary.").

[56] 2004 U.S. Dist. LEXIS 10532, at *50 (E.D. Pa. June 2, 2004) (citing Stuart J. Logan, et al., *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Reports 167 (2003)).

plier approved in common fund class actions was 4.35 and during 30 year period from 1973-2003, [the] average multiplier approved in common fund class actions was 3.89." So the 3.66 multiplier requested by plaintiffs' counsel in this matter is below the midrange of multipliers awarded in other cases—and almost none of these other cases, if any, approach the success of the results here. Indeed, multipliers of 4.0 and above are frequently applied in granting fee awards from common funds.[57]

7. The reputation, ability, and efficiency of plaintiffs' counsel supports the requested fee.

The three firms requesting attorneys' fees in this matter are among the most well-respected class action litigation firms in the country, as this Court has witnessed in numerous cases.[58] And the efficiency with which plaintiffs' counsel achieved such exceptional results is laudable because it benefits the classes. For example, by working efficiently and keeping a tight hold on the lodestar rein, class counsel is less inclined to seek a benchmark award of 25 percent (or more), resulting in

[57] *See, e.g., In re Credit Default Swaps Antitrust Litig.*, 2016 U.S. Dist. LEXIS 54587, at *54 (S.D.N.Y. Apr. 25, 2016) (lodestar multiplier "of just over 6"); *Gutierrez v. Wells Fargo Bank, N.A.*, 2015 U.S. Dist. LEXIS 67298, at *25 (N.D. Cal. May 21, 2015) (awarding $18.5 million in fees, noting that "this order allows a multiplier of 5.5 mainly on account of the fine results achieved on behalf of the class, the risk of non-payment they accepted, the superior quality of their efforts, and the delay in payment"); *In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 448 (E.D.N.Y. 2014) (multiplier of "about 3.41"); *Athale v. Sinotech Energy Ltd.*, 2013 U.S. Dist. LEXIS 199696 (S.D.N.Y. Sept. 4, 2013) (20% fee award with 5.65 multiplier); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers"); *In re Enron Corp. Secs., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 741 (S.D. Tex. 2008) (multiplier of 5.2); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319 (S.D.N.Y. 2005) (4.0 multiplier); *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 998-99 (D. Minn. 2005) (25% fee with 4.7 multiplier); *In re Rite Aid Corp. Secs. Litig.*, 362 F. Supp. 2d at 587 (25% fee with 6.96 multiplier); *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 134-35 (D.N.J. 2002) (28% fee with 4.3 multiplier); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 371 (S.D.N.Y. 2002) (33.3% fee, resulting in "modest multiplier of 4.65"); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) ("The percentage fee award in this case represents a multiplier of approximately 3.97 times Class Counsel's lodestar of $36,191,751. A multiplier of 3.97 is not unreasonable in this type of case."); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 198 (S.D.N.Y. 1997) (5.5 multiplier); *Weiss v. Mercedes-Benz of N. Am.*, 899 F. Supp. 1297 (D.N.J. 1995) (9.3 multiplier), *aff'd*, 66 F.3d 314 (3d Cir. 1995); *Rabin v. Concord Assets Grp., Inc.*, 1991 U.S. Dist. LEXIS 18273, at *4 (S.D.N.Y. Dec. 19, 1991) (awarding 4.4 multiplier and explaining that "multipliers of between 3 and 4.5 have been common") (internal quotation marks and citation omitted).

[58] *See* firm resumes at Berman Decl., Ex. E; Simon Decl., Ex. A; Pritzker Decl., Ex. 1.

more money to class members. So class counsel's efficiency should be considered favorably in evaluating the reasonableness of the fee request.[59]

Plaintiffs' counsel have focused on the most efficient path to results, not devoting resources to "nice to have" belt-and-suspender litigation.[60] These actions reduced their lodestar, resulting in a higher multiplier when cross-checking counsel's percentage-of-the-fund award. But that's a good thing.[61] Strategic and efficient lawyering not only encourages "the just, speedy, and inexpensive determination of every action and proceeding"[62] but also directly correlates with obtaining superb results. Meet and confers with fewer lawyers tend to be more productive; oral arguments tend to go better when the person who wrote the motion also argues the motion; and depositions are more effective when the person taking the deposition drafted the questions for the deposition.

Although modification of a fee award based on a lodestar cross-check may serve some utility in cases at the fringes, routine recourse to it threatens to swallow the benefits that the percentage-of-the-fund method provides, for "if a court sometimes employs a lodestar cross-check, then self-interested entrepreneurial lawyers will conduct their affairs accordingly."[63] In sum, in order to maximize the class recovery, promote optimal deterrence, incentivize efficient, speedy, and inexpensive dispute resolution, and conserve judicial resources, this Court awards attorneys' fees in

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[59] *See Vizcaino II*, 290 F.3d at 1050 n.5 ("The lodestar method is merely a cross-check on the reasonableness of a percentage figure, and it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee.").

[60] *See* Berman Decl. ¶ 10; Simon Decl. ¶ 17 n.2.

[61] *See In re Xcel Energy, Inc.*, 364 F. Supp. 2d at 996 ("But for the cooperation and efficiency of counsel, the lodestar of plaintiffs' counsel would have been substantially more and would have required this court to devote significant judicial resources to its management of the case. Instead, counsel moved the case along expeditiously, and the court determines that the time and labor spent to be reasonable and fully supportive of the 25% attorney fee.").

[62] Fed. R. Civ. P. 1.

[63] Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 145-46 (2006). *See also* Sandra R. McCandless et al., Tort Trial & Ins. Practice Section of the Am. Bar Ass'n, *Report on Contingent Fees in Class Action Litigation*, 25 Rev. Litig. 459, 471 (2006) ("The lodestar cross-check reintroduces the problems of the lodestar method. If the attorneys in the previous example know that their fee, when calculated as a percentage, will be 'crosschecked' by the lodestar, they have every financial incentive to put as many hours into the file as possible. They may do unnecessary work or delay settlement to make sure that the multiplier needed to get to their percentage fee does not appear to be out of line.").

an amount of 20% of the fund recovered for the classes.

C. Class counsel's expenses are reasonable and were necessarily incurred.

Class counsel seek reimbursement of $3,184,274.38 in expenses necessarily incurred in the prosecution of this action. All expenses that are typically billed by attorneys to paying clients in the marketplace are compensable.[64] With this motion, plaintiffs provide an accounting of the expenses incurred by class counsel.[65] The primary expense in this case is for experts. Several additional categories account for the remainder, including filing fees, travel expenses, costs of court and deposition transcripts, and computer research expenses. All of these costs were necessarily and reasonably incurred to achieve this $208 million dollar recovery, and they reflect market rates for the various categories of expenses incurred. And plaintiffs' counsel advanced these necessary expenses, interest-free, without assurance that they would even be recouped. The request of plaintiffs' counsel for reimbursement of expenses is reasonable.[66]

D. A service award of $20,000 is granted to each of the four class representatives.

Plaintiffs request that the Court approve service awards in the amount of $20,000 each for the four class representatives, to be deducted from the settlement funds. Service awards for class representatives are provided to encourage them to undertake the responsibilities and risks of representing the classes and to recognize the time and effort spent in the case. Incentive awards "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general."[67] Here, the class representatives spent a significant amount of time assisting in the

[64] *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994).

[65] *See* Berman Decl., Ex. B; Simon Decl., Ex. C; Pritzker Decl., Ex. 3.

[66] *See Vedachalam*, 2013 U.S. Dist. LEXIS 100796, at *9-10 ("Plaintiffs' Counsel have incurred unreimbursed costs prosecuting this case on behalf of the Class . . . . Plaintiffs' Counsel put forward these out-of-pocket costs without assurance that they would be repaid. These litigation expenses were necessary to secure the resolution of this litigation.").

[67] *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009); *see also Just Film, Inc. v. Merch. Servs., Inc.*, 2013 U.S. Dist. LEXIS 186623, at *4-5 (N.D. Cal. Dec. 11, 2013) (explaining that incentive awards "may be made to class representatives based on '(1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulty encountered by the class representative; (3) the amount of time and effort spent by the class

litigation of this case, in preparing for and having their depositions taken, in searching for and producing documents that spanned many years, and in conferring with counsel throughout the litigation.[68] Awards of $20,000 each are consistent with service awards in other cases.[69]

E. The sole objection is overruled.

The sole objection, filed by Darrin Duncan, is overruled. For the reasons set forth above, the attorneys' fees and service awards sought by plaintiffs and their counsel are reasonable. In addition, there is no merit to Mr. Duncan's request that the Court order that the claims administrator distribute class funds until each class member would receive less than $3.00. Mr. Duncan provides no legal or factual basis for that request.

IT IS SO ORDERED.

DATED: December 6, 2017

HONORABLE CLAUDIA WILKEN
UNITED STATES DISTRICT JUDGE

Submitted on November 20, 2017, by:

HAGENS BERMAN SOBOL SHAPIRO LLP

By */s/ Steve W. Berman*
Steve W. Berman

representative; (4) the duration of the litigation and; (5) the personal benefit (of lack thereof) enjoyed by the class representative as a result of the litigation.'" (citation omitted)).

[68] *See* Berman Decl. ¶¶ 22-25; Simon Decl. ¶¶ 47-48; Pritzker Decl. ¶¶ 26-30.

[69] *See Dandan Pan v. Qualcomm Inc.*, 2017 U.S. Dist. LEXIS 120150, at *42 (S.D. Cal. July 31, 2017) ("[A] $50,000.000-per-Class-Representative award is reasonable. In particular, there is no doubt that in the present case the Class Representatives have helped secure substantial relief for the class . . . ."); *Syed v. M-I, L.L.C.*, 2017 U.S. Dist. LEXIS 118064, at *26-27 (E.D. Cal. July 27, 2017) (awarding $15,000 and $20,000 to two class representatives); *In re High-Tech Empl. Antitrust Litig.*, 2015 U.S. Dist. LEXIS 118052, at *62 (N.D. Cal. Sept. 2, 2015) (authorizing $80,000 and $120,000 service awards in case with $415 million settlement fund, in addition to $20,000 award to each for prior settlement); *Godshall v. Franklin Mint Co.*, 2004 U.S. Dist. LEXIS 23976, at *21 (E.D. Pa. Dec. 1, 2004) (granting incentive award of $20,000 to each plaintiff); *In re Linerboard Antitrust Litig.*, 2004 U.S. Dist. LEXISIS 10532, at *56-58 (awarding $ 25,000 for each of five class representatives and collecting cases in which awards of $24,000 or more were authorized); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995) (authorizing $50,000 incentive award in case with settlement fund of $76,723,213.26).

Steven W. Berman (*Pro Hac Vice*)
Craig R. Spiegel (122000)
Ashley A. Bede (Pro Hac Vice)
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslaw.com
craigs@hbsslaw.com
ashleyb@hbsslaw.com

Jeff D. Friedman (173886)
HAGENS BERMAN SOBOL SHAPIRO LLP
715 Hearst Avenue, Suite 202
Berkeley, CA 94710
Telephone: (510) 725-3000
Facsimile: (510) 725-3001
jefff@hbsslaw.com

PEARSON, SIMON & WARSHAW, LLP

By */s/ Bruce L. Simon*
Bruce L. Simon
Bruce L. Simon (96241)
Benjamin E. Shiftan (265767)
44 Montgomery Street, Suite 2450
San Francisco, CA 94104
Telephone: (415) 433-9000
Facsimile: (415) 433-9008
bsimon@pswlaw.com
bshiftan@pswlaw.com

Plaintiffs' Co-Lead Class Counsel

Elizabeth C. Pritzker (146267)
Jonathan K. Levine (220289)
Shiho Yamamoto (264741)
Anne C. Maness (303438)
PRITZKER LEVINE LLP
180 Grand Avenue, Suite 1390
Oakland, CA 94612
Telephone: (415) 692-0770
Facsimile: (415) 366-6110
ecp@pritzkerlevine.com
jkl@pritzkerlevine.com
sy@pritzkerlevine.com
acm@pritzkerlevine.com
Additional Class Counsel

TAB 42B

Steve W. Berman (*pro hac vice*)
Craig R. Spiegel (122000)
Ashley A. Bede (*pro hac vice*)
HAGENS BERMAN SOBOL SHAPIRO LLP
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslaw.com
craigs@hbsslaw.com
ashleyb@hbsslaw.com

Bruce L. Simon (96241)
Benjamin E. Shiftan (265767)
PEARSON, SIMON & WARSHAW, LLP
44 Montgomery Street, Suite 2450
San Francisco, CA 94104
Telephone: (415) 433-9000
Facsimile: (415) 433-9008
bsimon@pswlaw.com
bshiftan@pswlaw.com

Plaintiffs' Class Counsel

[Additional Counsel on Signature Page]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION

This Document Relates to:

ALL ACTIONS EXCEPT

Jenkins v. Nat'l Collegiate Athletic Ass'n
Case No. 4:14-cv-02758-CW

Case No. 4:14-md-02541-CW

NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS

DATE: Nov. 17, 2017
TIME: 9:00 a.m.
DEPT: Courtroom 2, 4th Floor
JUDGE: Hon. Claudia Wilken

COMPLAINT FILED: Mar. 5, 2014

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on November 17, 2017, at 9:00 a.m., in the courtroom of the Honorable Claudia Wilken of the United States District Court of the Northern District of California, located at 1301 Clay Street, Courtroom 2 – 4th Floor, Oakland, CA 94612, plaintiffs will and hereby do move the Court for an order:

1. Awarding plaintiffs' counsel $41,732,889 in attorneys' fees;

2. Approving reimbursement of $3,184,274.38 in expenses and costs incurred by plaintiffs' counsel; and

3. Approving an incentive award of $20,000 for each of the four class representatives.

This motion is based on this notice of motion and motion, the accompanying memorandum of points and authorities, the declarations in support of the motion, argument by counsel at the hearing before this Court, any papers filed in reply, such oral and documentary evidence as may be presented at the hearing of this motion, and all papers and records on file in this matter.

STATEMENT OF ISSUES

1) Plaintiffs' counsel have dedicated over $11.5 million in attorney and professional time to this matter over more than a three-year period. Counsel now seek an attorneys' fee award in the amount of $41,732,889, which represents 20% of the settlements and a multiplier of 3.62 on their lodestar. Should this Court exercise its discretion to approve the fee request as fair and reasonable when plaintiffs' counsel obtained an exceptional result that will provide injured class members with approximately 66% of their losses before fees and expenses are deducted?

2) Plaintiffs' counsel have advanced $3,184,274.38 in out-of-pocket expenses in this litigation, mainly attributable to the costs of experts. Should the Court approve reimbursement of this amount as fair and reasonable?

3) Should the court grant a $20,000 incentive award to each of the four class representatives for their work in helping attain an exceptional settlement for class members?

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I. INTRODUCTION

Guided by Dr. Rascher's damages probit regression model, class counsel negotiated a settlement of $208,664,445. The probit model predicted which schools would have adopted full cost of attendance in 2009-2010 had the NCAA's rules prohibiting such payments not been adopted, and damages were estimated therefrom.[1] For eligible class members attending schools which the probit model predicted would have paid Cost of Attendance ("COA"), the estimated damages are approximately $210 million to $220 million.[2] Since the settlement was reached, many additional schools are now paying or have stated an intent to pay COA. Eligible class members from these additional COA-paying schools will also receive payment from the settlement fund.[3] The average recovery for class members who played their sports for four years and are entitled to an award under the settlement is approximately $6,000 (net of the fees and expenses requested here).

Class counsel committed to the Court at the preliminary approval hearing that we would not seek more than a 25% fee award—the Ninth Circuit's benchmark (attaching to it a presumption of reasonableness). Class counsel is honoring its commitment to the Court—and indeed is seeking even less, including costs and expenses. Class counsel respectfully requests that the Court award attorneys' fees of $41,732,889, which is 20% of the proposed settlement, well below the 25% benchmark.

Even though a higher fee award here (such as the Ninth Circuit's 25% benchmark) would be reasonable when compared to other large, complex antitrust cases in this district and elsewhere, class counsel request a more modest award of 20%. A 20% fee award is well within the range of

[1] *See* ECF No. 560-4 (Expert Declaration of Daniel A. Rascher in Support of Motion for Preliminary Approval of Damages Classes).

[2] *Id.*

[3] The number of class members eligible to receive payment has grown significantly since the settlement was reached. The settlement agreement benefitted class members by including a clause allowing for even more class members to become eligible to receive settlement payments after the parties reached an agreement in principle in December 2016 and executed their settlement agreement on February 3, 2017, if their school adopted or stated an intent to adopt COA any time up to June 1, 2017. *See* ECF No. 560-1 at Exhibit A to the Settlement Agreement, para. B.2. As Dr. Rascher opined at class certification, the market was still unwinding from the longstanding GIA cap and had yet to reach "equilibrium." After the parties reached settlement, dozens of schools adopted or declared their intent to adopt COA. So, many more student-athlete class members have become eligible to get paid from the settlement fund after the parties agreed to settlement and the Court granted preliminary approval. Counting all of the many additional class members who will now receive payment, the settlement fund now represents approximately 66% of total single damages—a tremendous result in comparison to most large antitrust settlements.

reasonableness, and could even be considered a below-market request, given the excellent result achieved for the classes, the risks plaintiffs' counsel faced of not receiving any compensation in pursuing this matter, the millions of dollars in out-of-pocket expenses they incurred, and the efficiency with which they litigated the case.

The Court well knows how hard fought this case has been. Not only are these defendants sophisticated entities, represented by some of the most experienced antitrust defense counsel in the United States, policy and institutional considerations—both within and across dozens of schools and conferences—required counsel to overcome varied interests and substantive road blocks to successfully settle the damages part of the case. In the face of these formidable challenges, plaintiffs' counsel achieved an extraordinary settlement on behalf of the classes, with class members who are entitled to damages under the settlement receiving approximately 66% of their damages before fees and expenses are deducted.

Class counsel also request reimbursement of $3,184,274.38 in expenses, the vast majority of which are expert fees. The total percentage of the fund for fees and costs is approximately 21.5%. And plaintiffs request $20,000 for each class representative as incentive awards.

II. THE WORK UNDERTAKEN BY PLAINTIFFS' COUNSEL

Plaintiffs' counsel have devoted enormous resources to prosecuting this case against vigorous opposition provided by the NCAA and conference defendants (and the defense lawyers they hired from some of the largest and best law firms in the country). As shown below, the road to a $208 million settlement required an enormous commitment from plaintiffs' counsel.

A. Pre-filing investigation and work-up

Lead counsel Hagens Berman ("HB") and Pearson, Simon & Warshaw ("PSW") began investigating this case several years before filing a complaint.[4] In performing the investigation, the firms conducted extensive due diligence, including:

- Conducting informational interviews with current and former student athletes, and conferring with student-athletes' rights organizations;

[4] ECF No. 50-2 ¶ 7; ECF No. 50-4 ¶ 4.

- Retaining the services of experienced consultants to perform a substantial economic analysis of the relevant market;
- Researching the relationships between the NCAA and its conferences, and making the strategic decision to include the conferences as defendants (with the concomitant increase in resources necessary to prosecute against multiple defendants);
- Analyzing the diverse types of remedies to frame the requested relief in the case;
- Researching the positions of the NCAA and conferences on issues of competitive balance and amateurism;
- Reviewing public statements, interviews, and quotes from defendants and their executives dating as far back as 2003; and
- Researching the NCAA's IRS Form 990 filings and other sources that provided important information regarding the revenues and finances of the NCAA and the conferences.[5]

The hard work of HB and PSW culminated in the drafting and filing of the *Alston* complaint,[6] which was the first-filed complaint in this MDL.

B. Successful efforts before the JMPL to coordinate this case

After HB and PSW filed the *Alston* complaint, other law firms filed complaints across the country.[7] Class counsel filed a motion to transfer actions to the Northern District of California with the JPML.[8] PSW attended and argued the motion to transfer before the JPML.[9] On June 13, 2014, the JPML granted the motion to transfer the cases to this Court.[10]

C. Opposing defendants' motion to dismiss

Plaintiffs' Consolidated Amended Complaint was immediately met with a motion to dismiss. Defendants' primary arguments were that this Court's decision in *O'Bannon* was fatal to plaintiffs' case here and there was a debilitating intra-class conflict.[11] But class counsel forcefully opposed the

[5] *See generally* ECF No. 50-2 ¶¶ 6-21; ECF No. 50-4 ¶¶ 4-14.

[6] *Alston v. Nat'l Collegiate Athletic Ass'n et al.*, No. 4:14-cv-01011-CW (N.D. Cal.).

[7] ECF No. 50-2 ¶ 42; ECF No. 50-4 ¶ 15.

[8] ECF No. 50-2 ¶ 42; ECF No. 50-4 ¶ 15.

[9] ECF No. 50-4 ¶ 16.

[10] ECF No. 50-2 ¶ 43; ECF No. 50-4 ¶ 16.

[11] ECF No. 89 at 2 ("Plaintiffs cannot allege any plausible theory that can reconcile the relief they seek in this case with the decision and injunction in *O'Bannon* . . . .").

motion by emphasizing the major differences between this case and *O'Bannon* and showing the legally deficient argument concerning the purported conflict.[12] This Court denied the motion.[13]

D. Written discovery and document production

Class counsel then began the written discovery and document production process. For three years, the two firms took the lead in responding to defendants' interrogatories and requests for production of documents, both by working with plaintiffs to acquire information requested by defendants and by drafting the discovery responses.[14] Discovery responses included, for example, a 45-page set of responses to defendants' contention interrogatories directed at critical issues in the case (e.g., less restrictive alternatives).[15]

Plaintiffs' counsel have also propounded extensive document requests on defendants and third parties. These requests yielded significant document productions of more than 550,000 documents and more than 2.8 ***million*** pages of documents.[16] And plaintiffs received productions from various NCAA member institutions throughout the litigation.[17] Reviewing these massive document productions was a major effort.[18] Lead counsel coordinated a complex and thorough review process with eleven attorneys, spanning two-and-a-half years and amounting to about 5,000 attorney hours.[19]

And plaintiffs issued subpoenas to ***three hundred and thirty-seven*** NCAA member institutions in order to obtain critical NCAA member scholarship data. This effort cannot be understated, given the importance of detailed school and player-specific data required for plaintiffs' econometric damages model.[20] One of defendants' primary attacks against class certification was the varying nature of the data and that a school-by-school, or even a player-by-player, analysis was required.

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[12] ECF No. 94 at 3 ("Moreover, Plaintiffs' but-for world (one without the challenged restraint) is different than the *O'Bannon* world.").

[13] ECF No. 131.

[14] Declaration of Steve W. Berman (filed concurrently herewith) ("Berman Decl.") ¶ 2; Declaration of Bruce L. Simon (filed concurrently herewith) ("Simon Decl.") ¶ 20.

[15] Simon Decl. ¶ 20.

[16] Berman Decl. ¶ 3; Simon Decl. ¶ 22.

[17] Simon Decl. ¶ 22.

[18] Berman Decl. ¶ 3; Simon Decl. ¶ 22.

[19] Berman Decl. ¶ 4.

[20] Berman Decl. ¶ 5; Simon Decl. ¶ 12; Declaration of Elizabeth C. Pritzker (filed concurrently herewith) ("Pritzker Decl.") ¶ 15.

Given this attack, it was critical for plaintiffs to acquire comprehensive data from hundreds of schools, organize and digest the information, and coordinate with plaintiffs' experts to help create workable economic models in the case. And given that these schools were third parties—and not defendants—getting timely responses to meet court deadlines (such as class certification) was a significant challenge and required a major investment of dedicated resources.

Elizabeth Pritzker and her firm assisted lead counsel with the ongoing and important efforts to collect comprehensive data from hundreds of schools.[21] This third-party subpoena project required a sustained effort by plaintiffs' counsel, which consisted in part of:

- Creating and managing a database to track third-party subpoenas issued to all 337 schools, including information regarding dates of service, deadlines for responding, timing and status of productions received, and plaintiffs' requests for missing, updated, or additional information;
- Meeting and conferring with counsel and staff from these NCAA member schools regarding information sought by the subpoenas, timing of responses, requested format for responsive document productions (electronic vs. hard copy), issues related to production costs and expenses, as well as the nature, form, and timing of any notifications to students under the Family Educational Rights and Privacy Act; and
- Drafting and collecting from NCAA members schools customized business records affidavits authenticating records and data produced in response to the subpoenas.[22]

When discovery disputes arose during this case, HB and PSW were intimately involved in resolving them.[23] For example, the two firms were actively involved in the lengthy meet-and-confer process with conference defendants to obtain their financials and media contracts.[24] Plaintiffs were successful, resulting in the production of financial statements, television contracts, and sponsorship contracts, all of which were asked about at depositions of conference defendant witnesses.[25] And when meet-and-confer talks broke down, HB and PSW litigated the discovery issues before Judge

[21] Berman Decl. ¶ 5; Simon Decl. ¶ 12; Pritzker Decl. ¶ 15.
[22] Pritzker Decl. ¶ 15.
[23] Berman Decl. ¶ 6; Simon Decl. ¶ 23.
[24] Berman Decl. ¶ 7; Simon Decl. ¶ 23.
[25] Berman Decl. ¶ 7; Simon Decl. ¶ 23.

Cousins. For example, PSW argued motions to compel regarding (1) Notre Dame's commercial contracts (including its television contract with NBC) and (2) the Pac-12's eSports documents.[26]

E. Depositions

As in most complex antitrust cases, this case involved a large number of depositions. Plaintiffs took more than 50 depositions.[27] HB and PSW lawyers have deposed numerous high-profile figures in the world of college sports, including, but not limited to, Mark Emmert (President of the NCAA); Mary Willingham (the whistleblower who helped to reveal an academic fraud scandal at the University of North Carolina at Chapel Hill); Mike Slive (former Commissioner of the Southeastern Conference); John Swofford (Commissioner of the Atlantic Coast Conference); Michael Aresco (Commissioner of the American Athletic Conference); Harvey Perlman (former Chancellor of the University of Nebraska); Jim Delany (Big Ten Conference Commissioner); Karl Benson (Sun Belt Conference Commissioner); and Larry Scott (Pac-12 Conference Commissioner).[28]

To maximize class recovery and minimize costs, plaintiffs' counsel used a lean team to take depositions and execute all other projects.[29] One comparison is that defendants routinely staffed the defense of depositions with numerous lawyers (often, numerous senior lawyers).[30] For example, at the deposition of former NCAA executive Greg Shaheen, the deposing attorney was a PSW associate, appearing alone for plaintiffs. But on the defense side, ***five*** lawyers appeared in person.[31] The NCAA was represented in person by a partner and an associate from one of its law firms (Schiff Hardin LLP), an associate from one of its other law firms (Skadden, Arps, Slate, Meagher & Flom LLP), and an in-house counsel from the NCAA, while the Southeastern Conference was represented in person by a partner from one of its law firms.[32] This efficiency was typical for plaintiffs' counsel.

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[26] Simon Decl. ¶ 24.

[27] Berman Decl. ¶ 8; Simon Decl. ¶ 14.

[28] Berman Decl. ¶ 9; Simon Decl. ¶ 15.

[29] Berman Decl. ¶ 10; Simon Decl. ¶ 17.

[30] Berman Decl. ¶ 10; Simon Decl. ¶ 17.

[31] Simon Decl. ¶ 18.

[32] Simon Decl. ¶ 18. NCAA counsel's approach to staffing is perhaps best evidenced by the fact that the NCAA is currently represented by ***four different law firms*** in this case.

F. Motion for class certification under Rule 23(b)(3)

HB and PSW spearheaded the filing of a motion for class certification under Rule 23(b)(3).[33] The two firms—along with the Pritzker Levine firm—put enormous time and energy into acquiring the NCAA member school scholarship data.[34] Armed with this critical data, the firms worked closely with Dr. Rascher to assist him in constructing his damages modeling of the but-for world.[35] In addition, HB and PSW performed significant legal research on class certification issues and wrote extensive briefs covering class-wide impact and damages as well as defendants' offset defense.[36]

Although plaintiffs were confident in the merits of their class certification arguments, defendants vigorously opposed their motion.[37] Relying in part on this Court having declined to certify a damages class in *O'Bannon*, defendants argued that plaintiffs could not establish either impact or damages on a class-wide basis.[38] But class counsel undermined defendants' arguments, in part during HB's deposition of defendants' expert economist on damages class certification. In response to more than a dozen school witness declarations submitted by defendants in opposition to class certification, HB took sample depositions of five different university officials, again proceeding along the most efficient track. These witnesses confirmed that schools track, audit, and maintain detailed financial records in the ordinary course of business and provided corroborative support for plaintiffs' class certification position.[39] Working together with Dr. Rascher, class counsel filed a strong reply brief[40] and a strong rebuttal report from Dr. Rascher.

G. Settlement

Settlement in this case was very challenging. Defendants forced plaintiffs to overcome numerous hurdles. For example, at virtually every step along the way, plaintiffs were forced to deal with defendants' argument that the *O'Bannon* decision somehow foreclosed plaintiffs' case. And

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[33] ECF No. 362.
[34] Berman Decl. ¶ 5; Simon Decl. ¶ 12; Pritzker Decl. ¶ 15.
[35] Berman Decl. ¶ 5; Simon Decl. ¶ 12.
[36] Berman Decl. ¶ 11; Simon Decl. ¶ 12.
[37] *See* ECF No. 494.
[38] ECF No. 494 at 14-21.
[39] Berman Decl. ¶ 12; ECF No. 509-2 at 1.
[40] ECF No. 509-2.

even setting aside the *O'Bannon* case, defendants claimed the difficulty endemic in individual data issues could not be overcome.

Steve Berman and Bruce Simon were personally involved in the hard-fought settlement discussions that persisted intermittently over several years.[41] During these negotiations, the parties confronted many difficult and time-consuming issues.[42] The negotiations have been arm's-length at all times and broke down on several different occasions before the parties were finally able to reach a settlement.[43] Berman and Simon attended multiple in-person mediation sessions with Professor Eric Green and participated in telephone calls with him as well.[44] Eventually, the settlement established a fund of $208,664,445—nearly single damages according to Dr. Rascher's model at the time of settlement.[45]

Plaintiffs and their experts engaged in extensive modeling of damages and a deep dive into the arcane classification systems and nomenclature used in college athletics. As a result, counsel was able to value the case with confidence. This extraordinary result is the product of a thorough assessment and evaluation of the strengths and weaknesses of plaintiffs' case.[46]

H. Providing notice to class members

HB has led and continues to lead the settlement and claims administration process by selecting Gilardi & Co. LLC ("Gilardi"), a company associated with Kurtzman Carson Consultants, after a thorough and competitive bid process involving multiple bids from four different companies over a period of over two weeks.[47] HB has spent many lawyer hours and resources working with the class administrator Gilardi and communicating with class members regarding the settlement, including working with Gilardi, defendants, and plaintiffs' own experts to establish a website that allows class members to see expected payout amounts, specific to each class member. Through these communi-

[41] Berman Decl. ¶ 13; Simon Decl. ¶ 25.
[42] Berman Decl. ¶ 14; Simon Decl. ¶ 25.
[43] Berman Decl. ¶ 14; Simon Decl. ¶ 25.
[44] Berman Decl. ¶ 13; Simon Decl. ¶ 25.
[45] Berman Decl. ¶ 15; Simon Decl. ¶ 28.
[46] Berman Decl. ¶ 15; Simon Decl. ¶ 29.
[47] Berman Decl. ¶ 16.

cations, class members have been very active, connected and interested.[48] HB anticipates about twenty hours weekly working with Gilardi and class members until settlement distribution is completed, which is estimated to be in February 2018.[49]

III. ARGUMENT

Plaintiffs' counsel request 20% of the common fund ($41,732,889) in attorneys' fees. This Court "has discretion to award fees either as a percentage of the common fund established or pursuant to the lodestar method."[50] But the Ninth Circuit has explained that "the primary basis of the fee award remains the percentage method," although "the lodestar may provide a useful perspective on the reasonableness of a given percentage award."[51] So the "lodestar method is merely a cross-check on the reasonableness of a percentage figure, and it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement."[52] For that reason, "[m]any courts and commentators have recognized that the percentage of the available fund analysis is the preferred approach in common-fund fee requests because it more closely aligns the interests of plaintiffs' counsel and the class, i.e., class counsel directly benefit from increasing the size of the class fund and working in the most efficient manner."[53]

As shown below, a 20% fee is reasonable. It is well below the 25% benchmark and is fully justified by the exceptional settlement obtained by plaintiffs' counsel. Class members who are eligible for payments under the settlement will receive 66% of their losses (approximately 50% after fees and expenses are deducted), which is a much higher rate of recovery than in most antitrust cases, in which fees of 25% or more are common. And a lodestar cross-check confirms that a 20% fee is reasonable, because the 3.62 multiplier is well within the normal range of multipliers in complex cases.

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[48] Berman Decl. ¶ 17.

[49] Berman Decl. ¶ 18.

[50] *Keller v. Elec. Arts, Inc.*, 2015 U.S. Dist. LEXIS 114387, at *11 (N.D. Cal. Aug. 18, 2015).

[51] *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002) ("*Vizcaino II*") (footnote omitted).

[52] *Id.* at 1050 n.5.

[53] *Aichele v. City of L.A.*, 2015 U.S. Dist. LEXIS 120225, at *15 (C.D. Cal. Sept. 9, 2015).

Plaintiffs' counsel also request reimbursement of $3,184,274.38 in expenses incurred in this litigation from its inception through August 31, 2017, the vast majority of which are fees paid to experts. Finally, plaintiffs and class counsel request that the four class representatives be granted a service award of $20,000 each for their work in making the settlement possible.

A. The requested fee of twenty percent of the settlement is fair and reasonable (and even below market) under the percentage-of-the-recovery method.

When considering a request for attorneys' fees under the percentage-of-recovery method, the Ninth Circuit has "established a 25 percent 'benchmark' in percentage-of-the-fund cases that can be 'adjusted upward or downward to account for any unusual circumstances involved in [the] case.'"[54] The Ninth Circuit has instructed that although the benchmark of 25 percent "is not per se valid, it is a helpful 'starting point.'"[55] Courts consider the following factors to determine whether to apply either an upward or downward adjustment from that benchmark: (1) the results obtained by counsel; (2) the risks and complexity of issues in the case; (3) whether the attorneys' fees were entirely contingent upon success and whether counsel risked time and effort and advanced costs with no guarantee of compensation; (4) whether awards in similar cases justify the requested fee; and (5) whether the class was notified of the requested fees and had an opportunity to inform the Court of any concerns they have with the request.[56] Each of these factors supports the request for fees of 20 percent.

1. The 25% benchmark award is presumptively reasonable, reflecting a market based fee.

Plaintiffs' counsel seek fees that are $10.4 million under the 25% benchmark. "While the benchmark is not per se valid," the Ninth Circuit has recognized that requesting "the 25% benchmark award only" shows the reasonableness of a fee request.[57] As a court in this District recognized, "in

[54] *Fischel v. Equitable Life Assur. Soc'y of the United States*, 307 F.3d 997, 1006 (9th Cir. 2002) (citation omitted). *See also In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) ("we have allowed courts to award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the lodestar").

[55] *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 955 (9th Cir. 2015) (citation omitted).

[56] *See, e.g.*, *Keller*, 2015 U.S. Dist. LEXIS 114387, at *12-13.

[57] *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 955. *See also Keller v. NCAA*, 2015 U.S. Dist. LEXIS 166546, at *28-29 (N.D. Cal. Dec. 10, 2015) ("A fee award of 30 percent is within the usual range of fee awards that Ninth Circuit courts award in common fund cases.") (citations and internal quotation marks omitted).

most common fund cases, the award exceeds the [25%] benchmark."[58] And this Court has referred to the "the many cases in this circuit that have granted fee awards of 30% or more."[59]

Empirical evidence supports the 20% fee request. A study of attorneys' fees, known as the EMG Study,[60] looked at awards in 458 class actions between 2009 and 2013, finding that 21% was the midpoint for fees where the recovery exceeded $100 million. The largest recoveries, over $100 million, had mean and median fee percentages ranging from 16.6% to 25.5%, depending on the year.[61] Twenty-one percent is the mid-point of that range and below the average award of 22.3% for the highest recoveries (above $67.5 million).[62] The report finds that "[o]n average, fees were 27% of gross recovery during the 2009-2013 period, which is higher than the average fee percentage of 23% that we reported in our analyses of the 1993-2008 period."[63] And of the 53 settlements in this District, the mean and median awards were 26% and 25%, respectively, matching the mean and median percentages found more broadly in the 144 settlements surveyed in the Ninth Circuit.[64] Further, of the 19 antitrust settlements between 2009 and 2013, with a mean recovery of $501.09 million and a median recovery of $37.3 million, the mean and median fee percentages were 27% and 30%.

2. All relevant circumstances confirm a 20% fee award is reasonable.

a. A 20% fee is justified by the exceptional results achieved.

"The most important factor is the results achieved for the class." [65] Here, the results are exceptional because counsel's efforts created a $208,664,445 fund for the class (nearly 100% single damages at time of settlement and 66% of single damages currently). Far lesser results (with 20%

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[58] *De Mira v. Heartland Empl. Serv.*, 2014 U.S. Dist. LEXIS 33685, at *2 (N.D. Cal. Mar. 13, 2014) (quoting *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008)).

[59] *Vedachalam v. Tata Consultancy Servs., Ltd.*, 2013 U.S. Dist. LEXIS 100796, at *4 (N.D. Cal. July 18, 2013) (awarding 30% fee). This Court cited *In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555, at *18 n.12 (C.D. Cal. June 10, 2005), in which the court noted that more than 200 federal cases awarded fees higher than 30% as of 2005.

[60] Berman Decl., Ex. C (Eisenberg, Miller & Germano, *Attorneys' Fees in Class Actions: 2009-2013*) ("EMG Study") at 8.

[61] *Id.*

[62] *Id.* at 9.

[63] *Id.* at 8.

[64] *Id.* at 11, 12.

[65] *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 U.S. Dist. LEXIS 102408, at *63 (N.D. Cal. Aug. 3, 2016).

recovery of damages or less) have justified upward departures from the 25% benchmark.[66] The results achieved are even more substantial when considering the actual recovery amounts. The average recovery for a class member who was eligible to receive payment for four years is approximately $6,000, after accounting for the fees and expenses class counsel requests. Importantly, class counsel also negotiated an allocation and payment method whereby, at the time of disbursement, each non-opt-out class member who is entitled to payment will receive payment directly in the mail, without needing to make any showing or do anything further. Plaintiffs' counsel achieved these exceptional raw-dollar, percentage, and per capita results despite facing off against some of the best, and most well-resourced, defense lawyers in the country.[67]

b. A 20% fee is justified by the significant risk borne by plaintiffs' counsel and the complexity of issues in this case.

Plaintiffs' counsel faced real risks in pursuing this case, not the least of which was being initially dismissed on the pleadings as a matter of law based on *O'Bannon*. "The risk that further litigation might result in [p]laintiffs not recovering at all, particularly a case involving complicated legal issues, is a significant factor in the award of fees."[68] And although numerous antitrust cases have been brought over the years against the NCAA, seldom if ever has there been a significant monetary award. An "antitrust class action is arguably the most complex action to prosecute. The

[66] *See, e.g.*, *id.* at *65 (holding that 20% antitrust recovery in a megafund case warranted "a modest increase over the Ninth Circuit benchmark"); *In re Omnivision Techs.*, 559 F. Supp. 2d at 1046 ("a total award of approximately 9% of the possible damages . . . weighs in favor of granting the requested 28% fee"). In *In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13627, at *28-29 (C.D. Cal. June 10, 2005), the court cited numerous examples, stating that the "the Settlement Fund, as a percentage of recovery, is greater than recoveries obtained in other cases where courts have awarded attorneys' fees of one-third of a common fund. *See, e.g.*, *Medical X-Ray*, 1998 U.S. Dist. LEXIS 14888, 1998 WL 661515, at *7-8 (court increased 25% benchmark to 33.3% where counsel recovered 17% of damages); *Crazy Eddie*, 824 F. Supp. at 326 (court increased 25% benchmark to 33.8% where counsel recovered 10% of damages); *In re General Instr. Sec. Litig.*, 209 F. Supp. 2d 423, 431, 434 (E.D. Pa. 2001) (one-third fee awarded from $48 million settlement fund that was 11% of the plaintiffs' estimated damages); *In re Corel Corp., Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 489-90, 498 (E.D. Pa. 2003) (one-third fee awarded from settlement fund that comprised about 15% of damages); *Cullen*, 197 F.R.D. at 148 (one-third awarded in fees from settlement of class consisting of defrauded vocational students that was 17% of the tuition the class members paid)."

[67] *See De Mira*, 2014 U.S. Dist. LEXIS 33685, at *5-6 (justifying 28% fee award in part because "Defendant was represented by an experienced and well-resourced defense firm. Had Class Counsel failed to vigorously prosecute this case, it is unlikely that this settlement could have been achieved").

[68] *In re Omnivision Techs.*, 559 F. Supp. 2d at 1046-47; *accord In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (holding fees justified "because of the complexity of the issues and the risks").

legal and factual issues involved are always numerous and uncertain in outcome."[69] And it bears noting that the EMG Study looked at average fee awards based on risk, according to the type of litigation. The average fee award for ***low-medium risk*** antitrust cases between 2009 and 2013 was ***24.91%***. This data looking at the risk dimension in antitrust cases reinforces the reasonableness of counsel's 20% fee request.

Just one example of unique complexity in this case was the challenge in obtaining, digesting, and utilizing the data necessary to model impact and damages in this case. Plaintiffs needed to obtain tens of thousands of records from hundreds of different schools. Each school maintained its own data and frequently had different systems and formats for data. Plaintiffs' counsel not only had to identify and get the right data but also had to work with their experts to understand (for their model and class certification arguments) the various financial aid packages and sources of grants.

Along with the data endeavor, counsel had to analyze and understand eligibility rules and definitions, and apply all of this in the context of an NCAA manual the size of a telephone book. These were all very specific factors unique to college athletics that were necessary to develop a reliable working model to both identify class members and calculate damages, as well as present compelling certification arguments.

c. A 20% fee is justified by the contingent nature of the representation and the efforts and costs expended by plaintiffs' counsel.

The 20% fee request is also reasonable in light of the contingent nature of class counsel's representation; they would only get paid if the classes recovered and only out of the class recovery at that. "Courts have long recognized that the public interest is served by rewarding attorneys who assume representation on a contingent basis with an ***enhanced fee*** to compensate them for the risk that they might be paid nothing at all for their work."[70] "This mirrors the established practice in the private legal market of rewarding attorneys for taking the risk of nonpayment by paying them ***a***

[69] *In re Optical Disk Drive Prods. Antitrust Litig.*, 2016 U.S. Dist. LEXIS 175515, at *45 (N.D. Cal. Dec. 19, 2016) (internal citation, quotation marks, and ellipses omitted).

[70] *Ching v. Siemens Indus.*, 2014 U.S. Dist. LEXIS 89002, at *25 (N.D. Cal. June 27, 2014) (emphasis added).

premium over their normal hourly rates for winning contingency cases."[71] And "[c]ontingent fees that may ***far exceed*** the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose."[72]

In short, contingent fees are good for clients and the public alike. In exchange for increased predictability, decreased bean counting, and unlimited protection against downside risks—including the risk of a zero dollar recovery—a client agrees to pay its attorneys an enhanced fee if and only if the client recovers. And because contingent fees are almost always determined as a percentage of the client's recovery, such fees are necessarily aligned with and proportional to the results achieved for that client—in short, the client only pays for what it gets.[73] Lest contingent fees disappear altogether, the law must recognize both sides of the bargain—namely, a significant upside fee for successful contingent representations. If it instead becomes that lawyers must not only bear all of the downside risk but must also do so only for the prospect of being paid what they would have been paid by the hour, the law will discourage sophisticated counsel from pursuing risky representations on behalf of non-wealthy clients.[74]

Here, counsel for the classes have spent more than three years investigating and litigating this case, without receiving any compensation to do so. Such burdens are significant, even for law firms of the stature of plaintiffs' counsel. For instance, the fact that no money was coming in did not relieve class counsel from having to pay the salaries of the associates and staff working on this case, or from having to cover non-reimbursable overhead expenses like rent. Class counsel floated these

[71] *Vizcaino II*, 290 F.3d at 1051 (emphasis added).

[72] *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994) (emphasis added).

[73] *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 887 (1987) ("[E]ven uninformed clients can align their attorney's interests with their own by compensating them through a percentage-of-recovery fee formula.").

[74] *See Vizcaino II*, 290 F.3d at 1051 ("In common fund cases, 'attorneys whose compensation depends on their winning the case must make up in compensation in the cases they win for the lack of compensation in the cases they lose.'" (citation omitted)).

expenses while assuming the risk that there might never be ***any*** repayment.[75] They also advanced over $3,184,274.38 in expenses, interest-free, prosecuting this action, including all expert fees and expenses, which are a substantial but necessary burden in any antitrust action. "This substantial outlay, when there is a risk that none of it will be recovered, further supports the award of the requested fees."[76] So a 20% award would reasonably compensate plaintiffs' counsel for carrying the financial burdens of this risky case.[77]

d. A 20% fee accords with fee awards in analogous cases.

An award of 20% of the common fund is consistent with, and within the range of, fee awards out of common funds of comparable size—which is not surprising since the benchmark is 25%. Of course, because "the percentage may be adjusted to account for any unusual circumstances,"[78] it is possible to cite many examples of percentage-of-the-fund awards falling on either side of that benchmark. But "[p]ercentage awards of between 20% and 30% are common"[79] and "in most common fund cases, the award exceeds th[e] benchmark."[80]

In fact, of the three common funds of nearly equivalent size cited by the Ninth Circuit in *Vizcaino II*,[81] ***all three cases awarded fees at or above the 25 percent benchmark***, and ***two of the three awards*** resulted in multipliers exceeding the 3.62 multiplier requested here:

Case	Fund	Fee (%)	Fee ($)	Multiplier
In re Rite Aid Corp. Secs. Litig., 146 F. Supp. 2d 706 (E.D. Pa. 2001)	$193M	25.0%	$48M	4.5-8.5
In re Lease Oil Antitrust Litig., 186 F.R.D. 403 (S.D. Tex. 1999)	$190M	25.0%	$47M	1.4
In re Merry-Go-Round Enters., 244 B.R. 327 (Bankr. D. Md. 2000)	$185M	40.0%	$71M	19.6

[75] *See Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376-77 (9th Cir. 1993) ("Class counsel, however, have the case on a contingency. Moreover, it is a double contingency; first, they must prevail on the class claims, and then they must find some way to collect what they win.").

[76] *In re Omnivision Techs.*, 559 F. Supp. 2d at 1047.

[77] *See Torrisi*, 8 F.3d at 1377 ("The 25% contingent fee rewarded class counsel not only for the hours they had in the case to the date of the settlement, but for carrying the financial burden of the case, effectively prosecuting it and, by reason of their expert handling of the case, achieving a just settlement for the class.").

[78] *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997).

[79] *De Mira*, 2014 U.S. Dist. LEXIS 33685, at *3.

[80] *Id.* at *2 (alteration in original) (citation and internal quotation marks omitted).

[81] 290 F.3d at 1052 (upholding 28% fee on $97 million settlement fund).

Indeed, "federal district courts across the country have, in the class action settlement context, routinely awarded class counsel fees in excess of the 25% 'benchmark,' even in so-called 'mega-fund' cases."[82]

While *Vizcaino II* alone demonstrates that both the requested fee and resultant multiplier is well within the reasonable range, additional market information further shows that a 20% award is reasonable and within the range of fee awards from analogous cases. As discussed above, the EMG Study reports that the highest decile of recoveries in the study, above $67.5 million, averaged a 22.3% fee award.[83] The largest recoveries in the study, above $100 million, had mean and median fee percentages that ranged from 16.6% to 25.5%, depending on the year.[84] Across all settlements in the study, "[o]n average, fees were 27% of gross recovery during the 2009-2013 period, which is higher than the average fee percentage of 23% that we reported in our analyses of the 1993-2008 period."[85] And of the 53 settlements in the Northern District of California, the mean and median

[82] *Allapattah Servs. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1210 (S.D. Fla. 2006) (31.33% fee on $1.075 billion settlement fund); *accord In re Urethane Antitrust Litig.*, 2016 U.S. Dist. LEXIS 99839, at *82 (D. Kan. July 29, 2016) (awarding 33.33% fee on $835 million settlement, noting that "Counsel's expert has identified 34 megafund cases with settlements of at least $100 million in which the court awarded fees of 30 percent or higher"). *See also, e.g.*, *In re Optical Disk Drive Prods. Antitrust Litig.*, 2016 U.S. Dist. LEXIS 175515, at *6 (awarding 25% fee on $124.5 million settlement fund); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 U.S. Dist. LEXIS 102408, at *55-56 (27.5% fee on $576.75 million settlement fund); *In re Polyurethane Foam Antitrust Litig.*, 2015 U.S. Dist. LEXIS 23482 (N.D. Ohio Feb. 26, 2015) (awarding 30% fee on $147.8 million settlement fund); *In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167, 170 (D. Mass. 2014) (28% fee on $325 million settlement fund); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 U.S. Dist. LEXIS 49885, at *72 (N.D. Cal. Apr. 1, 2013) (28.6% fee on $571 million settlement fund); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1366 (S.D. Fla. 2011) (33.3% fee on $510 million settlement fund); *In re Comverse Tech., Inc.*, 2010 U.S. Dist. LEXIS 63342 (E.D.N.Y. June 23, 2010) (25% fee on $225 million settlement fund); *In re Rite Aid Corp. Secs. Litig.*, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (25% fee on $126 million settlement fund, resulting in multiplier of 6.96); *In re Linerboard Antitrust Litig.*, 2004 U.S. Dist. LEXIS 10532 (E.D. Pa. June 2, 2004) (30% fee on $202.5 million settlement fund); *In re Buspirone Antitrust Litig.*, 2003 U.S. Dist. LEXIS 26538 (S.D.N.Y. Apr. 11, 2003) (33.3% fee of a $220 million dollar fund); *In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25067 (D.D.C. July 13, 2001) (34.6% fee on $365 million settlement fund); *In re Ikon Office Sols.*, 194 F.R.D. 166, 170 (E.D. Pa. 2000) (30% fee on $111 million settlement fund); *In re Brand Name Prescription Drugs Antitrust Litig.*, 2000 U.S. Dist. LEXIS 1734 (N.D. Ill. Feb. 9, 2000) (25% fee on $696 million settlement fund); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 395 (S.D.N.Y. 1999) (27.5% fee on $116 million settlement fund).

[83] See EMG Study at 9-10.

[84] *See id.* at 8.

[85] *Id.*

percentages awarded were 26% and 25% respectively, and of the 144 settlements in the Ninth Circuit, the mean and median percentages awarded were also 26% and 25% respectively.[86] The study further reports that 19 antitrust settlements between 2009-2013 had a mean recovery of $501.09 million and a median recovery of $37.3 million, with mean and median percentages awarded of 27% and 30% respectively.[87] In addition, the study reports that "the fee-to-recovery ratio tends to be lower in cases with very large recoveries."[88] Conversely, the study at the same time reports that "higher multipliers are associated with higher recoveries."[89] Here, again, the fact that the average award in mega-fund cases across all subject matters and all locales in 2011 was greater than the 20% fee requested here confirms, like *Vizcaino II* does, that a 20% fee on a recovery of this size is reasonable and well inside the range of fee awards in comparable common fund cases.

e. A 20% fee does not award windfall profits to counsel even if the settlement were deemed a megafund.

In reiterating that any fee award must be reasonable, the Ninth Circuit has remarked that "for example, where awarding 25% of a 'megafund' would yield windfall profits for class counsel in light of the hours spent on the case, courts should adjust the bench-mark percentage or employ the lodestar method instead."[90] As an initial matter, counsel do not seek the benchmark 25% fee, notwithstanding the cases and studies cited in the previous section that would support such a request. And the 20% fee is reasonable. This is not a mass tort or fraud case in which mere disclosure of a government investigation all but guarantees the creation of a megafund, notwithstanding what counsel does or does not do; instead, this case went from zero recovery to megafund ***solely*** because of counsel's efforts and expenditures of expert fees and other expenses.[91] Relatedly, the size of the common fund

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[86] *Id*. at 11, 12.

[87] *Id.* at 13; *see also In re Auto. Refinishing Paint Antitrust Litig.*, 2008 U.S. Dist. LEXIS 569, at *16 (E.D. Pa. Jan. 3, 2008) ("We have previously noted that is not unusual in antitrust class actions for the attorneys to receive awards for fees in the 30% range.").

[88] EMG Study at 8.

[89] *Id.* at 27.

[90] *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 942 (citation omitted).

[91] *Accord, e.g.*, *In re Linerboard Antitrust Litig.*, 2004 U.S. Dist. LEXIS 10532, at *51 ("the highly favorable settlement was attributable to the petitioners' skill and it is inappropriate to penalize them for their success"); *In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25067, at *68 ("This Court agrees that it is not fair to penalize counsel for obtaining fine results for their clients.").

obtained in this case is not "merely a factor of the size of the class."[92] A megafund was created in this case despite the size of the classes, not because of it. And above-benchmark fees frequently are awarded where megafunds must be shared by hundreds of thousands, if not millions, of class members.[93] Here, there are approximately 45,000 class members.

So while applying the so-called "increase-decrease" principle may be appropriate in certain cases,[94] it is tenuous here, where the size of the fund is not merely a factor of the size of the classes but is instead directly related to the efforts of plaintiffs' counsel, who achieved exceptional, megafund results for a relatively discrete set of class members. In so doing, they obtained incidental benefits for the public, expended huge amounts of time and money, and faced considerable risks of non-recovery (and thus non-payment) in pursuing this complex antitrust case against well-financed, top-notch counsel. The 20% fee request is below the market contingency rate, below the Ninth Circuit benchmark rate, and below rates awarded in other megafund cases, and results in a multiplier within the range of multipliers that the Ninth Circuit has deemed reasonable. The 20% fee request is eminently reasonable and justified based on all the circumstances of this case. To nonetheless apply the increase-decrease principle and reduce an otherwise reasonable fee simply because this is a

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[92] *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 943.

[93] *See In re Optical Disk Drive Prods. Antitrust Litig.*, 2016 U.S. Dist. LEXIS 175515, at *36 ($124.5 million settlement for "millions of class members"); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 U.S. Dist. LEXIS 102408, at *1 ($576.75 million settlement for millions of class members); *In re Polyurethane Foam Antitrust Litig.*, 2015 U.S. Dist. LEXIS 23482, at *8 ($147.8 million settlement for "more than 48,000" class members); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 U.S. Dist. LEXIS 49885, at *58 ($571 million settlement fund for "235,808 claimants"); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1366 ($510 million settlement for "approximately 13 million" class members); *In re Comverse Tech., Inc.*, 2010 U.S. Dist. LEXIS 63342, at *5 ($225 million settlement fund for "more than 204,000 potential class members"); *In re Linerboard Antitrust Litig.*, 2004 U.S. Dist. LEXIS 10532, at *18 ($202.5 million settlement for "approximately 80,000 companies"); *In re Ikon Office Sols.*, 194 F.R.D. at 170 ($111 million settlement for more than 200,000 class members); *but see In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25067 ($365 million settlement fund for 4,000 class members).

[94] Many courts are not so sure. As Judge Katz put it in oft-quoted language: "The court will not reduce the requested award simply for the sake of doing so when every other factor ordinarily considered weighs in favor of approving class counsel's request of thirty percent. . . . It is difficult to discern any consistent principle in reducing large awards other than an inchoate feeling that it is simply inappropriate to award attorneys' fees above some unspecified dollar amount, even if all of the other factors ordinarily considered relevant in determining the percentage would support a higher percentage. Such an approach also fails to appreciate the immense risks undertaken by attorneys in prosecuting complex cases in which there is a great risk of no recovery." *In re Ikon Office Sols.*, 194 F.R.D. at 196-97 (citations omitted).

"megafund" case would be unreasonable.

B. Using lodestar as a cross-check further supports the requested fees.

As the Ninth Circuit has explained, "a crosscheck using the lodestar method can confirm that a percentage of recovery amount does not award counsel an exorbitant hourly rate."[95] Here, counsel for plaintiffs have invested $11,515,749.30 in attorneys' and para-professionals' time in this case, and request a 3.62 multiplier, which is well within the range of multipliers awarded in similar cases.

A court may give an upwards adjustment to a lodestar (through a positive multiplier) to reflect "reasonableness" factors, including: (1) the amount involved and the results obtained, (2) the time and labor required, (3) the novelty and difficulty of the questions involved, (4) the skill requisite to perform the legal service properly, (5) the preclusion of other employment by the attorney due to acceptance of the case, (6) the customary fee, (7) the experience, reputation, and ability of the attorneys, and (8) awards in similar cases.[96] These are referred to as *Kerr* "reasonableness" factors after the Ninth Circuit's opinion in *Kerr v. Screen Extras Guild, Inc.*[97] "Foremost among these considerations, however, is the benefit obtained for the class."[98]

1. Plaintiffs' counsel achieved an exceptional result for the classes.

The first factor, the amount involved and the results for the classes, strongly supports the 20% fee request and the 3.62 multiplier. At the time of settlement, the parties agreed to a fund equaling nearly 100% of single damages according to Dr. Rascher's model.[99] And after settlement, as more class members became eligible to receive payment from the $208 million fund (because their schools agreed to start paying COA), the recovery for all of those eligible class members now stands

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[95] *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 949 (internal quotation marks and citation omitted).

[96] *Id.* at 941-42. The Supreme Court has since called into question the relevance of two of the original *Kerr* factors: the contingent nature of the fee and the "desirability" of the case. *See Resurrection Bay Conserv. All. v. City of Seward*, 640 F.3d 1087, 1095 n.5 (9th Cir. 2011). Other factors such as "time limitations imposed by the client or the circumstances" and "the nature and length of the professional relationship with the client" do not readily apply here.

[97] 526 F.2d 67, 70 (9th Cir. 1975).

[98] *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 942.

[99] *See* ECF No. 560-4.

at 66% of their single damages.[100] If the Court grants class counsel's fee and expense request, class members will receive approximately 50% of their damages, a result almost never achieved in large, complex antitrust cases.[101]

2. Plaintiffs' counsel expended significant resources on behalf of the classes.

Plaintiffs' counsel collectively devoted $11,515,749.30 in attorneys' and para-professionals' time in litigating this matter. They have also spent $3,184,274.38 in expenses in this litigation. This commitment of time, personnel, and money to the classes supports the requested award.

3. This case presented difficult questions, requiring extraordinary skill by plaintiffs' counsel.

The third and fourth *Kerr* factors—the difficulty of the questions presented by the litigation and the skill required to perform the legal services properly—both support the requested award. Plaintiffs' counsel first had to overcome defendants' argument that *O'Bannon* precluded their claim, and then had to present the motion for certification of damage classes so as to overcome this Court's order in *O'Bannon* declining to certify a damages class. And plaintiffs' counsel confronted the difficulties in establishing which schools would have provided COA (and which would not have) in the *but-for* world. In working with an economist to provide a workable, reliable economic model to support these arguments, counsel had to identify, acquire, and understand vast amounts of data, not only to ensure the workability of a reliable antitrust impact and damages model, but also to show the Court an administratively feasible method to identify class members and calculate damages specific to each school and student. And of course, plaintiffs faced the risk of proving liability before even getting a damages award. Counsel performed extensive work in discovery building the liability case to establish that defendants violated the antitrust laws by capping the GIA.

Defendants vigorously opposed plaintiffs at every turn, including on class certification and the merits (with such opposition continuing in the injunctive relief case). Settlement was not reached

[100] This smaller percentage recovery is a function of math—as the number of class members eligible to recover damages from the $209 million goes up, the average *pro rata* recovery goes down. There are few reported cases with sixty-six percent settlement recovery in large antitrust cases.

[101] *See, e.g.*, *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 U.S. Dist. LEXIS 102408, at *65 (holding that 20% antitrust recovery in a megafund case warranted "a modest increase over the Ninth Circuit benchmark"); *In re Omnivision Techs.*, 559 F. Supp. 2d at 1046 ("a total award of approximately 9% of the possible damages . . . weighs in favor of granting the requested 28% fee").

until class certification had been fully briefed. These issues have required advocacy and skill beyond routine litigation, especially in light of the strength of counsel hired by the multiple defendants in this action.

4. The market rate of antitrust lawyers with the experience of plaintiffs' counsel supports the request.

The hourly rates of plaintiffs' counsel are in line with market rates in this District. The most senior HB attorney on the case, Steve Berman, bills at an hourly rate of $950. Other partners at HB have hourly rates ranging between $578 and $760. Associates at HB billed at hourly rates ranging from $295 to $630.[102] The most senior PSW attorneys on the case—Clifford Pearson and Bruce Simon—billed at hourly rates between $835 and $1,035 over the course of this matter. Another PSW partner billed at between $715 and $870 per hour, while PSW "of counsel" lawyers billed at between $450 and $900 per hour. And PSW associates billed at hourly rates ranging from $350 to $900. Staff and law clerks at PSW billed at hourly rates ranging from between $175 to $225.[103] The two partners at Pritzker Levine who worked on this matter—Elizabeth Pritzker and Jonathan Levine—have an hourly rate of $695 each. The associates and "of counsel" attorney who worked on this matter for Pritzker Levine have hourly rates ranging from $495 to $625.[104]

All of these rates are well within the range of $200 to $1,080 charged by attorneys in California in 2015, as shown by a reputable survey of billing rates.[105]

5. Plaintiffs' counsel by-passed other cases due to their commitment to this case.

Plaintiffs' counsel have dedicated a core team of individuals to the litigation of this action. The consequence of dedicating a team of experienced antitrust attorneys has meant that many of these professionals could not work on other cases. The choice of plaintiffs' counsel to commit a significant number of attorneys almost exclusively to this litigation, forgoing other cases and other projects, further supports the request for fees.

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[102] *See* Berman Decl., Ex. A (setting forth HB hourly rates).
[103] *See* Simon Decl., Ex. B (setting forth PSW hourly rates).
[104] *See* Pritzker Decl., Ex. 2 (setting forth Pritzker Levine hourly rates).
[105] Berman Decl., Ex. D (2015 NLJ Billing Survey). *See also* Pritzker Decl. ¶ 23.

6. The requested fee is reasonable when compared to fees in similar litigation.

The sixth and eighth *Kerr* factors—the customary fee and awards in similar cases—both support the fee request. A 3.62 multiplier for a fee award of 20% is reasonable in light of awards in other cases. In *Vizcaino II*, the Ninth Circuit affirmed a fee award based on a 3.65 multiplier.[106] This is nearly the exact multiplier counsel ask for here. And in another case, the Ninth Circuit affirmed a 6.85 multiplier, holding that it "falls well within the range of multipliers that courts have allowed."[107] Similarly here, a 3.62 multiplier is reasonable, particularly given the difficult nature of this litigation and the fact that the fund equals approximately 66% of class members' damages.

The requested 3.62 multiplier is well within the range of awards in other cases. In *In re Linerboard Antitrust Litigation*,[108] the district court explained that "during 2001-2003, the average multiplier approved in common fund class actions was 4.35 and during 30 year period from 1973-2003, [the] average multiplier approved in common fund class actions was 3.89." So the 3.62 multiplier requested by plaintiffs' counsel in this matter is below the midrange of multipliers awarded in other cases—and almost none of these other cases, if any, approach the success of the results here. Indeed, multipliers of 4.0 and above are frequently applied in granting fee awards from common funds.[109]

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[106] 290 F.3d at 1050-51; *id*. at 1052-54 (noting district court cases in the Ninth Circuit approving multipliers as high as 6.2, and citing only 3 of 24 decisions with approved multipliers below 1.4).

[107] *Steiner v. Am. Broad. Co.*, 248 F. App'x 780, 783 (9th Cir. 2007). *See also Buccellato v. AT&T Operations, Inc.*, 2011 U.S. Dist. LEXIS 85699, at *4 (N.D. Cal. June 30, 2011) ("The resulting multiplier of 4.3 is reasonable in light of the time and labor required, the difficulty of the issues involved, the requisite legal skill and experience necessary, the excellent and quick results obtained for the Class, the contingent nature of the fee and risk of no payment, and the range of fees that are customary.").

[108] 2004 U.S. Dist. LEXIS 10532, at *50 (E.D. Pa. June 2, 2004) (citing Stuart J. Logan, et al., *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Reports 167 (2003)).

[109] *See, e.g., In re Credit Default Swaps Antitrust Litig.*, 2016 U.S. Dist. LEXIS 54587, at *54 (S.D.N.Y. Apr. 25, 2016) (lodestar multiplier "of just over 6"); *Gutierrez v. Wells Fargo Bank, N.A.*, 2015 U.S. Dist. LEXIS 67298, at *25 (N.D. Cal. May 21, 2015) (awarding $18.5 million in fees, noting that "this order allows a multiplier of 5.5 mainly on account of the fine results achieved on behalf of the class, the risk of non-payment they accepted, the superior quality of their efforts, and the delay in payment"); *In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 448 (E.D.N.Y. 2014) (multiplier of "about 3.41"); *Athale v. Sinotech Energy Ltd.*, 2013 U.S. Dist. LEXIS 199696 (S.D.N.Y. Sept. 4, 2013) (20% fee award with 5.65 multiplier); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers"); *In re Enron Corp. Secs., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 741 (S.D. Tex. 2008) (multiplier of 5.2); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319 (S.D.N.Y. 2005) (4.0 multiplier); *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 998-99 (D. Minn. 2005) (25% fee with 4.7 multiplier); *In re*

7. The reputation, ability, and efficiency of plaintiffs' counsel supports the requested fee.

The three firms requesting attorneys' fees in this matter are among the most well-respected class action litigation firms in the country, as this Court has witnessed in numerous cases.[110] And the efficiency with which plaintiffs' counsel achieved such exceptional results is laudable because it benefits the classes. For example, by working efficiently and keeping a tight hold on the lodestar rein, class counsel is less inclined to seek a benchmark award of 25 percent (or more), resulting in more money to class members. So class counsel's efficiency should be considered favorably in evaluating the reasonableness of the fee request.[111]

Plaintiffs' counsel have focused on the most efficient path to results, not devoting resources to "nice to have" belt-and-suspender litigation.[112] These actions reduced their lodestar, resulting in a higher multiplier when cross-checking counsel's percentage-of-the-fund award. But that's a good thing.[113] Strategic and efficient lawyering not only encourages "the just, speedy, and inexpensive determination of every action and proceeding"[114] but also directly correlates with obtaining superb results. Meet and confers with fewer lawyers tend to be more productive; oral arguments tend to go

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Rite Aid Corp. Secs. Litig., 362 F. Supp. 2d at 587 (25% fee with 6.96 multiplier); *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 134-35 (D.N.J. 2002) (28% fee with 4.3 multiplier); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 371 (S.D.N.Y. 2002) (33.3% fee, resulting in "modest multiplier of 4.65"); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) ("The percentage fee award in this case represents a multiplier of approximately 3.97 times Class Counsel's lodestar of $36,191,751. A multiplier of 3.97 is not unreasonable in this type of case."); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 198 (S.D.N.Y. 1997) (5.5 multiplier); *Weiss v. Mercedes-Benz of N. Am.*, 899 F. Supp. 1297 (D.N.J. 1995) (9.3 multiplier), *aff'd*, 66 F.3d 314 (3d Cir. 1995); *Rabin v. Concord Assets Grp., Inc.*, 1991 U.S. Dist. LEXIS 18273, at *4 (S.D.N.Y. Dec. 19, 1991) (awarding 4.4 multiplier and explaining that "multipliers of between 3 and 4.5 have been common") (internal quotation marks and citation omitted).

[110] *See* firm resumes at Berman Decl., Ex. E; Simon Decl., Ex. A; Pritzker Decl., Ex. 1.

[111] *See Vizcaino II*, 290 F.3d at 1050 n.5 ("The lodestar method is merely a cross-check on the reasonableness of a percentage figure, and it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee.").

[112] *See* Berman Decl. ¶ 10; Simon Decl. ¶ 17 n.2.

[113] *See In re Xcel Energy, Inc.*, 364 F. Supp. 2d at 996 ("But for the cooperation and efficiency of counsel, the lodestar of plaintiffs' counsel would have been substantially more and would have required this court to devote significant judicial resources to its management of the case. Instead, counsel moved the case along expeditiously, and the court determines that the time and labor spent to be reasonable and fully supportive of the 25% attorney fee.").

[114] Fed. R. Civ. P. 1.

better when the person who wrote the motion also argues the motion; and depositions are more effective when the person taking the deposition drafted the questions for the deposition.

Although modification of a fee award based on a lodestar cross-check may serve some utility in cases at the fringes, routine recourse to it threatens to swallow the benefits that the percentage-of-the-fund method provides, for "if a court sometimes employs a lodestar cross-check, then self-interested entrepreneurial lawyers will conduct their affairs accordingly."[115] In sum, in order to maximize the class recovery, promote optimal deterrence, incentivize efficient, speedy, and inexpensive dispute resolution, and conserve judicial resources, this Court should award attorneys' fees in an amount of 20% of the fund recovered for the classes.

C. Class counsel's expenses are reasonable and were necessarily incurred.

Class counsel seek reimbursement of $3,184,274.38 in expenses necessarily incurred in the prosecution of this action. All expenses that are typically billed by attorneys to paying clients in the marketplace are compensable.[116] With this motion, plaintiffs provide an accounting of the expenses incurred by class counsel.[117] The primary expense in this case is for experts. Several additional categories account for the remainder, including filing fees, travel expenses, costs of court and deposition transcripts, and computer research expenses. All of these costs were necessarily and reasonably incurred to achieve this $208 million dollar recovery, and they reflect market rates for the various categories of expenses incurred. And plaintiffs' counsel advanced these necessary expenses, interest-free, without assurance that they would even be recouped. The request of plaintiffs' counsel for reimbursement of expenses is reasonable.[118]

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[115] Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 145-46 (2006). *See also* Sandra R. McCandless et al., Tort Trial & Ins. Practice Section of the Am. Bar Ass'n, *Report on Contingent Fees in Class Action Litigation*, 25 Rev. Litig. 459, 471 (2006) ("The lodestar cross-check reintroduces the problems of the lodestar method. If the attorneys in the previous example know that their fee, when calculated as a percentage, will be 'crosschecked' by the lodestar, they have every financial incentive to put as many hours into the file as possible. They may do unnecessary work or delay settlement to make sure that the multiplier needed to get to their percentage fee does not appear to be out of line.").

[116] *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994).

[117] *See* Berman Decl., Ex. B; Simon Decl., Ex. C; Pritzker Decl., Ex. 3.

[118] *See Vedachalam*, 2013 U.S. Dist. LEXIS 100796, at *9-10 ("Plaintiffs' Counsel have incurred unreimbursed costs prosecuting this case on behalf of the Class . . . . Plaintiffs' Counsel put forward

D. Service awards should be granted to the class representatives.

Plaintiffs request that the Court approve service awards in the amount of $20,000 each for each class representative, to be deducted from the settlement funds. Service awards for class representatives are provided to encourage them to undertake the responsibilities and risks of representing the classes and to recognize the time and effort spent in the case. Incentive awards "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general."[119] Here, the class representatives spent a significant amount of time assisting in the litigation of this case, in preparing for and having their depositions taken, in searching for and producing documents that spanned many years, and in conferring with counsel throughout the litigation.[120] Awards of $20,000 each are consistent with service awards in other cases.[121]

IV. CONCLUSION

Plaintiffs and class counsel respectfully submit that their requests for fees, expenses, and service awards are reasonable and should be granted.

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these out-of-pocket costs without assurance that they would be repaid. These litigation expenses were necessary to secure the resolution of this litigation.").

[119] *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009); *see also Just Film, Inc. v. Merch. Servs., Inc.*, 2013 U.S. Dist. LEXIS 186623, at *4-5 (N.D. Cal. Dec. 11, 2013) (explaining that incentive awards "may be made to class representatives based on '(1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulty encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation and; (5) the personal benefit (of lack thereof) enjoyed by the class representative as a result of the litigation.'" (citation omitted)).

[120] *See* Berman Decl. ¶¶ 22-25; Simon Decl. ¶¶ 47-48; Pritzker Decl. ¶¶ 26-30.

[121] *See Dandan Pan v. Qualcomm Inc.*, 2017 U.S. Dist. LEXIS 120150, at *42 (S.D. Cal. July 31, 2017) ("[A] $50,000.000-per-Class-Representative award is reasonable. In particular, there is no doubt that in the present case the Class Representatives have helped secure substantial relief for the class . . . ."); *Syed v. M-I, L.L.C.*, 2017 U.S. Dist. LEXIS 118064, at *26-27 (E.D. Cal. July 27, 2017) (awarding $15,000 and $20,000 to two class representatives); *In re High-Tech Empl. Antitrust Litig.*, 2015 U.S. Dist. LEXIS 118052, at *62 (N.D. Cal. Sept. 2, 2015) (authorizing $80,000 and $120,000 service awards in case with $415 million settlement fund, in addition to $20,000 award to each for prior settlement); *Godshall v. Franklin Mint Co.*, 2004 U.S. Dist. LEXIS 23976, at *21 (E.D. Pa. Dec. 1, 2004) (granting incentive award of $20,000 to each plaintiff); *In re Linerboard Antitrust Litig.*, 2004 U.S. Dist. LEXISIS 10532, at *56-58 (awarding $ 25,000 for each of five class representatives and collecting cases in which awards of $24,000 or more were authorized); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995) (authorizing $50,000 incentive award in case with settlement fund of $76,723,213.26).

DATED: September 6, 2017

Respectfully Submitted,

By */s/ Steve W. Berman*
Steve W. Berman (*pro hac vice*)

Craig R. Spiegel (122000)
Ashley A. Bede (*pro hac vice*)
HAGENS BERMAN SOBOL SHAPIRO LLP
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslaw.com
craigs@hbsslaw.com
ashleyb@hbsslaw.com

Jeff D. Friedman (173886)
HAGENS BERMAN SOBOL SHAPIRO LLP
715 Hearst Avenue, Suite 202
Berkeley, CA 94710
Telephone: (510) 725-3000
Facsimile: (510) 725-3001
jefff@hbsslaw.com

Bruce L. Simon (96241)
Aaron M. Sheanin (214472)
Benjamin E. Shiftan (265767)
PEARSON, SIMON & WARSHAW, LLP
44 Montgomery Street, Suite 2450
San Francisco, CA 94104
Telephone: (415) 433-9000
Facsimile: (415) 433-9008
bsimon@pswlaw.com
asheanin@pswlaw.com
bshiftan@pswlaw.com

Plaintiffs' Class Counsel

TAB 43A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE OPTICAL DISK DRIVE PRODUCTS ANTITRUST LITIGATION	No. 3:10-md-2143 RS
	[~~PROPOSED~~] ORDER GRANTING FINAL APPROVAL OF INDIRECT PURCHASER PLAINTIFFS' SETTLEMENTS WITH PANASONIC, NEC, SONY AND HLDS DEFENDANT FAMILIES, GRANTING MOTION FOR ATTORNEY FEES, EXPENSES AND SERVICE AWARDS, AND OVERRULING OBJECTIONS **AS MODIFIED BY COURT**
	DATE ACTION FILED: Oct. 27, 2009
This Document Relates to: ALL INDIRECT PURCHASER ACTIONS	

This matter comes before the Court on indirect purchaser plaintiffs' motion for final approval of settlements (ECF No. 1994), motion for payment of attorney fees, reimbursement of expenses, and payment of service awards to the named representatives (ECF No. 1963). A hearing was held on December 8, 2016.

The Court has carefully reviewed and considered the record in this matter, including the memoranda and supporting declarations submitted in support of the motion for preliminary approval and the exhibits attached thereto, including the proposed settlement agreements and each of the class notices; indirect purchaser plaintiffs' (IPPs) motion for final approval of the Settlement Agreement; the memoranda in support of the motion for final approval submitted by IPPs; the memoranda and declarations submitted in support of the fee petition; all objections submitted to the Court and IPPs' responses to those objections.

Good cause appearing, the Court orders as follows:

I. BACKGROUND

Indirect purchaser plaintiffs (IPPs) move for final approval of their settlements with the Panasonic, NEC, Sony and HLDS defendant families.[1] On July 21, 2016, this Court granted preliminary approval of these settlements, provisionally certifying the settlement class, preliminarily approving the settlements, and ordering dissemination of notice to class members (ECF No. 1916).

Two notice administrators provided notice in accordance with this Court's order. Out of the millions of class members, only fifteen class members requested exclusion from the class, and a total of eight objections were filed. These four settlements will result in recovery of $124.5 million for the indirect purchaser class. Under the proposed schedule, the class is able to make claims until July 1, 2017, at which point IPPs propose a well-accepted distribution plan – a pro-rata calculation taking into account how many ODDs were purchased by each class member.

[1] "Panasonic" refers to Panasonic Corporation and Panasonic Corporation of North America. "NEC" refers to NEC Corporation. "Sony" refers to Sony Corporation; Sony Optiarc Inc. (formerly known as Sony NEC Optiarc Inc.); and Sony Optiarc America Inc. "HLDS" refers to Hitachi-LG Data Storage, Inc. and Hitachi-LG Data Storage Korea, Inc. (collectively "HLDS").

II. SUMMARY OF SETTLEMENTS

A. Settlement Terms

The proposed settlements resolve all claims against these four defendant families stemming from the alleged conspiracy to restrain competition for ODDs. The settlement classes are defined as follows (ECF No. 1898-3 at Ex. A, ¶ A(1); Ex. B, ¶ A(1); Ex. C, A(1); Ex. D, ¶ A(1)):

> All persons and entities who, as residents of Arizona, California, District of Columbia, Florida, Hawaii, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oregon, Tennessee, Utah, Vermont, West Virginia and Wisconsin and during the period April 2003 to December 2008, purchased new for their own use and not for resale: (i) a computer with an internal ODD; (ii) a stand-alone ODD designed for internal use in computers; or (iii) an ODD designed to be attached externally to a computer. ODD refers to a DVD-RW, DVD-ROM, or COMBO drive manufactured by one or more Defendants or their coconspirators. Excluded from the class are any purchases of Panasonic-branded computers.

The proposed settlement classes mirror the class certified by this Court on February 8, 2016 (ECF No. 1783).

B. The Settlement Consideration

Under the proposed settlements, defendants will pay a total of $124.5 million in cash. The Panasonic defendants will contribute $16.5 million; NEC will contribute $6.5 million; the Sony defendants will contribute $28.5 million; the HLDS defendants will contribute $73 million. In addition, each of the settlement agreements provides for cooperation from these defendants to assist in the prosecution of claims against the remaining defendants and at trial.

C. Release of Claims

Plaintiffs and class members will release all federal and state-law claims against the Panasonic, NEC, Sony and HLDS defendants if the settlements become final, relating to the conduct alleged in plaintiffs' complaint, including "claims under foreign antitrust or competition laws . . . that relate to or arise out of the sale of any of the ODDs or any of the products containing ODDs" (ECF No. 1898-3 at Ex. A, ¶ 13; Ex. B, ¶ 13; Ex. C, ¶ 12; Ex. D, ¶ 13) that are the subject of the complaint. The release does not preclude plaintiffs from pursuing their claims against the other defendants (ECF No. 1898-3 at Ex. A, ¶ 13; Ex. B, ¶ 13; Ex. C, ¶ 12; Ex. D, ¶ 12). The settlements release only those

claims of class members who will recover under the terms of the settlement. The HLDS settlement also releases claims against LG Electronics, Inc., LG Electronics USA, Inc., and Hitachi, Ltd. (related companies to HLDS).

III. THE SETTLEMENTS ARE FAIR, REASONABLE AND ADEQUATE

In order to approve a settlement in a class action, the court must conduct a three-step inquiry. *First*, it must assess whether defendants have met the notice requirements under the Class Action Fairness Act (CAFA). *See* 28 U.S.C. § 1715(d). *Second*, it must determine whether the notice requirements of Federal Rule of Civil Procedure 23(c)(2)(B) have been satisfied. *Finally*, it must conduct a hearing to determine whether the settlement agreement is "fair, reasonable, and adequate." *See* Fed. R. Civ. P. 23(e)(2); *Staton v. Boeing Co*., 327 F.3d 938, 959 (9th Cir. 2003) (discussing the Rule 23(e)(2) standard); *Adoma v. Univ. of Phoenix. Inc*., 913 F.Supp.2d. 964, 972 (E.D. Cal. 2012) (conducting three-step inquiry). Each of these requirements are met here.

A. The Parties Have Complied with the Class Action Fairness Act

CAFA requires that "[n]ot later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve [notice of the proposed settlement] upon the appropriate State official of each State in which a class member resides and the appropriate Federal official[.]" *See* 28 U.S.C. § 1715(b).The court may not grant final approval of a class action settlement until the CAFA notice requirement is met. *See* 28 U.S.C. § 1715(d). Here, the NEC, Panasonic, Sony and HLDS defendants provided the required CAFA notice (ECF Nos. 1987, 1990, 1991, 1992). No Attorneys General have submitted statements of interest or objections in response to these notices.

B. The Settlement Class Meets All Requirements of Rule 23(e)

In its order granting preliminary approval, and its order certifying the class on February 8, 2016 (ECF No. 1783), the Court certified the class pursuant to Rule 23(b)(3) (ECF No. 1916). The same analyses apply here, and the Court affirms its order certifying the class for settlement purposes under Rule 23(e).

C. The Parties Have Complied with Rule 23(c) Notice Requirements

Class actions brought under Rule 23(b)(3) must satisfy the notice provisions of Rule 23(c)(2), and upon settlement of a class action, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(l). Rule 23(c)(2) prescribes the "best notice that is practicable under the circumstances, including individual notice" of particular information. Fed. R. Civ. P. 23(c)(2)(B).

The proposed notice plan was undertaken and carried out pursuant to this Court's preliminary approval order. The notice administrators provided direct notice via e-mail (obtained from retailers of the products at issue in this case) to approximately 14.7 million consumers. On August 20, 2016, The notice administrators made a case website publicly available which contained the full settlement agreements, the Court's order granting preliminary approval to these settlements, the long form notice, and the claims form (in both electronic and PDF version). On October 5, 2016, the website was updated to include IPPs' motion for attorney fees, expenses and service awards for class representatives, as well as the accompanying attorney declaration. A toll-free automated telephone support line was activated to provide answers to frequently asked questions by class members. The notice administrators engaged in an extensive public notice campaign, including:

a. Publishing summary notice in the national edition of *USA Today*;

b. Publishing summary notice in the national edition of *People* magazine;

c. Implementing a text link advertising campaign on Google.com which served 4,593,972 impressions with 8,092 clicks through to the case website;

d. Developing creative banner advertisements that utilizes behavioral audience targeting, contextual targeting, mobile inventory, and prospecting to reach likely class members – which resulted in 196,122,505 impressions with 158,556 clicks through to the case website;

e. Developing banner advertising and text link advertising on Facebook.com, resulting in 4,481,222 impressions with 89,327 clicks through to the case website;

f. Advertising through Twitter.com, resulting in 1,770,199 impressions with 16,209 clicks through to the case website;

g. Case write-up and inclusion in the Top Class Action website and monthly newsletter, and;

h. Releasing a national, party-neutral press release.

In total, the indirect notice efforts generated over 207,530,045 impressions, directing over 272,184 clicks through to the case website. The volume of impressions generated was nearly 11 million more than estimated in the Notice plan. The notice administrator confirms that at least 70 percent of the class has received notice of these settlements.

The Court previously found that the notice itself informed class members of the nature of the action, the terms of the proposed settlements, the effect of the action and the release of claims, as well as class members' right to exclude themselves from the action and their right to object to the proposed settlements (ECF No. 1783). The Court finds that plaintiffs have complied with all of the requirements of Rule 23.

D. The Proposed Panasonic, NEC, Sony and HLDS Settlements Are Fair, Adequate and Reasonable

This Court is entitled to exercise its "sound discretion" when deciding whether to grant final approval. *See Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981) ("Dismissal or compromise of a class action is left to the sound discretion of the trial judge."). It is also well established in the Ninth Circuit that "voluntary conciliation and settlement are the preferred means of dispute resolution." *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). "[T]here is an overriding public interest in settling and quieting litigation" and this is "particularly true in class action suits." *Van Bronkhorst v. Safeco Corp*., 529 F.2d 943, 950 (9th Cir. 1976). A "presumption in favor of voluntary settlement agreements" exists, and "'this presumption is especially strong in class actions and other complex cases . . . because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts.'" *Sullivan v. DB Invs.*, 667 F.3d 273, 311 (3d Cir. 2011) (internal citation omitted; ellipsis in original).

The four settlements reached between IPPs and four defendant families – NEC, Panasonic, Sony and HLDS – satisfy all criteria for a fair, adequate, and reasonable settlement. In determining whether a settlement agreement is fair, adequate, and reasonable, the Court must weigh some or all

of the following factors: (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011).

1. Strength of Plaintiffs' Case

The Court finds that the "strength of the plaintiffs' case" weighs in favor of approving the settlement. *Bluetooth*, 654 F.3d at 946. Plaintiffs' claims implicate legal and factual issues that are vigorously disputed, including the scope of the conspiracy, the impact from the conspiracy, whether the overcharge due to the conspiracy was passed-through, and whether IPPs will prove a conspiracy that is larger than the one outlined in the criminal guilty pleas by HLDS. The novelty of these issues created uncertainty as to IPPs' likelihood of success on their claims, as well as to defendants' defenses to those claims.

2. Risk, Expense, Complexity, and Likely Duration of Further Litigation

The Court finds that the "risk, expense, complexity, and likely duration of further litigation" (*Bluetooth,* 654 F.3d at 946) supports final approval of these settlements. "'An antitrust class action is arguably the most complex action to prosecute. . . . The legal and factual issues involved are always numerous and uncertain in outcome.'" *In re Linerboard Antitrust Litig*., MDL No. 1261, 2004 U.S. Dist. LEXIS 10532, at *34 (E.D. Pa. June 2, 2004) (citations omitted). IPPs took on substantial risk in bringing this case. Antitrust class actions are one of the most complex types of litigation – this one involves eleven defendant families, multiple continents, four languages, and alleges a global conspiracy that purportedly started over a decade ago. The risk inherent in this litigation was evidenced by this Court's denial of the IPPs' first motion for class certification (ECF No. 1444).

The continued litigation against the remaining defendants underscores that allowing some recovery for the IPP class brings certain value to these claims. The remaining defendants intend on bringing multiple motions for summary judgment, decertification, and likely further motions to

exclude expert testimony. In the face of both the historic risk faced by the IPPs, as well as the future risk to the class, this factor certainly supports final approval of these settlements.

3. The Risk of Maintaining Class Action Status Throughout the Trial

The Court finds that the "risk of maintaining class action status throughout the trial," (*Bluetooth*, 654 F.3d at 946) weighs in favor of approving the settlements. The defendants have already suggested that they intend to bring a motion for decertification (ECF No. 1972). Although this Court has already found that the class met the requirements of Rule 23, a court may decertify a class at any time. *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009) (citing *General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)).

4. The Amount Offered in Settlement

"[T]he very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes." *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (internal quotation marks omitted). Here, recovery from these four defendants represents 31 percent of the damages attributable to the market share of these defendants, and 15 percent of the total damages ($840 million) suffered by the indirect purchaser class, as calculated by their experts and which they would have claimed at trial. The litigation will continue against defendants responsible for approximately fifty percent of the commerce at issue. This factor strongly weighs in favor of granting final approval.

5. The Extent of Discovery Completed and Stage of Proceedings

The extent of the discovery conducted to date and the stage of the litigation are both indicators of counsel's familiarity with the case and of plaintiffs having enough information to make informed decisions. *See, e.g.*, *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). "A settlement following sufficient discovery and genuine arms-length negotiation is presumed fair." *See Knight v. Red Door Salons, Inc.*, No. 08-01520 SC, 2009 U.S. Dist. LEXIS 11149, at *10 (N.D. Cal. Feb. 2, 2009).

The parties here conducted extensive discovery, thoroughly testing the claims and defenses available in this case. Discovery included dozens of depositions, hundreds of written interrogatories, and the production and review of millions of pages of documents. IPPs and the Panasonic and Sony

defendants also reached these settlements with the assistance of Magistrate Judge Corley, further supporting the presumption that they were genuine, arms-length settlements. Given that the parties entered into these settlements with a substantial understanding of the strengths and weaknesses of their case, this factor further supports final approval here.

6. The Experience and Views of Class Counsel Support Approval

"The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *See In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2007) (internal quotation marks and citation omitted). Here, counsel for IPPs – experienced antitrust lawyers with many years of experience – support the settlement. This factor weighs in support of final approval.

7. The Presence of a Government Participant

The Class Action Fairness Act requires notice of a settlement be given to the Department of Justice and affected states with time to comment prior to final approval of the settlement. *See* 28 U.S.C. § 1715(b). This allows the appropriate state or federal official the chance to voice concerns if they believe that the class action is not in the best interest of their citizens. *See* S. REP. 109-14, 5, 2005 U.S.C.C.A.N. 3, 6. The State of Florida is a participant in this litigation. Here, no government participant has raised an objection or concern regarding the settlements. This fact supports final approval of the settlement.

8. The Reaction of Class Members

IPPs' notice program reached millions of consumers who purchased the computers and ODDs involved in this case. Only eight objections and fifteen requests for exclusion were received out of the millions of class members. The reaction of the class thus strongly favors approval of the settlement. *See, e.g.*, *Churchill Village L.L.C. v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming settlement with 45 objections out of 90,000 notices sent); *In re Linkedin User Privacy Litig.*, 309 F.R.D. 573, 589 (N.D. Cal. 2015) (finding "an overall positive reaction" by the class where only 57 class members opted out and six objected out of a class of 798,000).

9. Whether the Settlement Was the Product of Collusion

The Ninth Circuit recently identified three factors that may indicate a disregard for the interests of the class: (1) when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded; (2) when the parties negotiate a "clear sailing" arrangement providing for payment of attorney fees separate and apart from class funds, which carries the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class; and (3) when the parties arrange for sums not awarded to the Class to revert to defendants rather than be added to the class fund. *Bluetooth*, 654 F.3d at 947. None of these factors are present here.

* * *

In summary, the Court finds that the four proposed settlements are fair, reasonable and adequate and gives these settlements final approval.[2] The Court will enter the final proposed judgments provided by the settling parties.

IV. ATTORNEY FEES

IPPs request: (1) an award of attorney fees in the amount of 25 percent of the $124.5 million settlement fund; (2) reimbursement of expenses IPPs' counsel have advanced to date on behalf of the class; and (3) service awards for the twenty-three class representatives.

In the Ninth Circuit, the district court has discretion in a common fund case to choose either the "percentage-of-the-fund" or the "lodestar" method in calculating fees. *In re Online DVD-Rental Antitrust Litig*., 779 F.3d 934, 949 (9th Cir. 2015). Regardless of what method is chosen as the primary method to calculate attorney fees, the Ninth Circuit encourages district courts to conduct "a cross-check using the other method." *Id.*

[2] The majority of the objections relate to the attorney fee petition, rather than the fairness, adequacy, or other terms of the settlement itself. For convenience, the objections are all addressed in a separate section below. As discussed in that section, all of the objections to the settlement itself are overruled, for the reasons stated.

Hagens Berman requests 25 percent of the common fund – $31,125,000. Applying a lodestar cross-check, this would represent a 1.29 multiplier from Hagens Berman's lodestar of $24,199,800.20. The Court finds these fees to be fair and reasonable under either method.[3]

A. The Twenty-Five Percent Benchmark

When considering a request for attorney fees that is calculated using the percentage-of-recovery method, the Ninth Circuit instructs courts to consider the following factors: (1) whether counsel "achieved exceptional results for the class;" (2) whether the case was risky for class counsel; (3) whether counsel's performance "generated benefits beyond the cash settlement fund;" (4) the market rate for the particular field of law; (5) the burdens class counsel experienced while litigating the case (e.g., cost, duration, foregoing other work); and (6) whether the case was handled on a contingency basis. *Online DVD*, 779 F.3d at 954-55. The Ninth Circuit has instructed that although the benchmark of 25 percent "is not per se valid, it is a helpful 'starting point.'" *Id.*at 955.

1. Results for the Class

Recovery of $124.5 million for the indirect purchaser class – with only 50 percent of the ODD defendants – is an exceptional result. At class certification, plaintiffs' damages expert estimated that nationwide, indirect purchaser damages totaled $1.67 billion for the period of April 2003 through December 2008 (ECF No. 1808-4). This Court certified 24 jurisdictions under California law (which are the same jurisdictions covered by each of the four settlements), representing approximately 50 percent of the population; the best estimate of damages is approximately $840 million. Considering each of these defendants' market share, the percent of recovery is as follows:

[3] At the hearing, the Court suggested it might be appropriate to apply a "holdback" of some percentage, so that a final determination of the total fees to be awarded for this phase of the litigation could be made in light of the entire record at the conclusion of the case. Given counsel's assurances that any future fee requests will be made with care to avoid double recovery, and because whatever the value of future work may be, it will not diminish the value of what has been obtained to date, the Court concludes a "holdback" is unnecessary.

Defendant Family	Contribution to Settlement Fund	Percent Share of ODD Market	Damages Attributed to Defendant Family	Percent Recovery for IPPs
Panasonic	$16,500,000	12%	$100,784,612.82	16%
NEC/Sony (Joint Venture)	$35,000,000	10%	$83,987,177.35	42%
HLDS	$73,000,000	26%	$218,366,661.11	33%
Total	**$124,500,000**	**48%**	**$403,138,451.28**	**31%**

These settlements represent recovery of 31 percent of the estimated damages attributable to the market share of these defendants, and 15 percent of total estimated damages ($840 million) suffered by indirect purchasers. Compared more generally against other similar litigation, in *LCD*, after settlements with all defendants, the indirect purchasers recovered approximately 50 percent of potential damages. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827, 2013 U.S. Dist. LEXIS 49885, at *70 (N.D. Cal. Apr. 1, 2013). In *CRT*, the indirect purchasers recovered 20 percent of potential single damages after settlements with all defendants. *In re Cathode Ray Tube (CRT) Antitrust Litig*., No. C-07-5944 (JST), 2016 U.S. Dist. LEXIS 88665, at *185 (N.D. Cal. July 7, 2016). This Court finds the results here to be excellent on behalf of the IPP class.

2. Risk for Class Counsel

The risk associated with this case plays an important role in determining a fair fee award. *Online DVD*, 779 F.3d at 955. A number of risks made this case unique – and made the actions of class counsel unique. *First*, defendants have used the very factor which some might point to as a strength in plaintiffs' case – the criminal guilty pleas of HLDS and its executives – as an affirmative tactical weapon. IPPs have devoted many hours both to developing evidence outside of the guilty pleas, as well as economic evidence demonstrating that HP and Dell form the floor of the ODD market. IPPs' theory is that even if the conspiracy targeted only HP and Dell, it would still have the effect of moving the entire market. *Second*, the very real risk existed that no class would ever be certified. Not only did IPPs need to convince this Court that a measureable overcharge existed due to the actions of the cartel, but IPPs also needed to demonstrate that this overcharge was passed-through to class members. *Third*, collectively, these defendants have enormous resources to devote to this litigation. *Fourth*, risk still remains. Two defendants have declared bankruptcy – Quanta Storage

America, Inc. and TSST-Korea (ECF Nos. 1643, 1906). Even if the IPPs prevail at trial, they may not be able to collect the full amount of their damages. The enormous risk posed by this case, and Hagens Berman's committed perseverance even in the face of this risk, deserves recognition.

3. Benefits for the Class Beyond Cash

These four settlements offer the class benefits – and have realized benefits – beyond just cash. Each settlement agreement provides for certain cooperation provisions, including producing witnesses for deposition (ECF No. 1898-3 at Ex. A, ¶ 25, Ex. B, ¶¶ 24, 26, 27, Ex. C, ¶¶ 24-26, Ex. D, ¶ 28. Because the vast majority of witnesses are located overseas, the testimony of these witnesses at deposition is the testimony that will be used at trial. This factor provides significant benefit to the class.

4. Market Rates

Hagens Berman's hourly rates are in line with market rates in this district. The most senior attorney on the case, Steve Berman, bills at an hourly rate of $950. This is well within the range of $200 to $1,080 charged by partners in California (ECF No. 1963-2). Other partners at Hagens Berman have hourly rates ranging between $525 to $735. Associates at Hagens Berman have hourly rates ranging from $250 to $605. Staff and contract attorneys have hourly rates ranging from between $300 to $350. A number of these staff and contract attorneys were specifically hired because of their unique language skills (Korean, Japanese and Chinese). Finally, translators, paralegals, and paralegal assistants have rates ranging between $125 to $265. All of these ranges are within the ranges accepted by other Courts in this District and market surveys (ECF No. 1963-2).

5. Burdens on Class Counsel

The Ninth Circuit instructs district courts to consider the burdens class counsel experienced while litigating the case (e.g., cost, duration, foregoing other work). Here, this litigation has been pending for six years – and trial is not scheduled until February 2018. Hagens Berman has spent $3,704,323.97 in out-of-pocket expenses to date. Many team members have been almost exclusively assigned to this litigation, billing thousands of hours reviewing documents, translating documents, and preparing for depositions – even in the face of the denial of class certification and the prospect that recovery of attorneys' fees was unlikely. This factor also supports the requested fee award.

6. Litigation on a Contingency Basis

Hagens Berman accepted this case on a contingency basis. In negotiating the guilty pleas, the DOJ pointed to this civil litigation as the place where consumers would recover from their financial injury – emphasizing the importance of private litigation within the larger context of the enforcement of the antitrust laws. The contingent nature of this case means that Hagens Berman has a balanced set of interests – both to achieve excellent results for the class, and to achieve those results in as efficient manner as possible.

As former Judge Walker, the original judge assigned to this matter, recognized at the outset of this case, "potential recovery by indirect purchaser plaintiffs in this litigation is subject to a greater variety of imponderables" than other pieces of litigation such as securities litigation under the PSLRA (ECF No. 96). This has certainly turned out to be the case. IPPs brought two successive motions for class certification, increasing their lodestar beyond what it would have been. If IPPs settled on the same terms as the direct purchaser class with ***all defendants*** after the denial of the initial motion for class certification, without investing any additional resources and risk, the total recovery to the indirect purchaser class would have been a little more than half what they are receiving here. IPPs' willingness to seek recertification, if the requested fees are granted, nearly doubles the recovery to the IPP class while settling with only one half of the market in this case. Hagens Berman's prosecution of this case on a contingency basis warrants consideration.

B. Lodestar As a Cross-Check

Indirect purchaser counsel submit they have invested $24,199,800.20 in attorney fees in this litigation. IPPs request a 1.29 multiplier which is well within the range of multipliers awarded in other, similar litigation.

Lodestar is calculated "by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer." *Bluetooth*, 654 F.3d at 941. A court may give an upwards adjustment to a lodestar (through a positive multiplier) to reflect a host of "reasonableness" factors, including: (1) the amount involved and the results obtained, (2) the time and labor required, (3) the novelty and difficulty of the questions involved, (4) the skill requisite to perform the legal

service properly, (5) the preclusion of other employment by the attorney due to acceptance of the case, (6) the customary fee, (7) the experience, reputation, and ability of the attorneys, and (8) awards in similar cases. *Id.* at 941-42. These are referred to as the *Kerr* "reasonableness" factors after the Ninth Circuit's opinion in *Kerr v. Screen Extras Guild, Inc*., 526 F.2d 67, 70 (9th Cir. 1975). Each of the factors supports the positive multiplier requested by IPPs' counsel.

1. Awards in Similar Cases

The first factor, the results for the class, strongly supports an upwards adjustment from lodestar. As outlined above, the results achieved on behalf of the class are exceptional and are on par with other similar pieces of litigation.

2. Resources Expended

Hagens Berman was appointed as sole lead counsel on behalf of the IPP class. As a result, Hagens Berman has staffed this case entirely with its own resources during the pendency of the six years of litigation. Hagens Berman committed the time of experienced antitrust litigators to this case, in addition to countless hours from staff attorneys to review documents and assist in the prosecution of this litigation. Hagens Berman attests that it committed internal resources to the document review in this case – over 2.9 million documents, many of which were produced in foreign languages such as Chinese, Korean, and Japanese. As of the end of August 2016, the firm has spent 47,807 hours of attorney time and 18,492 hours of para-professional time. Hagens Berman has also spent $3,704,323.97 in expenses and $39,295.01 in costs to date in this litigation. This commitment of time, personnel, and money to the indirect purchaser class supports the requested award.

3. Novelty, Difficulty and Skill

The third and fourth *Kerr* factors – the novelty of the questions presented by the litigation and the skill required to perform the legal services properly – both support the requested award. This litigation has presented unique and challenging questions unaddressed by many other courts. Even the defendants, in their petition for permission to appeal the granting of class certification to the Ninth Circuit Court of Appeals, acknowledged the uniqueness of many of the issues faced by plaintiffs and this Court. Defendants stated that to their knowledge, "no case has certified a class" on

the same basis and record as this case.[4] Regarding this Court's choice-of-law analysis, defendants argued to the Ninth Circuit that "[n]either this Court nor the California Supreme Court has ever addressed whether the Cartwright Act can be applied across-the-board to all jurisdictions with '*Illinois Brick* repealer' statutes."[5] Class certification has not been the only "novel" and difficult question presented here. In litigating against TSST-Korea and the TSST-Korea employee "John Doe," IPPs addressed the unique issue of whether the DOJ recordings were "grand jury" materials. IPPs have also spent a significant amount of time and resources on discovery regarding the structure and liability of parent companies involved in the many joint ventures at issue in this litigation. All of these issues have required advocacy and skill beyond routine litigation.

4. Preclusion of Other Employment

Hagens Berman has dedicated a core team of individuals to the litigation of this action. The consequence of dedicating a team of experienced antitrust attorneys has meant that many of these professionals worked nearly exclusively on this case for some number of years. Nine attorneys have dedicated over a thousand hours each to this litigation, and many of those attorneys have devoted many thousands of hours (ECF No. 1963-1). Hagens Berman's choice to commit a significant number of attorneys almost exclusively to this litigation, forgoing other cases and other projects, further supports the request for fees.

5. Comparable Fees in Similar Litigation

The sixth and eight *Kerr* factors – the customary fee and awards in similar cases – both support Hagens Berman's fee request. IPPs request a multiplier of 1.29, which is well within the range of other similar cases. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050-51 (9th Cir. 2002) (upholding a 28% fee award that constituted a 3.65 multiple of lodestar); *id*. at 1052-54 (noting district court cases in the Ninth Circuit approving multipliers as high as 6.2, and citing only 3 of 24 decisions with approved multipliers below 1.4); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 96 (2d Cir. 2005) (finding 3.5 multiplier reasonable); *In re Cathode Ray Tube (CRT)*

[4] Petition for Permission to Appeal the District Court's Order Granting Class Certification at 1, *Wagner, et al. v. Hitachi Ltd., et al*., No. 16-80026 (9th Cir. Feb. 22, 2016), ECF No. 1.

[5] *Id.* at 20.

Antitrust Litig., No. C-07-5944 JST, 2016 U.S. Dist. LEXIS 102408, at *71 (N.D. Cal. Aug 3, 2016) (finding that a multiplier of 1.96 was well within the range of acceptable multipliers); *Noll v. eBay, Inc*., 309 F.R.D. 593, 610 (N.D. Cal. 2015) (finding that the lodestar cross check, with a 1.6 multiplier, confirmed the reasonableness of the percentage-based calculation); *Dyer v. Wells Fargo Bank, N.A*., 303 F.R.D. 326, 334 (N.D. Cal. 2014) (finding a 2.83 multiplier appropriate*); In re Netflix Privacy Litig*., No. 5:11-CV-00379 EJD, 2013 U.S. Dist. LEXIS 37286, at *31 (N.D. Cal. Mar. 18, 2013) (finding that a lodestar multiplier of 1.66 confirms the reasonableness of the percentage-based attorney fees calculation, 25% of the settlement fund); *Lane v. Facebook, Inc*., No. C 08-3845 RS, 2010 U.S. Dist. LEXIS 57765, at *10 (N.D. Cal. May 24, 2010) (finding that a multiplier of 2 should be applied).

6. Experience, Reputation, and Ability

Hagens Berman is a highly-respected class action litigation firm and has litigated some of the largest class actions in history, including the tobacco litigation, *In re Visa MasterCard Litigation*,[6] and the *In re Toyota Motor Corp. Unintended Acceleration Litigation*.[7] It has demonstrated exceptional ability in this case.

* * *

In conclusion, the Court tentatively finds that under either measurement – lodestar or percentage-of-the-fund – the IPPs' request for attorney fees is fair and reasonable. Hagens Berman is therefore awarded $31,125,000 in attorney fees

V. EXPENSES

Attorneys who create a common fund for the benefit of a class are entitled to be reimbursed for their out-of-pocket expenses incurred in creating the fund so long as the submitted expenses are reasonable, necessary and directly related to the prosecution of the action. *Vincent v. Hughes Air W., Inc*., 557 F.2d 759, 769 (9th Cir. 1977). Reasonable reimbursable litigation expenses include: those

[6] *In re Visa-MasterCard Litig*., No. CV-96-5238 (E.D.N.Y.). Hagens Berman was co-lead counsel in a case alleging antitrust violations by Visa and MasterCard. The case settled for $3 billion in cash and changes in practices valued at $20 billion.

[7] *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices & Prods. Liab. Litig*., No. 8:10ML2151 JVS (C.D. Cal.). Hagens Berman recovered $1.6 billion for the class.

for document production, experts and consultants, depositions, translation services, travel, mail and postage costs. *See In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1995) (Court fees, experts/consultants, service of process, court reporters, transcripts, deposition costs, computer research, photocopies, postage, telephone/fax); *Thornberry v. Delta Air Lines*, 676 F.2d 1240, 1244 (9th Cir. 1982), *remanded on other grounds*, 461 U.S. 952 (1983) (travel, meals and lodging).

Hagens Berman requests reimbursement of $3,704,323.97 in expenses. Hagens Berman does not request reimbursement of costs which may be recoverable as taxable costs after a successful jury verdict. Most of the expense for which Hagens Berman requests reimbursement is attributable to expert fees ($3,103,648.81), translation costs ($71,417.03) and hosting defendants' document productions in an online database ($241,160.00) ECF No. 1963-1). These expenses are reasonable and well within the limits of other cases.

VI. SERVICE AWARDS FOR CLASS REPRESENTATIVES

Plaintiffs also request that the Court approve the service awards in the amount of $4,500 each for the twenty-three class representatives, to be deducted from the settlement funds with HLDS, Panasonic and Sony. Service awards for class representatives are routinely provided to encourage individuals to undertake the responsibilities and risks of representing the class and to recognize the time and effort spent in the case. "Incentive *awards* are fairly typical in class action cases." *Rodriguez v. W. Publ'g Corp*., 563 F.3d 948, 958 (9th Cir. 2009) (emphasis in original). In the Ninth Circuit, service awards "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Id.* at 958-59. Courts have discretion to approve service awards based on, *inter alia*, the amount of time and effort spent, the duration of the litigation, and the personal benefit (or lack thereof) as a result of the litigation. *See Van Vraken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995).

Here, the twenty-three representatives have spent a significant amount of time assisting in the litigation of this case. All but four plaintiffs has responded to written discovery and produced documents. Each plaintiff was deposed by defense counsel. Each plaintiff has consulted with and

assisted counsel in this litigation. Each plaintiff submits a declaration detailing the time he or she spent involved in this litigation ECF Nos. 1963-4). The requested awards of $4,500 are consistent with service awards in other cases and the Court approves them here.

VII. THE OBJECTIONS ARE OVERRULED

Eight objections have been filed objecting to the fairness of the settlements, the request for attorneys' fees, the adequacy of notice, and the service awards requested on behalf of the class representatives.

The IPPs have presented evidence that four of the objectors – Conner Erwin (represented by Christopher Bandas) (ECF No. 1970), Christopher Andrews (ECF No. 1978), Steven Helfand (ECF No. 1983), and Patrick Sweeney (ECF No. 1983) – frequently file objections in class action settlement proceedings. Collectively, these four objectors have filed hundreds of pages of objections in this action– many which do not appear well-tailored to the facts of the case. To the extent that an objection is not directly addressed below, this Court has considered the objection and it is overruled.

A. Objections to Attorney Fees

1. Erwin's Objection Regarding Hagens Berman's Lead Counsel Submission

Objector Erwin objects that Hagens Berman made a fee proposal to Judge Walker at the beginning of the case and requests that the proposal now be made public. Judge Walker ordered that the lead counsel submissions should remain under seal "during the pendency of this litigation" (ECF No. 96 at 1). IPPs have settled with approximately half the defendants in this litigation. This Court finds that unsealing the record now would provide the remaining defendants with work product of counsel for IPPs and insight into how Hagens Berman sees the valuation of this case at certain stages. This Court rules that the requirements of the local rules have been met, and these materials shall continue to remain under seal.

The original order from Judge Walker, however, revealed that the potential fee structure contemplated a "fee percentage which increases with the stages of litigation and declines as the amount of the recovery rises" (ECF No. 96). Hagens Berman has further revealed that the proposed fee structure listed four stages: (1) From Pleading Through Decision on Motion to Dismiss; (2) After

Motion to Dismiss Through Adjudication of Class Certification; (3) After Adjudication of Summary Judgment; and (4) Through Trial Verdict and Final Appellate Determination.

This Court has broad discretion to determine the reasonable and fair amount of attorney fees. Great weight is accorded to a district judge's views because "he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly." *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992) (internal quotation marks and citation omitted). This Court finds that under the circumstances, the original fee structure does not apply. As Judge Walker noted, there were many "imponderables" that might impact this litigation. The IPPs' litigation of both an original motion for class certification, as well as a renewed motion for class certification, and multiple appeals to the Ninth Circuit, certainly qualifies as such an "imponderable."

2. The 1.29 Multiplier

Erwin and Helfand suggest that awarding Class Counsel a 1.29 (or any) multiplier would be "an error of law." Erwin cites a concern over "billing inefficiencies" only, but make no other specific objection to the work of class counsel. Given the context of this litigation, however, class counsel's request of a 1.29 multiplier is within reason and well within the range contemplated by the Ninth Circuit.

3. The "Megafund" issue

Andrews and Erwin both object that this case is a "mega-fund" case, requiring an automatic reduction in attorney fees. But there is no automatic rule in the Ninth Circuit which requires an automatic percentage – instead, the Ninth Circuit requires a comprehensive analysis of the reasonableness of any award. *See Vizcaino*, 290 F.3d at 1047 (rejecting categorical "megafund" rule); *Online DVD-Rental* 779 F.3d at 949 (courts should avoid "mechanical or formulaic" rules in awarding fees in favor of totality of circumstances analysis); *In re TFT-LCD (Flat Panel) Antitrust Litig*., No. 07-md-1827, 2013 U.S. Dist. LEXIS 51271, at *67 (N.D. Cal. Mar. 29, 2013) (rejecting similar megafund objections). IPPs provided this Court with a detailed analysis of their lodestar, which would yield a reasonable 1.29 multiplier. As recognized by the court in *CRT*, "[r]ather than abandon the percentage-of-recovery method, the best way to guard against a windfall is first to

examine whether a given percentage represents too high a multiplier of counsel's lodestar." *In re Cathode Ray Tube (CRT) Antitrust Litig*. ("*CRT II*"), No. C-07- 5944 JST, 2016 U.S. Dist. LEXIS 102408, at *70 (N.D. Cal. Aug 3, 2016). That analysis here establishes that applying the 25 percent benchmark here results in no undue windfall to counsel.

4. Other counsel

Under the original order approving Hagens Berman as interim lead counsel, Judge Walker gave class counsel leave to "coordinate its efforts with additional counsel" (ECF No. 96). Erwin objects that Hagens Berman does not disclose whether other plaintiffs' counsel will be provided with a portion of the fee award. Because Hagens Berman's lodestar more than adequately supported the requested award, it was not necessary to put in the limited lodestar from other firms. "[F]ederal courts routinely . . . have recognized that lead counsel are better suited than a trial court to decide the relative contributions of each firm and attorney." *Hartless v. Clorox Co*., 273 F.R.D. 630, 646 (S.D. Cal. 2011), *aff d in part*, 473 F. App'x 716 (9th Cir. 2012). Regardless, Hagens Berman has agreed two firms will be paid for their assistance in responding to discovery and defending the depositions of two class representatives. These two payments are appropriate at the discretion of lead counsel.

5. Hourly Rates

Andrews and Helfand both object that the hourly rates of class counsel are not reasonable. IPPs submitted the most recent survey of market rates – a survey accepted by many district courts (ECF No. 1963-2). Hagens Berman's rates are well within that market survey, and within the range approved by this Court for the direct purchasers.

Andrews suggests that the class lacked information regarding the experience of each Hagens Berman attorney. But IPPs submitted a detailed resume of their firm, which includes the year each attorney from Hagens Berman graduated from law school, as well as calculating the years of experience for each attorney (ECF No. 1963-3).

Andrews objects to the $265 hourly rate charged by Hagens Berman's two Bay-area based paralegals, relying on a 2013 survey of market rates. Hagens Berman has provided detail regarding the depth of experience and involvement of these paralegals. Give their expertise, the proposed rate of $265 is reasonable.

Sweeney objects that class counsel should submit detailed billing records. The Court finds that given the detailed description of the time dedicated to this case, the hourly rates of the Hagens Berman attorneys, and the number of hours per attorney provided by Hagens Berman, such a submission is not necessary.

6. Contract Attorneys

Andrews and Helfand object to the use of contract attorneys as well as the rates charged for these attorneys. Courts throughout the country have accepted the use of contract attorneys in this type of complex litigation. *See, e.g., In re Cathode Ray Tube (CRT) Antitrust Litig*. ("*CRT III*"), MDL No. 1917, 2016 U.S. Dist. LEXIS 24951, at *310 (N.D. Cal. Jan. 28, 2016) ("[T]he legal community now commonly uses contract attorneys. There is not the slightest justification to downgrade their billing rates or not apply a multiplier to them."). Hagens Berman has provided an explanation regarding the expertise, language skills, and involvement of these contract attorneys with other members of the trial team, making these attorneys more valuable than just a first-line document reviewer. Given this, the objection to the use and hourly rates of the contract attorneys are overruled.

7. Information Available to Class Members

Andrews objects that a number of documents were allegedly either missing or sealed from the public record. Andrews has not shown how access to these documents would change the outcome for any class members, where the notice to the class and the existence of detailed "frequently asked questions" on the website provided the class with sufficient information to make an adequate determination of whether to stay in the class or whether to opt-out. Regardless, IPPs have demonstrated that ample information was available to all class members upon which to make a decision whether to exclude themselves from the class. *See, e.g.,* ECF No. 1049, 1161, 1808-4, 1808-8.

8. Quick Pay

Helfand objects to IPPs' settlements because they contain quick pay provisions. Quick pay provisions are common practice in the Ninth Circuit. *In re TFT-LCD (Flat Panel) Antitrust Litig. ("LCD I"),* No. 07-md-1827, 2011 U.S. Dist. LEXIS 154288, at *1 (N.D. Cal. Dec. 27, 2011); *Miller v. Ghirardelli Chocolate Co.*, No. C-12-04936, 2014 U.S. Dist. LEXIS 141111, at*16 (N.D. Cal.

Oct. 2, 2014) ("Such 'quick pay' provisions are routinely approved by courts in this district."). This Court finds that the inclusion of quick-pay provisions here are appropriate, and do not violate the Rules of Professional Responsibility.

B. Objections to the Fairness of the Settlement, Plan of Allocation, and Adequacy of Notice

1. The Panasonic Settlement

Andrews objects to the recovery of 16 percent against Panasonic, compared to the recovery of 42 percent from Sony/NEC and 33 percent from HLDS. Effectively, this is just another version of the complaint that "the class should recover more," which has long been rejected. Regardless, the Panasonic settlement was reached at a time when the first motion for class certification had been denied, and when the revised motion for class certification was still pending – a time of extraordinary risk for the class receiving no recovery at all – as well as Panasonic's position as the first IPP settlement in the case. These two reasons are more than adequate to explain the lower rate of recovery for the class in the Panasonic settlement.

2. *Cy Pres*

Andrews objects to a *cy pres* beneficiary (Andrews Obj. ECF No. 1978-3 at 8), when none is contemplated at this time. IPPs intend on distributing as much money as possible to the class – whether it be through multiple rounds of distribution or otherwise. At the time that either a *cy pres* award or escheatment of the settlement becomes necessary, this Court will address the issue. *See Rodriguez*, 563 F.3d at 966 (declining to consider the propriety of *cy pres* where "no *cy pres* disbursement[was] imminent"); *In re Cathode Ray Tube (CRT) Antitrust Litig*., MDL No. 1917, 2016 U.S. Dist. LEXIS 88665, at *217 (N.D. Cal. July 7, 2016) (declining to consider objection to *cy pres* when "Perhaps the parties will designate a cy pres recipient; perhaps there will [be] a supplemental distribution; perhaps another approach will be most appropriate.").

C. Service Awards

Andrews objects to the $4,500 service awards requested on behalf of the named representatives. The declarations submitted by each class member detailing their efforts and involvement over the past six years are adequate. The incentive awards are appropriate and well within the range awarded by other courts in this district.

D. Expenses

Helfand objects to $72,420.09 for certain professional services by vendors retained by IPPs. Helfand Obj. at 7. The Court finds this request reasonable. Nearly $40,000 of this amount was for a graphics vendor who prepared IPPs' presentation at the first motion for class certification. The remaining amounts specifically relate to marketing for this case to reach plaintiffs to represent the proposed state classes.

Helfand objects to the $3,103,648.81 paid to IPPs' experts and consultants. This amount, however, was paid to IPPs' testifying expert Dr. Flamm and the economists supporting him for the preparation of his four expert reports. In a similar context, the court in *CRT* approved payment of approximately $5.7 million for the IPPs' experts and consultants.[8] Given the critical role the testimony of economists played at class certification, IPPs' requested reimbursement for this expense is reasonable.

Sweeney objects that IPPs have not submitted receipts for litigation expenses. Sweeney Obj. at 3. The Court finds that receipts are not necessary. IPPs have attested that they have prepared their request for reimbursement of litigation expenses from the books and records of the firm, which are prepared from expense vouchers, expenses records, and which are an accurate record of the expenses incurred (ECF No. 1963).

E. Other Objections

In addition to the four objectors mentioned above, four additional individual class members have objected to the settlement and attorney fees.

1. Kelly Campbell

Kelly Campbell objects to the amount of attorney fees, and to her estimated recovery of $10 per ODD (ECF No. 1982). Ms. Campbell raises no specific objection to attorney fees. Class members recover only for the overcharge and not the entire purchase price of the computer. Even

[8] Declaration of Mario N. Alioto in Support of Indirect Purchaser Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Incentive Awards at 46, *In re Cathode Ray Tube (CRT) Antitrust Litig*., MDL No. 1917 (N.D. Cal. Sept. 23, 2015), ECF No. 4071-1 (requesting reimbursement of $5,767,600.46 for experts/consultants/investigators).

then, $10 represents an estimate of the amount class members may recover, not the outside limit. Regardless, "[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery [does] not *per se* render the settlement inadequate or unfair." *Officers for Justice*, 688 F.2d at 628. As found above, this settlement falls well within the range approved by other courts in this district.

2. Barbara Cochran

Barbara Cochran objects that the notice does not explain the procedure for submitting claims (ECF No. 1986). Ms. Cochran voices her concern that the settlement may impose "unreasonable documentation requirements." Receipts, however, are not required to make a claim in this litigation (ECF No. 1898-2). Ms. Cochran also objects to the attorneys getting paid more than their lodestar, without raising any further specific objection to the request for attorney fees. An objector "bears the burden of providing specific evidence to challenge the accuracy and reasonableness of the hours charged." *McGrath v. Cty. of Nevada*, 67 F.3d 248, 255 (9th Cir. 1995); *see also Satchell v. Wallace*, 439 Fed. App'x. 644, 645 (9th Cir. 2011) (accord).

3. Yury Sacrificial

Yury Sacrificial objects to the settlement because ODDs have declined in price over the class period, "there is no 'injury to the consumer" (ECF No. 1977). Mr. Sacrificial's contends the class should recover nothing. If Mr. Sacrificial believes this case is without merit, he was free to opt-out. Courts consistently recognize the value of this option. *See, e.g., Eisen v. Porsche Cars N. Am., Inc*., No. 2:11-CV-09405-CAS, 2014 WL 43900, at *7 (C.D. Cal. Jan. 30, 2014), appeal dismissed (Sept. 22, 2014) ("In any event, class members could have opted out if they objected to the benefits offered by the settlement. . . . Federal courts routinely hold that the opt-out remedy is sufficient to protect class members who are unhappy with the negotiated class action settlement terms.")

4. James Nellen II

James Nellen II objects to the claims procedure which requires attesting under penalty of perjury that the information submitted on the claims form is true and correct (ECF No. 1967). Other courts in this district have required similar attestations that the information provided is accurate. *CRT*, 2016 U.S. Dist. LEXIS 24951, at *230 n.26 (requiring a claims form with "an attestation under

penalty of perjury that the information provided is accurate"). Mr. Nellen suggests that class counsel should be required to identify class members and the number of purchases by each ODD member. Here there is no perfect set of information that identifies all class members, as well as the number of products each class member purchased. Mr. Nellen's objections are overruled.[9]

IT IS SO ORDERED.

DATED: December 19, 2016

HONORABLE RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE

Submitted by:

HAGENS BERMAN SOBOL SHAPIRO LLP

By /s / Jeff D. Friedman
JEFF D. FRIEDMAN

Shana E. Scarlett (217895)
715 Hearst Avenue, Suite 202
Berkeley, CA 94710
Telephone: (510) 725-3000
Facsimile: (510) 725-3001
jefff@hbsslaw.com
shanas@hbsslaw.com

Steve W. Berman (*Pro Hac Vice*)
HAGENS BERMAN SOBOL SHAPIRO LLP
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslaw.com

Lead Counsel for
Indirect Purchaser Class

[9] To the extent any of the objectors have joined in the objections of others and/or incorporated other objections by reference, the objections are all overruled.

TAB 43B

Jeff D. Friedman (173886)
Shana E. Scarlett (217895)
HAGENS BERMAN SOBOL SHAPIRO LLP
715 Hearst Avenue, Suite 202
Berkeley, CA 94710
Telephone: (510) 725-3000
Facsimile: (510) 725-3001
jefff@hbsslaw.com
shanas@hbsslaw.com

Steve W. Berman (*Pro Hac Vice*)
HAGENS BERMAN SOBOL SHAPIRO LLP
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslaw.com

Lead Counsel for Indirect Purchaser Class

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE OPTICAL DISK DRIVE PRODUCTS ANTITRUST LITIGATION	No. 3:10-md-2143 RS
This Document Relates to: ALL INDIRECT PURCHASER ACTIONS	INDIRECT PURCHASER PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS Date: December 8, 2016 Time: 1:30 p.m. Dept: Courtroom 3, 17th Floor Judge: Hon. Richard Seeborg DATE ACTION FILED: Oct. 27, 2009

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on December 8, 2016 at 1:30 p.m., or as soon thereafter as this matter may be heard, before the Honorable Richard Seeborg, United States District Judge of the Northern District of California, located in Courtroom 3, 17th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, plaintiffs and class counsel will, and hereby do, move for an award of attorneys' fees, expenses, and service awards to the named plaintiffs. This motion is based on this notice of motion and motion, the accompanying memorandum of points and authorities, the declarations in support of the motion, argument by counsel at the hearing before this Court, any papers filed in reply, such oral and documentary evidence as may be presented at the hearing of this motion, and all papers and records on file in this matter.

STATEMENT OF ISSUES

1) Hagens Berman Sobol Shapiro LLP (HB) has dedicated more than $24 million in attorney time and advanced over $3 million in expenses and costs to this matter – over a six year period, without any compensation to date. HB is now proposing $124.5 million in settlements, while continuing to pursue other defendants. HB is seeking a 1.29 multiplier (the 25% benchmark), in asking for fees of $31,250,000. If the Court grants HB's request, the class would receive far more than the direct purchaser class received that the Court deemed fair and reasonable. Should the Court approve HB's fee request in its discretion as fair and reasonable?

2) HB advanced $3,704,323.97 in out-of-pocket expenses in this litigation. HB is not seeking to recover $39,295.01 in taxable costs which may be recovered after a successful trial against the remaining defendants. Should the Court approve reimbursement of this amount as fair and reasonable?

3) Whether the class representatives, each of whom supports the proposed settlements, and each of whom has actively participated in this litigation, should be recognized with a $4,500 service award.

I. INTRODUCTION

Hagens Berman Sobol Shapiro LLP (Hagens Berman or HB) has litigated this case as the sole lead counsel on behalf of the indirect purchaser class for six years. Over the past six years, Hagens Berman has dedicated significant resources fighting dozens of attorneys with tremendous resources, taken on extraordinary risk on behalf of the class and has refused to blink, even when odds of success seemed at their longest. Rather than spread work (and risk) across dozens of lawyers at different plaintiffs' firms, Hagens Berman has dedicated a single core team of lawyers specializing in antitrust class actions to maximize efficiencies and ensure the key litigating team operated on a single, cohesive page. This high risk structure has led to great results for the class.

The Court well knows how hard fought this case has been. The defendants in this case are some of the most sophisticated corporate entities in the world. These defendants are repeat cartelists, playing a major role in a litany of price-fixing MDLs in this district. And this group of defendants is represented by sophisticated antitrust defense counsel, many of whom have spent the last decade defending these very companies against similar antitrust claims. Beyond this vast trove of experience, these companies when considered as a joint defense group have near limitless assets which they have demonstrated they are willing to devote to this litigation. No motion has been too small for this group to oppose, including even at one point opposing indirect purchaser plaintiffs' (IPPs) request for an additional two pages in a brief.[1]

In the face of this formidable opposition, Hagens Berman has achieved an extraordinary set of settlements on behalf of the indirect purchaser class. With the current four settlements (with the NEC, Panasonic, Sony and HLDS defendant families), the indirect purchaser class will recover $124.5 million. And even then, this is only 50 percent of the ODD market. Many defendants still remain.

Respectfully, Hagens Berman requests an attorneys' fee aware of $31,125,000 which is 25 percent of the proposed $124.5 million settlements, equating to a modest 1.29 multiplier (even less if time-value of money is considered) from Hagens Berman's lodestar of $24,199,800.20. Hagens

[1] Order Granting Indirect Purchaser Plaintiffs' Administrative Motion for an Extension of Page Limits, Sept. 8, 2015, ECF No. 1672.

Berman requests reimbursement of $3,704,323.97 in out-of-pocket expenses incurred so far in this litigation – the vast majority of which is expert fees. And IPPs request $4,500 in service awards for each of the class representatives who has spent time and energy on behalf of consumers across the country.

II. THE WORK UNDERTAKEN BY INDIRECT PURCHASERS

Hagens Berman has spent six years vigorously advocating on behalf of the class and, even for a period of time, on behalf of individual consumers (when the first motion for class certification had been denied). The summary below reflects just a narrow window into the effort and attention paid by a dedicated team of HB attorneys and their professional staff.

A. Pleadings, Motions to Dismiss and the First Motion for Class Certification

1. Motions to Dismiss and Production of the Grand Jury Documents

Even before its appointment as lead counsel, Hagens Berman worked on behalf of the class, including opposing the U.S. Department of Justice's (DOJ) request for a limited stay of discovery.[2] On June 4, 2010, Judge Walker appointed Hagens Berman as sole lead counsel on behalf of the indirect purchaser class in a contested leadership fight.[3] Even before its appointment as lead counsel, however, Hagens Berman retained and worked with economists to research the ODD market, analyze ODD price trends, research market concentration, and determine the distribution channels for ODDs to consumers. Friedman Decl., ¶ 3.[4]

On August 26, 2010, IPPs filed their consolidated amended complaint. A first amended complaint was filed on October 1, 2010, to clarify two allegations. Defendants filed seven separate motions to dismiss the consolidated pleading, arguing that IPPs had failed to state any claim under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), that class representatives lacked standing to pursue claims under the District of Columbia, Hawaii, Nebraska, New Hampshire, and North Dakota, that IPPs did not have standing to assert claims of antitrust standing given the "seminal"

[2] Plaintiff Wagner's Response to Motion by the United States for a Limited Stay of Discovery, June 3, 2010, ECF No. 88.

[3] Order, June 4, 2010, ECF No. 96.

[4] "Friedman Decl." refers to the Declaration of Jeff D. Friedman in Support of Indirect Purchaser Plaintiffs' Motion for Attorneys' Fees, Expenses and Service Awards, filed concurrently herewith.

case of *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), that the Foreign Trade Antitrust Improvement Act, 15 U.S.C. § 6a ("FTAIA") precluded IPP claims, and that the Supreme Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) prevented the extra-territorial application of California's laws. Defendants also challenged a host of individual state law claims, whether the allegations of the complaint were sufficient to state a claim against many of the individual defendants, and whether IPPs had alleged vicarious liability for actions of certain joint ventures. On August 3, 2011, this Court granted the motions to dismiss with leave to amend, ruling that plaintiffs had not alleged a plausible factual basis for inferring the existence of a conspiracy of the scope and nature alleged in the complaints. Friedman Decl., ¶ 4.

During the pendency of the motions to dismiss, IPPs moved to compel production of the documents defendants had produced to the grand jury. On April 7, 2011, Chief Magistrate Judge Spero granted plaintiffs' motion to compel. *Id.*, ¶ 5.

On September 23, 2011, IPPs filed their second amended complaint, adding the Panasonic defendants and Quanta Storage America as defendants. Defendants filed eight motions to dismiss, again challenging nearly every facet of the IPP complaint. In April 2012, the Court denied defendants' second set of motions to dismiss, ruling that the amended complaint alleged a plausible conspiracy. *Id.*, ¶ 6.

IPPs took the lead on behalf of plaintiffs negotiating the bulk of the discovery protocols governing this case, including an ESI protocol, custodians, a search term protocol, the search terms themselves, multiple deposition protocols, protective orders, and case management statements filed before Magistrate Judge Spero. In addition, IPPs took the lead on the vast majority of discovery motions filed before Magistrate Judge Spero, including: motions to compel additional custodians, and a motion to compel defendants to produce witnesses in the United States for deposition. Defendants have fought nearly every request by the plaintiffs in this case, including a request to depose a particular witness while he was in the United States serving a prison sentence, have refused to produce witnesses according to the deposition protocols, and opposed nearly every scheduling request made by IPPs. TSST-Korea (unsuccessfully) moved to stay production of all foreign-located

documents to keep these documents out of the hands of the U.S. Department of Justice. When the large direct action plaintiffs Dell and HP joined this MDL, defendants refused to allow these plaintiffs additional time at deposition, resulting in further motion practice. *Id.*, ¶ 7.

Defendants threatened IPPs' counsel with Rule 11 sanctions, including (unsuccessfully) moving to compel all communications between IPPs' counsel and the ACPERA applicant who provided some cooperation to IPPs (whether it was timely and a full accounting, however, is to be determined after trial). Defendants also (unsuccessfully) moved to compel IPPs to "identify in detail every past or present relationship or acquaintance, including those of a business, personal, or familial nature, between potential class representatives and any person affiliated with a law firm representing plaintiffs in this matter" – suggesting some impropriety between class counsel and the named class representatives where none existed. And as this Court is also aware, these defendants rarely passed up the opportunity to object to the orders of the Magistrate Judge and request that this Court intervene in the ongoing discovery disputes. *Id.*, ¶ 8.

2. Early Written Discovery and Depositions of Defense Witnesses

IPPs have served and enforced written discovery from defendants, including serving 29 interrogatories and 34 requests for production of documents during this early period in the case. Prior to the ruling on the first motion for class certification, IPPs also deposed a number of critical merits witnesses, including an HLDS Acer account representative (Bruce Jeong), an HLDS HP account manager (Eugene Yang), and a PLDS account manager (JC Lim). Five other depositions where the witnesses invoked their Fifth Amendment right not to testify also occurred during this period: the depositions of two TSST-Korea witnesses (Kenny Lee and Matthew Lee), and three Quanta Storage witnesses (Haw Chen, Shu-Ming Tzeng, and Sally Huang). *Id.*, ¶ 9.

3. Third-Party Discovery Related to IPPs' Pass-Through Analysis

To demonstrate pass-through, IPPs subpoenaed 100 separate third parties pursuing purchase and cost data to use for their pass-through analysis. In connection with the first motion for class certification, IPPs performed pass-through estimates based on $58 billion in commerce involving the exchange of 194 million ODD products. Dr. Flamm estimated 95 pass-through rates for 49 company-product categories over 19 different companies. During this period, IPPs also deposed ten third

parties regarding their pricing and procurement practices relating to pass-through, including: Best Buy, Newegg, TigerDirect, Microsoft, Amazon, Fry's, Shuttle Computer, ASI, Wal-Mart, and Sears. *Id.*, ¶ 10.

4. Discovery and Defendants' Depositions of Class Representatives

The class representatives have been actively involved in the litigation of this case. With the exception of the four newly added representatives on whom defendants have not served discovery (Ms. Duryea, Ms. Tecce, Mr. Tufa and Mr. Tindall), each representative has responded to over 42 interrogatories and 45 document requests. Defendants have deposed each representative (including the newly added representatives) at length – sometimes by the most senior attorney representing the defendant. The depositions of the class representatives have been long and tedious – defendants have done everything possible to make the service of these class representatives very time consuming (and at times bordering on harassing), with some depositions lasting over four hours for the simple purchase of a computer. One deposition transcript – the deposition of Minnesota representative Anbessa Tufa – was only 16 pages less in length than the 2015 deposition transcript of plaintiffs' economist, Dr. Kenneth Flamm. The following chart details the amount of time of each deposition and the number (and graduation years) of the defense counsel attending these depositions:

Class Representative	Deposition Time	Name of Attending Defense Counsel and Level of Seniority
Bishop, Michael	3:58	Campbell, Christopher (JD 2007)
Bissen, Alex	3:07	Kaas, Lisa (JD 2004)
Booze, Cindy	3:20	Biagioli, Kimberley (Admitted 2009)
Cooper, Gregg	3:06	Aragona, Arin (JD 2007)
Duryea, Wanda	5:08	Curt Lambert (JD 2006)
Ence, Matthew	3:36	Pellegrini, John (JD 2008)
Faber, Benjamin	2:22	Pearl, James (JD 1998) Ghafary, Qais (JD 2011)
Gooman, Barney	3:34	Wong, Alvina (JD 2009)
Hatfield, Douglas	4:24	Ghafary, Qais (JD 2011) McCarthy, Michael (JD 2009) Wong, Christine (JD 2000)
Hosking, Matthew	6:14	Nardi, Marissa (JD 2012) Reblitz-Richardson, Beko (JD 2005)
Ito-Adler, James	2:00	Visser, Michelle (JD 2005) Graber, Lauren (JD 2010)
Jacobson, Evan	1:59	Cheolas, Nick (JD 2010)
Johnson, Christopher	4:04	Meenan, Sean (JD 2008)

Class Representative	Deposition Time	Name of Attending Defense Counsel and Level of Seniority
		Kaas, Lisa (JD 2004) Visser, Michelle (JD 2005)
Lim, Susie	3:08	Lanski, Kelley (JD 2009)
McKee, John	2:19	Wong, Christine (JD 2000) Wong, Alvina (JD 2009) Ghafary, Qais (JD 2011) Pearl, James (JD 1998) Van Panhuys, Vincent (JD 2006) Cate, Elizabeth (JD 2008)
Melegari, Lisa	2:27	Wilson, Hannah (Admitted 2011)
Murphy, Gail	2:29	Ambar, Daniel (Admitted 2011) Bogaciu, Corina (JD 2009) Wilson, Hannah (Admitted 2011)
Murray, Benjamin	2:09	Aragona, Arin (JD 2007)
Porter, Benjamin	3:32	Reblitz-Richardson, Beko (JD 2005) Loeb, Alexis (Admitted 2008) Wong, Christine (JD 2009) Pearl, James (JD 1998)
Pritchard, Angela	2:13	Kessler, Jeffrey (JD 1977) Foltz, Stacey (JD 2012)
Ravenelle, Evan	3:17	Ghafary, Qais (JD 2011)
Reilly, Michael	2:17	Kaas, Lisa (JD 2004)
Steffen, Sandra	3:50	McShane, Brendan (JD 2003)
Stenger, Thomas	4:04	Graber, Lauren (JD 2010) Biagioli, Anthony (JD 2009)
Tecce, Kristina	4:00	Nardi, Marissa (JD 2012) Parsigian, Jeanifer (JD 2012)
Tindall, Brian	1:24	LeVee, Jeffrey (JD 1984)
Tufa, Anbessa	5:12	Ribner, David (Admitted 2013)
Wagner, Aaron	4:22	Walter, Keith (JD 1998)
Wood, Kimberly	3:19	Reblitz-Richardson, Beko (JD 2005) Cate, Elizabeth (JD 2008)

Hagens Berman spent time with each class representative preparing them for these depositions and, with rare exception, defended each class representative's deposition. *Id.*, ¶¶ 11-12.

5. IPPs' First Motion for Class Certification and Rule 23(f) Petition

On May 29, 2013, IPPs filed their first motion for class certification. The initial round of class certification took seventeen months from the first filing until the Court's denial of certification on October 3, 2014. The parties presented large amounts of argument and evidence to the Court, including 250 pages of legal briefs, 4,347 pages of exhibits, and 1,029 pages of expert declarations. Defendants filed a motion to exclude all testimony from IPPs' expert, Dr. Kenneth Flamm. After the

denial of class certification, IPPs filed a petition for permission to appeal the denial to the Ninth Circuit Court of Appeals – a request that was denied on January 14, 2015. *Id.*, ¶ 13.

IPPs' lodestar through the denial of the petition for permission to appeal the denial of class certification pursuant to Rule 23(f) was $17,763,454.70 (48,601.36 hours). *Id.*, ¶ 14.

B. IPPs' Second Motion for Class Certification, Pursuit of Recordings of Cartel Members and Trial Depositions of Defense Witnesses

For nearly two years, between the dates of October 3, 2014 (when this Court denied the first motion for class certification) and June 10, 2016 (when the Ninth Circuit denied defendants' petition to appeal the granting of class certification), the IPPs faced a period of extreme risk. As demonstrated by the outcome of the DPP action, nearly every participant in this MDL (with the exception of Hagens Berman), believed that the risk to the class action was extraordinarily high. To be blunt, many thought continuing to pursue the case as a class was a long shot at best. *Id.*, ¶ 15.

Despite this, Hagens Berman filed a revised motion for class certification with extensive additional work regarding the overcharge multi-variate regression model, co-integration analysis, a Granger analysis, and also many additional pass-through studies. At the same time, IPPs doggedly pursued the production of recordings made of phone calls between co-conspirators to the Ninth Circuit Court of Appeals (resulting in the production of these recordings). And even in the face of the very serious prospect that the case would not be certified even on the second attempt, Hagens Berman ***took the lead on every single deposition*** of defense witnesses during this period. *Id.*, ¶ 16.

1. Renewed Motion for Class Certification and Second Rule 23(f) Petition

At a January 29, 2015 case management conference, IPPs requested leave to file a renewed motion for class certification, which this Court allowed. IPPs' revised motion for class certification involved, again, a large written record, including an additional 111 pages of briefing, 1,500 pages of exhibits and 683 pages of expert declarations. In support of the renewed motion, IPPs submitted additional expert reports, deposed defendants' experts for a second time, and defended the third deposition of Dr. Flamm. *Id.*, ¶ 17.

During this period, IPPs sought the production of additional data, including moving to compel additional data from Toshiba for use in the revised class certification motion, and pursued

additional data from HP and other third parties related to pass-through. In presenting their renewed motion for class certification, IPPs included a pass-through analysis on 273 million ODD products, including companies responsible for approximately 80 percent of personal computer retail sales, and 45 percent of top distributor sales. *Id.*, ¶ 18.

On February 8, 2016, this Court granted the renewed motion for class certification. Defendants filed a petition for permission to appeal the granting of class certification with the Ninth Circuit Court of Appeals – a request which was denied on June 10, 2016. *Id.*, ¶ 19.

2. IPPs' Pursuit of DOJ Recordings

With their opposition to the first motion for class certification, defendants informed the Court that the U.S. DOJ's criminal investigation into the ODD cartel had ended. Upon learning of this, the DPPs and IPPs jointly subpoenaed the DOJ for production of certain recordings between a cooperating entity and several co-conspirators. TSST-Korea moved to quash the subpoena, as did one individual on the recordings who requested to be called "John Doe." TSST-Korea filed its original motion to quash the subpoena in September 2014. Despite this Court's denial of class certification, for over a year, IPPs fought for the production of these recordings, including multiple sets of motions before Magistrate Judge Spero, objections to this Court, disputes over the governing protective order, "emergency" motions by John Doe filed with the Ninth Circuit Court of Appeals, a decision on the merits from the Ninth Circuit Court of Appeals denying John Doe's motion to quash, a petition for rehearing before a panel of the Ninth Circuit Court of Appeals, and disputes regarding the timing of the production. IPPs took the lead on the vast majority of the briefs, and took the lead in arguing this issue before the Ninth Circuit Court of Appeals. All of this occurred at the same time IPPs were briefing the revised motion for class certification, and were unsure whether a class would ever be certified. *Id.*, ¶ 20.

3. Hagens Berman's Depositions of Co-Conspirators

During this twenty-month period between the Court's denial of the first motion for class certification and the date when the Ninth Circuit denied defendants' Rule 23(f) petition, Hagens Berman took the first chair in questioning on **all fourteen depositions** of the conspiracy participants at the same time as briefing the renewed motion for class certification. Because many of these

depositions lasted for multiple days as they were fully translated from a foreign language into English, these fourteen depositions lasted for a total of **forty-six days**. Beyond the mere time spent questioning these witnesses, however, nearly all of these witnesses spoke or wrote in a foreign language, meaning Hagens Berman attorneys with foreign language skills spent hundreds of hours reviewing and selecting documents for translation and use as exhibits. HB had to pay for the documents to be translated for review by the English-speaking trial team. Many of these witnesses were some of the most critical witnesses whose depositions will be used at trial, including the high-level executives of PBDS and TSST-Korea. IPPs also deposed the team leaders – those who reported to the chief-level officers and who also met with competitors. And IPPs deposed the account-level managers whose communications with competitors took place on an almost daily basis. All of this work took place at a time when Hagens Berman did not know if it was litigating on behalf of twenty-nine individual consumers, or on behalf of a certified class of indirect purchasers. *Id.*, ¶ 21.

Despite this period of heightened risk, IPPs continued to pursue discovery against the remaining defendants. This included moving to compel additional testimony from critical TSST-Korea witness Kenny Lee – a participant in the conspiracy who spent days preparing for his deposition with counsel, and met again with his counsel ***during the break*** between plaintiffs' questioning and TSST's own direct examining of Mr. Lee. Magistrate Judge Spero ordered that Mr. Lee respond to a set of interrogatories regarding his preparation with counsel. *Id.*, ¶ 22.

IPPs' lodestar from the denial of the first motion for class certification to the denial of defendants' petition for permission to appeal the denial of class certification pursuant to Rule 23(f) was $5,601,103.00 (15,205.40 hours). *Id.*, ¶ 23.

C. Discovery After the Granting of Class Certification

After the granting of class certification and the Ninth Circuit's denial of defendants' Rule 23(f) appeal, Hagens Berman has continued to work tirelessly on behalf of the class. In July and August alone, IPPs have taken the lead chair in deposing an additional five defense witnesses.[5] IPPs

[5] IPPs do not include any time or activities for September 2016.

have participated in, although not taken the lead chair, in three other depositions during this period. *Id.*, ¶ 24.

On July 19, 2016, IPPs moved to amend their complaint to conform with the class certification ruling, among other things. Defendants opposed even this most mundane of motions – requesting that they not be required to provide answers to the IPP complaint. That motion is still pending before the Court. In the meantime, IPPs served interrogatories on most of the remaining defendants requesting that they provide some statement of facts regarding the affirmative defenses they intend to assert at trial. IPPs' lodestar for the period between June 11, 2016 (the denial of defendants' petition for appeal by the Ninth Circuit Court of Appeals) and August 31, 2016, is $835,242.50 (2,493.40 hours). *Id.*, ¶ 25.

III. ARGUMENT

IPPs request: (1) an award of attorneys' fees in the amount of 25 percent of the $124.5 million settlement fund; (2) reimbursement of expenses IPPs' counsel have advanced to date on behalf of the class; and (3) service awards for the twenty-three class representatives.

In the Ninth Circuit, the district court has discretion in a common fund case to choose either the "percentage-of-the-fund" or the "lodestar" method in calculating fees.[6] Regardless of what method is chosen as the primary method to calculate attorneys' fees, the Ninth Circuit encourages district courts to conduct "a cross-check using the other method."[7]

Hagens Berman requests 25 percent of the common fund – $31,125,000. Applying a lodestar cross-check, this would be a 1.29 multiplier from Hagens Berman's lodestar of $24,199,800.20. Under either method, these fees are reasonable and fair. In addition, Hagens Berman requests reimbursement of $3,704,323.97 in out-of-pocket expenses.

A. Application of the Twenty-Five Percent Benchmark Is Appropriate

When considering a request for attorneys' fees that is calculated using the percentage-of-recovery method, the Ninth Circuit instructs courts to consider the following factors: (1) whether counsel "achieved exceptional results for the class;" (2) whether the case was risky for class counsel;

[6] *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015).

[7] *Id.*

(3) whether counsel's performance "generated benefits beyond the cash settlement fund;" (4) the market rate for the particular field of law; (5) the burdens class counsel experienced while litigating the case (e.g., cost, duration, foregoing other work); and (6) whether the case was handled on a contingency basis.[8] Each of these factors supports IPPs' request for attorneys' fees of 25 percent. The Ninth Circuit has instructed that although the benchmark of 25 percent "is not per se valid, it is a helpful 'starting point.'"[9]

1. Hagens Berman Has Achieved Exceptional Results for the Class

Recovery of $124.5 million for the indirect purchaser class – with only 50 percent of the ODD defendants – is an exceptional result. At class certification, plaintiffs' damages expert estimated that nationwide, indirect purchaser damages totaled $1.67 billion for the period of April 2003 through December 2008.[10] This Court certified 24 jurisdictions under California law (which are the same jurisdictions covered by each of the four settlements), representing approximately 50 percent of the population, the best estimate of damages is approximately $840 million.[11] Considering each of these defendants' market share, the percent of recovery is as follows:

Defendant Family	Contribution to Settlement Fund	Percent Share of ODD Market	Damages Attributed to Defendant Family	Percent Recovery for IPPs
Panasonic	$16,500,000	12%	$100,784,612.82	16%
NEC/Sony (Joint Venture)	$35,000,000	10%	$83,987,177.35	42%
HLDS	$73,000,000	26%	$218,366,661.11	33%
Total	**$124,500,000**	**48%**	**$403,138,451.28**	**31%**

These settlements represent recovery of **31 percent** of the estimated damages attributable to the market share of these defendants, and **15 percent of total estimated damages** ($840 million)

[8] *Online DVD*, 779 F.3d at 954-55.

[9] *Id.* at 955.

[10] *See* Declaration of Dr. Kenneth Flamm in Support of Indirect Purchaser Plaintiffs' Revised Motion for Class Certification at 133, ECF No. 1808-4.

[11] These population estimates are based on the United State Census Bureau's Annual Estimates of the Resident Population for the United States, Regions, States and Puerto Rico, April 1, 2000 to July 1, 2006, available at: http://www.census.gov/popest/data/historical/2000s/vintage_2006/index.html (last visited Oct. 5, 2016).

suffered by indirect purchasers. Of course, when considering this recovery against total estimated damages, one must also consider that six defendant families remain in this case from which IPPs believe they will recover either further settlements or an award after trial.

Measured against the most direct benchmark, the direct purchaser settlements in the case, the IPP settlements stand in stark contrast. The IPP settlements exceed each individual DPP settlement with these defendants and equal just under three times what the DPPs recovered:[12]

Defendant Family	IPP Settlement	DPP Settlement	Percentage (Multiplier) of IPP Compared to DPP
Panasonic	$16,500,000	$5,750,000	287% (2.87x)
NEC	$6,500,000	$6,150,000	106% (1.06x)
Sony	$28,500,000	$6,000,000	475% (4.75x)
HLDS	$73,000,000	$26,000,000	281% (2.81x)
Total	**$124,500,000**	**$43,900,000**	**284% (2.84x)**

Not only the IPP settlements with these four defendants almost triple the DPP settlements with these four defendants, the IPP settlements to date exceed the total settlements ($74.9 million) recovered by DPPs in the case. Once fees paid to the DPP counsel are considered, the direct purchaser class recovered only $52.4 million.[13] In contrast, even if this Court awards IPPs' counsel the requested $31.1 million fee, the IPP class will recover $93.4 million from just these four settlements.

[12] *See* Direct Purchaser Plaintiffs' Motion for 1) Certification of Classes; 2) Preliminary Approval of Class Action Settlements with BenQ, Pioneer, PLDS, QSI, Sony, TEAC, and Toshiba/Samsung; 3) Directing Notice to Class; and 4) Memorandum in Support Thereof at 3, 4, Nov. 3, 2015, ECF No. 1724.

[13] *See* Order Granting Direct Purchaser Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Class Representative Incentive Awards, ¶ 2, July 23, 2015, ECF No. 1658; Order Granting Direct Purchaser Plaintiffs' Second Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Class Representative Awards, ¶ 2, April 14, 2016, ECF No. 1851.

Compared more generally against other similar litigation, in *LCD*, after settlements with all defendants, the indirect purchasers recovered approximately 50 percent of potential damages.[14] In *CRT*, the indirect purchasers recovered 20 percent of potential single damages after settlements with all defendants.[15] Indirect purchasers' settlements here certainly represent exceptional results.

2. This Case Posed an Enormous Risk for Class Counsel

The risk associated with this case plays an important role in determining a fair fee award.[16] A number of risks made this case unique – and made the actions of class counsel unique.

First, defendants have used the very factor which some might point to as a strength in plaintiffs' case – the criminal guilty pleas of HLDS and its executives – as an affirmative tactical weapon. From the very first hearing on the motion to dismiss, defendants have aggressively pursued the narrative that this case is limited to certain specific instances of bid-rigging of Dell and HP auction – that is, that this is a conspiracy whose outer-limits are formed by the guilty pleas themselves. This narrative fed into this Court's skepticism in its first order denying the motion for class certification of the direct purchaser class.[17] In addition to spending countless hours developing evidence of collusion outside of the guilty pleas, IPPs have also demonstrated that ***even if*** no evidence existed outside of Dell/HP collusion, fixing prices to Dell and HP would move the entire market because Dell and HP formed the price floor. Regardless, what many might have seen as a

[14] *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827, 2013 U.S. Dist. LEXIS 49885, at *70 (N.D. Cal. Apr. 1, 2013). *See also In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 538 (3d Cir. 2004) (approving $44.5 million settlement, recovery of **33%** of single damages); *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 124 (S.D.N.Y. 2009), (approving $336 million settlement, recovery of **31%** of single damages), *aff'd, Priceline.com, Inc. v. Silberman*, 405 Fed. Appx. 532 (2d Cir. 2010); *In re Linerboard Antitrust Litig.*, 321 F. Supp. 2d 619, 633 (E.D. Pa. 2004) (approving $202.5 million in settlements, recovery of **55%** of single damages); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 478 (S.D.N.Y. 1998) (approving settlements of $1.027 billion, recovery of **33%-41%** of single damages).

[15] *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944 (JST), 2016 U.S. Dist. LEXIS 88665, at *185 (N.D. Cal. July 7, 2016).

[16] *Online DVD*, 779 F.3d at 955.

[17] Order Denying Motions for Class Certification at 9, Oct. 3, 2014, ECF No. 1444 ("even though the named plaintiffs have strong evidence of bid-rigging involving some of the largest purchasers, they are struggling to find a way to prove that list prices paid by ordinary purchasers such as themselves were fixed").

discounted risk, in this case it forms one of the greatest risks – that a judge or jury might find plaintiffs' case to begin and end with the criminal guilty pleas.

Second, the very real risk existed that no class would ever be certified. Not only did IPPs need to convince this Court that a measureable overcharge existed due to the actions of the cartel, but IPPs also needed to demonstrate that this overcharge was passed-through to class members. IPPs failed once; but after three years of briefing and argument, IPPs' determination was rewarded.

Third, these defendants are serial cartel participants.[18] They have brought almost limitless resources to this litigation, including some of the most sophisticated defense counsel available for purchase. Defense counsel have outnumbered IPPs' counsel at every discovery conference, hearing, and deposition. The resources available to opposing parties are an important factor to be considered in the analysis of attorneys' fees.[19]

Fourth, risk still remains. Two defendants have declared bankruptcy – Quanta Storage America, Inc. and TSST-Korea.[20] Defendants have declared that they will be filing a minimum of two summary judgment motions against the indirect purchasers, in addition to a motion for decertification. Friedman Decl., ¶ 26. IPPs are confident that they will prevail at trial, but as in any litigation, and in particular in class action litigation, a high amount of risk regarding the final outcome of this case exists.

The enormous risk posed by this case, and Hagens Berman's committed perseverance even in the face of this risk, deserves recognition.

3. The Settlements Generate Benefits for the Class Beyond Cash

These four settlements offer the class benefits – and have realized benefits – beyond just cash. Each settlement agreement provides for certain cooperation provisions, including producing

[18] Fifth Amended Class Action Complaint, Sept. 16, 2013, ECF No. 996.

[19] *Vizcaino v. Microsoft Corp.*, 142 F. Supp. 2d 1299, 1303-04 (W.D. Wash. 2001).

[20] Defendant Quanta Storage America, Inc.'s Suggestion of Bankruptcy Filing, June 4, 2015, ECF No. 1643; Notice of Bankruptcy Proceedings of Toshiba Samsung Storage Technology Korea Corp., July 7, 2016, ECF No. 1906.

witnesses for deposition.[21] Because the vast majority of witnesses are located overseas, the testimony of these witnesses at deposition is the testimony that will be used at trial. Particularly as to the HLDS witnesses (of which IPPs have already deposed four of the five witnesses committed to in the settlement agreement), their testimony regarding the remaining co-conspirators has been of significant value to the class.

4. The Market Rate for Antitrust Lawyers with the Experience of IPP Counsel Supports the Request

Hagens Berman's hourly rates are in line with market rates in this district. The most senior attorney on the case, Steve Berman, bills at an hourly rate of $950. This is well within the range of $200 to $1,080 charged by partners in California. Friedman Decl., Ex. A (market survey of attorney rates). Other partners at Hagens Berman have hourly rates ranging between $525 to $735. Associates at Hagens Berman have hourly rates ranging from $250 to $605. Staff and contract attorneys have hourly rates ranging from between $300 to $350. A number of these staff and contract attorneys were specifically hired because of their unique language skills (Korean, Japanese and Chinese) which have proved invaluable on this case. Finally, translators, paralegals, and paralegal assistants have rates ranging between $125 to $265. All of these ranges are within the ranges accepted by other Courts in this District and market surveys. Friedman Decl., Ex. A.

5. The Burdens on Class Counsel Support the Request for Attorneys' Fees

The Ninth Circuit instructs district courts to consider the burdens class counsel experienced while litigating the case (e.g., cost, duration, foregoing other work). Here, this litigation has been pending for six years – and trial is not scheduled until February 2018. Hagens Berman has spent $3,704,323.97 in out-of-pocket expenses to date. Many team members have been almost exclusively assigned to this litigation, billing thousands of hours reviewing documents, translating documents, and preparing for depositions – even in the face of the denial of class certification and the prospect that recovery of attorneys' fees was unlikely. This factor also supports the requested fee award.

[21] Declaration of Jeff D. Friedman in Support of Motion for Preliminary Approval of Settlements with Panasonic, NEC, Sony, and HLDS Defendant Families and Dissemination of Class Notice, Ex. A, ¶ 25 (IPP-Panasonic Settlement Agreement), Ex. B, ¶¶ 24, 26, 27 (IPP-NEC Settlement Agreement), Ex. C, ¶¶ 24-26 (IPP-Sony Settlement Agreement), Ex. D, ¶ 28 (IPP-HLDS Settlement Agreement), June 28, 2016, ECF No.1898.

6. Class Counsel's Litigation on a Contingency Basis

As this Court is aware, Hagens Berman accepted this case on a contingency basis. In negotiating the guilty pleas, the DOJ pointed to this civil litigation as the place where consumers would recover from their financial injury[22] – emphasizing the importance of private litigation within the larger context of the enforcement of the antitrust laws. The contingent nature of this case means that Hagens Berman has a balanced set of interests – both to achieve excellent results for the class, and to achieve those results in as efficient manner as possible.

As Judge Walker recognized at the outset of this case, "potential recovery by indirect purchaser plaintiffs in this litigation is subject to a greater variety of imponderables" than other pieces of litigation such as securities litigation under the PSLRA.[23] This has certainly turned out to be the case. Had this case been successfully certified originally according to typical proceedings projected at the outset of the case, HB's lodestar and total attorneys' fees for resolution at that stage would have been less. If IPPs settled on the same terms as the direct purchaser class with ***all defendants***, without investing any additional resources and risk, the total recovery to the indirect purchaser class would have been a little more than half what they are receiving here. IPPs' willingness to seek recertification, if the requested fees are granted, nearly doubles the recovery to the IPP class while settling with only one half of the market in this case. Hagens Berman continued to litigate this case on behalf of the class through fairly unchartered territory and heightened risk that was not anticipated at the outset and warrants the consideration of these factors.

B. Using Lodestar As a Cross-Check Further Supports the Requested Fees

Indirect purchaser counsel have invested $24,199,800.20 in attorneys' fees in this litigation. IPPs request a modest 1.29 multiplier which is well within the range of multipliers awarded in other, similar litigation.

Lodestar is calculated "by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for

[22] United States' and Defendant HLDS's Joint Sentencing Memorandum and United States' Motion for Departure at 4, *United States v. Hitachi-LG Data Storage, Inc.*, Case No. 3:11-cr-00724-RS, Oct. 28, 2011, ECF No. 5.

[23] Order at 8, ECF No. 96.

the region and for the experience of the lawyer."[24] A court may give an upwards adjustment to a lodestar (though a positive multiplier) to reflect a host of "reasonableness" factors, including: (1) the amount involved and the results obtained, (2) the time and labor required, (3) the novelty and difficulty of the questions involved, (4) the skill requisite to perform the legal service properly, (5) the preclusion of other employment by the attorney due to acceptance of the case, (6) the customary fee, (7) the experience, reputation, and ability of the attorneys, and (8) awards in similar cases.[25] These are referred to as the *Kerr* "reasonableness" factors after the Ninth Circuit's opinion in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975). Foremost among these considerations, however, is the "benefit obtained for the class."[26] Here, there can be no dispute regarding the exceptional results achieved for the class to date. But each of the factors likewise supports the positive multiplier requested by IPPs' counsel which is well-within the range applied in other cases.

1. Class Counsel Has Achieved Exceptional Results for the IPP Class When Compared to Awards in Similar Cases

The first factor, the results for the class, strongly supports an upwards adjustment from lodestar. As outlined above (*see* section III.B.1), the results achieved on behalf of the class dwarf those of the direct purchasers and are on par with other similar pieces of litigation.

2. IPPs' Counsel Have Expended Significant Resources on Behalf of the Class

Hagens Berman was appointed as sole lead counsel on behalf of the IPP class. As a result, Hagens Berman has staffed this case entirely with its own resources during the pendency of the six years of litigation. Hagens Berman committed the time of experienced antitrust litigators to this case, in addition to countless hours from staff attorneys to review documents and assist in the prosecution of this litigation. All of Hagens Berman's document review – of over 2.9 million documents, many

[24] *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011).

[25] *Id.* at 941-42. The Supreme Court has since called into question the relevance of two of the original *Kerr* factors: the contingent nature of the fee, and the "desirability" of the case. *See Resurrection Bay Conserv. All. v. City of Seward*, 640 F.3d 1087, 1095 n.5 (9th Cir. 2011). Other factors such as "time limitations imposed by the client or the circumstances" and "the nature and length of the professional relationship with the client" do not readily apply here. IPPs, thus, do not address these questionable or irrelevant factors.

[26] *Bluetooth*, 654 F.3d at 942.

of which were produced in foreign languages such as Chinese, Korean, and Japanese – was performed by in-house staff and contract attorneys, many of whom have worked on this case since its inception. These specialized attorneys enabled Hagens Berman to identify and translate hot documents for English-speaking attorneys at a great cost savings to the class. Only documents identified as likely to be used in court filings, at deposition or at trial were sent to an outside vendor for translation. Friedman Decl., ¶ 27. As of the end of August 2016, the firm has spent 47,807 hours of attorney time and 18,492 hours of para-professional time. Hagens Berman has also spent $3,704,323.97 in expenses and $39,295.01 in costs to date in this litigation. *Id*, ¶ 29. This commitment of time, personnel, and money to the indirect purchaser class supports the requested award.

3. This Case Has Presented Novel and Difficult Questions, Requiring Extraordinary Skill by IPPs' Counsel

The third and fourth *Kerr* factors – the novelty of the questions presented by the litigation and the skill required to perform the legal services properly – both support the requested award. This litigation has presented unique and challenging questions unaddressed by many other courts. Even the defendants, in their petition for permission to appeal the granting of class certification to the Ninth Circuit Court of Appeals, acknowledged the uniqueness of many of the issues faced by plaintiffs and this Court. Defendants stated that to their knowledge, "no case has certified a class" on the same basis and record as this case.[27] Regarding this Court's choice-of-law analysis, defendants argued to the Ninth Circuit that "[n]either this Court nor the California Supreme Court has ever addressed whether the Cartwright Act can be applied across-the-board to all jurisdictions with '*Illinois Brick* repealer' statutes."[28] But class certification has not been the only "novel" and difficult question presented here. In litigating against TSST-Korea and the TSST-Korea employee "John Doe," IPPs addressed the unique issue of whether the DOJ recordings were "grand jury" materials. IPPs have also spent a significant amount of time and resources on discovery regarding the structure

[27] Petition for Permission to Appeal the District Court's Order Granting Class Certification at 1, *Wagner, et al. v. Hitachi Ltd., et al*., No. 16-80026 (9th Cir. Feb. 22, 2016), ECF No. 1.

[28] *Id.* at 20.

and liability of parent companies involved in the many joint ventures at issue in this litigation. All of these issues have required advocacy and skill beyond routine litigation.

4. Hagens Berman Has Foregone Other Employment Due to Their Commitment to This Case

Hagens Berman has dedicated a core team of individuals to the litigation of this action. Rather than the sprawling involvement of many firms (for example, twenty-five firms submitted attorneys' fees declarations in the direct purchaser action), from the beginning of the case, Hagens Berman has dedicated an efficient and streamlined team to this litigation. The consequence of dedicating a team of experienced antitrust attorneys has meant that many of these professionals worked nearly exclusively on this case for some number of years. Nine attorneys have dedicated over a thousand hours each to this litigation, and many of those attorneys have devoted many thousands of hours. Friedman Decl., ¶ 29. Hagens Berman's choice to commit a significant number of attorneys almost exclusively to this litigation, forgoing other cases and other projects, further supports the request for fees.

5. The Requested Fee Is Reasonable When Compared to Fees in Similar Litigation

The sixth and eight *Kerr* factors – the customary fee and awards in similar cases – both support Hagens Berman's fee request. IPPs request a multiplier of 1.29, which is well within the range of other similar cases.[29]

[29] *See, e.g.*, *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050-51 (9th Cir. 2002) (upholding a 28% fee award that constituted a 3.65 multiple of lodestar); *id*. at 1052-54 (noting district court cases in the Ninth Circuit approving multipliers as high as 6.2, and citing only 3 of 24 decisions with approved multipliers below 1.4); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 96 (2d Cir. 2005) (finding 3.5 multiplier reasonable); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944 JST, 2016 U.S. Dist. LEXIS 102408, at *71 (N.D. Cal. Aug 3, 2016) (finding that a multiplier of 1.96 was well within the range of acceptable multipliers); *Noll v. eBay, Inc.*, 309 F.R.D. 593, 610 (N.D. Cal. 2015) (finding that the lodestar cross check, with a 1.6 multiplier, confirmed the reasonableness of the percentage-based calculation); *Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 334 (N.D. Cal. 2014) (finding a 2.83 multiplier appropriate*); In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EJD, 2013 U.S. Dist. LEXIS 37286, at *31 (N.D. Cal. Mar. 18, 2013) (finding that a lodestar multiplier of 1.66 confirms the reasonableness of the percentage-based attorneys' fees calculation, 25% of the settlement fund); *Lane v. Facebook, Inc.*, No. C 08-3845 RS, 2010 U.S. Dist. LEXIS 57765, at *10 (N.D. Cal. May 24, 2010) (finding that a multiplier of 2 should be applied).

6. The Reputation and Ability of Hagens Berman Supports the Requested Fee

Hagens Berman is one of the most well-respected class action litigation firms in the country and has litigated some of the largest class actions in history, including the tobacco litigation,[30] *In re Visa MasterCard Litigation*,[31] and the *In re Toyota Motor Corp. Unintended Acceleration Litigation*.[32] Hagens Berman has over 65 lawyers in offices across the country. Since its founding in 1993, the firm has been recognized in courts throughout the United States for its ability and experience in handling major class litigation efficiently and obtaining outstanding results for its clients. Further details regarding critical Hagens Berman team members are included in the accompanying declaration of Jeff Friedman. Friedman Decl., ¶¶ 34-45; Ex. B.

C. Hagens Berman Requests Reimbursement of $3,704,323.97 in Expenses

Attorneys who create a common fund for the benefit of a class are entitled to be reimbursed for their out-of-pocket expenses incurred in creating the fund so long as the submitted expenses are reasonable, necessary and directly related to the prosecution of the action.[33] Reasonable reimbursable litigation expenses include: those for document production, experts and consultants, depositions, translation services, travel, mail and postage costs.[34]

Hagens Berman requests reimbursement of $3,704,323.97 in expenses. Hagens Berman does not request reimbursement of $39,295.01 in costs which would be recoverable as taxable costs after a successful jury verdict. In a diversity case such as this, federal law regarding recovery of costs

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[30] In the historic litigation against Big Tobacco, Hagens Berman represented 13 states and advanced groundbreaking legal claims to secure a global settlement worth $260 billion, the largest recovery in history. Only two firms went to trial, and Hagens Berman served as co-lead trial counsel.

[31] *In re Visa-MasterCard Litig.*, No. CV-96-5238 (E.D.N.Y.). Hagens Berman was co-lead counsel in a case alleging antitrust violations by Visa and MasterCard. The case settled for $3 billion in cash and changes in practices valued at $20 billion.

[32] *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices & Prods. Liab. Litig.*, No. 8:10ML2151 JVS (C.D. Cal.). Hagens Berman recovered $1.6 billion for the class.

[33] *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *In re OmniVision Techs., Inc.*, 559 F. Supp. 2d 1036, 1048 (N.D. Cal. 2008) ("Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters.").

[34] *See In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1995) (Court fees, experts/consultants, service of process, court reporters, transcripts, deposition costs, computer research, photocopies, postage, telephone/fax); *Thornberry v. Delta Air Lines*, 676 F.2d 1240, 1244 (9th Cir. 1982), *remanded on other grounds*, 461 U.S. 952 (1983) (travel, meals and lodging).

governs.[35] If successful after trial, IPPs will be able to recover court reporter and docket fee costs from the remaining defendants.[36]

What remains is $3,704,323.97, most of this attributable to expert fees ($3,103,648.81), translation costs ($71,417.03) and hosting defendants' document productions in an online database ($241,160.00). Friedman Decl., ¶ 31. These expenses are reasonable and well within the limits of other cases.

D. Plaintiffs Request Service Awards on Behalf of the Class Representatives

Plaintiffs also request that the Court approve the service awards in the amount of $4,500 each for the twenty-three class representatives, to be deducted from the settlement funds with HLDS, Panasonic and Sony.[37] Service awards for class representatives are routinely provided to encourage individuals to undertake the responsibilities and risks of representing the class and to recognize the time and effort spent in the case. "Incentive *awards* are fairly typical in class action cases."[38] In the Ninth Circuit, service awards "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general."[39] Courts have discretion to approve service awards based on, *inter alia*, the amount of time and effort spent, the duration of the litigation, and the personal benefit (or lack thereof) as a result of the litigation.[40]

Here, the twenty-three representatives have spent a significant amount of time assisting in the litigation of this case. All but four plaintiffs has responded to written discovery and produced documents. Each plaintiff was deposed by defense counsel. Each plaintiff has consulted with and assisted counsel in this litigation. Each plaintiff submits a declaration detailing the time he or she

[35] *Best Buy Co. v. AU Optronics Corp. (In re TFT-LCD Flat Panel Antitrust Litigation*), No. 10-CV-4572 SI, 2014 U.S. Dist. LEXIS 32207, at *53 (N.D. Cal. Feb. 3, 2014).

[36] *See* 28 U.S.C. §1920 (2012).

[37] Declaration of Jeff D. Friedman in Support of Motion for Preliminary Approval of Settlements with Panasonic, NEC, Sony, and HLDS Defendant Families and Dissemination of Class Notice, Ex. A, ¶ 24 (IPP-Panasonic Settlement Agreement), Ex. C, ¶ 23 (IPP-Sony Settlement Agreement), Ex. D, ¶27 (IPP-HLDS Settlement Agreement), June 28, 2016, ECF No. 1898.

[38] *Rodriguez v. W. Publ'g Corp*., 563 F.3d 948, 958 (9th Cir. 2009) (emphasis in original).

[39] *Id.* at 958-59.

[40] *See Van Vraken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995).

spent involved in this litigation. Friedman Decl., Exs. C-Y. The requested awards of $4,500 are consistent with service awards in other cases.[41] Thus, respectfully, plaintiffs and class counsel respectfully request that the Court approve the modest service awards for each of the class representatives.

IV. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request an award of $31,250,000 in attorneys' fees, $3,704,323.97 in expenses, and a $4,500 service award for each of the class representatives.

DATED: October 5, 2016

HAGENS BERMAN SOBOL SHAPIRO LLP

By s/ Jeff D. Friedman
JEFF D. FRIEDMAN

Shana E. Scarlett (217895)
715 Hearst Avenue, Suite 202
Berkeley, CA 94710
Telephone: (510) 725-3000
Facsimile: (510) 725-3001
jefff@hbsslaw.com
shanas@hbsslaw.com
colleen@hbsslaw.com

Steve W. Berman (*Pro Hac Vice*)
HAGENS BERMAN SOBOL SHAPIRO LLP
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslaw.com

Lead Counsel for Indirect Purchaser Class

[41] Order Granting Direct Purchaser Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Class Representative Awards, July 23, 2015, ECF No. 1658 (awarding $10,000); Order Granting Direct Purchaser Plaintiffs' Second Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Class Representative Incentive Awards, Apr. 14, 2016, ECF No. 1851 (awarding $5,000); *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 253 (3d Cir. 2009) (approving service award of $10,000).

TAB 44A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE BROILER CHICKEN ANTITRUST LITIGATION This Document Relates To: *Commercial & Institutional Indirect Purchaser Plaintiff Actions*	No. 1:16-cv-08637 Hon. Thomas M. Durkin Magistrate Judge Jeffrey T. Gilbert

ORDER GRANTING COMMERCIAL AND INSTITUTIONAL INDIRECT PURCHASER PLAINTIFFS' MOTION FOR PAYMENT OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND CLASS REPRESENTATIVE SERVICE AWARDS

This Court, having fully considered Commercial and Institutional Indirect Purchaser Plaintiffs' ("CIIPPs") Motion for Payment of Attorneys' Fees, Reimbursement of Expenses, and Class Representative Service Awards (the "Motion"), the Memorandum in Support of the Motion, the Joint Declaration of CIIPPs' Co-Lead Counsel in Support of the Motion, and all exhibits attached thereto, and after a duly noticed hearing on the Motion, hereby finds that:

1. The Motion seeks an interim award of attorneys' fees of $31,000,833.46, together with a proportional share of interest earned on the Settlement Fund for the same time period until dispersed to Class Counsel. This amount represents one third of the $103,890,000.00 Settlement Fund (not including the $1 million payment from the Pilgrim's Pride Settlement designated for notice and claims administration services) after deduction of the expenses and service awards. In that regard, Class Counsel for the CIIPPs seek an order reimbursing $10,407,499.62 in litigation expenses incurred in the prosecution of this action and interim service awards of $15,000 for each of the 32 CIIPP Class Representative totaling $480,000.00.

2. The attorneys' fees amount requested is fair and reasonable under the percentage-of-the-fund method, which is further confirmed by a lodestar "cross-check."

3. The attorneys' fees requested were wholly contingent upon a successful outcome for the CIIPP Class. The risk undertaken by CIIPPs' Class Counsel was significant, especially considering the absence of any parallel criminal case at the time of filing, the complex legal theories advanced in the CIIPPs' Complaints, including the numerous state law claims, and the strong defense put forward by some of the leading defense firms in the country.

4. An interim award of one third of the Settlement Fund is amply supported for the reasons set forth in the Memorandum, including the outstanding monetary recovery obtained for the Class (payment by the Settling Defendants of $103,890,000.00 plus $1 million specifically for notice and administration services); the high quality and quantity of the work performed by CIIPPs' Class Counsel, including extensive and contested motion practice on issues unique to the indirect class, substantial discovery efforts of parties and non-parties, and multiple rounds of mediation, all involving complex issues of fact and law that have been vigorously pursued for over five years; and the substantial risks faced throughout the litigation, which existed from the start and will continue beyond these settlements given the number of remaining Defendants.

5. The Court finds that CIIPPs' Class Counsel's lodestar as of August 31, 2021 was $40,260,516.00, based on historical hourly rates. Accordingly, CIIPPs' Class Counsel's requested fee award of $31,000,833.46 represents a negative multiplier of .77 based on their historical hourly rates through August 31, 2021. CIIPPs' Class Counsel have continued to incur attorneys' fees since August 31, 2021, which are not included in this lodestar calculation, resulting in a further negative multiplier.

6. In addition to the numerous hours expended by CIIPPs' Class Counsel, they have advanced significant costs and expenses in connection with the prosecution of this action for the benefit of the CIIPP Class, with no guarantee of compensation. CIIPPs have incurred expenses in the total amount of $10,407,499.62, which have been reviewed and are approved by the Court as reasonable and necessarily incurred for this Action.

7. Each of the CIIPP Class Representatives has fulfilled their duties as a class representative by remaining apprised of the status of the action, consulting with counsel, searching for and producing documents, responding to written discovery requests, sitting for depositions, and filing a declaration in support of class certification. The CIIPP Class Representatives also undertook significant financial and personal risk in representing the CIIPP Class in this action.

8. Upon consideration of the Motion, Memorandum, and all other accompanying documents, and based upon the entire record in this action, the Court finds that (1) the requested interim attorneys' fees are fair and reasonable; (2) the expenses that CIIPPs' Class Counsel have incurred in this action were necessary, reasonable, and proper; and (3) the requested service awards for the CIIPP Class Representatives are fair and reasonable.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. CIIPPs' Class Counsel are awarded interim attorneys' fees in the amount of $31,000,833.46, together with a proportional share of interest earned on the Settlement Fund for the same time period until dispersed to Class Counsel. This amount represents one third of the $103,890,000.00 Settlement Fund (not including the $1 million payment from the Pilgrim's Pride Settlement designated for notice and claims administration services) after deduction of the expenses and service awards.

2. CIIPPs' Class Counsel are reimbursed $10,407,499.62 in reasonably incurred litigation expenses.

3. The following 32 CIIPP Class Representatives shall each receive $15,000 as interim service awards: Fargo Stopping Center, LLC; Sargent's Restaurant and Lounge; Wildwood Tavern, LLC; Bodega Brew Pub, Inc.; Sullott Corporation; Chicken Joe's, LLC; Eat This, Inc. dba Some Like It Hot; Alpine Special Treatment Center, Inc.; Tennis Bums, LLC dba Alabama Joes; Alabama Joe's 2, Inc. dba Alabama Joes[1]; Tani Sushi Bistro, LLC; France 44 Foods, Inc.; Midtown Bar and Grill LLC; Avanti's of Phoenix, Inc.; Floersch IGA, Inc. dba Ray's Apple Market; Da Big Blue Enterprises Corp. dba Blue Tropix Bar and Grill and Da Big Kahuna Waikiki; Little Figs, Inc. dba Figaretti's Restaurant; Alliance Healthcare System, Inc.; Mookie's Southern Cuisine LLC; Eowyn, LLC dba Cabana; Peppers Grill & Bar, Inc.; Daliano's, Inc. dba Daliono's; Sumner Country Restaurant & Creamery LLC dba Kelley's Row Restaurant & Pub; Bashara & Company, LC dba J. Morgan's Steakhouse; Tic-Tac-O; Brix Tavern, LLC; Pancho's Taqueria, Inc. dba Pancho's Taqueria; Legacy 5, LLC dba Mr. Jim's Pizza 149; Roost Fried Chicken LLC; Oregano Italian LLC dba Oregano Italian Kitchen; Bordenaro's Pizza, Inc. dba Bordenaro's Pizza; Telavi Hospitality, Inc. dba Levante; and FB Mall, LLC dba Fat Belly's.

4. The awarded interim attorneys' fees, reimbursed expenses, and service awards shall be paid from the Settlement Fund.

5. The awarded interim attorneys' fees and reimbursed expenses shall be distributed among CIIPPs' Class Counsel by the Court-appointed CIIPP Co-Lead Counsel (*see* ECF No.

[1] Both Alabama Joe's entities together shall receive one award of $15,000.

144) in a manner that reflects Co-Lead Counsel's judgment as to each individual Class Counsel's contribution to the institution, prosecution, and resolution of the action.

6. Finding no just reason for delay, this Court shall enter this Order as of this date pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

April 19, 2022

Thomas M Durkin

Honorable Thomas M. Durkin
United States District Judge

TAB 44B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE BROILER CHICKEN ANTITRUST LITIGATION This Document Relates To: *Commercial & Institutional Indirect Purchaser Plaintiff Actions*	No. 1:16-cv-08637 Hon. Thomas M. Durkin Magistrate Judge Jeffrey T. Gilbert

MEMORANDUM IN SUPPORT OF COMMERCIAL AND INSTITUTIONAL INDIRECT PURCHASER PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND CLASS REPRESENTATIVE SERVICE AWARDS

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I. INTRODUCTION

Unlike many antitrust cases that begin with the benefit of a government investigation, this case began with extensive pre-complaint investigation and analysis by counsel for the Commercial and Institutional Indirect Purchaser Plaintiffs ("CIIPPs"). This extensive work resulted in Class Counsel for CIIPPs establishing a comprehensive and well-pled complaint that withstood the many challenges lodged by Defendants and their able counsel.

Now, after nearly five years of tireless advocacy, CIIPPs have secured settlements with several Defendants in this matter: Amick Farms, LLC, Fieldale Farms Corporation, Mar-Jac,[1] Peco Foods, Inc., Pilgrim's Pride Corporation, George's,[2] and Tyson[3] (collectively, the "Settling Defendants"). Under the agreements, the Settling Defendants paid $104,890,000.00 into an escrow account ("Settlement Fund"), of which $1 million from the Pilgrim's Pride settlement may be used for notice and claims administration, exclusively, and Co-Lead Counsel for the CIIPPs have commenced the claims process to disburse the net proceeds of the Settlement Fund to qualified class members. These significant settlements illustrate the talent, competence, and hard work of Co-Lead Counsel[4] and other law firms[5] (jointly "Class Counsel") that provided excellent representation in prosecuting this case on behalf of the CIIPPs. The requested award of one third

[1] The Mar Jac Defendants are Mar-Jac Poultry, Inc., Mar-Jac Poultry MS, LLC, Mar-Jac Poultry AL, LLC, Mar-Jac AL/MS, Inc., Mar-Jac Poultry, LLC, and Mar-Jac Holdings, Inc.

[2] The George's Defendants consist of George's Inc. and George's Farms. Inc.

[3] The Tyson Defendants are Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Breeders, Inc., and Tyson Poultry, Inc.

[4] On October 14, 2016, this Court appointed Gustafson Gluek PLLC and Cotchett, Pitre & McCarthy, LLP as interim co-lead counsel. ECF No. 144.

[5] Co-Lead Counsel supervised the work of a number of supporting law firms that assisted with prosecuting the CIIPPs' case.

of the Settlement Fund is fair and reasonable and would appropriately compensate CIIPPs' Class Counsel for the enormous risk and investment undertaken in this complex case.

Class members have received notice of, and will have an opportunity to be heard on, this motion. Class Counsel informed all class members that they would seek an award of attorneys' fees not to exceed 35% of the Settlement Fund and reimbursement of litigation expenses not to exceed $10,658,854.99. In addition to filing this motion via ECF, Class Counsel also informed class members that it will be posted on the case website, www.chickencommercialsettlement.com. Finally, class members were informed through CIIPPs' Court-approved class notice program (ECF No. 5234) they may object to any portion of the settlements or this motion and that the deadline to do so is March 2, 2022. Before the fairness hearing on April 18, 2022, Class Counsel will report any objections lodged by members of the class and respond thereto. *See id*.

With qualified class members in the process of submitting claims to receive proceeds from the Settlement Fund, CIIPPs respectfully bring this motion seeking an order granting Class Counsel one-third of the settlement fund in an award of attorneys' fees (after deduction of expenses and service awards), reimbursement of litigation expenses in the amount of $10,407,499.62, and a $15,000 service award for each Class Representative in this matter.

II. ARGUMENT

Rule 23 permits the Court to award reasonable attorneys' fees and expenses in class actions. Fed. R. Civ. P. 23(h). In the Seventh Circuit, courts have discretion to use the percentage of the fund method or the lodestar approach. *See, e.g., Americana Art China Co. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243 (7th Cir. 2014) ("Both the lodestar approach and the percentage approach may be appropriate in determining attorney fee awards, depending on the circumstances."); *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 566 (7th Cir. 1994)

(same). In cases such as this one, the preferred method in the Seventh Circuit is to use the percentage of the fund approach. *See, e.g., Chambers v. Together Credit Union*, No. 19-CV-00842-SPM, 2021 WL 1948452, at *1 (S.D. Ill. May 14, 2021) ("[T]he percentage method is employed by the vast majority of courts in the Seventh Circuit"); *In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d 838, 845 (N.D. Ill. 2015) (the percentage method has "emerged as the favored method for calculating fees in common–fund cases in this district"); *Beesley v. Int'l Paper Co.*, No. 3:06–cv– 703–DRH–CJP, 2014 WL 375432, at *2 (S.D. Ill. Jan. 31, 2014) ("When determining a reasonable fee, the Court of Appeals for the Seventh Circuit uses the percentage basis rather than a lodestar or other basis.") (citation omitted).

This court has already recognized the percentage of the fund method as the "emerge[nt]" and "favored method for calculating fees in common-fund cases[.]" *In re Dairy Farmers of America, Inc., Cheese Antitrust Litigation*, 80 F.Supp.3d 838, 844 (N.D. Ill. 2015); *see also Steele v. GE Money Bank*, No. 1:08-civ-1880, 2011 WL 13266350, at *1, *5 (N.D. Ill. May 17, 2011), *report and recommendation adopted*, 2011 WL 13266498 (N.D. Ill. Jun. 1, 2011) ("The Seventh Circuit favors the use of the percentage of the fund method for calculating attorneys' fees in a common fund case."); *Pierce v. Visteon Corp*, No. 1:05-cv-01325-LJM, 2014 WL 941311, at *1, *11 (S.D. Ind. Mar. 11, 2014) (recognizing that "the Seventh Circuit has noted the advantages of the percentage of the fund method" over the lodestar method); *In re FedEx Ground Package System, Inc., Employment Practices Litigation*, 251 F.Supp.3d 1225, 1236 (N.D. Ind. 2017) ("Our court of appeals [the Seventh Circuit] favors the percentage-of-the-fund fee in common fund cases"). Unlike the lodestar calculation, a percentage fee is easily calculable and does not require the Court to scrutinize years of billing records. *See Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 565–566 (7th Cir. 1994).

Moreover, Class Counsel retained Professor Robert Klonoff**,** an esteemed law professor who is considered by federal courts across the country as an expert on attorneys' fees, to opine on the reasonableness of CIIPPs' request in this case. *See* ECF Nos. 5050 and 5050-1. This Court concluded that Professor Klonoff's and Direct Purchaser Plaintiff ("DPP") Expert, Brian Fitzpatrick's opinions were helpful and relied on them to determine an award of one third of the settlement fund—the same sought here—was an appropriate award for DPPs. ECF No. 5229, at 4 n. 5.

A. CLASS COUNSEL'S REQUEST FOR ONE-THIRD OF THE SETTLEMENT FUND SHOULD BE GRANTED

To determine the reasonableness of attorney's fees in a common fund case, such as this, "courts must do their best to award counsel the 'market price' for the legal services" they provided. *Sutton*, 504 F.3d at 692; *see also Silverman v. Motorola Sols., Inc.,* 739 F.3d 956, 957 (7th Cir. 2013) ("[A]ttorneys' fees in class actions should approximate the market rate that prevails between willing buyers and willing sellers of legal services."); *see also,* ECF No. 5050 (Commercial and Institutional Indirect Purchaser Plaintiffs' Response Regarding Application of a Sliding Attorneys' Fee Scale).

In the antitrust class action context, the "market price" is most commonly one third of the common fund recovered. *In re Ready-Mixed Concrete Antitrust Litig.*, No. 1:05-cv-00979, 2010 WL 3282591, at *1, *3 (S.D. Ind. Aug. 17, 2010); *see also* Declaration of Professor Robert Klonoff in Support of Commercial and Institutional Indirect Purchaser Plaintiffs' Response to this Court's August 4, 2021 Minute Entry ECF No. 5050-1 ("Klonoff Decl.") paras. 60-67, also attached to Joint Declaration of CIIPPs' Co-Lead Counsel Daniel C. Hedlund and Adam J. Zapala in Support of Commercial and Institutional Indirect Purchaser Plaintiffs' Motion for Payment of Attorneys' Fees, Reimbursement of Expenses, and Class Representative Service Awards ("Joint Decl.").

"[T]he district court must try to assign fees that mimic a hypothetical *ex ante* bargain between the class and its attorneys." *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011); *accord, e.g., Sutton*, 504 F.3d at 693 (7th Cir. 2007).

The Seventh Circuit permits courts to consider four factors to determine the "market rate" in a case such as this: (1) the actual agreements between the parties, as well as fee agreements reached by entities in the market for legal services; (2) the risk of non-payment at the outset of the case; (3) the caliber of Class Counsel's performance; and (4) information from other cases, including fees awarded in comparable cases. *Hale v. State Farm Mut. Auto. Ins. Co.*, 2018 WL 6606079, at *1, *8 (S.D. Ill. Dec. 16, 2018) (citing *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 719 (7th Cir. 2001)). Consideration of the foregoing factors weigh heavily in favor of the Court granting CIIPPs' attorneys' fee request.

1. CIIPPs' Agreements and the Market Price Weigh in Favor of Granting the Request

The Seventh Circuit has directed district courts "to estimate the contingent fee that the class would have negotiated with Class Counsel at the outset of the litigation . . . ." *In re Cap. One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 794 (N.D. Ill. 2015) (quoting *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 744 (7th Cir. 2011)). Here, because there are legal agreements that contain fee provisions between CIIPPs' Class Counsel and class representatives with a "real stake" in the outcome, these agreements favor granting the one-third fee request.

The agreements with the Class Representatives here fall into two groups: (1) agreements that expressly state Class Counsel may receive one-third of any common fund created, and (2) agreements that expressly state Class Counsel may receive an award of attorneys' fees from a

common fund, but do not specify the precise percentage to be awarded.[6] Joint Decl. ¶ 30. Thus, the only agreements that exist in the CIIPP case that set forth a percentage specify a one-third fee award, which demonstrates that the requested fee in this Motion is reasonable on its face. *See, e.g., In re Comverse Tech., Inc. Sec. Litig.*, No. 06-CV-1825 (NGG), 2010 WL 2653354, at *4 (E.D.N.Y. June 24, 2010) ("The court sees no need to impose its own ex post assessment of lead counsel's value when the retainer and fee agreements speak for themselves."); *Heekin v. Anthem, Inc.*, No. 1:05-CV-01908-TWP, 2012 WL 5878032, at *5 (S.D. Ind. Nov. 20, 2012) (awarding the request fee award of 33.3 percent, reasoning that the "named plaintiffs . . . entered into contingent fee agreements with Class Counsel agreeing to pay a fee of 33.3% and up to 45% percent of the recovery depending on the stage of the litigation"); *City of Greenville v. Syngenta Crop Prot., Inc.*, 904 F. Supp. 2d 902, 908 (S.D. Ill. 2012) ("[P]laintiffs in this matter concluded a one-third contingency fee with advanced costs was in their best financial interests in this litigation . . . . Accordingly, these contracts *define* the market.") (emphasis in original); *accord* Klonoff Decl. ¶ 65.

And, in any event, as subsequent sections demonstrate, a one-third fee *is* the market-based fee percentage. *See* Klonoff Decl. ¶¶ 66, 75, 76 ("typical contingent fee agreements in the Seventh Circuit (and elsewhere in the country) are 33 1/3 percent or greater" and including numerous examples of antitrust cases within the 7th Circuit with percentages of 33 percent or greater); *Leung v. XPO Logistics, Inc.*, 326 F.R.D. 185, 201 (N.D. Ill. 2018) ("a typical contingency agreement in this Circuit might range from 33% to 40% of recovery"); *In re Potash Antitrust Litig.*, No. 1:08-

[6] CIIPPs include 32 named plaintiffs: 14 plaintiffs entered legal agreements that expressly specified Class Counsel may receive 1/3 of any recovery; 18 plaintiffs entered legal agreements that stated Class Counsel may receive a fee award from any settlement or judgment fund created, but did not specify a percentage; and one plaintiff entered an agreement that expressly stated Class Counsel may receive "up to 35%." Joint Decl. ¶ 30.

cv-06910 (N.D. Ill. June 12, 2013), Doc. No. 589 (awarding 33 1/3% fees) Joint Decl. Ex. 28; *In re: Plasma-Derivative Protein Therapies Antitrust Litig.*, No. 09-07666 (N.D. Ill. April 4, 2014), Doc. Nos. 697, 701 (same) Joint Decl. Exs. 29, 30; *In re Dairy Farmers of Am., Inc.,* 80 F. Supp. 3d 838 (N.D. Ill. 2015 (same).[7] Thus, the legal agreements that exist in this case with the Class Representatives for the CIIPPs support the fee requested.

2. The Substantial Risk of Non-Payment Also Weighs in Favor of Granting CIIPPs' Fee Request

"The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel." *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958 (7th Cir. 2013); *see also In re Flonase Antitrust Litig.*, 291 F.R.D. 93, 104 (E.D. Pa. 2013) ("[A]s a contingent fee case, counsel faced a risk of nonpayment in the event of an unsuccessful trial. Throughout this nearly 5 ½ year litigation, class counsel have not received any payment. This factor supports approval of the requested fee [of 33 1/3 percent]."). Thus, "[w]hen determining the reasonableness of a fee request, courts put a fair amount of emphasis on the severity of the risk (read: financial risk) that class counsel assumed in undertaking the lawsuit." *In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d 838, 847-48 (N.D. Ill. 2015).

The risk that CIIPPs' Class Counsel would not receive payment at the outset of this case was *significant*. *See* Klonoff Decl. ¶¶ 55-58, 68-71; *accord Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 258 F.R.D. 545, 559 (N.D. Ga. 2007) ("[C]ourts have found that antitrust actions generally present complex, novel issues, and that plaintiffs can rarely guarantee recovery at trial.");

[7] Moreover, this Court already determined, with respect to the DPPs' Motion, ECF No. 5229, that an unspecified fee in a retainer agreement would result in "an award of 33 percent" because "[t]here is simply little to no precedent recommending" otherwise. *See Broiler Chicken*, 2021 WL 5709250, at *3 (granting one-third attorneys fee award where fee agreements between DPPs and their counsel stated their attorneys would receive a "percentage of any award," but did not specify how much).

In re Shopping Carts Antitrust Litig., No. 451-CLB, 1983 WL 1950, at *7 (S.D.N.Y. Nov. 18, 1983) ("[A]ntitrust price fixing actions are generally complex, expensive and lengthy."). The breadth of the CIIPPs' case is vast: CIIPPs alleged Defendants engaged in an antitrust conspiracy to fix, raise, maintain, and stabilize the price of Broilers, and allege that the Class materially overpaid as a result of the conspiracy. *See* ECF No. 3929 (CIIPPs' Seventh Amended Consolidated Class Action Complaint). Despite the risk of no recovery and the opportunity cost of choosing this case over others, CIIPPs' Class Counsel deeply believed in the merits of the case. As mentioned, this risk was even greater than in many antitrust cases because this case was commenced without the benefit of any government investigation or enforcement action. CIIPPs' Class Counsel spent many hours researching the poultry industry and available public data and statements to craft the underlying allegations in this Action. Id. As the first indirect purchaser to file a complaint, many hours were similarly spent researching possible state-law antitrust, consumer protection, and unjust enrichment claims to bring in *Illinois Brick* repealer states on behalf of indirect purchasers. Id. Overcoming these initial challenges, Class Counsel have secured significant recoveries on behalf of the CIIPP Class. To date, CIIPPs' Class Counsel have generated a cumulative settlement amount of $104,890,000.00. Joint Decl. ¶ 11.

Since the intense preliminary work before filing the complaint, Class Counsel has spent nearly 85 thousand hours over five years diligently prosecuting this case for CIIPP class. After appointment as Co-Lead Counsel, CIIPPs' Class Counsel engaged, *inter alia*, in the following extensive work:

- Successfully opposed multiple motions to dismiss filed jointly and individually by each Defendant, in which Defendants contested every claim the CIIPP class set forth. After extensive briefing and oral argument, the Court denied Defendants' motions and allowed this case to proceed;

- Quickly began negotiating discovery requests, search terms, and custodians for each Defendant and engaging in extensive third-party discovery;

- Served over 50 document subpoenas on non-parties, some of which required contested motion practice including in far-flung jurisdictions, for purposes of demonstrating pass-through, antitrust impact, and damages. This work was extensive, laborious, and critical for purposes of class certification and damages. The work resulted in extensive granular transactional data from intermediaries in the chain of distribution;

- Once Defendants started producing documents, CIIPPs' Class Counsel undertook a review of over 9 million pages of documents in coordination with the other classes, putting the most attorneys on the document review of any other class;

- Without duplicating work, prepared for and participated in more than 120 depositions, with CIIPPs' Class Counsel being the lead deposition taker on a significant number;

- Spent hundreds of hours working with their 32 class representatives to respond to Defendants' requests for production, interrogatories, and requests for admission, and formulating subsequent supplemental responses;

- Relatedly, Class Counsel undertook a comprehensive review and collection of responsive documents and data from all 32 class representatives, which took considerable staffing, resources, time, and money. Defendants noticed the deposition of every class representative, requiring CIIPPs to spend many hours preparing for and defending the depositions of 32 named plaintiffs. Id. Many of these class-representative depositions lasted over four hours, with some taking almost seven hours;

- CIIPP Class Counsel prepared for, attended, and argued at many Court hearings, including on contested motions, case management conferences, hearings regarding case structure, and settlement approval.

Joint Decl. ¶ 8

For a full discussion of the extensive work performed by Class Counsel in this litigation, the Joint Declaration of Class Counsel recounts these tasks in more detail. *See* Joint Decl. ¶ 8.

Notably, the risk of nonpayment was ever-present, as CIIPPs faced some of the most powerful and well-financed multinational corporations, which were represented by the biggest and most prominent law firms in the United States. Indeed, the first settlement (Fieldale) in this

litigation was not achieved until over two years of litigation, and the first large settlement (Tyson) was not achieved until *five years* into the litigation. No litigation outcome was ever certain. As this Court aptly noted, motion practice has included moments that could have defeated CIIPPs' claims, with some even being "close call[s]." *Broiler Chicken*, 2021 WL 5709250, at *1, *3.

Any final outcome to this Action has also been delayed, and thus the entire Action made more risky for CIIPPs' Class Counsel, by unprecedented and lengthy stays brought on by the COVID-19 pandemic, *see, e.g.,* United States District Court for the Northern District of Illinois Amended General Order 20-0012 (March 16, 2020) ("In all civil cases, all deadlines, whether set by the court or by the Rules of Civil Procedure or Local Rules, are hereby extended by 21 days from the current deadline set."), and the continual discovery stays, either in full or in part, sought by the Department of Justice, *see, e.g.,* ECF No. 2268 (June 21, 2019), Motion by Intervenor United States of America to Intervene and Stay Discovery. As stated above, this case was initiated without the benefit of a government investigation. Instead, the United States intervened over two years into this Action and sought a stay. As this Court noted, "[a]ppointed Counsel's work appears to have prompted the government investigations that led to [the] indictments, rather than the reverse." ECF No. 5229, at 8. Moreover, the Department of Justice requested and eventually received large and comprehensive document productions from the civil plaintiff classes by subpoena. Based on the foregoing, CIIPPs' fee request is particularly reasonable and appropriate. *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 122 (2d Cir. 2005) (affirming fee award of $220,290,160 and noting that "plaintiffs' counsel did not have the benefit of 'piggybacking' off of a previous case—instead, the Government piggybacked off of plaintiffs' counsel's work" and that "it is especially important to provide appropriate incentives to attorneys pursuing antitrust actions because public policy relies on private sector enforcement of the antitrust

laws."); *In re Linerboard Antitrust Litig.*, No. CIV.A. 98-5055, 2004 WL 1221350, at *17 (E.D. Pa. June 2, 2004), amended, No. CIV.A.98-5055, 2004 WL 1240775 (E.D. Pa. June 4, 2004) (noting that "providing sufficient . . . incentive for the private attorney general is particularly important in the area of antitrust enforcement because public policy relies so heavily on such private action for enforcement of the antitrust law"). As this Court concluded, "[a] substantial award is warranted here as a proper incentive for high quality counsel to take on complex cases, requiring a massive investment of time and money, with such a high risk of non-payment." ECF No. 5229, at 8.

The risk undertaken by CIIPP Class Counsel has been magnified by the extensive expert work (and their related, substantial costs) necessary for CIIPPs to meet their burden at class certification and summary judgment. CIIPPs' Class Counsel engaged Dr. Russell Mangum and his staff, who performed extensive transactional data analysis, constructed vast databases, and built robust regression models, amongst many other tasks, that permitted them to opine on the magnitude of the overcharges caused by Defendants' conduct, including the measure of such overcharges that were passed-through to CIIPPs. Joint Decl. ¶ 8. Class Counsel's work has thus far culminated with Dr. Mangum's 147-page opening report; a 195-page reply report in support of class certification; and a 90-page opening merits report. Id. Furthermore, CIIPPs retained Dr. Michael Williams, who prepared a 183-page liability report detailing, *inter alia*, the anticompetitive nature of Defendants' conduct. CIIPPs' Class Counsel drafted and filed their voluminous class certification motion with related expert reports, substantive exhibits, and declarations. Id; *see* ECF Nos. 3968, 4493, and 4512. Indeed, CIIPPs face a case that is even more complex and risky than the DPPs, as they must perform unique analyses of passthrough requiring extensive, additional expert work and data analysis. As set out further below, the cost of all this

expert work required large amounts of funding. Joint Decl. ¶ 20, ¶ 22, Exs. 26-27 (detailing over $10 million in case costs). All of this costly, necessary, and complex work was undertaken without any promise of repayment, making the risks to Class Counsel truly extraordinary.

3. The Caliber of Class Counsel and the Amount of Work Performed Weigh Heavily in Favor of Granting the Request

The caliber of Class Counsel in this matter has been exemplary. CIIPPs' Class Counsel have invested over 85,000 hours to this Action. Class Counsel's collective lodestar, therefore, is $40,260,516.00. CIIPPs' requested fee if granted, therefore, will constitute a negative multiplier of .77. This is another factor supporting approval of the requested fee. *See, e.g., In re Blech Securities Litigation*, No. 94-cv-9696 (RWS), 2000 U.S. Dist. LEXIS 6920 (S.D. N.Y. May 22, 2000) (citing evidence that award would represent a negative multiplier of the lodestar as support for a 30% award) *In re TFT-LCD (Flat-Panel) Antitrust Litig.*, 2013 WL 149692, at *1 (N.D. Cal. Apr. 3, 2013) (negative multiplier of 0.86 confirmed amount of attorneys' fees requested was fair and reasonable); *Gong-Chun v. Aetna Inc.*, No. 1:09-cv-01995-SKO, 2012 WL 2872788, at *23 (E.D. Cal. July 12, 2012) (negative multiplier of .79 suggested that fee award was reasonable); *Chun-Hoon v. McKee Foods Corp.,* 716 F. Supp. 2d 848, 853–54 (N.D. Cal. 2010) (negative multiplier of .59 indicated fee award was "reasonable and a fair valuation of the services rendered to the class by class counsel"); *In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2007 WL 4171201, at *16 (N.D. Cal. Nov. 26, 2007) (negative lodestar multiplier of 0.83 or 0.74 "suggests that the requested percentage based fee is fair and reasonable").

The enormous amount of work undertaken by Class Counsel, as noted, is detailed in the Joint Declaration. CIIPPs' Class Counsel are some of the country's most experienced and successful antitrust and complex litigation attorneys. *See* ECF No. 116 at 8-13. And, Defendants' counsel are similarly skilled and experienced, and have mounted a formidable defense. *See*

Arenson, et al. v. Bd. of Trade of City of Chicago, 372 F. Supp. 1349, 1354 (N.D. Ill. 1974) (noting that the quality, vigor, and prior success of opposing counsel is an important factor when assessing the quality of work performed by plaintiffs' counsel). This Court is familiar with the caliber of work performed by CIIPPs' Class Counsel, and they respectfully suggest that it merits the requested fee.

4. Comparable Cases Favor Granting CIIPPs' Request

"Another relevant data point for the market price for attorneys' fees is those awarded in 'analogous class action settlements.'" *Hale*, 2018 WL 6606079 at *10 ("Courts within the Seventh Circuit, and elsewhere, regularly award percentages of 33.33% or higher to counsel in class action litigation."); *see also Taubenfeld v. AON Corp.*, 415 F.3d 597, 600 (7th Cir. 2005) (noting the relevance of "attorneys' fees from analogous class action settlements"); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483 (N.D. Ill. 2015) ("Attorney's fee awards in analogous class action settlements shed light on the market rate for legal services in similar cases."); *Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (collecting cases). Additionally, Professor Klonoff's Declaration previously submitted and also submitted herewith compiles a number of cases within the Seventh Circuit awarding fees of 33% or great. Klonoff Decl. ¶ 76.

Here, this Court need look no further than its own finding in the DPP Action: "The fact that fee awards in antitrust cases in [the Seventh Circuit] are almost always one-third is a strong indication that this should be considered the 'market rate.'" *Broiler Chicken*, 2021 WL 5709250, at *4. This is precisely the approach CIIPPs are taking here, and their request is exactly in line with what this Court previously ordered in connection with the DPPs' fee request. The foregoing considerations strongly support CIIPPs' request.

5. A Lodestar Cross-Check Confirms the Reasonableness of the Request

Although the previously mentioned percentage-of-the-fund method is favored in the Seventh Circuit for determining fees in common fund cases, courts may also use a "lodestar cross-check" to ascertain class counsel's time investment, determine the reasonableness of a fee, and avoid windfall. *In re Dairy Farmers of America, Inc.*, 80 F. Supp. 3d 838, 844 (N.D. Ill. 2015). This cross-check is not required, however. *Rohm & Haas II*, 658 F.3d at 636 ("[C]onsideration of a lodestar check is not an issue of required methodology"); *Leung v. XPO Logistics, Inc.*, 326 F.R.D. 185, 204 (N.D. Ill. 2018) ("The Court is not required to check its percentage-of-fee determination against the lodestar.")

As noted, using counsel's historic hourly rates to calculate the lodestar results in a .77 multiplier, which constitutes a *negative* multiplier. CIIPPs' Class Counsel invested over 85,000 hours of attorney and other professional time from case inception through August 31, 2021. Joint Decl. Ex. 25. The average hourly rate by Class Counsel and their associated professional staff is approximately $470 per hour (with a cap of $350.00 for hour on document review, *see* Joint Decl Ex. 2), a reasonable and comparable rate for those charged by other firms with similar experience, expertise, reputation and for similar services.[8] Courts in the Seventh Circuit regularly grant fee awards that result in a negative multiplier. *See, e.g., Domann v. Summit Credit Union*, No. 18-cv-167-wmc, 2020 WL 1847868 (W.D. Wisc. April 13, 2020) ("The fact that the lodestar method produces a 'negative multiplier' is also a factor supporting the reasonableness of the fee request, given that courts have approved multipliers of five or more.").

[8] Since the inception of this Action, Interim Co-Lead Counsel have submitted Class Counsel's lodestar and expense information to the Court *in camera* on a quarterly basis. CIIPPs' Class Counsel have conducted an additional audit of this time in preparing this motion. Joint Decl. ¶ 15.

III. CIIPPs' EXPENSES REQUEST SHOULD BE GRANTED

CIIPPs request reimbursement of $10,407,499.62 for reasonable expenses incurred in bringing these claims. CIIPPs counsel is aware that this request exceeds the amount of costs of the DPP class when they sought payment of expenses from this Court. However, of the amount CIIPPs request, nearly $8.5 million stems from the extensive work undertaken by CIIPPs' economic experts and their analysis of massive amounts of data including non-party data to prove pass through of overcharges—something not required in the DPP case. This amount of costs further supports CIIPPs' Class Counsel's requested fee because it demonstrates that this has been an extraordinarily high-risk endeavor to pursue. This is all the more true given this Court's practice—consistent with CIIPPs' request— that litigation costs are deducted before a percentage is applied to the settlement fund to calculate the fee. Thus, Class Counsel is not seeking fees on this portion ($10,407,499.62) of the Settlement Fund.

Counsel are routinely entitled to reimbursement of reasonable expenses incurred in litigation, as DPPs were with respect to their expenses. Fed. R. Civ. P. 23(h); *see also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392 (1970) (recognizing counsel's right to reimbursement of expenses where a common fund has been established for the benefit of a class). Reimbursable expenses are those "that are consistent with market rates and practices." *In re Ready-Mixed Concrete*, 2010 WL 3281591, at *1, *3 (S.D. Ind. Aug. 17, 2010).[9] CIIPPs' expenses include $8,474,655.60 in expert costs, $1,123,780.46 in discovery database costs, $76,663.12 in special master and mediator costs, $134,121.86 in deposition costs, and $166,338.96 in consultant costs,

[9] Conforming to this Court's guidance in the DPP proceeding, CIIPPs' request for expenses can be deducted from the settlement fund before the one-third fee award percentage is applied. *Broiler Chicken*, 2021 WL 5709250, at *4.

along with a number of miscellaneous costs, including transcript orders, travel, photocopies, mail, telephone, etc. Joint Decl. ¶ 20, Exs. 26, 27. These expenses have been necessary to litigate this Action in the best interests of the CIIPP Class and to achieve the favorable settlements to date.

IV. THE CLASS REPRESENTATIVES SHOULD RECEIVE SERVICE AWARDS FOR THEIR CONSIDERABLE TIME AND EFFORT

Each Class Representative representing the CIIPP class should receive $15,000 for their considerable time and effort in supporting the case. "Because a named plaintiff is an essential ingredient of any class action, an incentive [or service] award is appropriate if it is necessary to induce individuals to participate in the suit." *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). To determine if an incentive award is warranted, a court evaluates (i) actions the plaintiff has taken to the protect the interests of the class, (ii) the degree to which the class has benefitted from those actions, and (iii) the amount of time and effort the plaintiff expended in pursuing the litigation. *Camp Drug Store, Inc. v. Cochran Wholesale Pharm, Inc.*, 897 F.3d 825, 834 (7th Cir. 2018). This Court has recognized that "[e]mpirical evidence shows that incentive awards [][] paid in most class suits average between $10-$15,000 per class representative." *Broiler Chicken*, 2021 WL 5709250, at *5. CIIPPs request exactly that—$15,000, the same amount this Court awarded to the DPP class representatives.

The Class Representatives have thus far undertaken substantial and invasive work, at a risk to themselves and their business. *See* ECF Nos. 3968-8 and 3968-9 (Compendium of Class Representatives Declaration Part I and II). The Class Representatives are all small businesses, many are owner-operated, and many have only a handful of employees. Joint Decl. ¶ 32. Every Class Representative spent numerous hours searching their offices and homes to provide documents and information in response to discovery requests propounded by the Defendants. ECF Nos. 3968-8 and 3968-9. Every Class Representative had a Fed. R. Civ. P. 30(b)(6) or a Fed. R.

Civ. P. 30(b)(1) deposition taken, and one of them—Alpine Special Treatment Center, Inc.—had its deposition taken twice. *Id.* ¶ 31. Often, the corporate representative of the Class Representative was the owner and chef, meaning the restaurant had to be closed or operated with limited resources while the deposition took place. *Id.* ¶ 32. The Class Representatives also risked potential retaliatory actions taken up the distribution chain for their involvement in this litigation. In light of the work already performed, CIIPPs request a reasonable $15,000 service award for each of the businesses serving as a Class Representative.

V. CONCLUSION

For all the foregoing reasons, CIIPPs respectfully ask this Court to: (1) grant their request for attorneys' fees of one-third of the settlement fund, (2) grant their request for reimbursement of their reasonably incurred litigation expenses, and (3) grant their request for Class Representative service awards.

Dated: January 28, 2022

Respectfully Submitted:

/s/ *Daniel C. Hedlund*
Daniel E. Gustafson
Daniel C. Hedlund
Michelle J. Looby
Joshua J. Rissman
Brittany Resch
GUSTAFSON GLUEK PLLC
120 South Sixth Street, Suite 2600
Minneapolis, MN 55402
Tel: (612) 333-8844
dgustafson@gustafsongluek.com
dhedlund@gustafsongluek.com
mlooby@gustafsongluek.com
jrissman@gustafsongluek.com
bresch@gustafsongluek.com

Co-Lead Counsel for the Commercial and Institutional Indirect Purchaser Class

/s/ *Adam J. Zapala*
Adam J. Zapala
Tamarah P. Prevost
James G.B. Dallal
COTCHETT, PITRE & MCCARTHY, LLP
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Tel: (650) 697-6000
azapala@cpmlegal.com
tprevost@cpmlegal.com
jdallal@cpmlegal.com

Alexander E. Barnett
COTCHETT, PITRE & MCCARTHY, LLP
40 Worth Street, Suite 602
New York, NY 10013
Tel: (212) 201-6820
abarnett@cpmlegal.com

Co-Lead Counsel for the Commercial and Institutional Indirect Purchaser Class

Kenneth A. Wexler
Melinda J. Morales
WEXLER BOLEY & ELGERSMA, LLP
55 W. Monroe Street, Suite 3300
Chicago, IL 60603
Tel: (312) 346-2222
kaw@wbe-llp.com
mjm@ wbe-llp.com

Liaison Counsel for the Commercial and Institutional Indirect Purchaser Class

TAB 45A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: PHARMACEUTICAL INDUSTRY AVERAGE WHOLESALE PRICE LITIGATION	MDL NO. 1456 CIVIL ACTION: 01-CV-12257-PBS
THIS DOCUMENT RELATES TO: ALL NON-MASSACHUSETTS CLASS ACTIONS CONCERNING CLASSES 2 &3	Judge Patti B. Saris

~~[PROPOSED]~~ REVISED FINAL ORDER AND JUDGMENT GRANTING FINAL APPROVAL OF THE PROPOSED SETTLEMENT AGREEMENT AND RELEASE OF ASTRAZENECA RELATED TO NON-MASSACHUSETTS CLASSES TWO AND THREE, APPROVING THE PROPOSED ALLOCATION OF SETTLEMENT FUNDS, AND APPROVING CLASS COUNSEL'S APPLICATION FOR ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES AND COMPENSATION FOR CLASS REPRESENTATIVES

This Court having considered: (a) the Revised Settlement Agreement and Release of AstraZeneca Related to Non-Massachusetts Classes Two and Three, dated August 5, 2010, including all Exhibits thereto (collectively, the "Agreement"), between Class Plaintiffs (as defined in the Agreement) and Defendant AstraZeneca Pharmaceuticals LP ("AstraZeneca"); (b) the proposed allocation and distribution of funds among the Settlement Classes; and (c) Class Counsel's application for attorneys' fees, reimbursement of litigation expenses, and compensation for the Class Representatives; and having held a hearing on February 8, 2011, and having considered all of the submissions and arguments with respect thereto, and otherwise being fully informed, and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that:

1. This Final Order and Judgment incorporates herein and makes a part hereof, the Agreement, and all Exhibits thereto. Unless otherwise provided herein, the terms as defined in the Agreement shall have the same meanings for purposes of this Final Order and Judgment.

2. The Court has personal jurisdiction over all Class Representatives, Class Members, and AstraZeneca for purposes of this settlement only, and has subject matter jurisdiction to approve the Agreement.

3. The Settlement Classes are defined as follows:

> **Third-Party Payor MediGap Supplemental Insurance Class ("Class 2").** All TPPs in the United States who, from January 1, 1991 through January 1, 2005, made, or incurred an obligation to make, reimbursements for any portion of a Medicare Part B co-payment for Zoladex® purchased outside the Commonwealth of Massachusetts.
>
> **Consumer and Third-Party Payor Class For Payments Made Outside the Medicare Context ("Class 3").** All natural persons in the United States who made, or incurred an obligation to make, a non-Medicare Part B payment for Zoladex® purchased outside of the Commonwealth of Massachusetts, and all TPPs in the United States who made, or incurred an obligation to make, non-Medicare Part B reimbursements for Zoladex® purchased outside of the Commonwealth of Massachusetts, during the period from January 1, 1991, through June 11, 2010.

Excluded from each of the Settlement Classes are the AstraZeneca Releasees, defined in the Agreement. (The exclusion of AstraZeneca "employees" from the Settlement Classes shall not affect the eligibility of any ERISA plans or other TPPs for settlement benefits regardless whether any plan participants might be excluded "employees.") Additionally excluded from each of the Settlement Classes are the following: (1) all natural persons who only paid flat co-payments, and not any percentage co-payments, for Zoladex®; (2) all federal, state, and local governmental entities in the United States, except any such governmental agencies or programs

that made or incurred an obligation to make a reimbursement for Zoladex® as part of a health benefit plan for their employees, but only with respect to such payments; and (3) the ISHPs.

4. This Court previously certified Classes 2 and 3 as Massachusetts-only Classes for all AstraZeneca Covered Drugs. *See In re Pharm. Indus. Average Wholesale Price Litig.* ("*In re AWP*"), 233 F.R.D. 229, 231 (D. Mass. 2006) (order); *In re AWP*, 230 F.R.D. 61 (D. Mass. 2005) (Memorandum Opinion). In addition, after conducting a bellwether Massachusetts-only trial under Mass. G.L. c93A with respect to Zoladex®, this Court certified Classes 2 and 3 for Zoladex under numerous state consumer protection statutes. *See In re AWP*, 252 F.R.D. 83 (2008). In certifying the Settlement Classes referenced in Paragraph 3 above, the Court incorporates by reference all of these previous orders. *See In re AWP*, 588 F.3d 24, 40 (1st Cir. 2009) ("In this case the district court satisfied Rule 23(c)(1)(B)'s text and purpose. The court could incorporate its prior orders by reference when certifying the expanded class.")

5. The Court finds that the prerequisites of FED. R. CIV. P. 23(a) and (b)(3) have been satisfied for certification of the Settlement Classes for settlement purposes, and finds that the Settlement Classes are properly certified pursuant to those Rules: Class Members, numbering in the thousands, are so numerous that joinder of all members is impracticable; there are questions of law and fact common to each of the Settlement Classes; the claims and defenses of the Class Representatives are typical of the claims and defenses of the Settlement Class Members they represent; the Class Representatives have fairly and adequately protected the interests of the Settlement Classes with regard to the consolidated claims of the Settlement Classes they represent; the common questions of law and fact predominate over questions affecting only individual Class Members, rendering the Settlement Classes sufficiently cohesive to warrant a nationwide class settlement; and the certification of the Settlement Classes is

superior to individual litigation and/or settlement as a method for the fair and efficient resolution of the MDL Class Actions.

In making all of the foregoing findings, the Court has exercised its discretion in certifying the Settlement Classes, based, *inter alia*, upon the Court's familiarity with the claims and parties in these and other cases, the factual record before this Court in connection with its prior class certification orders and the bellwether Massachusetts trial, the facts and proceedings of prior AWP class settlements, the interests of the various constituent groups, and the negotiation process.

6. The record shows that notice has been given to the Settlement Classes in the manner approved by the Court in its Preliminary Approval Order of August 12, 2010 [Docket No. 7225]. The Court finds that such notice: (i) constitutes reasonable and the best practicable notice; (ii) constitutes notice that was reasonably calculated, under the circumstances, to apprise Class Members of the terms of the Agreement and Class Settlements, and Class Members' right to object to or exclude themselves from the Settlement Classes and appear at the settlement fairness hearing held on February 8, 2001 (the "Fairness Hearing"), (iii) constitutes due, adequate, and sufficient notice to all persons or entities entitled to receive notice; and (iv) meets the requirements of due process and FED. R. CIV. P. 23.

7. No individuals or entities, other than those listed on Exhibit A hereto (filed under seal), have excluded themselves from the Settlement Classes. This Order shall have no force or effect on the persons or entities listed on Exhibit A hereto.

8. The Court finds that extensive arm's-length negotiations have taken place in good faith between Lead Class Counsel and AstraZeneca's Counsel resulting in the Agreement. Additionally the Court finds that extensive arm's-length negotiations have taken place on behalf

of separate counsel appointed by Lead Class Counsel to represent the interests of Consumer Class Members and TPP Class Members in order to apportion the Settlement Fund between these constituencies and that these arm's length negotiations afforded the structural protection required to ensure adequate representation of these constituencies.

9. The Court finds that the designated class representatives are appropriate representatives for settlement purposes. The Court finds that each of these representatives, or an agent or member thereof, made a purchase or reimbursement for Zoladex®.

10. The Court confirms that Zoladex® was the only AstraZeneca drug as to which class claims were certified in the Court's September 26, 2008 Memorandum and Order certifying Non-Massachusetts Classes 2 and 3. The Court did not certify Non-Massachusetts class claims with respect to Pulmicort Respules® or any other AstraZeneca drug.

11. The Court has considered all of the factors enumerated in FED. R. CIV. P. 23(g) and finds that Class Counsel have fairly and adequately represented the interests of the Settlement Classes.

12. Pursuant to FED. R. CIV. P. 23(e), the Court hereby finally approves in all respects the Class Settlement set forth in the Agreement ("the Class Settlement") and finds that the Class Settlement, the Agreement, and the plan of distribution as set forth in Paragraphs III.C-F of the Agreement, are, in all respects, fair, reasonable and adequate, and in the best interest of the Settlement Classes.

13. The Court further approves the establishment of the Settlement Fund as set forth in the Agreement and the Escrow Agreement submitted by the Parties. The Parties are hereby directed to implement and consummate the Class Settlements according to the terms and provisions of the Agreement. In addition, the Parties are authorized to agree to and adopt such

amendments and modifications to the Agreement that (i) are consistent in all material respects with this Final Order and Judgment, and (ii) do not limit the rights of the Settlement Classes.

14. Upon the Effective Date of the Agreement, the Class Releasors (as defined in Paragraph II.F of the Agreement) shall release and forever discharge the AstraZeneca Releasees (as defined in Paragraph II.B of the Agreement) from their respective Released Consumer Class Claims and Released TPP Class Claims (as defined in Paragraphs II.JJ and II.LL of the Agreement).

15. The Court finds that the Escrow Account is a "Qualified Settlement Fund" as defined in section 1.468B-1(a) of the Treasury Regulations in that it satisfies each of the following requirements:

(a) The Escrow Account is established pursuant to an order of this Court and is subject to the continuing jurisdiction of this Court;

(b) The Escrow Account is established to resolve or satisfy one or more contested or uncontested claims that have resulted or may result from an event that has occurred and that has given rise to at least one claim asserting liability arising out of an alleged violation of law; and

(c) The assets of the Escrow Account are segregated from other assets of AstraZeneca, the transferor of payments to the Settlement Fund, and from the assets of persons related to AstraZeneca.

16. Under the "relation-back" rule provided under section 1.468B-1(j)(2)(i) of the Treasury Regulations, the Court finds that:

(a) The Escrow Account met the requirements of paragraph 13 of this Order prior to the date of this Order approving the establishment of the Settlement Fund subject to the continued jurisdiction of this Court; and

(b) AstraZeneca and the "administrator" under section 1.468B-2(k)(3) of the Treasury Regulations may jointly elect to treat the Escrow Account as coming into existence as a "Qualified Settlement Fund" on the later of the date the Escrow Account met the requirements of paragraphs 13(b) and 13(c) of this Order or January 1 of the calendar year in which all of the requirements of Paragraph 13 of this Order are met. If such relation-back election is made, the assets held by the Escrow Account on such date shall be treated as having been transferred to the Escrow Account on that date.

17. Nothing in this Final Order and Judgment, the Class Settlements, the Agreement, or any documents or statements related thereto, is or shall be deemed or construed to be an admission or evidence of any violation of any statute or law or of any liability or wrongdoing by any of the Released Parties.

18. Class Counsel have moved pursuant to FED. R. CIV. P. 23(h), 54(d) and 52(a) for an award of attorneys' fees and reimbursement of expenses. Pursuant to Rules 23(h)(3) and 52(a) this Court awards $27,000,000, which represents 30% of the Settlement Amount, and makes the following findings of fact and conclusions of law:

(a) that the Class Settlement confers substantial benefits on the Members of each of the Settlement Classes;

(b) that the value conferred on the Settlement Classes is immediate and readily quantifiable (upon this Judgment becoming Final (as defined in the Agreement),

Settlement Class Members who have submitted valid Claim Forms will receive cash payments that represent a significant portion of their alleged financial harms);

(c) that Class Counsel vigorously and effectively pursued the Settlement Class Members' claims before this Court in this highly complex case;

(d) that the Class Settlements were obtained as a direct result of Class Counsel's skillful advocacy;

(e) that the Class Settlements were reached following extensive negotiation between Lead Class Counsel and AstraZeneca's Counsel, and were negotiated in good-faith and in the absence of collusion;

(f) that during the prosecution of the AstraZeneca claims in the MDL Class Actions, Class Counsel incurred expenses at least in the amount of $9,401,741, which included costs for expert witnesses and other expenses which the Court finds to be reasonable and necessary to the representation of the Settlement Classes;

(g) that Settlement Class Members were advised in the Notice approved by the Court that Class Counsel intended to apply for an award of attorneys' fees in an amount of up to 33 1/3% of the Settlement Fund (plus interest thereon from the date of funding of the Settlement Fund) plus reimbursement of reasonable costs and expenses incurred in the prosecution of this action, to be paid from the Settlement Fund;

(h) that no Member(s) of the Settlement Classes have submitted written objection(s) to the award of attorneys' fees and expenses;

(i) that counsel who recover a common benefit for persons other than himself or his client is entitled to a reasonable attorneys' fee from the Settlement Fund as a whole. *See,*

e.g., Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980); *Blum v. Stenson*, 465 U.S. 866, 900 n.16 (1984);

(j) that use of the percentage of the fund method in common fund cases is the prevailing practice in this Circuit for awarding attorneys' fees and permits the Court to focus on a showing that a fund conferring benefit on a class resulted from the lawyers' efforts. *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295 (1st Cir. 1995); and

(k) the fee award is within the applicable range of percentage awards in this Circuit; *In re Relafen Antitrust Litig.*, No. 01-12239 (D. Mass. April 9, 2004) [Doc. No. 297]; *Mowbray v. Waste Management Holdings*, No. 98-11534-WGY (D. Mass. Aug. 2, 2001); *In re Copley Pharmaceutical, Inc. Sec. Litig.*, No. 94-11897-WGY (D. Mass. Feb. 8, 1996); *Wilensky v. Digital Equipment Corp.*, No. 94-10752-JLT (D. Mass. July 11, 2001).

(l) Accordingly, Class Counsel are hereby awarded twenty-seven million dollars ($27,000,000.00) (or in other words 30% of the Settlement Amount) as their fee and expense award, which the Court finds to be fair and reasonable. This amount shall be paid to Class Counsel from the Settlement Fund in accordance with the terms of the Agreement, with interest from August 24, 2010 (the date of the funding of the Settlement Fund) to the date of payment, at the same net interest rate earned by the Settlement Fund. Consumer and TPP Class Members shall pay Class Counsel 30% of the Settlement Amount allocated to each respective group under Section III(E) of the Agreement, and ISHP Group Members shall likewise pay Class Counsel 30% of the Settlement Amount allocated to them under Section III(E) of the Agreement. As a result, Consumer Class Members, TPP Class Members and ISHP Group Members will pay the same 30% towards fees and litigation expenses. The attorneys' fees and expenses awarded

by the Court shall be allocated among Class Counsel by Lead Class Counsel pursuant to the Agreement and shall, upon petition, be reviewed under an abuse of discretion standard.

19. The Class Representatives and other appropriate parties, as identified in the Order Granting Preliminary Approval of the Settlement Agreement and Release of AstraZeneca Related to Non-Massachusetts Classes Two and Three, Directing Notice to the Classes, and Scheduling Fairness Hearing, dated August 12, 2010, are hereby compensated in the following amounts for their time spent on this case. Because the non-Massachusetts Settlement is 87.4% of the total Settlement Amount, 87.4% of these amounts should be taken from the non-Massachusetts Settlement Fund.

Declarant	Representative Of	Class	Hours Claimed	Compensation [redacted]
Sara A. Walker	Blue Cross Blue Shield of Massachusetts	2 & 3	183	$7,320.00
Daniel W. Ryan	United Food and Commercial Workers Unions and Employers Midwest Health Benefits Fund	2 & 3	115.5	$4,620.00
Earl Seymour	Pirelli Armstrong Tire Corporation Retiree Medical Benefits Trust	3	50.5	$2,020.00
Glenn Randle	Sheet Metal Workers National Health Fund	2	73.5 (Fund) + 26.5 (TPA) = 100	$4,000.00
William Einhorn	Teamsters Health & Welfare Fund of Philadelphia and Vicinity	3	127 (from Einhorn GSK Decl., Dkt No. 4509-7)	$5,080.00
Arthur Steinberg	Philadelphia Federation of Teachers Health and Welfare Fund	3	63 + $980.00 in costs	$3,500.00
Charles Hannaford	Pipefitters Local 537 Trust Funds	3	41 (from Hannaford GSK Decl., Dkt No. 4509-10)	$1,640.00
William A. Rhodes, Jr.	Board of Trustees of Carpenters and Millwrights of Houston and Vicinity Welfare Trust Fund	3	65 (from Rhodes GSK Decl., Dkt No. 4509-8)	$2,600.00
Richard Wessels	Successor in interest to Susan Wessels	3	16	$1,600.00
TOTAL				**$32,380.00**

20. Without affecting the finality of this Final Order and Judgment, the Court retains continuing and exclusive jurisdiction over all matters relating to administration, consummation, enforcement, and interpretation of the Agreement and of this Final Order and Judgment, to protect and effectuate this Final Order and Judgment, and for any other necessary purpose. AstraZeneca, Class Representatives, and all Settlement Class Members are hereby deemed to have irrevocably submitted to the exclusive jurisdiction of this Court, for the purpose of any suit, action, proceeding or dispute arising out of or relating to the Agreement or the applicability of the Agreement, including the Exhibits thereto, and only for such purposes. Without limiting the generality of the foregoing, and without affecting the finality of this Final Order and Judgment, the Court retains exclusive jurisdiction over any such suit, action, or proceeding. Solely for purposes of such suit, action, or proceeding, to the fullest extent they may effectively do so under applicable law, the parties hereto are deemed to have irrevocably waived and agreed not to assert, by way of motion, as a defense or otherwise, any claim or objection that they are not subject to the jurisdiction of this Court, or that this Court is, in any way, an improper venue or an inconvenient forum.

21. In the event that the Class Settlements do not become effective according to the terms of the Agreement, this Final Order and Judgment shall be rendered null and void as provided by the Agreement, shall be vacated and, all orders entered and releases delivered in connection herewith shall be null and void to the extent provided by and in accordance with the Agreement.

22. No Class Member, either directly, representatively, or in any other capacity (other than a Class Member who validly and timely elected to be excluded from one or more of the Classes), shall commence, continue, or prosecute any action or proceeding against any or all

Re eased Party or Parties in any court or tribunal asserting any of the Released Claims defined in the Agreement, and Class Members (other than Class Members who validly and timely elected to be excluded from one or more of the Classes) are hereby permanently enjoined from so proceeding.

23. Pursuant to FED. R. CIV. P. 54(b) this Court expressly finds that there are no remaining claims between Class Plaintiffs and AstraZeneca in the MDL. There are no subsequent proceedings between the Class Plaintiffs and any remaining party in the MDL that will affect the Court's decision with respect to Class Plaintiffs' settlement with AstraZeneca. No party in the MDL will be prejudiced by the immediate entry of this Final Order and Judgment in accordance with the Settlement Agreement. Pursuant to FED. R. CIV. P. 54(b), this Court expressly determines that there is no just cause for delay and expressly directs that this Final Order and Judgment, upon filing in 01-CV-12257-PBS, be deemed as a final judgment with respect to each of the Settlement Classes, and specifically all such Settlement Class Members' Released Claims against all AstraZeneca Releasees.

24. The Released Claims (as defined in Section II.II of the Agreement) are hereby dismissed with prejudice and without costs to any party, except as otherwise provided herein.

25. All private class actions included within *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456, No. 01-CV-12257-PBS (D. Mass.) are hereby dismissed with prejudice as against AstraZeneca and without costs to any party; and all of the Master Consolidated Complaint (through and including the Fifth Amended Master Consolidated Class Action Complaint) filed in the above-referenced actions are hereby dismissed with prejudice as against AstraZeneca and without costs to any party.

26. Class Counsel shall investigate the feasibility of increasing the distribution of settlement funds to Consumer Class Members. In addition, Class Counsel are authorized to issue a second round of direct mail notice to the previously-identified Consumer Class Members (using the previously approved form amended to demonstrate clearly the simplicity of what is required to receive the $400.00 Easy Refund), and shall do so as soon as practicable but in no event no later than February 28, 2011. Class Counsel shall file a report (and, if appropriate, any recommendation) with the Court on or before February 28, 2011 providing a status on matters under this paragraph. Class Counsel's completion of these matters shall not otherwise affect the finality of this Order and Judgment.

DATED: 2/22/2011

Patti B. Saris

Hon. Patti B. Saris

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: PHARMACEUTICAL INDUSTRY AVERAGE WHOLESALE PRICE LITIGATION	MDL NO. 1456 CIVIL ACTION: 01-CV-12257-PBS
THIS DOCUMENT RELATES TO: ALL MASSACHUSETTS CLASS ACTIONS CONCERNING CLASSES 2 &3	Judge Patti B. Saris

~~[PROPOSED]~~ REVISED FINAL ORDER AND JUDGMENT GRANTING FINAL APPROVAL OF THE PROPOSED SETTLEMENT AGREEMENT AND RELEASE OF ASTRAZENECA RELATED TO MASSACHUSETTS CLASSES TWO AND THREE, APPROVING THE PROPOSED ALLOCATION OF SETTLEMENT FUNDS, AND APPROVING CLASS COUNSEL'S APPLICATION FOR ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES AND COMPENSATION FOR CLASS REPRESENTATIVES

This Court having considered: (a) the Revised Settlement Agreement and Release of AstraZeneca Related to Massachusetts Classes Two and Three, dated August 5, 2010, including all Exhibits thereto (collectively, the "Agreement"), between Class Plaintiffs (as defined in the Agreement) and Defendant AstraZeneca Pharmaceuticals LP ("AstraZeneca"); (b) the proposed allocation and distribution of funds among the Settlement Classes; and (c) Class Counsel's application for attorneys' fees, reimbursement of litigation expenses, and compensation for the Class Representatives; and having held a hearing on February 8, 2011, and having considered all of the submissions and arguments with respect thereto, and otherwise being fully informed, and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that:

1. This Final Order and Judgment incorporates herein and makes a part hereof, the Agreement, and all Exhibits thereto. Unless otherwise provided herein, the terms as defined in the Agreement shall have the same meanings for purposes of this Final Order and Judgment.

2. The Court has personal jurisdiction over all Class Representatives, Class Members, and AstraZeneca for purposes of this settlement only, and has subject matter jurisdiction to approve the Agreement.

3. The Settlement Classes are defined as follows:

> **Third-Party Payor MediGap Supplemental Insurance Class ("Class 2").** All TPPs that, from January 1, 1991 through January 1, 2005, made, or incurred an obligation to make, reimbursements for any portion of a Medicare Part B co-payment for Zoladex® purchased in the Commonwealth of Massachusetts.
>
> **Consumer and Third-Party Payor Class For Payments Made Outside the Medicare Context ("Class 3").** All natural persons who made, or were liable for all or any portion of, a non-Medicare Part B payment for Zoladex® purchased in the Commonwealth of Massachusetts, and all TPPs that made, or incurred an obligation to make, non-Medicare Part B reimbursements for Zoladex® purchased in the Commonwealth of Massachusetts, during the period from January 1, 1991 through June 11, 2010.

Excluded from each of the Settlement Classes are the AstraZeneca Releasees, defined in the Agreement. (The exclusion of AstraZeneca "employees" from the Settlement Classes shall not affect the eligibility of any ERISA plans or other TPPs for settlement benefits regardless whether any plan participants might be excluded "employees.") Additionally excluded from each of the Settlement Classes are the following: (1) all natural persons who only paid flat co-payments, and not any percentage co-payments, for Zoladex®; (2) all federal, state, and local governmental entities in the United States, except any such governmental agencies or programs that made or incurred an obligation to make a reimbursement for Zoladex® as part of a health benefit plan for their employees, but only with respect to such payments; and (3) the ISHPs.

4. This Court previously certified Classes 2 and 3 as Massachusetts-only Classes for all AstraZeneca Covered Drugs. *See In re Pharm. Indus. Average Wholesale Price Litig.* ("*In re AWP*"), 233 F.R.D. 229, 231 (D. Mass. 2006) (order); *In re AWP*, 230 F.R.D. 61 (D. Mass. 2005) (Memorandum Opinion). Thereafter, pursuant to a discussion at the July 12, 2010 hearing on preliminary approval of this Settlement, AstraZeneca moved for entry of an order granting judgment and dismissing all claims asserted by Massachusetts Class 2 and 3 under Mass. G.L. c93A with respect to Pulmicort, a Subject Drug the Court had previously certified. On August 4, 2010 the Court entered such an order. [Docket No. 7210]. In certifying the Settlement Classes referenced in Paragraph 3 above, the Court incorporates by reference all of these previous orders. *See In re AWP*, 588 F.3d 24, 40 (1st Cir. 2009) ("In this case the district court satisfied Rule 23(c)(1)(B)'s text and purpose. The court could incorporate its prior orders by reference when certifying the expanded class.")

5. The Court finds that the prerequisites of FED. R. CIV. P. 23(a) and (b)(3) have been satisfied for certification of the Settlement Classes for settlement purposes, and finds that the Settlement Classes are properly certified pursuant to those Rules: Class Members, numbering in the thousands, are so numerous that joinder of all members is impracticable; there are questions of law and fact common to each of the Settlement Classes; the claims and defenses of the Class Representatives are typical of the claims and defenses of the Settlement Class Members they represent; the Class Representatives have fairly and adequately protected the interests of the Settlement Classes with regard to the consolidated claims of the Settlement Classes they represent; the common questions of law and fact predominate over questions affecting only individual Class Members, rendering the Settlement Classes sufficiently cohesive to warrant a nationwide class settlement; and the certification of the Settlement Classes is

superior to individual litigation and/or settlement as a method for the fair and efficient resolution of the MDL Class Actions.

In making all of the foregoing findings, the Court has exercised its discretion in certifying the Settlement Classes, based, *inter alia*, upon the Court's familiarity with the claims and parties in these and other cases, including prior AWP class settlements, the interests of the various constituent groups, and the negotiation process.

6. The record shows that notice has been given to the Settlement Classes in the manner approved by the Court in its Preliminary Approval Order of August 12, 2010 [Docket No. 7226]. The Court finds that such notice: (i) constitutes reasonable and the best practicable notice; (ii) constitutes notice that was reasonably calculated, under the circumstances, to apprise Class Members of the terms of the Agreement and Class Settlements, and Class Members' right to object to or exclude themselves from the Settlement Classes and appear at the settlement fairness hearing held on February 8, 2011 (the "Fairness Hearing"), (iii) constitutes due, adequate, and sufficient notice to all persons or entities entitled to receive notice; and (iv) meets the requirements of due process and FED. R. CIV. P. 23.

7. No individuals or entities, other than those listed on Exhibit A hereto (filed under seal), have excluded themselves from the Settlement Classes. This Order shall have no force or effect on the persons or entities listed on Exhibit A hereto.

8. The Court finds that extensive arm's-length negotiations have taken place in good faith between Lead Class Counsel and AstraZeneca's Counsel resulting in the Agreement. Additionally the Court finds that extensive arm's-length negotiations have taken place on behalf of separate counsel appointed by Lead Class Counsel to represent the interests of Consumer Class Members and TPP Class Members in order to apportion the Settlement Fund between these

constituencies and that these arm's length negotiations afforded the structural protection required to ensure adequate representation of these constituencies.

9. The Court finds that the designated class representatives are appropriate representatives for settlement purposes. The Court finds that each of these representatives, or an agent or member thereof, made a purchase or reimbursement for Zoladex®.

10. The Court has considered all of the factors enumerated in FED. R. CIV. P. 23(g) and finds that Class Counsel have fairly and adequately represented the interests of the Settlement Classes.

11. Pursuant to FED. R. CIV. P. 23(e), the Court hereby finally approves in all respects the Class Settlement set forth in the Agreement ("the Class Settlement") and finds that the Class Settlement, the Agreement, and the plan of distribution as set forth in Paragraphs III.C-F of the Agreement, are, in all respects, fair, reasonable and adequate, and in the best interest of the Settlement Classes.

12. The Court further approves the establishment of the Settlement Fund as set forth in the Agreement and the Escrow Agreement submitted by the Parties. The Parties are hereby directed to implement and consummate the Class Settlements according to the terms and provisions of the Agreement. In addition, the Parties are authorized to agree to and adopt such amendments and modifications to the Agreement that (i) are consistent in all material respects with this Final Order and Judgment, and (ii) do not limit the rights of the Settlement Classes.

13. Upon the Effective Date of the Agreement, the Class Releasors (as defined in Paragraph II.F of the Agreement) shall release and forever discharge the AstraZeneca Releasees (as defined in Paragraph II.B of the Agreement) from their respective Released Consumer Class

Claims and Released TPP Class Claims (as defined in Paragraphs II.BB and II.CC of the Agreement).

14. The Court finds that the Escrow Account is a "Qualified Settlement Fund" as defined in section 1.468B-1(a) of the Treasury Regulations in that it satisfies each of the following requirements:

(a) The Escrow Account is established pursuant to an order of this Court and is subject to the continuing jurisdiction of this Court;

(b) The Escrow Account is established to resolve or satisfy one or more contested or uncontested claims that have resulted or may result from an event that has occurred and that has given rise to at least one claim asserting liability arising out of an alleged violation of law; and

(c) The assets of the Escrow Account are segregated from other assets of AstraZeneca the transferor of payments to the Settlement Fund, and from the assets of persons related to AstraZeneca.

15. Under the "relation-back" rule provided under section 1.468B-1(j)(2)(i) of the Treasury Regulations, the Court finds that:

(a) The Escrow Account met the requirements of Paragraph 12 of this Order prior to the date of this Order approving the establishment of the Settlement Fund subject to the continued jurisdiction of this Court; and

(b) AstraZeneca and the "administrator" under section 1.468B-2(k)(3) of the Treasury Regulations may jointly elect to treat the Escrow Account as coming into existence as a "Qualified Settlement Fund" on the later of the date the Escrow Account met the requirements of paragraphs 13(b) and 13(c) of this Order or January 1 of the calendar year in which all of the

requirements of Paragraph 12 of this Order are met. If such relation-back election is made, the assets held by the Escrow Account on such date shall be treated as having been transferred to the Escrow Account on that date.

16. Nothing in this Final Order and Judgment, the Class Settlements, the Agreement, or any documents or statements related thereto, is or shall be deemed or construed to be an admission or evidence of any violation of any statute or law or of any liability or wrongdoing by any of the Released Parties.

17. Class Counsel have moved pursuant to FED. R. CIV. P. 23(h), 54(d) and 52(a) for an award of attorneys' fees and reimbursement of expenses. Pursuant to Rules 23(h)(3) and 52(a) this Court awards Class Counsel $3,900,000, which represents 30% of the Settlement Amount, and makes the following findings of fact and conclusions of law:

(a) that the Class Settlement confers substantial benefits on the Members of each of the Settlement Classes;

(b) that the value conferred on the Settlement Classes is immediate and readily quantifiable (upon this Judgment becoming Final (as defined in the Agreement), Settlement Class Members who have submitted valid Claim Forms will receive cash payments that represent a significant portion of their alleged financial harms);

(c) that Class Counsel vigorously and effectively pursued the Settlement Class Members' claims before this Court in this highly complex case;

(d) that the Class Settlements were obtained as a direct result of Class Counsel's skillful advocacy;

(e) that the Class Settlements were reached following extensive negotiation between Lead Class Counsel and AstraZeneca's Counsel, and were negotiated in good-faith and in the absence of collusion;

(f) that during the prosecution of the AstraZeneca claims in the MDL Class Actions, Class Counsel incurred expenses at least in the amount of $9,401,741, which included costs for expert witnesses and other expenses which the Court finds to be reasonable and necessary to the representation of the Settlement Classes;

(g) that Settlement Class Members were advised in the Notice approved by the Court that Class Counsel intended to apply for an award of attorneys' fees in an amount of up to 33 1/3% of the Settlement Fund (plus interest thereon from the date of funding of the Settlement Fund) plus reimbursement of reasonable costs and expenses incurred in the prosecution of this action, to be paid from the Settlement Fund;

(h) that no Member(s) of the Settlement Classes have submitted written objection(s) to the award of attorneys' fees and expenses;

(i) that counsel who recover a common benefit for persons other than himself or his client is entitled to a reasonable attorneys' fee from the Settlement Fund as a whole. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Blum v. Stenson*, 465 U.S. 866, 900 n.16 (1984);

(j) that use of the percentage of the fund method in common fund cases is the prevailing practice in this Circuit for awarding attorneys' fees and permits the Court to focus on a showing that a fund conferring benefit on a class resulted from the lawyers' efforts. *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295 (1st Cir. 1995); and

(k) the fee award is within the applicable range of percentage awards in this Circuit; *In re Relafen Antitrust Litig.*, No. 01-12239 (D. Mass. April 9, 2004) [Doc. No. 297]; *Mowbray v. Waste Management Holdings*, No. 98-11534-WGY (D. Mass. Aug. 2, 2001); *In re Copley Pharmaceutical, Inc. Sec. Litig.*, No. 94-11897-WGY (D. Mass. Feb. 8, 1996); *Wilensky v. Digital Equipment Corp.*, No. 94-10752-JLT (D. Mass. July 11, 2001). Accordingly, Class Counsel are hereby awarded $3,900,000 from the balance of the Settlement Fund, as their fee and expense award which the Court finds to be fair and reasonable, and which amount shall be paid to Class Counsel from the Settlement Fund in accordance with the terms of the Agreement, with interest from August 24, 2010 (the date of the funding of the Settlement Fund) to the date of payment, at the same net interest rate earned by the Settlement Fund. The attorneys' fees and expenses awarded by the Court shall be allocated among Class Counsel by Lead Class Counsel pursuant to the Agreement and shall, upon petition, be reviewed on an abuse of discretion standard.

18. The Class Representatives and other appropriate parties, as identified in the Order Granting Preliminary Approval of the Settlement Agreement and Release of AstraZeneca Related to Non-Massachusetts Classes Two and Three, Directing Notice to the Classes, and Scheduling Fairness Hearing, dated August 12, 2010, are hereby compensated in the following amounts for their time spent on this case. Because the Massachusetts Settlement is 12.6% of the total Settlement Amount, 12.6% of these amounts should be taken from the Massachusetts Settlement Fund.

Declarant	Representative Of	Class	Hours Claimed	Compensation
Sara A. Walker	Blue Cross Blue Shield of Massachusetts	2 & 3	183	$7,320.00

Declarant	Represented Party Of	Class	Hours Claimed	Compensation Requested
Daniel W. Ryan	United Food and Commercial Workers Unions and Employers Midwest Health Benefits Fund	2 & 3	115.5	$4,620.00
Earl Seymour	Pirelli Armstrong Tire Corporation Retiree Medical Benefits Trust	3	50.5	$2,020.00
Glenn Randle	Sheet Metal Workers National Health Fund	2	73.5 (Fund) + 26.5 (TPA) = 100	$4,000.00
William Einhorn	Teamsters Health & Welfare Fund of Philadelphia and Vicinity	3	127 (from Einhorn GSK Decl., Dkt No. 4509-7)	$5,080.00
Arthur Steinberg	Philadelphia Federation of Teachers Health and Welfare Fund	3	63 + $980.00 in costs	$3,500.00
Charles Hannaford	Pipefitters Local 537 Trust Funds	3	41 (from Hannaford GSK Decl., Dkt No. 4509-10)	$1,640.00
William A. Rhodes, Jr.	Board of Trustees of Carpenters and Millwrights of Houston and Vicinity Welfare Trust Fund	3	65 (from Rhodes GSK Decl., Dkt No. 4509-8)	$2,600.00
Richard Wessels	Successor in interest to Susan Wessels	3	16	$1,600.00
TOTAL				**$32,380.00**

19. Without affecting the finality of this Final Order and Judgment, the Court retains continuing and exclusive jurisdiction over all matters relating to administration, consummation, enforcement, and interpretation of the Agreement and of this Final Order and Judgment, to protect and effectuate this Final Order and Judgment, and for any other necessary purpose. AstraZeneca, Class Representatives, and all Settlement Class Members are hereby deemed to have irrevocably submitted to the exclusive jurisdiction of this Court, for the purpose of any suit, action, proceeding or dispute arising out of or relating to the Agreement or the applicability of the Agreement, including the Exhibits thereto, and only for such purposes. Without limiting the generality of the foregoing, and without affecting the finality of this Final Order and Judgment, the Court retains exclusive jurisdiction over any such suit, action, or proceeding. Solely for

purposes of such suit, action, or proceeding, to the fullest extent they may effectively do so under applicable law, the parties hereto are deemed to have irrevocably waived and agreed not to assert, by way of motion, as a defense or otherwise, any claim or objection that they are not subject to the jurisdiction of this Court, or that this Court is, in any way, an improper venue or an inconvenient forum.

20. In the event that the Class Settlements do not become effective according to the terms of the Agreement, this Final Order and Judgment shall be rendered null and void as provided by the Agreement, shall be vacated and, all orders entered and releases delivered in connection herewith shall be null and void to the extent provided by and in accordance with the Agreement.

21. No Class Member, either directly, representatively, or in any other capacity (other than a Class Member who validly and timely elected to be excluded from one or more of the Classes), shall commence, continue, or prosecute any action or proceeding against any or all Released Party or Parties in any court or tribunal asserting any of the Released Claims defined in the Agreement, and Class Members (other than Class Members who validly and timely elected to be excluded from one or more of the Classes) are hereby permanently enjoined from so proceeding.

22. Pursuant to FED. R. CIV. P. 54(b) this Court expressly finds that there are no remaining claims between Class Plaintiffs and AstraZeneca in the MDL. There are no subsequent proceedings between the Class Plaintiffs and any remaining party in the MDL that will affect the Court's decision with respect to Class Plaintiffs' settlement with AstraZeneca. No party in the MDL will be prejudiced by the immediate entry of this Final Order and Judgment in accordance with the Settlement Agreement. Pursuant to FED. R. CIV. P. 54(b), this Court

expressly determines that there is no just cause for delay and expressly directs that this Final Order and Judgment, upon filing in 01-CV-12257-PBS, be deemed as a final judgment with respect to each of the Settlement Classes, and specifically all such Settlement Class Members' Released Claims against all AstraZeneca Releasees.

23. The Released Claims (as defined in Section II.II of the Agreement) are hereby dismissed with prejudice and without costs to any party, except as otherwise provided herein.

24. All private class actions included within *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456, No. 01-CV-12257-PBS (D. Mass.) are hereby dismissed with prejudice as against AstraZeneca and without costs to any party; and all of the Master Consolidated Complaint (through and including the Fifth Amended Master Consolidated Class Action Complaint) filed in the above-referenced actions are hereby dismissed with prejudice as against AstraZeneca and without costs to any party.

25. Class Counsel shall investigate the feasibility of increasing the distribution of settlement funds to Consumer Class Members. In addition, Class Counsel are authorized to issue a second round of direct mail notice to the previously-identified Consumer Class Members (using the previously approved form amended to demonstrate clearly the simplicity of what is required to receive the $400.00 Easy Refund), and shall do so as soon as practicable but in no event no later than February 28, 2011. Class Counsel shall file a report (and, if appropriate, any recommendation) with the Court on or before February 28, 2011 providing a status on matters under this paragraph. Class Counsel's completion of these matters shall not otherwise affect the finality of this Order and Judgment.

DATED: 2/22/2011

Hon. Patti B. Saris

TAB 45B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: PHARMACEUTICAL INDUSTRY AVERAGE WHOLESALE PRICE LITIGATION	MDL NO. 1456
THIS DOCUMENT RELATES TO: ASTRAZENECA MASSACHUSETTS AND NON-MASSACHUSETTS CLASS 2 AND CLASS 3 SETTLEMENTS	CIVIL ACTION: 01-CV-12257-PBS Judge Patti B. Saris

LEAD CLASS COUNSEL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS AND COMPENSATION TO THE CLASS REPRESENTATIVES IN ASSOCIATION WITH THE ASTRAZENECA MASSACHUSETTS AND NON-MASSACHUSETTS CLASS 2 AND CLASS 3 SETTLEMENTS

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I. INTRODUCTION

As detailed in Class Plaintiffs' Combined Memorandum of Law in Support of Joint Motions for Final Approval of Massachusetts and Non-Massachusetts Class 2 and Class 3 AstraZeneca Settlements filed contemporaneously herewith, AstraZeneca has agreed to pay TPP and consumer Class Members who file valid claims up to an aggregate total of $103 million. The Settlement of this ground-breaking litigation provides real, immediate, and substantial cash benefits for each Class Member who submits a valid claim. Consumer Class Members are eligible to receive triple their damages for Zoladex payments made during an expanded Heartland Period.

Class Counsel now seek an award of attorneys' fees and expenses and compensation to the class representatives in association with the AstraZeneca Massachusetts and non-Massachusetts Class 2 and Class 3 settlements. Class Counsel respectfully request that the Court approve a combined fee and cost award of $34,329,900, to be paid from the settlement funds. This represents 331/3 percent of the total $103 million settlement amount for both settlements.

Class Counsel also request that the Court approve compensation for the Class Representatives in the total amount of $32,100.00 which, as set forth in the Declarations attached to this Memorandum, constitutes 40% of $100 per hour for the time that each Representative spent providing documents and testimony in connection with this case. Like the attorneys' fees and expenses, these amounts will be paid from the settlement funds.

The requested attorneys' fee and cost award is reasonable in light not only of the excellent results achieved for the Classes but also the risks involved in undertaking this unique and highly complex matter and the immense effort required in litigating the claims. From its inception, this case has been intensely fought, as AstraZeneca, like the other Defendants, challenged discovery, class certification and liability. The parties challenged each other virtually

every step of the way. Indeed, the Class 2 and Class 3 Massachusetts claims were tried to a bench verdict; the verdict was sustained on appeal in the First Circuit; AstraZeneca filed a certiorari petition with the Supreme Court; and these Settlements then resulted after arduous negotiations. Litigating this case has required immense time, energy and resources from Class Counsel. Furthermore, as the Court is well aware, the claims involve extremely complex and challenging issues of fact and law.

Class Counsel faced considerable risk in proceeding on a wholly contingent-fee basis. They have foregone other opportunities, devoting their time to this matter instead of others. To date, Class Counsel have been awarded compensation for only two settlements in the nearly ten years this action has been pending: $21,615,000 out of the proceeds of the GSK settlement and $8,580,000 in connection with the AstraZeneca Class 1 Settlement, for a total of $30,195,000. In contrast, for the entire AWP litigation against all Defendants from the inception of this case in 2001 through October 31, 2010, Plaintiffs' counsel have accumulated a total lodestar of $70,092,220 and incurred expenses totaling $9,401,741,[1] for a total case "investment" of $79,493,961.[2] If the Court grants the present fee request of $34,439,900, which would bring the total fee and cost award for all AWP settlements here to $64,524,900, Plaintiffs' counsel will not yet recover their total investment in the actions, let alone their lodestar.

[1] The Declaration of Marc H. Edelson In Support Of Lead Class Counsel's Motion For Attorneys' Fees And Costs in Association with the AstraZeneca Massachusetts and non-Massachusetts Class 2/Class 3 Settlements ("Edelson Decl."), submitted herewith, sets forth the breakdown of total unaudited attorney hours, fees and expenses incurred from inception through October 31, 2010. Class Counsel will provide back-up for all attorneys' fees and expenses sought for reimbursement, if the Court wishes. We also note that it is possible that we have not received complete information from all counsel and that, consequently, the lodestar information attached to the Edelson Declaration may change. Nonetheless, we believe that it is a reasonable approximation of the hours and expenses incurred by counsel through October 31, 2010. Edelson Decl., ¶ 9.

[2] As the Court is aware, the MDL includes multiple Defendants in two separate tracks, and this Settlement resolves claims against only AstraZeneca. Due to the nature of the allegations, it is not possible to attribute each attorney hour or particular expenditure to litigation against a particular Defendant. Some items could be allocated to specific Defendants, but many more – for example discovery from third parties and research on particular legal or factual issues that apply to all Defendants – cannot be separately attributed to a particular Defendant.

However, global settlements with BMS and the Track 2 Defendants are pending. If those settlements are approved, and if the Court grants the anticipated fee requests, Plaintiffs' counsel will recover their collective lodestar plus a small multiplier. The table below sets forth each AWP class settlement (both actual and anticipated), the actual fees awarded to date in the AWP class actions, and projected fee awards if the Court grants the anticipated requests. As shown, estimated fees for all AWP class action settlements could total $108,357,800.

Settlement Award	Amount of Actual/Projected Fee and Cost Awards	Awards as a Percent of Settlement Value
GSK Global Settlement (approved)	$ 21,615,000	33⅓%
AstraZeneca Class 1 Settlement (approved)	8,580,000	30%
AstraZeneca Class 2/3 (requested here)	34,329,900	33⅓%
BMS Global Settlement (to be requested)	6,332,900	33⅓%
Track 2 Global Settlement (to be requested)	37,500,000	30%
Total	**$ 108,357,800**	

A total projected fee and cost award of $108,357,800 modestly exceeds Plaintiffs' counsels' collective lodestar of $70,092,220 as of October 31, 2010, resulting in a small and very reasonable multiplier of 1.55, even though the overall results achieved in the AWP litigation should warrant a larger multiplier. If Plaintiffs' counsels' collective expenses of $9,401,741 are included in the analysis, the multiplier drops to 1.36. These multiplier cross-checks should assure the Court that counsel's overall compensation for all settlements is fair and reasonable.

The results in this complex litigation and the effort required well support the requested attorneys' fee and expense award here, which is justified by relevant factors considered by courts in this Circuit and others, is in line with the fees that Class Counsel could have obtained at arm's-length in the open market, and, when added to prior and anticipated fee awards, will result in reasonable overall compensation for Plaintiffs' counsels' substantial efforts in litigating and

resolving all AWP class actions pending before this Court. Therefore, Class Counsel respectfully request that the Court grant this petition.

II. HISTORY OF THE LITIGATION

The Court is well acquainted with the history of this complex case and the unique challenges that Class Counsel have faced in representing their clients and the Classes against a array of sophisticated and well-represented Defendants, including AstraZeneca. Rather than repeat here the outlines of Plaintiffs' allegations, the history of Class Counsel's efforts, and the details of the Massachusetts and non-Massachusetts Class 2 and Class 3 Settlements, Class Counsel respectfully refer the Court to in Class Plaintiffs' Combined Memorandum of Law in Support of Joint Motions for Final Approval of Massachusetts and non-Massachusetts Class 2 and Class 3 AstraZeneca Settlements filed contemporaneously herewith and which is incorporated herein by this reference.

III. THE COURT SHOULD APPROVE THE FEE PETITION AS FAIR AND REASONABLE

A. Class Counsel Are Entitled To Compensation Based Upon The Benefits Created By The Litigation

Courts have long recognized that a lawyer who recovers a "common fund" is entitled to reasonable attorney fees from the fund as a whole. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 n.6 (1st Cir. 1995) ("[t]he common fund doctrine is founded on the equitable principle that those who have profited from litigation should share its costs"); *In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999) ("lawyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also to recover from the fund, as a general matter, expenses, reasonable in amount, that were necessary to bring the action to a climax"). "The 'common fund' doctrine is designed to spread

the costs of litigation among all the beneficiaries of an identifiable fund over which a court can exercise legitimate control, in effect guarding against the unjust enrichment of passive beneficiaries at the expense of the active beneficiary." *Bebchick v. Washington Metro. Area Transit Comm'n*, 805 F.2d 396, 402 (D.C. Cir. 1986).

Substantial fee awards in successful cases, such as the present action, encourage and support meritorious class actions, and promote private enforcement of, and compliance with, various RICO and consumer protection laws. Moreover, awards of attorney fees help to ensure adequate enforcement of class members' legal rights. "[A] financial incentive is necessary to entice capable attorneys, who otherwise could be paid regularly by hourly-rate clients, to devote their time to complex, time-consuming cases for which they may never be paid." *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 679, 687 (M.D. Ala. 1988).

B. The Percentage-Of-The-Fund Method Is Appropriate For Calculating Attorneys' Fees In This Circuit

The Supreme Court has repeatedly held in cases involving the computation of a common fund fee award that it is appropriate for the fee to be determined as a percentage-of-the-fund. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("under the common fund doctrine … a reasonable fee is based on a percentage of the fund bestowed on the class"); *see also Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165-66 (1939); *Central R. & Banking Co. v. Pettus*, 113 U.S. 116, 124-25 (1885); *Trustees v. Greenough*, 105 U.S. 527, 532 (1882). In a percentage fee award, the fee is measured by the benefit conferred upon the class.

The First Circuit has left it to the trial court's discretion as to whether to apply the lodestar or percentage-of-the-fund ("POF") method or a combination of the two to award attorneys' fees. *In re Thirteen Appeals*, 56 F.3d at 308. In adopting what it termed this "malleable" approach, the court recognized that the POF is the prevailing method because it has

distinct advantages in complex cases. For example, it is less burdensome to administer,[3] reduces the possibility of collateral disputes, enhances efficiency throughout the litigation, and better approximates the workings of the marketplace. *See In re Thirteen Appeals*, 56 F.3d at 307-08; *see also In re Fidelity/Micron*, 167 F.3d at 737.[4]

As a result, many district courts within the First Circuit have indicated their preference for the POF method over the lodestar method. *See*, *e.g.*, *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 79 (D. Mass. 2005); *In re Lupron Mktg. & Sales Practices Litig.*, 2005 U.S. Dist. LEXIS 17456, at *9 (D. Mass. Aug. 17, 2005); *In re Fidelity/Micron Secs. Litig.*, 1998 U.S. Dist. LEXIS 21698 (D. Mass. June 5, 1998), *vacated on other grounds*, 167 F.3d 735 (1st Cir. 1999); *Branch v. FDIC*, No. 91-CV-13270, 1998 WL 151249, at *2-4 (D. Mass. Mar. 24, 1998); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 215 (D. Me. 2003) (describing the method as determining whether the "total fee [is] reasonable when examined as a percentage of recovery"); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 377

[3] "Rather than forcing the judge to review the time records of a multitude of attorneys in order to determine the necessity and reasonableness of every hour expended, the POF method permits the judge to focus on 'a showing that the fund conferring a benefit on the class resulted from' the lawyers' efforts." *Id*. at 307 (quoting *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991)).

[4] The trend in this Circuit is consistent with the decisions nationwide awarding fees in common fund cases based on a percentage of the total recovery. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14.121 (4th ed. 2009) ("[T]he vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases."). In addition to this Circuit, at least nine other circuits – the Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and District of Columbia – have accepted the POF method as an appropriate method for awarding attorneys' fees. *See In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 822 (3d Cir. 1995) ("[i]n common fund cases, a district judge can award attorneys' fees as a percentage of the fund recovered," and in prior cases "fee awards have ranged from nineteen percent to forty-five percent of the settlement fund"); *Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994) (fee award should be calculated using the percentage method; "use of the lodestar in common fund cases is 'out of fashion'"); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 515-16 (6th Cir. 1993) (noting "the recent trend towards adoption of a percentage of the fund method," and permitting use of the "percentage of the fund method" in common fund cases); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) ("percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases"); *In re Continental Illinois Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (fee award should not be based on "individual hours," but rather on the percentage that counsel "would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client"); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 744-45 (11th Cir. 1991) (percentage method mandatory in common fund cases); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) ("a reasonable fee under the common fund doctrine is calculated as a percentage of the recovery"); *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 254-59 (1985).

(D. Mass. 1997); *Conley v. Sears, Roebuck & Co.*, 222 B.R. 181, 187 (D. Mass. 1998); *In re Fleet/Norstar Secs. Litig.*, 935 F. Supp. 99, 108 (D.R.I. 1996).

In this case in particular, where there are multiple Defendants and the Court is considering only the fee related to settlement of a single Defendant, use of the POF method saves the Court and the parties from the near impossible task of allocating the particular hours of the many attorneys involved to a particular Defendant. This Court has already used the POF approach in awarding fees associated with the GSK and AstraZeneca Class 1 settlements.

C. The Requested Fee And Expense Award Is Fair And Reasonable As A Percentage Of The Benefits Achieved For The Class

Courts have approved fee awards in common fund cases in the range of 25-45%. *See, e.g.*, *In re Relafen Antitrust Litig.*, 231 F.R.D. 52 (D. Mass. 2005) (awarding class counsel $22,311,000 in fees or 33% of class fund of $67,000,000, plus a separate award of litigation expenses in the amount of $1,297,301); *In re Fleet/Norstar*, 935 F. Supp. at 109; *Conley*, 222 B.R. at 187; *In re Compact Disc*, 216 F.R.D. at 216 n.45; *Gaskill v. Gordon*, 160 F.3d 361, 363-64 (7th Cir. 1998) (affirming award of 38% of class action settlement fund); *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (awarding 33% of $12 million common settlement fund); *In re Buspirone Antitrust Litig.*, 2003 U.S. Dist. LEXIS 26538, at *11 (S.D.N.Y. Apr. 11, 2003) (awarding fees of 33⅓% of $220 million common fund to Direct Purchaser Plaintiff's Class Counsel); *In re Lorazepam & Clorazepate Antitrust Litig.*, 2003 U.S. Dist. LEXIS 12344 (D.D.C. June 16, 2003) (awarding class counsel 30% of the common fund); *In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25067, at *57 (D.D.C. July 13, 2001) (determining that the one-third award was reasonable and granting class counsel fee petition in the amount of $123,188,032 plus interest, or approximately 34% of the total estimated settlement amount, in antitrust price fixing litigation); *In re Activision Sec. Litig.*, 723 F. Supp 1373, 1375 (N.D. Cal.

1989) (awarding a 32.8% fee and adopting a "policy of awarding approximately 30% of the fund as attorneys' fees in the ordinary case," as "well-justified in light of the lengthy line of cases which find such an award appropriate and reasonable…").

In *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 n.4 (9th Cir. 2002), the court included an exhaustive table of 34 cases generating revenues ranging from $54 million to $185 million, all of which generated fees of 30% or more, including the case at the high end of the scale (45%), the $185 million settlement in *In re Merry-Go Round Enters., Inc.*, 244 B.R. 327 (Bankr. D. Md. 2000). *See also* Frederick C. Dunbar, Todd S. Foster, Vinita M. Juneja, Denise N. Martin, *Recent Trends III: What Explains Settlements in Shareholder Class Actions?* (NERA, June 1995) (finding that "[r]egardless of case size, fees average approximately 32 percent of the settlement"); *see also* MANUAL FOR COMPLEX LITIGATION § 14.121 ("Attorney fees awarded under the percentage method are often between 25% and 30% of the fund.").

The Court approved a 33⅓ percent fee and cost award in association with the GSK Settlement as well as a fee and cost award that amounted to 30 percent of the fund with respect to the AstraZeneca Class 1 Settlement. In hearings and in its orders related to these settlements, the Court has recognized that the risks incurred by Class Counsel and the results achieved for the Class have warranted the fee awards:

> Well, I do think one-third is appropriate. I might say that, for the record, I approved that in the other case [GSK]. I think this was an incredibly risky piece of litigation which was cutting-edge and no certainty of success. The pharmaceutical companies have done a fabulous job defending it, and it was fought tooth and nail the entire way along with the best firms in the country.

May 1, 2008 Hearing Tr. at 24 (AstraZeneca Class 1 Settlement Hearing).

The instant request falls within the foregoing ranges of reasonableness. The Settlement Amount is $103 million, and the combined $34,329,900 fee and expense request is 33.33% of the amount.

D. A Cross-Check With The Lodestar Confirms The Reasonableness Of The Requested Fee And Expense Award

1. Plaintiffs' counsel have still not recovered their total "investment" in the case, resulting in a "negative multiplier."

As noted, the First Circuit also provides the Court with the discretion to employ the lodestar approach (reasonable hours spent times reasonable hourly rated, subject to a multiplier or discount for special circumstances, plus reasonable disbursements) in combination with the POF approach. *In re Thirteen Appeals*, 56 F.3d at 307; *In re Compact Disc*, 216 F.R.D. at 215-16; *see also* MANUAL FOR COMPLEX LITIGATION § 14.122 ("the lodestar is … useful as a cross-check on the percentage method by estimating the number of hours spent on the litigation and the hourly rate, using affidavits and other information provided by the fee applicant. The total lodestar estimate is then divided into the proposed fee calculated under the percentage method. The resulting figure represents the lodestar multiplier to compare to multipliers in other cases.").

The total lodestar accumulated by Plaintiffs' counsel as of October 31, 2010, was $70,092,220. Edelson Decl., ¶ 5. Additionally, Class Counsel have expended $9,401,741 in litigation related expenses. Edelson Decl., ¶ 6. Both numbers represent all effort and expenses for all AWP class actions pending before this Court. The lodestar calculation is based on each law firm's historic rate (those in effect when the work was done, over the nearly ten years this case has been pending). Class Counsel are providing this historic rate calculation because it is more conservative, even though the First Circuit has noted the appropriateness of calculating the lodestar on current hourly rates (*i.e.*, in this case, those in effect in 2010 at each firm) because of the delay in payment of the fees to the firms performing the work, as well as other factors. *See*

Lipsett v. Blanco, 975 F.2d 934, 942-43 (1st Cir. 1992). Given this precedent, it would be appropriate to calculate the lodestar of all firms at current rates, which would yield a higher total lodestar.

To date, Class Counsel have been awarded compensation for only two settlements in the nearly ten years this action has been pending: $21,615,000 out of the proceeds of the GSK settlement and $8,580,000 in connection with the AstraZeneca Class 1 Settlement, for a total of $30,195,000. If the Court awards the $34,329,900 requested here, this total will increase to $64,524,900, resulting in a negative multiplier. In other words, if the Court were to grant the requested fee/cost award, Plaintiffs' counsel still will not have recovered their total investment in the AWP class actions, let alone a multiplier for their significant efforts in recovering almost $200 million for the GSK and AstraZeneca classes.

The "negative" multiplier here is a result of the fact that the Settlement at issue involves only one of multiple Defendants. However, it underscores the risks undertaken by Class Counsel in this matter and the fact that an enormous amount of time and money has been invested in this important and ground breaking litigation.

2. We cannot isolate time and expenses devoted specifically to the AstraZeneca portion of the litigation or even to efforts limited to the claims of AstraZeneca Class 2 and 3.

In previous hearings, the Court has asked Class Counsel how time can be divided to isolate efforts related to specific Defendants. This would be a daunting and monumental task. More than 250 attorneys have spent time working on this case for plaintiffs, a testament to the breathtaking scope and complexity of this litigation. Indeed, attorneys and paralegals had collectively billed 220,440 hours as of October 31, 2010. Edelson Decl., ¶ 5. The sheer number of work hours underpinning the lodestar highlights how time-consuming and burdensome a detailed lodestar inquiry would be and demonstrates why the POF approach works best for this

litigation. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 331 (3d Cir. 1998); *In re Fleet/Norstar Sec. Litig.*, 935 F. Supp. at 108. It is extremely difficult to apportion those hours by Defendant or to attribute a specific lodestar to the group of Track 2 Defendants given the breadth of common issues and the number of tasks completed over the last nine-plus years. An attempt to do so would involve a very time-consuming and expensive audit and even then may not result in an accurate estimate.

In addressing multiple claims based on a core of common facts, the Supreme Court has recognized that the focus should be placed on the overall relief provided:

> In other cases the plaintiff's claims for relief will involve a "common core of facts" or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.
>
> Where a plaintiff has obtained excellent results, his attorneys should recover a fully compensatory fee.

Hensley v. Eckerhart, 461 U.S. 424, 434-35 (1983).

The same concept applies here to claims against multiple defendants where common issues are inextricably intertwined. An immense amount of work was done on common issues, work that cannot be segregated from other aspects of the prosecution. This work includes researching and drafting complaints; working on issues related to the initial MDL motions; a panoply of issues related to the use of AWP as a benchmark in the Medicare program and in the private insurance market; legal research and drafting of briefs on the joint motions to dismiss, joint motions for summary judgment, and briefing associated with class certification; coordination with experts regarding class certification issues; motions and discovery related to many third parties, including governmental organizations, trade associations and the hundreds of

insurers, pharmacies and other market participants subpoenaed by Defendants. Even the work of the Class 2/Class 3 trial was devoted to four separate defendants and, therefore, the work on that trial could not be reasonably segregated.

This Court has previously recognized the difficulty in apportioning lodestar to specific Defendants: "A percentage-of-fund approach makes more sense because this multi-district litigation has many moving parts with common issues and it would be too difficult to calculate a fair lodestar for this piece of the litigation." *Memorandum and Order Re: Requested Final Approval of the AstraZeneca Class 1 Settlement* (Dkt. No. 5624) at 4.

Because of the challenges outlined above, and because the fee amount requested is undoubtedly reasonable under the POF method, no effort was made to determine the precise amount of fees that would be specifically attributable to prosecuting the case on behalf of Class 2 and Class 3 against AstraZeneca, which Class Counsel believe cannot be done.[5] Given the "extremely broad" discretion that the Court has in evaluating an attorneys' fee and cost petition in class litigation, *In re Thirteen Appeals*, 56 F.3d at 309 (emphasis added), Class Counsel strongly believe that the foregoing lodestar and expense information suffices for purposes of a rough cross-check on the reasonableness of the POF fee and cost award.

[5] As with attempting to calculate a lodestar specific to the Class 2/Class 3 AstraZeneca cases, splitting expenses that way is also very difficult to do given the existence of so many common issues. Moreover, the very nature of the expenses themselves makes allocation by defendant extremely difficult. Counsel did not track expenses by Defendant and, with some limited exceptions, we are unable to go back and re-assign expenses by Defendant. These include expenses incurred for expert work, including the development of Dr. Rosenthal and Dr. Hartman's many reports; Court fees (including fees incurred for use of the Court's electronic filing system); subpoena costs; technology services, including maintaining and servicing computer stations for document review; mail and fax charges; computer research charges (*e.g.*, Lexis/Nexis); photocopy expenses; and some travel expenses. All of the expenses incurred were reasonable and necessary for the prosecution of this litigation, even though they are not amenable to division by particular Defendant. It may be possible to construct an expense allocation model taking into consideration reasonable assumptions based on the number of defendants, but this would be very time consuming and not necessary where the lodestar and expense estimate is used as a cross-check to the POF approach.

E. The Fee Percentages Sought Ensure That Each Settlement Class Pays An Equitable Portion Of Attorneys' Fees And That A Reasonable Overall Multiplier Results For All Fees Awarded At the End Of The Case

As Class Counsel have previously explained, their goal is to request approximately one-third of the value of each settlement in order to ensure that (i) the aggregate attorneys' fee award is, at the end of all settlements, in the "ballpark" of the one-third benchmark, and (ii) each settlement Class pays an equitable share of attorneys' fees. We believe that this responds to the Court's frequently expressed concern that attorneys' fee awards remain reasonable across all settlements.

Comparing the actual and projected fee and cost recovery in this case against Plaintiffs' Counsel's collective lodestar accentuates the reasonableness of the percentage approach recommended by Class Counsel. Global settlements with BMS and the Track 2 Defendants are pending. If those settlements are approved, and if the Court grants the anticipated fee requests, Plaintiffs' counsel will recover their collective lodestar plus a small multiplier. The table below sets forth each AWP class settlement (both actual and anticipated), the actual fees awarded to date in the AWP class actions, and projected fee awards if the Court grants the anticipated requests. As shown, estimated fees for all AWP class action settlements could total $108,357,800.

Settlement Award	Amount of Actual/Projected Fee and Cost Awards	Awards as a Percent of Settlement Value
GSK Global Settlement (approved)	$ 21,615,000	$33^{1/3}$%
AstraZeneca Class 1 Settlement (approved)	8,580,000	30%
AstraZeneca Class 2/3 (requested here)	34,329,900	$33^{1/3}$%
BMS Global Settlement (to be requested)	6,332,900	$33^{1/3}$%
Track 2 Global Settlement (to be requested)	37,500,000	30%
Total	**$ 108,357,800**	

If the foregoing settlements are all approved, there will be no further settlements in the AWP MDL class actions and, therefore, no further fee petitions. A total projected fee and cost award of $108,357,800 will modestly exceed Plaintiffs' counsels' collective lodestar of $70,092,220 as of October 31, 2010, resulting in a small and very reasonable multiplier of **1.55**, even though the overall results achieved in the AWP litigation should warrant a larger multiplier. If Plaintiffs' counsels' collective expenses of $9,401,741 are included, total case "investment" rises to just under $80 million ($79,493,961), and the multiplier drops to **1.36**. And Lead Class Counsel will continue to incur additional time and expenses if and until all settlements are finalized. Given the multipliers approved in many other cases, Class Counsel's request here is more than reasonable. *See In re Copley Pharm., Inc.*, 1 F. Supp. 2d 1407, 1415 (D. Wyo. 1998) (finding a multiplier of two to be reasonable based on these factors); *see also In re Rite Aid Corp. Secs. Litig.*, 146 F. Supp. 2d 706, 736 n.44 (E.D. Pa. 2001) (concluding that, under the cross-check approach, a lodestar multiple in the range of 4.5 to 8.5 is "unquestionably reasonable"); *Third Circuit Task Force*, 108 F.R.D. at 265 (suggesting that courts consider the "contingency factor" in all common fund cases).

An award of approximately one-third of the value of each settlement at each step along the way will lead to a reasonable, overall fee and cost award to Class Counsel. It will also further the First Circuit fee award guideposts of ease of administration, a reduction in the possibility of collateral disputes, enhanced efficiency throughout the litigation, and a better approximation of the workings of the marketplace. *In re Thirteen Appeals*, 56 F.3d at 307-08.

Moreover, the fees paid by each settlement class are proportional to the settlement amounts assignable to each settlement class, as the following table demonstrates:

Settlement	Settlement Amount	Percent of Total AWP Settlement Amounts	Actual/Projected Fee and Cost Awards	Percent of Total AWP Fees
GSK Global	$ 65,500,000	19.2	$ 21,615,000	20
Astra Class 1	28,600,000	8.4	8,580,000	7.9
BMS Class 1	19,000,000	5.6	6,332,900	5.8
Astra Class 2/3	103,000,000	30.2	34,329,900	31.7
Track 2 Global	125,000,000	36.6	37,500,000	34.6
Total	**$ 341,100,000**		**$ 108,357,800**	

In other words, the AstraZeneca Class 2/3 fee award, if granted, will ultimately represent 34.6 percent of all fees awarded in the AWP litigation. This is roughly commensurate with the value of the AstraZeneca Class 2/3 settlements as a percentage of all AWP settlement values: 36.6%. And this analysis demonstrates that no settlement class will shoulder a disproportionate share of attorneys' fees.

F. Various Other Factors Applied By This Circuit And Others Support Class Counsel's Request

The First Circuit has not required that lower courts use a particular set of factors to determine the reasonableness of the fee request. However, the Third Circuit Task Force Report approved certain factors to assist courts in this analysis. Among other things, these factors include: (i) the size of the fund created and the number of persons benefited; (ii) the skill and efficiency of the attorneys involved; (iii) the complexity and duration of the litigation; (iv) the risk of nonpayment; (v) the amount of time devoted to the case by plaintiffs' counsel; and (vi) the awards in similar cases. *See Third Circuit Task Force*, 108 F.R.D. at 245; *see also Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000) (applying factors); *In re GMC Pick-up Truck*, 55 F.3d at 819-22 (same). The Second Circuit has adopted a similar list of factors: the time and labor expended by Class Counsel, the complexities of the litigation, the risks borne by Class Counsel in litigating this case on a contingency fee basis, the quality of the

representation provided, the fee request in relation to the settlement, public policy considerations and the reaction of the Class to the settlement. *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000).

Applying these factors, the award for both fees and litigation expenses in this case is fair and reasonable.

1. The size of the fund created and the number of people who benefit

The total fund eligible to be claimed is $103,000,000 and will benefit thousands of consumers. The Settlement is described at length in Class Plaintiffs' Combined Memorandum of Law in Support of Joint Motions for Final Approval of Massachusetts and non-Massachusetts Class 2 and Class 3 AstraZeneca Settlements, filed simultaneously herewith. To avoid duplication, Class Counsel hereby incorporate that description by reference.

2. The time and labor expended by counsel

Class Counsel have been investigating and litigating this case intensely and thoroughly for nearly a decade. Class Counsel have devoted considerable time, energy, and resources from the beginning of this case through discovery and motion practice, through a Class 2 and 3 Massachusetts trial, an appeal to the First Circuit Court of Appeals, and until settlement. From the very beginning, "Defendants mounted an aggressive and vigorous defense throughout the course of this litigation." *In re Aetna Inc. Sec. Litig.*, 2001 U.S. Dist. LEXIS 68, at *46 (E.D. Pa. Jan. 4, 2001). Indeed, AstraZeneca still vigorously disputes that it engaged in any wrongful conduct or violation of law and, when these Settlements were reached, had filed a Petition for Certiorari with the United States Supreme Court.

This litigation required an all-out effort by Class Counsel. First, the motion practice in this case has in and of itself required enormous work, as the case raised many complex and difficult legal and factual issues. This required Class Counsel to oppose more than one round of

substantial motions to dismiss as well as class certification motions. Second, discovery in this case was extensive. Class Counsel had to devote substantial energy and thousands of hours in obtaining, inventorying, and examining millions of documents produced by AstraZeneca. Even more time and effort was necessary to cull those documents and create a useful database – an invaluable tool for identifying key issues and evidence for depositions and possible trial. Additionally, Class Counsel conducted over 40 depositions of AstraZeneca's current and former employees, including senior managers, consultants, and contractors, as well as relevant third-parties, including reimbursement consultants and doctors targeted by AstraZeneca's Zoladex sales team. The depositions resulted in nearly 700 marked deposition exhibits. Declaration of Steve W. Berman In Support of Lead Class Counsel's Memorandum of Law in Support of Motion for Attorneys' Fees and Costs and Compensation to the Class Representatives in Association with the AstraZeneca Massachusetts and Non-Massachusetts Class 2 and Class 3 Settlements (the "Berman Decl."), ¶ 21.

Class Counsel also spent considerable time consulting with economic experts concerning the economic impact of Defendants' scheme on the Class and the measure and amount of damages to the Class. *Id.* at ¶¶ 24, 25, 32. And Class Counsel spent many hours researching and briefing complex legal issues for more than one round of motions to dismiss and class certification motions. *Id.* at ¶¶ 12-15, 23-29, 34-35. These "efforts in posturing this case for trial … played a role in spurring the settlement [and] produced a substantial payout to the class." *In re Newbridge Networks Sec. Litig.*, 1998 U.S. Dist LEXIS 23238, at *11 (D.D.C. Oct. 23, 1998).

Throughout this entire process, Class Counsel have litigated this case with extreme efficiency. The bulk of the work was handled by a small number of experienced attorneys.

Assignments were allocated so that work was performed expeditiously, efficiently and in an organized manner. Review and repetition was avoided. Berman Decl., ¶ 18.

Moreover, the significant investment of time required by this action necessarily precluded Class Counsel from working on other matters. Class Counsel expended hours and incurred expenses in prosecuting this case, and were prepared to put at risk more time and money had the AstraZeneca Class 2 and Class 3 litigation not settled. *Id.* at ¶¶ 41, 42.

Based on all of the above factors, the fee and expense award requested by Class Counsel is reasonable in light of the risk, quantity, and quality of work expended by Class Counsel over nearly ten years.

3. The complexity and duration of the litigation

The complexity of the issues and the duration of the litigation support the award requested. Class actions alleging violations of RICO and fraud, particularly in the pharmaceutical reimbursement context, are arguably the most complex class actions to prosecute because the legal and factual issues are inherently complicated and uncertain. In fact, in addition to the legal issues involved in overcoming the Defendants' motions to dismiss, this case involved some highly technical and complex issues with regard to pharmaceutical reimbursement systems, pharmacy benefit manager contracting, health insurance, federal regulation, and preemption. These legal issues required exhaustive research and briefing.

4. The risk of nonpayment

A determination of a fair fee must include consideration of the uncertain nature of the fee, the wholly contingent outlay of large out-of-pocket sums by Plaintiffs' counsel, and the fact that the risks of failure and nonpayment are extremely high. Many cases recognize that attorneys' risk is "perhaps the foremost factor" in determining an appropriate fee award. *Goldberger*, 209

F.3d at 54 (citation omitted). In *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990), the court noted that:

> Generally, the contingency arrangement must be promoted to assure representation when a person could not otherwise afford the services of a lawyer… A contingency fee arrangement often justifies an increase in the award of attorneys' fees. This rule helps assure that the contingency fee arrangement endures. If this 'bonus' methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing. [*Id*. (citations omitted).]

The history of complex litigation is replete with cases in which plaintiffs succeeded at trial on liability, but recovered no damages or very small damages at trial or after appeal. *See*, *e.g.*, *United States Football League v. National Football League*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) ("the jury chose to award plaintiffs only nominal damages, concluding that the USFL had suffered only $1.00 in damages"), *aff'd*, 842 F.2d 1335 (2d Cir. 1988); *MCI Commc'ns Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1166-67 (7th Cir. 1983) (remanding antitrust judgment for new trial and damages); *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973) (following two trips to the Court of Appeals and one to the U.S. Supreme Court, plaintiffs, the putative class, and their counsel recovered nothing), *vacated on other grounds*, 417 U.S. 156 (1974).

Indeed, when Class Counsel undertook representation of the Class, there were no assurances that any fees would ever be received. Class Counsel were aware that they would likely have to overcome the daunting difficulties, and would have to expend thousands of hours and millions of dollars to prosecute this case over an extended period of time before having even a possibility of recovering fees and expenses. Class Counsel alone bore the risk of the case being dismissed at the pretrial stage, of not prevailing at trial, or even losing on appeal. Berman Decl., ¶¶ 41-44.

To date, Class Counsel have only been compensated for two settlements (GSK global and AstraZeneca Class 1). Because of the risk undertaken by Class Counsel, the requested fee award is reasonable.

5. The skill and efficiency of the attorneys involved

The experience, reputation, and ability of plaintiff's counsel has often been noted as a key factor in a court's consideration of counsel's fee request. *See*, *e.g.*, *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 748 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986); *Rosenbaum v. MacAllister*, 64 F.3d 1439, 1445 n.3 (10th Cir. 1995). The Settlement here was not easily achieved. Negotiations were hard-fought and protracted and did not produce a settlement until after the Class 2/3 trial had been affirmed by the First Circuit Court of Appeals. AstraZeneca is represented by experienced and highly-regarded counsel, and they contested this litigation at every stage. Therefore, settlement negotiations required persistence, negotiating skill, and a willingness to take this case to trial. Class Counsel employed all of these, and obtained a settlement agreement.

IV. CLASS COUNSEL'S EXPENSES ARE REASONABLE AND SHOULD BE FACTORED IN THE COURT'S CONSIDERATION OF THE AWARD

In addition to being entitled to reasonable attorneys' fees, it is well-settled that "lawyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also to recover from the fund, as a general matter, expenses, reasonable in amount, that were necessary to bring the action to a climax." *In re Fidelity/Micron Secs. Litig.*, 167 F.3d at 737; *In re Nineteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 606 (1st Cir. 1992); *In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25067, at *67 (holding that "an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of … reasonable litigation expenses from that fund") (citations

omitted). "[B]ecause each common fund case presents its own unique set of circumstances, trial courts must assess each request for fees and expenses on its own terms." *In re Fidelity/Micron Secs. Litig.*, 167 F.3d at 737.

The expenses incurred in this litigation in the amount of $9,401,741 are described in the accompanying Edelson Declaration. They are the type of expenses typically billed by attorneys to paying clients in the marketplace and include such costs as fees paid to experts, computerized research and other services, deposition and transcript expenses, and travel expenses in connection with this litigation through October 31, 2010. These expenses were reasonable and necessary for the prosecution of this litigation. Class Counsel do not request a separate award for expenses and will subsume the expenses within the requested 33⅓% award.

V. THE COURT SHOULD APPROVE COMPENSATION TO THE NAMED CLASS REPRESENTATIVES

Class Counsel request that the Court approve compensation to the named class representatives. As with the approval of compensation to named representatives in both the GSK and AstraZeneca Class 1 Settlements, and consistent with the Court's previous instructions, the amount of compensation sought on behalf of named representatives is based upon the hours expended in furtherance of the litigation. Like the combined attorneys' fees and expense award, these amounts would be paid from the common fund.

In July 2007, in connection with the GSK Settlement, the named class representatives in the GSK Settlement each submitted affidavits attesting to the time expended in furtherance of the litigation. *See* Co-Lead Counsel's Motion for Order Authorizing Compensation to Consumers and Third-Party Payor Class Representatives (Dkt. No. 4509). Each class representative in that settlement included a tally of the time spent responding to document requests, conferring with Class Counsel and preparing for depositions related to class certification and/or the merits of

Plaintiffs' claims, among other tasks necessary to fulfill their obligations as class representatives. Rather than request that the full amount of time be compensated at the Court-suggested rate of $100 per hour out of the GSK Settlement, for the TPP representatives, the Court made an award of only 20% of the overall time expended on behalf of the litigation. This was meant to allow for the possibility that the remaining compensation would come from future settlement and/or verdicts against the remaining Defendants.

Class Counsel now seek a full payment to the consumer class representative for the non-Massachusetts Settlement, Richard Wessels, and a payment to the TPP named representatives of an additional 40% of their total expended time as set forth in the table below. (Class representatives that did not have time since the submission of a GSK Declaration have incorporated their Declarations submitted with that settlement by reference.) An award of 40% is justified because of the enormous efforts expended by many of the class representatives during the Class 2/Class 3 trial, some of whom traveled to Boston to testify at trial.

Declarant	Representative Of	Class	Hours Claimed	Compensation Requested
Sara A. Walker	Blue Cross Blue Shield of Massachusetts	2&3	183	$7,320.00
Daniel W. Ryan	United Food and Commercial Workers Unions and Employers Midwest Health Benefits Fund	2 & 3	115.5	$4,620.00
Earl Seymour	Pirelli Armstrong Tire Corporation Retiree Medical Benefits Trust	3	43.5	$1,740.00
Glenn Randle	Sheet Metal Workers National Health Fund	2	73.5 (Fund) + 26.5 (TPA) = 100	$4,000.00
William Einhorn	Teamsters Health & Welfare Fund of Philadelphia and Vicinity	3	127 (from Einhorn GSK Decl., Dkt No. 4509-7)	$5,080.00
Arthur Steinberg	Philadelphia Federation of Teachers Health and Welfare Fund	3	63 + $980.00 in costs	$3,500.00
Charles Hannaford	Pipefitters Local 537 Trust Funds	3	41 (from Hannaford GSK Decl., Dkt No. 4509-10)	$1,640.00

Declarant	Representative Of	Class	Hours Claimed	Compensation Requested
William A. Rhodes, Jr.	Board of Trustees of Carpenters and Millwrights of Houston and Vicinity Welfare Trust Fund	3	65 (from Rhodes GSK Decl., Dkt No. 4509-8)	$2,600.00
Richard Wessels	Successor in interest to Susan Wessels	3	16	$1,600.00
TOTAL				**$32,100.00**

Compensation to named plaintiffs is "not uncommon in class action litigation … particularly where a common fund has been created for the benefit of the entire class.… [C]ourts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002); *see also In re Southern Ohio Correctional Facility*, 175 F.R.D. 270, 272-73 (S.D. Ohio 1997) (collecting cases in which awards to named representatives approved). A district court in the First Circuit has stated that "[b]ecause a named plaintiff is an essential ingredient of any class action, an incentive award can be appropriate to encourage or induce an individual to participate in the suit." *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 292 F. Supp. 2d 184, 189 (D. Me. 2003). Further, in determining whether such compensation is warranted, courts consider not only the efforts of the plaintiffs in pursuing the claims, but also the important public policy of fostering enforcement of laws and rewarding representative plaintiffs for being instrumental in obtaining recoveries for persons other than themselves. *Bussie v. Allmerica Fin. Corp.*, 1999 U.S. Dist. LEXIS 7793, at *11-12 (D. Mass. May 19, 1999).

The class representatives here actively and effectively fulfilled their obligations as representatives for the Class. The Plaintiffs went above and beyond the call of duty in complying with demands placed upon them during this litigation. Of crucial importance is the willingness of the Plaintiffs to bring this action in the first place. Each of the named Plaintiffs

also monitored the case and discussed its progress with counsel and consulted with counsel concerning the Settlement. Indeed, lead TPP plaintiff BCBSMA had representations present at the negotiations that led to these Settlements.

The requested compensation is more than justified, because of the named plaintiffs' active and prominent role in this litigation. In such situations, courts have awarded compensation of the requested amount and larger. *See*, *e.g.*, *In re Revco Litig.*, 1992 U.S. Dist. LEXIS 7852, at *22 (N.D. Ohio May 5, 1992) (awarding $200,000 to a named plaintiff); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, at 203-04 (S.D.N.Y. 1997) (awarding $85,000 to a named plaintiff); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (awarding $55,000 each to two named plaintiffs); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 914 (S.D. Ohio 2001) (awarding $50,000 to the class representative).

Finally, the Notice to the Class advised Class members that Class Counsel would apply for such compensation on behalf of Class Representatives, and no Class member has to date objected to such an award.

VI. CONCLUSION

For the reasons set forth above, Class Counsel respectfully request that the Court approve the fee and expense petition and enter an order awarding Class Counsel the attorneys' fees and expenses requested and the compensation for the Class Representatives.

DATED: December 15, 2010

By /s/ **Steve W. Berman**
Thomas M. Sobol (BBO#471770)
Edward Notargiacomo (BBO#567636)
Hagens Berman Sobol Shapiro LLP
One Main Street, 4th Floor
Cambridge, MA 02142
Telephone: (617) 482-3700
Facsimile: (617) 482-3003

LIAISON COUNSEL

Steve W. Berman
Sean R. Matt
Hagens Berman Sobol Shapiro LLP
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594

Jennifer Fountain Connolly
Hagens Berman Sobol Shapiro LLP
1629 K St., NW, Suite 300
Washington, D.C. 20006
Telephone: (202) 355-6435
Facsimile: (202) 355-6455

Jeffrey Kodroff
John Macoretta
Spector, Roseman, Kodroff & Willis, P.C.
1818 Market Street, Suite 2500
Philadelphia, PA 19103
Telephone: (215) 496-0300
Facsimile: (215) 496-6611

Kenneth A. Wexler
Wexler Wallace LLP
55 W. Monroe, Suite 3300
Chicago, IL 60603
Telephone: (312) 346-2222
Facsimile: (312) 346-0022

Marc H. Edelson
Edelson & Associates LLC
45 West Court Street
Doylestown, PA 18901
Telephone: (215) 230-8043
Facsimile: (215) 230-8735

CLASS COUNSEL

CERTIFICATE OF SERVICE BY LEXISNEXIS FILE & SERVE

Docket No. MDL 1456

I, Steve W. Berman, hereby certify that I am one of plaintiffs' attorneys and that, on December 15, 2010, I caused copies of **LEAD CLASS COUNSEL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS AND COMPENSATION TO THE CLASS REPRESENTATIVES IN ASSOCIATION WITH THE ASTRAZENECA MASSACHUSETTS AND NON-MASSACHUSETTS CLASS 2 AND CLASS 3 SETTLEMENTS,** to be served on all counsel of record by causing same to be posted electronically via Lexis-Nexis File & Serve.

/s/ Steve W. Berman
Steve W. Berman

TAB 46A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE AGGRENOX ANTITRUST LITIGATION	No. 3:14-md-02516 (SRU)
THIS DOCUMENT RELATES TO: ALL DIRECT PURCHASER ACTIONS	

AMENDED FINAL JUDGMENT AND ORDER OF DISMISSAL

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, and in accordance with the terms of the Settlement Agreement dated August 15, 2017 between Defendants Boehringer Ingelheim Pharma GmbH & Co. KG, Boehringer Ingelheim International GmbH and Boehringer Ingelheim Pharmaceuticals (collectively, "Boehringer"); Teva Pharmaceuticals USA, Teva Pharmaceutical Industries, Barr Pharmaceuticals, Barr Laboratories, Duramed Pharmaceuticals, and Duramed Pharmaceutical Sales Corp. (collectively, "Teva") and Direct Purchaser Plaintiffs' Lead Counsel acting pursuant to the Court's Order, dated June 16, 2014, Doc. No. 94, on behalf of Plaintiffs Miami Luken Inc. ("Miami Luken"), Rochester Drug Co-Operative ("RDC"), American Sales Co. ("American Sales") and Cesar Castillo, Inc. ("Castillo") (collectively "Direct Purchaser Class Plaintiffs," "named Plaintiffs," or "Plaintiffs"), and on behalf of the Direct Purchaser Class, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. This Amended Final Judgment and Order of Dismissal hereby incorporates by reference the definitions in the Settlement Agreement among Defendants, Plaintiffs, and the Direct Purchaser Class, and all capitalized terms used and not otherwise defined herein shall have the meanings set forth in the Settlement Agreement.

2. On September 19, 2017 this Court certified a class for purposes of settlement ("the Class"):

> All persons or entities in the United States and its territories and possessions including the Commonwealth of Puerto Rico who directly purchased branded Aggrenox in any form from any of the Defendants from December 1, 2009 through June 30, 2015 (the "Class Period"), or their assignees (the "Class"). Excluded from the Class are Defendants and their officers, directors, management and employees, predecessors, subsidiaries and affiliates, and all federal governmental entities. Also excluded from the Class are CVS Pharmacy, Inc., Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Walgreen Co., The Kroger Co., Safeway Inc., HEB Grocery Company L.P. and Albertson's LLC and their officers, directors, management and employees, predecessors, subsidiaries and affiliates who have brought individual claims as direct purchasers or assignees of direct purchasers to the extent they have valid assignments as more fully described in paragraph 10 of the Settlement Agreement ("Retailer Plaintiffs").

3. The Court has appointed Miami Luken, RDC, American Sales and Castillo as representatives of the Direct Purchaser Class (the "Class Representatives"). The Court has found that Lead Counsel, Liaison Counsel and the Executive Committee ("Class Counsel") have fairly and adequately represented the interests of the Direct Purchaser Class and satisfied the requirements of Fed. R. Civ. P. 23(g).

4. The Court has jurisdiction over these actions, each of the parties, and all members of the Direct Purchaser Class for all manifestations of this case, including this Settlement.

5. The notice of settlement (substantially in the form presented to this Court as Exhibit B to the Settlement Agreement) (the "Notice") directed to the members of the Class, constituted the best notice practicable under the circumstances. In making this determination, the Court finds that the Notice provided for individual notice to all members of the Direct Purchaser Class who were identified through reasonable efforts. Pursuant to, and in accordance with, Rule 23 of the Federal Rules of Civil Procedure, the Court hereby finds that the Notice provided Direct Purchaser Class members due and adequate notice of the Settlement, the Settlement Agreement,

these proceedings, and the rights of Class members to opt out of the Direct Purchaser Class and/or object to the Settlement.

6. Due and adequate notice of the proceedings having been given to the Direct Purchaser Class and a full opportunity having been offered to the Direct Purchaser Class to participate in the December 18, 2017 Fairness Hearing, it is hereby determined that all Direct Purchaser Class members are bound by this Order and Amended Final Judgment.

7. The Settlement of this Direct Purchaser Class Action was not the product of collusion between the Direct Purchaser Class Plaintiffs and Defendants or their respective counsel, but rather was the result of bona fide and arm's-length negotiations conducted in good faith between Direct Purchaser Class Counsel and counsel for Defendants, with the assistance of a mediator.

8. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court hereby approves the Settlement, and finds that the Settlement is, in all respects, fair, reasonable and adequate to Direct Purchaser Class members. Accordingly, the Settlement shall be consummated in accordance with the terms and provisions of the Settlement Agreement.

9. The Court hereby approves the Plan of Allocation of the Settlement Fund as proposed by Class Counsel (the "Plan of Allocation"), which was summarized in the Notice of Proposed Settlement and was attached to Direct Purchaser Class Plaintiffs' Motion for Final Approval of Settlement, and directs Berdon Claims Administration LLC, the firm retained by Direct Purchaser Class Counsel as the Claims Administrator, to distribute the net Settlement Fund as provided in the Plan of Allocation.

10. All claims against Defendants in *In re Aggrenox Antitrust Litigation*, Civil Action No. 3:14-md-02516 (SRU) (D. Conn.) (the "Direct Purchaser Class Action"), including by those

members of the Direct Purchaser Class who have not timely excluded themselves from the Direct Purchaser Class, are hereby dismissed with prejudice, and without costs.

11. Upon the Settlement Agreement becoming final in accordance with paragraph 7 of the Settlement Agreement, Plaintiffs and the Direct Purchaser Class unconditionally, fully and finally release and forever discharge Defendants, any past, present and future parents, subsidiaries, divisions, affiliates, joint ventures, stockholders, officers, directors, management, supervisory boards, insurers, general or limited partners, employees, agents, trustees, associates, attorneys and any of their legal representatives, or any other representatives thereof (and the predecessors, heirs, executors, administrators, successors and assigns of each of the foregoing) (the "Released Parties") from any and all manner of claims, rights, debts, obligations, demands, actions, suits, causes of action, damages whenever incurred, liabilities of any nature whatsoever, known or unknown, suspected or unsuspected, fixed or contingent, including costs, expenses, penalties and attorneys' fees, accrued in whole or in part, in law or equity, that Plaintiffs or any member or members of the Direct Purchaser Class (including any of their past, present, or future officers, directors, insurers, general or limited partners, divisions, stockholders, agents, attorneys, employees, legal representatives, trustees, parents, associates, affiliates, joint ventures, subsidiaries, heirs, executors, administrators, predecessors, successors and assigns, acting in their capacity as such) (the "Releasors"), whether or not they object to the Settlement, ever had, now has, or hereafter can, shall or may have, directly, representatively, derivatively or in any other capacity, arising out of or relating in any way to any claim under federal or state law that was alleged or could have been alleged in the Direct Purchaser Class Action, prior to the date of the Settlement, including but not limited to:

(1) the alleged delayed entry of generic Aggrenox;

(2) conduct with respect to the procurement, maintenance and enforcement of United States Patent Number 6,015,577; and

(3) the sale, marketing or distribution of Aggrenox or generic Aggrenox except as provided for in paragraph 13 herein (the "Released Claims").

Releasors hereby covenant and agree that each shall not sue or otherwise seek to establish or impose liability against any Released Party based, in whole or in part, on any of the Released Claims. For the avoidance of doubt, the release provided herein applies, without limitation, to any conduct relating to the procurement, maintenance or enforcement of United States Patent Number 6,015,577, including any commencement, maintenance, defense or other participation in litigation concerning any such patents, that was alleged in, could be fairly characterized as being alleged in, is related to an allegation made in, or could have been alleged in the Direct Purchaser Class Action.

12. In addition, Plaintiffs on behalf of themselves and all other Releasors, hereby expressly waive, release and forever discharge, upon the Settlement becoming final, any and all provisions, rights and benefits conferred by §1542 of the California Civil Code, which reads:

> Section 1542. *General Release; extent*. A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor;

or by any law of any state or territory of the United States or other jurisdiction, or principle of common law, which is similar, comparable or equivalent to § 1542 of the California Civil Code. Plaintiffs and members of the Direct Purchaser Class may hereafter discover facts other than or different from those which he, she or it knows or believes to be true with respect to the claims which are the subject matter of this paragraph 12, but each Plaintiff and member of the Direct Purchaser Class hereby expressly waives and fully, finally and forever settles, releases and

discharges, upon this Settlement becoming final, any known or unknown, suspected or unsuspected, asserted or unasserted, contingent or non-contingent claim that would otherwise fall within the definition of Released Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts. Each Plaintiff and member of the Direct Purchaser Class also hereby expressly waives and fully, finally and forever settles, releases and discharges any and all claims it may have against any Released Party under § 17200, *et seq.*, of the California Business and Professions Code or any similar comparable or equivalent provision of the law of any other state or territory of the United States or other jurisdiction, which claims are expressly incorporated into the definition of Released Claims.

13. The releases set forth in paragraphs 11 and 12 of this Order shall not release claims between Plaintiffs, members of the Direct Purchaser Class, and the Released Parties unrelated to the allegations in *In re Aggrenox Antitrust Litigation*, Civil Action No. 3:14-md-02516 (SRU) (D. Conn.), including claims under Article 2 of the Uniform Commercial Code (pertaining to Sales), the laws of negligence or product liability or implied warranty, breach of contract, breach of express warranty, or personal injury, or other claims unrelated to the allegations in *In re Aggrenox Antitrust Litigation*, Civil Action No. 3:14-md-02516 (SRU) (D. Conn.).

14. Class Counsel for the Direct Purchaser Class have moved for an award of attorneys' fees, reimbursement of expenses and incentive awards for the class representatives. Class Counsel request an award of attorneys' fees totaling $48,666,666.67 (representing 33⅓% of the Settlement) and reimbursement of the reasonable costs and expenses incurred in the prosecution of this action in the amount of $969,375.91, together with a proportionate share of the interest thereon, and incentive awards of $75,000.00 for each of the named plaintiffs, and such motion has been on the docket and otherwise publicly available since October 13, 2017, with a

supplemental motion as to costs and expenses being on the docket and otherwise publicly available since November 21, 2017.

15. Upon consideration of Class Counsel's petition for fees, costs and expenses, Class Counsel are hereby awarded attorneys' fees totaling $29,200,000.00 (representing 20% of the Settlement Fund), and costs and expenses totaling $988,678.53, together with a proportionate share of the interest thereon, from the date the funds are deposited in the Settlement Escrow Account until payment of such attorneys' fees, costs and expenses, at the rate earned by the Settlement Fund, to be paid solely from the Settlement Fund and only if and after the Settlement becomes final in accordance with paragraph 7 of the Settlement Agreement. Upon consideration of Class counsel's petition for incentive payments for Direct Purchaser Class Representatives, each of Miami Luken, RDC, American Sales, and Castillo are hereby each awarded $75,000.00, to be paid solely from the Settlement Fund and only if and after the Settlement becomes final in accordance with paragraph 7 of the Settlement Agreement. Garwin Gerstein & Fisher LLP shall allocate and distribute such attorneys' fees, costs and expenses among the various Class Counsel which have participated in this litigation. Garwin Gerstein & Fisher LLP shall allocate and distribute such incentive awards among the various Direct Purchaser Class Representatives which have participated in this litigation. The Released Parties (as defined in paragraph 14 of the Settlement Agreement) shall have no responsibility for, and no liability whatsoever with respect to, any payment or disbursement of attorneys' fees, expenses, costs or incentive awards among Class Counsel and/or Class Representatives, nor with respect to any allocation of attorneys' fees, expenses, costs or incentive awards to any other person or entity who may assert any claim thereto. The attorneys' fees, costs and expenses, and incentive awards authorized and approved by this Amended Final Judgment and Order of Dismissal shall be paid to Garwin Gerstein &

Fisher LLP within five (5) business days after this Settlement becomes final pursuant to paragraph 7 of the Settlement Agreement or as soon thereafter as is practical and in accordance with the terms of the Settlement Agreement and the Escrow Agreement. The attorneys' fees, costs and expenses, and incentive award authorized and approved by this Amended Final Judgment and Order of Dismissal shall constitute full and final satisfaction of any and all claims that Plaintiffs and any Direct Purchaser Class member, and their respective counsel, may have or assert for reimbursement of fees, costs, and expenses, and incentive awards, and Plaintiffs and members of the Direct Purchaser Class, and their respective counsel, shall not seek or demand payment of any fees, costs, expenses, or incentive awards from Defendants other than the Settlement Fund.

16. The Court retains exclusive jurisdiction over the Settlement and the Settlement Agreement as described therein, including the administration and consummation of the Settlement, and over this Amended Final Judgment and Order of Dismissal.

17. The Court finds that this Amended Final Judgment and Order of Dismissal adjudicates all of the claims, rights and liabilities of the parties to the Settlement Agreement (including the members of the Direct Purchaser Class), and is final and shall be immediately appealable. Neither this Order nor the Settlement Agreement nor any other Settlement-related document shall constitute any evidence or admission by Defendants or any other Released Party on liability, any merits issue, or any class certification issue (including but not limited to whether a class can be certified for purposes of litigation or trial) in this or any other matter or proceeding, nor shall this Order, the Settlement Agreement, or any other Settlement-related document be offered in evidence or used for any other purpose in this or any other matter or proceeding except as may be necessary to consummate or enforce the Settlement Agreement or

the terms of this Amended Final Judgment and Order of Dismissal, or if offered by any released Party in responding to any action purporting to assert Released Claims.

So ordered.

Dated at Bridgeport, Connecticut, this 21st day of December 2017.

/s/ STEFAN R. UNDERHILL
Stefan R. Underhill
United States District Judge

TAB 46B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

IN RE AGGRENOX ANTITRUST LITIGATION	**Master Docket No. 3:14-md-02516 (SRU)** **Judge Stefan R. Underhill**

MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES AND INCENTIVES AWARD TO THE CLASS REPRESENTATIVES

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I. INTRODUCTION

Class Counsel, who have represented class representatives Miami Luken Inc. ("Miami Luken"), Rochester Drug Co-Operative, Inc. ("RDC"), American Sales Company, LLC ("American Sales") and Cesar Castillo, Inc. ("Castillo") and direct purchaser class plaintiffs (collectively "DPCPs") in this litigation, respectfully submit this memorandum in support of their Motion for an Award of Attorneys' Fees, Reimbursement of Expenses and Incentive Awards for the Class Representatives.[1]

For nearly four years, Class Counsel have aggressively prosecuted this highly-complex, hotly-contested antitrust case against two pharmaceutical companies represented by some of the most prominent defense law firms in the country. In May 2017, with the assistance of a private mediator, the Honorable Layn R. Phillips (formerly of the Western District of Oklahoma), Class Counsel and counsel for Defendants agreed to the terms of a settlement in principle of DPCPs' claims against Defendants[2] ("the Settlement"). Pursuant to the Settlement, Defendants agreed to pay $146 million in cash into an escrow fund for the benefit of DPCPs, in exchange for dismissal of the litigation between DPCPs and Defendants.[3] Class Counsel believes that the Settlement,

[1] Class Counsel are the firms listed in n. 2 of the accompanying Declaration of Lead Counsel Bruce E. Gerstein (the "Gerstein Dec.") annexed as Exhibit A hereto.

[2] Defendants are Boehringer Ingelheim Pharma GmbH & Co. KG, Boehringer Ingelheim International GmbH and Boehringer Ingelheim Pharmaceuticals, Inc. ("Boehringer") and Teva Pharmaceuticals USA, Inc., Teva Pharmaceutical Industries, Ltd., Barr Pharmaceuticals, Inc. (n/k/a Barr Pharmaceuticals, LLC), Barr Laboratories Inc., Duramed Pharmaceuticals Inc. (n/k/a Teva Women's Health Inc.) and Duramed Pharmaceutical Sales Corp. (n/k/a Teva Sales and Marketing, Inc. ("Teva") (collectively, "Defendants").

[3] On September 19, 2017, the Court granted preliminary approval to the Settlement and approved the form and manner of notice of the Settlement to the class. *See* Dkt No. 685. Thereafter, the Defendants deposited $146 million into an escrow account held in trust that is earning interest for the benefit of the class, and members of the class were mailed a notice of settlement. *See* Exs. 1-2 to the Gerstein Dec. Pursuant to the Court's order, Class Counsel's briefing in support of final approval of the Settlement and the entry of final judgment will be submitted to the Court on November 24, 2017, and the Fairness Hearing will take place on December 18, 2017. *See* Dkt

which unquestionably confers a significant financial benefit on class members and brings this long-pending, contentious litigation to a close, represents a highly successful outcome for DPCPs.

From the inception of the litigation through the time that the Court granted preliminary approval to the Settlement, Class Counsel expended more than 33,000 hours of uncompensated professional time and incurred almost one million dollars in unreimbursed out-of-pocket expenses. As compensation for its efforts, Class Counsel seek an award of attorneys' fees in the amount of 33⅓% of the Settlement (including a *pro rata* share of the accrued interest), and reimbursement of litigation expenses.[4] Class Counsel also seek incentive awards of $75,000 for each of the four class representatives in recognition of their vital participation in this litigation.

As described more fully below and in the Gerstein Declaration, the following factors, among others, strongly support Class Counsel's application:

First, the size of the Settlement will unquestionably confer substantial financial benefit on class members. The class will share in a recovery of $146 million (less any attorneys' fees, expenses, and incentive awards granted by the Court), and in order to receive their respective *pro rata* shares, a class member need only submit a claim form that will be directly mailed to them after final approval of the Settlement, if granted.

Second, Class Counsel undertook significant risk by expending substantial time and resources in aggressively prosecuting this complex and lengthy case. Although all antitrust cases are inherently complex and involve substantial legal risk, Defendants sought to dismiss DPCPs' claims just as district courts around the country began issuing opinions interpreting the Supreme

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No. 685.

[4] Class Counsel submits, as Exhibits 3-16 to the Gerstein Dec., the declarations of the individual firms that worked on this litigation. These declarations detail the services rendered, the hours expended, and the expenses incurred by each firm.

Court's landmark decision concerning reverse payment agreements, *Federal Trade Commission v. Actavis, Inc.*, 133 S. Ct. 2223 (2012). Consequently, Class Counsel had to develop and reformulate DPCPs' liability theories in step with rapidly evolving case law, in addition to developing DPCPs' causation theories and damage models. Class Counsel also spent significant time successfully responding to Defendants' two petitions for interlocutory appeal pursuant to 28 U.S.C. 1292(b), which dealt with statute of limitations and market power/relevant market issues, respectively. Both petitions were denied. *See* Gerstein Dec. at ¶¶ 29, 54. Class Counsel also faced significant financial risk since they prosecuted DPCPs' claims against Defendants on a wholly contingent basis, without any guarantee of success or compensation for time spent, or for reimbursement of out-of-pocket costs and expenses.

Third, Class Counsel's percentage-of-recovery fee request is consistent with fee awards in similar cases that Class Counsel has litigated, and is otherwise strongly supported by analysis of the "*Goldberger* factors" derived from *Goldberger v. Integrated Resources, Inc.*, 209 F. 3d 43 (2d Cir. 2000) that are used by the Second Circuit in determining attorneys' fees.

II. HISTORY OF THE LITIGATION

DPCPs are direct purchasers of Boehringer's brand-name prescription pharmaceutical product, Aggrenox. In November 2013, Class Counsel, on behalf of DPCPs, filed the first antitrust lawsuit brought by a putative class of direct purchasers challenging certain of Defendants' conduct concerning Aggrenox as violative of the antitrust laws, causing members of the Class to pay artificially inflated prices for Aggrenox and/or its generic equivalents. *See* Gerstein Dec. at ¶ 2. Defendants have consistently denied wrongdoing and have asserted numerous defenses. A more detailed history of the litigation is fully set forth in detail in the Gerstein Declaration.

III. CLASS COUNSEL'S LITIGATION EFFORTS

The team assembled by Lead Counsel, Liaison Counsel and the Executive Committee includes lawyers from some of the preeminent antitrust law firms in the country. These firms have almost two decades of extensive experience prosecuting and trying Hatch-Waxman antitrust cases on behalf of the same core class of direct purchasers, and have been involved in many of the critical decisions made by various courts in this evolving area of antitrust law. *See* Gerstein Dec. at ¶ 68; *infra* at pp. 1-12. Class Counsel took advantage of each firm's particular area of expertise to litigate this case in the most effective and efficient manner possible, without duplication of effort. A detailed description of Class Counsel's efforts is fully set forth in the Gerstein Declaration.

IV. ARGUMENT

A. Class Counsel's Fee Request Is Reasonable

i. The Percentage-of-Recovery Method is Appropriate for Calculating an Award of Attorneys' Fees in This Case

Federal Rules of Civil Procedure 23(h) and 54(d) permit courts overseeing class actions to award reasonable attorneys' fees and costs. The Supreme Court has long recognized that, as here, a lawyer who recovers a "common fund" on behalf of a class is entitled to reasonable attorneys' fees and expenses from the fund. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). This Court has discretion in determining what attorneys' fees are reasonable. *See Kemp-Delisser v. St. Francis Hosp. & Med. Ctr.*, 2016 U.S. Dist. LEXIS 152496, at *43 (D. Conn. Nov. 3, 2016).

In the Second Circuit, there are two methods that courts may use in order to award attorneys' fees: (1) the "percentage-of-fund" method, which bases the fee on a percentage of the total amount of a common settlement fund; or (2) the "lodestar" method, which multiplies the amount of attorney hours reasonably expended by reasonably hourly rates. *Id.* at *45. Courts in the Second Circuit have largely stated a preference for the use of the percentage-of-fund method in awarding attorneys' fees. *See In re BioScrip, Inc. Sec. Litig.*, 2017 U.S. Dist. LEXIS 118881, at

*56 (S.D.N.Y. July 26, 2017) (though both methods are available, "the trend in [the Second] Circuit has been toward the use of a percentage of recovery as the preferred method of calculating the award for class counsel in common fund cases…")(internal quotation omitted); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 146 (S.D.N.Y. 2010)(trend in Second Circuit is toward the percentage method). Among other reasons, courts generally favor this method because:

> The percentage method directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system. The percentage approach is also the most efficient means of rewarding the work of class action attorneys, and avoids the wasteful and burdensome process – to both counsel and the courts – of preparing and evaluating fee petitions, which the Third Circuit Task Force described as "cumbersome, enervating, and often surrealistic."

In re Lloyd's Am. Trust Fund Litig., 2002 U.S. Dist. LEXIS 22663, at *74 (S.D.N.Y. Nov. 26, 2002)(quoting *Court Awarded Attorney Fees, Report of the Third Cir. Task Force*, 108 F.R.D. 237, 258 (3d Cir. 1985)).

ii. Application of the Second Circuit's Reasonableness Factors Supports the Requested Fee

Class Counsel's fee request is consistent with applicable Second Circuit law. Regardless of whether the percentage method or the lodestar method is used, the Second Circuit has identified six factors for district courts to consider in analyzing the reasonableness of a request for attorneys' fees. These six factors – known as the *Goldberger* factors – are:

> (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

Kemp-Delisser, 2016 U.S. Dist. LEXIS 152496 at *43 (quoting *Goldberger v. Integrated Res., Inc.*, 209 F. 3d 43, 50 (2d Cir. 2000). *See also Caitflo, L.L.C. v. Sprint Communs. Co. L.P.*, 2013 U.S. Dist. LEXIS 90858, at *5-6 (D. Conn. June 24, 2013) (listing factors).

As detailed below, analysis of each of the *Goldberger* factors strongly supports approval of Class Counsel's requested fee.

a. The Time and Labor Expended by Counsel

Class Counsel expended more than 33,000 hours in prosecuting this case from its inception in 2013 up through September 6, 2017, the date upon which Class Counsel submitted its request for preliminary approval of the Settlement. As detailed more fully in the Gerstein Declaration, Class Counsel, *inter alia*: (a) successfully defeated Defendants' motion to dismiss; (b) reviewed and analyzed almost 11 million of pages of documents; (c) analyzed the many defenses raised by Defendants in light of the millions of pages of documents they produced and documents which were obtained from numerous third-parties; (d) took 6 fact depositions; (e) consulted with and retained four expert witnesses; (f) engaged in substantial motion practice on various issues, including but not limited to complex legal and economic issues pertaining to monopoly power and relevant market; (g) successfully defeated Defendants' two petitions for interlocutory appeal; and (h) prepared for and participated in mediation, during which Class Counsel engaged in hard-fought settlement negotiations and agreed to the terms of a settlement in principle. *See generally Kemp-Delisser,* 2016 U.S. Dist. LEXIS 152496 at *46-47; *In re BioScrip, Inc. Sec. Litig.*, 2017 U.S. Dist. LEXIS 118881 at *62 (litigation was "a hard-fought, complicated case, requiring extensive work on the part of Lead Counsel"); *Velez v. Novartis Pharms. Corp.*, 2010 U.S. Dist. LEXIS 125945, at *54 (S.D.N.Y. Nov. 30, 2010)("Class Counsel devoted 36,996.77 hours from 68 attorneys and staff members to the successful prosecution of this matter"). Moreover, Class Counsel will be expending a significant number of hours in connection with administering the Settlement without any compensation. *See Garcia v. Pancho Villa's of Huntington Vill., Inc.,* 2012 U.S. Dist. LEXIS 144446, at *22-23 (E.D.N.Y. Oct. 4, 2012)(acknowledging that class counsel would perform more work on behalf of the class after final approval, including "assisting with the administration of the

settlement, and answering Class Member questions, which further supports their fee request"); *Aros v. United Rentals, Inc.*, 2012 U.S. Dist. LEXIS 104429, at *17 (D. Conn. July 26, 2012)(acknowledging that class counsel would continue to perform work on behalf of the class during the settlement approval process and the disbursement phase).

Accordingly, the significant time and labor that has been (and will be) expended by Class Counsel supports Class Counsel's fee request.

b. The Magnitude and Complexities of the Litigation

"An antitrust class action is arguably the most complex action to prosecute." *In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000). *See also In re Flonase Antitrust Litig*., 951 F. Supp. 2d 739, 743 (E.D. Pa. 2013)("Antitrust class actions are particularly complex to litigate and therefore quite expensive."); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2015 U.S. Dist. LEXIS 138479, at *148-49 (E.D.N.Y. Oct. 9, 2015)(price-fixing conspiracy required "complex expert analysis and review of mountains of documents").

This antitrust case was no exception. As an initial matter, Class Counsel had to brief and argue the question of what jurisdiction the litigation should proceed in before the Judicial Panel for Multidistrict Litigation. Once transferred to this Court, Class Counsel was then almost immediately faced with two motions to dismiss grounded upon multiple bases, which resulted in protracted briefing, and upon disposition, a petition for interlocutory appeal to the United States Court of Appeals for the Second Circuit on statute of limitations grounds. The Second Circuit denied the petition in September 2015. Thereafter, Class Counsel then had to undertake fact discovery to support their liability, causation and damages theories and to rebut Defendants' defenses, and received and reviewed almost eleven million pages of documents. Apart from developing DPCPs' liability theories, which Class Counsel had to constantly evaluate in view of the rapidly developing case law concerning the legality of reverse payment agreements, Class

Counsel also had to address causation and damages, and establish that Boehringer had market power with respect to Aggrenox, which, were all issues that were hotly contested by Defendants. In particular, Class Counsel faced repeated discovery motions filed by Defendants as part of their attempt to prove that Boehringer did not have monopoly power in a relevant market. The parties' continuing disputes relating to this issue ultimately resulted in the Court ordering the parties to brief the issue so that it could make a predicate ruling on market power. That decision, which held that the relevant market was Aggrenox and its generic equivalents, resulted in Defendants' second petition for interlocutory appeal, which was denied by the Second Circuit in January 2017. *See generally Dial Corp. v. News Corp.*, 317 F.R.D. 426, 435 (S.D.N.Y. 2016)(monopolization case involved complex and contested theories of liability and a serious challenge pertaining to establishing damages); *Kemp-Delisser,* 2016 U.S. Dist. LEXIS 152496 at *48 (facts and law "at the heart" of ERISA class action were complicated and litigation was "highly contentious").

Accordingly, the magnitude and complexity of the litigation supports the requested fee.

c. The Risk of the Litigation

"The Second Circuit recognizes that the risk of success is 'perhaps the foremost factor' to be considered in determining a fee award in class actions." *Kemp-Delisser*, 2016 U.S. Dist. LEXIS 152496 at *48 (quoting *Goldberger*, 209 F. 3d at 54). *See also Woburn Ret. Sys. v. Salix Pharms., Ltd.*, 2017 U.S. Dist. LEXIS 132515, at *17 (S.D.N.Y. Aug. 18, 2017)("risk of the litigation is one of the most important factors, if not the foremost factor, to consider when determining the reasonableness of fee.").

It is well-established that when lawyers undertake litigation on a contingency basis, they face the "significant risk of non-payment." *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010). *See also Woburn Ret. Sys.*, 2017 U.S. Dist. LEXIS 132515 at *17 (lawyers who undertake litigation on contingency basis "assume a great deal of risk"); *Aros,* 2012 U.S. Dist.

LEXIS 104429 at *18 (efforts of class counsel were "without compensation, and their entitlement to be paid has been wholly contingent upon achieving a good result"). Here, Class Counsel represented the named plaintiffs and the class purely on a contingency fee basis – with no up-front retainer fees or allowance for expenses, nor any compensation from any other source – and prosecuted this case for nearly four years. Consequently, Class Counsel faced the very real risk that they would ultimately receive nothing for the hard work and long hours, as well as the millions of dollars in cash outlays expended litigating.

And indeed, the litigation itself presented substantive risks. At the time when Defendants' motions to dismiss were filed, district courts were beginning to issue conflicting decisions interpreting the Supreme Court's *Actavis* decision, and there was no guarantee that this Court would find DPCPs' allegations sufficient in view of such decisions. *See* Gerstein Dec. at ¶¶ 69, 72. Moreover, proving causation (*i.e.,* that Barr could and would have entered the market earlier with a less-expensive version of generic Aggrenox) also presented significant risks because Barr contended that it could not and would have launched in view of equipment, supply and FDA approval problems. Additionally, as this Court itself observed, the parties' protracted disputes concerning monopoly power and relevant market presented a potentially dispositive issue. *Id.* at ¶¶ 44, 69, 72.[5] Further, absent the Settlement, Class Counsel would have had to, *inter alia*, complete costly and time-consuming expert discovery, litigate class certification and then take the case through summary judgment and trial, as well as the (inevitable) appeals. Although Class Counsel have always been confident in DPCPs' claims, and remain so, Class Counsel had no

[5] *See also* Dkt No. 423 (Nov. 30, 2015 Hearing Tr. at 35-36)("[A]s I see it, if [defendants] win the product market definition, [plaintiffs] lose. If [plaintiffs] win the product market definition, many – much of [defendants'] discovery and their defenses go away, and we have a very narrow case…").

guarantee that class certification would be obtained, that DPCPs' claims would survive summary judgment and/or that a jury would ultimately find in DPCPs' favor (and that a favorable jury verdict would withstand appellate scrutiny). These risk considerations have particular application to complex Hatch-Waxman antitrust cases, where several cases litigated by the same Class Counsel as here have been unsuccessful and have yielded no recovery, even after Class Counsel expended thousands of hours in time and millions of dollars in out-of-pocket expenditures.[6]

Accordingly, the significant risks faced by Class Counsel support the requested fee.

d. The Quality of Representation

Class Counsel's skill and efficiency supports the fee request here. Class Counsel include some of the most preeminent antitrust firms in the United States, with decades of experience prosecuting and trying complex antitrust actions. *See* Gerstein Dec. at ¶ 68; Exs. 3-16 to the Gerstein Dec. These firms have a particular expertise in litigating Hatch-Waxman pharmaceutical antitrust cases on behalf of direct purchasers, having litigated such cases for almost two decades on behalf of the same core class of direct purchasers; no other collection of firms in the U.S. has litigated more Hatch-Waxman antitrust cases on behalf of the direct purchaser class. This experience has enabled each law firm involved to specialize in particular areas of expertise (*e.g.*, antitrust violations, causation, quantifying damages, economics, class certification, the Hatch-Waxman regulatory regime, pharmaceutical patents, pharmaceutical company business

[6] For instance, after years of litigation, jury trials were lost in the cases of *Louisiana Wholesale Drug Co., Inc. v. Sanofi-Aventis*, Case No. 07-cv-07343 (S.D.N.Y.) and *In re Nexium (Esomeprazole) Antitrust Litig.*, Case No. 12-cv-2409 (D. Mass.). And Class Counsel litigated reverse payment agreements involving the brand drug Cipro for a decade, including conducting numerous depositions in London (with translators for German speaking witnesses of defendant Bayer). The Second Circuit affirmed dismissal of the case under the now-defunct "scope of the patent" standard that pre-dated the Supreme Court's decisions in *Federal Trade Commission v. Actavis*, 133 S. Ct. 2223 (2013). *See Arkansas Carpenters*, 604 F.3d 98 (2d Cir. 2010), *cert. denied*, 562 U.S. 1280 (2011).

operations, and direct purchaser business operations), thus providing Class Counsel with the ability to efficiently coordinate, organize, and implement litigation strategies, and to react to defenses of all makes and models. Class Counsel's experience and skill is evidenced by their effective prosecution of this case for nearly four years, including the highly favorable settlement achieved.[7] *See, e.g., In re BioScrip, Inc. Sec. Litig.*, 2017 U.S. Dist. LEXIS 118881 at *73 ("[L]ead Counsel's work was consistently of a high quality – in its motion practice, in its appearances before the Court, and in attaining a fair and reasonable settlement"); *Kemp-Delisser*, 2016 U.S. Dist. LEXIS 152496 at *49-50 (class counsel was comprised of national leaders in ERISA class action litigation that had been appointed lead or co-lead counsel in numerous other cases). Relatedly, "the quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work." *Id.* at *50 (internal quotation omitted); *In re BioScrip, Inc. Sec. Litig.*, 2017 U.S. Dist. LEXIS 118881 at *73 ("[O]pposing counsel in this case was itself highly skilled, a factor courts have considered in approving fees."). Here, Defendants here have been vigorously represented by some of the country's leading defense firms both of which also have extensive Hatch-Waxman antitrust litigation experience: White & Case LLP and Goodwin Procter LLP. Achieving such a successful result for the class when faced by such skillful defense counsel further demonstrates Class Counsel's skill. *See also Kemp-Delisser*, 2016 U.S. Dist. LEXIS 152496 at *50 (defense counsel was a "highly capable" leading international firm).

Separately, the quality of representation provided by Class Counsel is further demonstrated by the recovery that Class Counsel achieved for the benefit of class members. *See Dial Corp.*, 317

[7] In a very recent Hatch-Waxman case involving many of the same lawyers comprising Class Counsel here, a district court acknowledged Class Counsel's skill and experience. *See In re K-Dur Antitrust Litig.*, Case No. 01-1652 (D.N.J.) (Dkt No. 1057) (Oct. 5, 2017 Order) ("The settlement here is directly attributable to the skill and efforts of Class Counsel, who are highly experienced in prosecuting these types of cases").

F.R.D. at 435 ("The results achieved through the efforts of [c]ounsel are a 'critical element in determining the appropriate fee to be awarded.'")(internal quotation omitted). As noted above, the recovery for class members here is unquestionably financially substantial. *Id.* ($244 million settlement "undoubtedly" benefitted class); *Velez*, 2010 U.S. Dist. LEXIS 125945 at *55 ($175 million settlement deemed "substantial"). Not only is the recovery substantial in terms of dollar value, but also when assessed in light of the risks of going forward against Defendants, discussed *supra*. Through the Settlement, class members are assured of an immediate and substantial financial recovery free of the attendant risks of continuing to litigate through trial and any subsequent appeals.

Accordingly, the quality of representation provided by Class Counsel supports Class Counsel's fee request.

e. The Requested Fee in Relation to the Settlement

This factor ensures that the requested fee is "fair and reasonable in relation to the recovery and compares favorably to fee awards" in other common fund cases. *See In re Marsh ERISA Litig.*, 265 F.R.D. at 149. *See also Velez*, 2010 U.S. Dist. LEXIS 125945 at *58-60 (examining whether fee requested was "consistent with awards made in other class actions"); *Caitflo, L.L.C.*, 2013 U.S. Dist. LEXIS 90858 at *8 (requested percentage was "well within the range of reasonable percentage-fee awards in this Circuit").

Here, Class Counsel's requested fee is consistent with the fee awards granted in the most analogous cases previously settled – other complex Hatch-Waxman antitrust class action cases brought by classes of direct purchasers alleging impeded generic entry – as the following chart indicates:

Case	Fee Award
In re K-Dur Antitrust Litig., No. 01-1652 (D.N.J. Oct. 5, 2017)	33⅓% of $60 million settlement
In re Provigil Antitrust Litig., No. 07-1979 (E.D. Pa. Oct. 16, 2015)	27.5% of $512 million settlement (partial settlement)
In re Prograf Antitrust Litig., No. 11-md-2242 (D. Mass. May 20, 2015)	33⅓% of $98 million settlement
In re Doryx Antitrust Litig., No. 12-3824 (E.D. Pa. Sept. 15, 2014)	33⅓% of $15 million settlement
In re Neurontin Antitrust Litig., No. 02-1830 (D.N.J. Aug. 6, 2014)	33⅓% of $191 million settlement
In re Skelaxin (Metaxalone) Antitrust Litig., No. 12-cv-83 (E.D. Tenn. June 30, 2014)	33⅓% of $73 million settlement
In re Flonase Antitrust Litig., No. 08-cv-3149 (E.D. Pa. June 14, 2013)	33⅓% of $150 million settlement
In re Wellbutrin XL Antitrust Litig., No. 08-cv-2431 (E.D. Pa. Nov. 7, 2012)	33⅓% of $37.5 million settlement
Rochester Drug Co-Operative, Inc. v. Braintree Labs., Inc., No. 07-142 (D. Del. May 31, 2012)	33⅓% of $17.25 million settlement
In re DDAVP Antitrust Litig., No. 05-2237 (S.D.N.Y. Nov. 28, 2011)	33⅓% of $20.25 million settlement
In re Wellbutrin SR Antitrust Litig., No. 04-5525 (E.D. Pa. Nov. 21, 2011)	33⅓% of $49 million settlement
Meijer, Inc. v. Abbott Labs., No. 07-5985 CW (N.D. Cal. Aug. 11, 2011)	33⅓% of $52 million settlement
In re Nifedipine Antitrust Litig., No. 03-mc-223-RJL (D.D.C. Jan. 31, 2011)	33⅓% of $35 million settlement
In re Oxycontin Antitrust Litig., No. 04-md-1603-SHS (S.D.N.Y. Jan. 25, 2011)	33⅓% of $16 million settlement
In re Tricor Direct Purchaser Antitrust Litig., No. 05-cv-340 (D. Del. April 23, 2009)	33⅓% of $250 million settlement
In re Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013 (D.N.J. Nov. 9, 2005)	33⅓% of $75 million settlement

In re Terazosin Hydrochloride Antitrust Litig., No. 99-MDL-1317, 2005 U.S. Dist. LEXIS 43082 (S.D. Fla. Apr. 19, 2005)	33⅓% of $74 million settlement
In re Relafen Antitrust Litig., No. 01-12239, 2004 U.S. Dist. LEXIS 28801 (D. Mass. April 9, 2004)	33⅓% of $175 million settlement
In re Buspirone Antitrust Litig., No. 01-CV-7951, 2003 U.S. Dist. LEXIS 26538 (S.D.N.Y. April 11, 2003)	33⅓% of $220 million settlement
In re Cardizem CD Antitrust Litig., MDL No. 1278 (E.D. Mich. Nov. 26, 2002)	30% of $110 million settlement

Further, Class Counsel's requested fee falls squarely within the range of fee awards granted within this Circuit. *See, e.g.*, *Collins v. Olin Corp.*, 2010 U.S. Dist. LEXIS 39862, at *24 (D. Conn. Apr. 21, 2010)("[O]ne third of the total fund is in line with the percentage fees awarded in similar class action suits"); *In re Marsh ERISA Litig.*, 265 F.R.D. at 149 (approving one-third of the total fund and observing that many cases within the Second Circuit have awarded percentage fees equal to or greater than one third); *Velez*, 2010 U.S. Dist. LEXIS 125945 at *59-61 (observing that "[d]istrict courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater" and collecting cases ranging from 28 percent to 38.26 percent); *Garcia*, 2012 U.S. Dist. LEXIS 144446 at *20-21 ("Class Counsel's request for one-third of the Fund is reasonable and 'consistent with the norms of class litigation in this circuit'")(internal quotation omitted).

Finally, to date, no class member has objected to the request, a factor that numerous courts in this Circuit have determined as being a supportive factor. *See Kiefer v. Moran Foods, LLC*, 2014 U.S. Dist. LEXIS 106924 at *53 (D. Conn. July 31, 2014)(in approving attorneys' fees of one-third of common fund in wage-and-hour class action, noting there were no objections to requested fee); *Stinson v. City of New York*, 2017 U.S. Dist. LEXIS 89844 at *26-27 (S.D.N.Y. June 7, 2017)(noting absence of any objections to requested fee); *Hall v. Prosource Techs.*, 2016 U.S.

Dist. LEXIS 53791 at *50-51 (E.D.N.Y. Apr. 11, 2016) (absence of any objection to requested fee "while [] not dispositive of the reasonableness of the fee request, 'does lend support for approval of the award.'")(internal quotation omitted).[8]

Accordingly, analysis of this factor supports Class Counsel's fee request.

f. Public Policy Considerations

As the Supreme Court has held, "private suits are an important element of the Nation's antitrust enforcement effort." *Am. Soc'y of Mech. Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 572 n. 10 (1982). In keeping with that rationale, a fee award "should reflect the important public policy goal of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest." *Kemp-Delisser*, 2016 U.S. Dist. LEXIS 152496 at *52-53 (internal quotation omitted).

As one court has noted, "it is important to encourage top-tier litigators to pursue challenging antitrust cases…[because] [o]ur antitrust laws address issues that go to the heart of our economy." *In re Credit Default Swaps Antitrust Litig.*, 2016 U.S. Dist. LEXIS 54587, at *55 (S.D.N.Y. Apr. 25, 2016). Thus, public policy considerations warrant incentivizing Class Counsel – who have pursued litigating Hatch-Waxman pharmaceutical antitrust cases for almost two decades on purely a contingency basis – to persist in enforcing this nation's antitrust laws.

Accordingly, public policy considerations support Class Counsel's fee request.

[8] The deadline for class members to object to Class Counsel's fee application is November 3, 2017. If Class Counsel receives any objection(s) to its fee application between the date of this filing and November 3, 2017, Class Counsel will promptly inform the Court and address such objection(s) in its motion for final approval of the Settlement.

g. A Lodestar Cross-Check Confirms the Reasonableness of the Requested Fee

In assessing the reasonableness of a fee award, courts routinely compare the lodestar to the fees that would be awarded under the percentage-of-recovery method as a "cross-check." *See Kemp-Delisser*, 2016 U.S. Dist. LEXIS 152496 at *53 (lodestar cross-check may be helpful in assessing reasonableness). Additionally, "counsel may be entitled to a 'multiplier' of their lodestar rate to compensate them for the risk they assumed, the quality of their work and the result achieved for the class." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 590 (S.D.N.Y. 2008).

Class Counsel's requested percentage-of-recovery fee award is also reasonable when analyzed in light of a lodestar crosscheck. As detailed in the Gerstein Declaration, Class Counsel worked 33,215.88 hours on this case, which is collectively $19,633,232.27 million in time based on current billing rates.[9] *See* Gerstein Dec. at ¶ 75. A 33⅓% fee award would equate to a lodestar multiplier of 2.48. Such a multiplier falls well within the range of lodestar multipliers routinely awarded by courts in this Circuit. *See, e.g., Kemp-Delisser*, 2016 U.S. Dist. LEXIS 152496 at *54 (multiplier of 2.77 "well within the range of lodestar multipliers that are regularly approved by district courts in the Second Circuit"); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 579, 590 (S.D.N.Y. 2008) ("In contingent litigation, lodestar multipliers of over 4 are routinely awarded by courts…"); *Maley v. Del Global Techs. Corp.*, 189 F. Supp. 2d 358, 371 (S.D.N.Y. 2002) (approving multiplier of 4.65).

Accordingly, the lodestar cross check in this case supports the requested fee.

[9] Where personnel are no longer with a particular firm, Class Counsel used the person's last applicable hourly billing rate.

B. Class Counsel's Costs And Expenses Are Reasonable And Were Necessarily Incurred To Achieve The Benefit Obtained

It is well-settled that counsel who have created a common fund for the benefit of a class are entitled to be reimbursed for out-of-pocket expenses reasonably incurred in creating the fund. *See In re Marsh ERISA Litig.*, 265 F.R.D. at 150; *Kemp-Delisser*, 2016 U.S. Dist. LEXIS 152496 at *54-55.

Class Counsel's unreimbursed expenses were reasonably incurred and necessary to the representation of the Class. These expenses have been itemized by category for the Court's convenience. *See* Exs. 3-16 to the Gerstein Dec. These expenses include costs for computerized legal research, the creation and maintenance of an electronic document database, experts, travel and lodging expenses, copying, court reporters, deposition transcripts and mediation. *Id.*[10] Accordingly, Class Counsel respectfully request that the Court approve reimbursement of Class Counsel's expenses in full.

C. Incentive Awards for the Class Representatives are Appropriate and Reasonable

The purpose of incentive awards is to reimburse named plaintiffs, who "take on a variety of risks and tasks when they commence representative actions…" *Kemp-Delisser*, 2016 U.S. Dist. LEXIS 152496 at *55 (internal quotation omitted). Courts take into consideration the personal risk (if any) incurred by becoming and continuing as a litigant, the time and effort expended in assisting in the prosecution of the litigation, any other burdens sustained, and the ultimate recovery achieved. *See Dial Corp.*, 317 F.R.D. at 439.

[10]Such expenses are of the type routinely deemed reasonable and necessary. *See, e.g.*, *In re Marsh ERISA Litig.*, 265 F.R.D. at 150 (deeming costs such as court reporters, expert fees, computer-assisted document organization, travel and copying are "ordinary and necessary").

Here, Class Counsel requests that the Court approve incentive awards in the amount of $75,000 for each of the class representatives – Miami Luken, RDC, American Sales and Castillo - in recognition of their commitment to, and participation in, this litigation. As class representatives, each actively pursued the class's interests by filing suit as a named plaintiff on behalf of all direct purchasers and undertaking the responsibilities attendant upon them as representative plaintiff. In particular, the class representatives undertook significant burden in this case in responding to Defendants' extensive discovery requests, which required the class representatives to perform repeated search and production. *See* Gerstein Dec. at ¶ 79. Moreover, courts have recognized the risks inherent in filing suit as a named plaintiff on behalf of a class against an entity with which all class members transact business. *See Dial Corp.*, 317 F.R.D. at 439 ("[T]he decision to fire the first shot on behalf of the Class was fraught with risks. Notably, the named Plaintiffs in this case assumed a substantial risk in antagonizing a longstanding, power business partner…"). Here, that risk is inherent inasmuch as the class members are direct purchasers who transact business with Defendants on a regular basis.

Finally, the amount requested here is in line with awards made to named representatives in other Hatch-Waxman cases that Class Counsel has litigated.[11] Class Counsel therefore respectfully

[11] *See, e.g.*, *In re K-Dur Antitrust Litig.*, Civil Action No. 01-1652, Dkt No. 1057 at ¶ 12 (D.N.J. Oct. 5, 2017) (awarding $100,000 to class representative); *In re Provigil Antitrust Litig.*, Civil Action No. 2:06-cv-01797 (MSG), Dkt No. 870 at ¶ 30 (E.D. Pa. Oct. 15, 2015) (awarding $100,000 to each of four class representatives and $50,000 to each of two other class representatives); *In re Neurontin Antitrust Litig.*, Civil Action No. 02-1830 (FSH), Dkt No. 114 at ¶ 31 (D.N.J. Aug. 6, 2014) (awarding $100,000 to two class representatives); *In re Nifedipene Antitrust Litig.*, MDL No. 1515, Civil Action No. 1:03-MC-223 (RJL), Dkt No. 333 at ¶ 3 (D.D.C. Jan. 31, 2011) (awarding $60,000 to each of four class representatives, for a total of $240,000 in incentive awards); *Meijer, Inc. et al. v. Barr Pharmaceuticals, Inc.*, Civ. Action No. 05-2195 (CKK), Dkt. No. 210 at ¶ 17 (D.D.C. Apr. 20, 2009) (approving $50,000 to each of five class representatives for a total of $250,000 in incentive awards); *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 347 (E.D. Pa. 2007) ($75,000 incentive award); *In re Lupron Mktg. & Sales Practices Litig.*, MDL No. 1430, 2005 U.S. Dist. LEXIS 17456, at *24-25 (D. Mass. Aug.

request that the Court approve these appropriate and reasonable incentive awards to the named plaintiffs.

V. CONCLUSION

For the reasons set forth above and in the Gerstein Declaration, Class Counsel respectfully request that this Court enter an Order awarding Class Counsel fees in the amount of $48,666,666.70, *i.e.*, 33⅓% of the Settlement (including a *pro rata* share of the accrued interest), and reimbursement of expenses in the amount of $976,338.23. Class Counsel also respectfully request that this Court approve incentive awards of $75,000 for each of the class representatives for their efforts on behalf of the Class in the prosecution of this action.

Dated: October 13, 2017

Respectfully submitted:

/s/ Bruce E. Gerstein
Joseph Opper
Bruce E. Gerstein
Noah Silverman
Ephraim R. Gerstein
GARWIN GERSTEIN & FISHER LLP
88 Pine Street Fl. 10
New York, NY 10005
212-398-0055
bgerstein@garwingerstein.com
jopper@garwingerstein.com
nsilverman@garwingerstein.com
egerstein@garwingerstein.com

Lead Counsel for Direct Purchaser Class Plaintiffs

17, 2005) (awarding a total of $100,000 to named plaintiffs and noting that "the named plaintiffs participated actively in the litigation…"); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 535-36 (E.D. Mich. 2003) (awarding $75,000 to each of two corporate class representatives).

TAB 47A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

In re: Ranbaxy Generic Drug Application Antitrust Litigation	**MDL No. 19-md-02878-NMG**

MEMORANDUM & ORDER

GORTON, J.

This multi-district litigation involves five actions that were centralized in this Court and divided into two plaintiff classes against Ranbaxy Inc. and Sun Pharmaceutical Industries Limited (collectively, "Ranbaxy" or "defendants") for allegedly causing the delayed market entry of three generic drugs. After years of protracted litigation, the parties reached proposed settlement agreements in March, 2022.

Pending before the Court are motions by each of the two plaintiff classes for final approval of those settlements, as well as motions for attorneys' fees, litigation expenses and service awards for class representatives.

I. Background

The two plaintiff classes are composed of direct purchaser plaintiffs ("DPPs") and end-payor plaintiffs ("EPPs"). DPPs, such as wholesalers and distributors, purchase generic drugs directly from drug manufacturers. EPPs are third-party payors, such as health plans and insurance companies, that indirectly purchase and/or provide reimbursement for generic drugs at the end of the distribution chain from retailers and other intermediaries. Plaintiffs brought claims against Ranbaxy for violations of federal and state antitrust law, the federal Racketeer Influenced and Corrupt Organizations Act ("RICO") and state consumer protection statutes.

Two weeks before trial was set to commence, the parties notified the Court that they had reached global settlement agreements and preliminary approval of those settlements was subsequently allowed. Under the terms of the settlements, Ranbaxy will deposit $145,000,000 into a settlement fund for EPPs and $340,000,000 into a settlement fund for DPPs. The settlement funds, together with any interest accrued, will be used to pay: (1) taxes payable on the settlement funds, (2) any and all costs and expenses associated with issuing notice of the settlement to the classes and administering the settlement, (3) costs and expenses incurred by lead class counsel in connection

with the litigation, and (4) any Court-approved attorneys' fees, as well as Court-approved service awards to the named plaintiffs. If the Court grants final approval, the remainder of the settlement funds will be distributed to qualifying members of the respective classes in accordance with the allocation plans.

In exchange, plaintiffs have agreed, inter alia, to release defendants from liability for the claims arising from the conduct alleged. Class members have been notified as to the terms of the settlement, including the attorneys' fees requested, and there have been no objections from members of either class to date.

Counsel have also submitted motions seeking attorneys' fees, litigation expenses and service awards for class representatives. More specifically, counsel for DPPs seek: (1) attorneys' fees of $92,523,554 (which represents 27.5 percent of the net fund or a lodestar multiplier of 2.11), (2) reimbursement of $3,550,713 in expenses and (3) $40,000 service awards for each of the two class representatives. Correspondingly, counsel for EPPs seek: (1) attorneys' fees of $40,600,000 (which represents 28 percent of the net fund or a lodestar multiplier of 2.94), (2) reimbursement of $2,268,846 in

expenses and (3) $50,000 service awards for each of the two class representatives.

II. Motions for Final Settlement Approval

Federal Rule of Civil Procedure 23(e) provides the broad requirements for approval of a proposed settlement in class action litigation:

> [T]he court may approve [a settlement] only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). Although the First Circuit Court of Appeals has not provided supplemental guidance concerning the factors to be considered in assessing the fairness of a settlement, many courts in this Circuit have looked to those set forth by the Second Circuit Court of Appeals in City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974). See, e.g., New

England Carpenters Health Benefits Fund v. First DataBank, Inc., 602 F. Supp. 2d 277, 281 (D. Mass. 2009). Those factors are:

> (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

City of Detroit, 495 F.2d at 463.

The necessary assessment is, thus, holistic and incorporates "a wide variety of factors bearing on the central question of whether the settlement is reasonable in light of the uncertainty of litigation." Bussie v. Allmerica Fin. Corp., 50 F. Supp. 2d 59, 72 (D. Mass. 1999). Notwithstanding the responsibility of the district court to carefully assess the settlement, there is a presumption in its favor so long as parties engaged in arms-length negotiations after meaningful discovery. In re Tyco Int'l, Ltd. Multidistrict Litig., 535 F. Supp. 2d 249, 259 (D.N.H. 2007).

After taking all of this and the submissions of counsel into consideration, the Court finds that the proposed settlement satisfies those requirements and represents a "fair, reasonable,

and adequate" outcome to this litigation. That determination is supported by the complexities of class action litigation in the field of antitrust, the lack of objections to the settlement, the late stage at which the settlement was adopted and the risks associated with extending the litigation through trial. The settlement is also within the range of reasonableness when compared to other settlements in other generic delay antitrust cases. That the settlement is the result of arms-length negotiations weighs heavily in its favor, as does the quality of class counsel.

The Court therefore will allow plaintiffs' motions for final approval of the settlement insofar as they do not impact attorneys' fees.

III. Motions for Attorneys' Fees

A. Legal Standard

Counsel who recovers common funds for a class is entitled to reasonable attorneys' fees and reimbursement of expenses prior to the distribution of the balance to the class. Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980). Courts have wide discretion in awarding attorneys' fees. In re Thirteen Appeals Arising Out of San Juan, 56 F.3d 295, 307 (1st Cir. 1995). In addition to ensuring that class counsel is fairly compensated, the district court is obliged to function as "a quasi-fiduciary

to safeguard the corpus of the fund for the benefit of the plaintiff class." In re Fidelity/Micron Sec. Litig., 167 F.3d 735, 736 (1st Cir. 1990).

The district court may calculate attorneys' fees by either the percentage of the fund ("POF") method or the lodestar method. In re Thirteen Appeals, 56 F.3d at 307. The First Circuit has acknowledged the "distinct advantages" of the POF method, explaining that it is less burdensome, enhances efficiency and better approximates the marketplace dynamics. Id. Regardless of the method utilized, the goal of such a calculation is to compensate plaintiffs' counsel fairly for the labor provided, taking into account the risks they faced during the representation.

As a percentage of the relevant common fund, standard awards in the First Circuit range from 20% at the low end to 33% at the high end. Commonly, courts in this Circuit award fees between 25% (the benchmark) and 30%. See Conley v. Sears, Roebuck & Co., 222 B.R. 181, 187 (D. Mass. 1998); see also Roberts v. TJX Companies, Inc., 2016 WL 8677312 (D. Mass. Sept. 30, 2016) (33%); In re Puerto Rican Cabotage Antitrust Litig., No. 08-MD-1960(DRD), 2011 WL 4537726, at *9-10 (D.P.R. Sept. 13, 2011) (23%); In re Am. Dental Partners, Inc. Sec. Litig., No. 08-CV-10119-RGS, 2010 WL 1427404, at *1 (D. Mass. Apr. 9, 2010)

(22.5%); New Eng. Carpenters Health Benefits Fund v. 1st Databank, Inc., No. 05-CV-11148-PBS, 2009 WL 2408560, at *1-2 (D. Mass. Aug. 3, 2009) (20%); Sylvester v. Cigna Corp., 401 F. Supp. 2d 147 (D. Me. 2005) (33%). See generally Theodore Eisenberg & Geoffrey P. Miller, Attorneys' Fees & Expenses in Class Action Settlements: 1993-2008, J. Empirical Legal Stud. 248, 260 (2010) (Table 4) (finding that 20% was both the median and mean attorneys' fees awarded in the First Circuit between 1993 and 2008); Theodore Eisenberg, Geoffrey P. Miller & Roy Germano, Attorneys' Fees in Class Actions: 2009-2013, 92 N.Y.U. L. Rev. 937, 951 (2017) (Table 3) (finding the median attorneys' fees awarded in the First Circuit between 2009 and 2013 was 23% and the mean 26%).

This Session typically approves attorneys' fees of 25% or, sometimes, more but often reduces requested fees when they are deemed excessive. See Latorraca v. Centennial Techs. Inc., 834 F. Supp. 2d 25, 27 (D. Mass. 2011) (a securities fraud class action in which this Session reduced the fees awarded to 25% of the amount to be paid to class members rather than the initially requested 30%); Boyd v. Pepsi Beverages Company et al., 14-cv-12289 (D. Mass Feb. 18, 2016)(a FLSA class action in which this Session allowed attorneys' fees of 25% of the total gross value of the settlement); Kingsborough v. Sprint et al., 14-cv-12049 (D. Mass. June 3, 2015)(a property rights dispute in which this

Session approved attorneys' fees of 25% of the total gross value of the settlement); Tracey v. MIT, 16-cv-11620-NMG (D. Mass. May 29, 2020) (an ERISA class action in which this Session allowed attorneys' fees of 29% of the settlement fund where the lodestar calculation exceeded the 25% benchmark). Most recently, in Bettencourt v. Jeanne D'Arc Credit Union et al., 17-cv-12548-NMG (D. Mass. June 17, 2020), this Session decreased the requested attorneys' fees from 30% of the settlement fund to 27%, "splitting the difference" between the request and its usual benchmark of 25%.

The lodestar method, under which a lodestar multiplier is calculated based upon the total hours worked, is often used in this Circuit to cross-check the attorneys' fees calculated pursuant to the POF method. The typical range of the lodestar multiplier allowed by this Court is between one and 2.7. Most multipliers fall between one and four, although there is significant variation. See In re Relafen Antitrust Litigation, 231 F.R.D. 52, 82 (D. Mass 2005) (citing Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1050 (9th Cir. 2002)). See also Theodore Eisenberg et al., Attorneys' Fees in Class Actions: 2009-2013, (finding, between 2009 and 2013, the mean multiplier in common fund cases in the First Circuit was 2.4 and the mean multiplier in national antitrust cases was 1.61).

> A properly calculated lodestar allows the court to assess whether the multiplier being requested by counsel is justified by the complexity of the case, the risks of the litigation, and the benefit they conferred on the class.

Arkansas Tchr. Ret. Sys. v. State St. Bank & Tr. Co., 512 F. Supp. 3d 196, 239 (D. Mass. 2020), appeal dismissed sub nom. Arkansas Tchr. Ret. Sys. v. State St. Corp., No. 20-1365, 2020 WL 5793216 (1st Cir. Sept. 3, 2020), and aff'd in part, appeal dismissed in part sub nom. Arkansas Tchr. Ret. Sys. v. State St. Corp., 25 F.4th 55 (1st Cir. 2022) (citations omitted). See Stanger v. China Elec. Motor, Inc., 812 F.3d 734, 741 (9th Cir. 2016) ("Risk multipliers incentivize attorneys to represent class clients, who might otherwise be denied access to counsel, on a contingency basis.").

B. Application

Regardless of the precise formula by which the Court calculates attorneys' fees in this case, they will be immense due to the scope of this litigation, which has culminated in two proposed settlement funds totaling approximately $475 million. While plaintiffs effectively cite case law concerning the alleged delayed market entry of other generic pharmaceuticals, that precedent is of limited value in light of the relative magnitude of the amounts involved here. The Court must holistically determine what constitutes fair compensation under

these particular circumstances, given the enormity of the settlement and the relatively routine (albeit extensive) nature of the legal services rendered. In assessing attorneys' fees either as a percentage of the settlement fund or a multiple of the lodestar, it is necessary and appropriate to consider the funds at issue which, in this case, are colossal.

A brief survey of attorneys' fees awarded in similar cases arising from the alleged delayed market entry of generic pharmaceuticals in this District highlights the magnitude of both the settlement funds at issue here and, relatedly, the attorneys' fees requested. Among those cases, the modal fraction of the settlement fund awarded as attorneys' fees has been one-third, significantly higher than the fraction sought by counsel here. The total dollar amount of the funds in those prior cases was, however, significantly lower. See In re Solodyn Antitrust Litig., No. 14-md-2503, 2018 WL 7075881, at *2 (D. Mass. July 18, 2018) (Casper, J.) (awarding fees of $24,176,667 to direct purchaser counsel and $7,666,667 to end-payor purchasers, representing one-third of each respective settlement fund); In re Asacol Antitrust Litig., No. 1:15-CV-12730-DJC, 2017 WL 11475275, at *4 (D. Mass. Dec. 7, 2017) (Casper, J.) (awarding fees of $5,000,000, equaling one-third of settlement fund, for direct purchaser counsel); In re Prograf Antitrust Litig., No. 1:11-MD-02242-RWZ, 2015 WL 13908415, at *1 (D. Mass.

May 20, 2015) (Zobel, J.) (awarding fees of $4,416,667, equaling one-third of settlement fund, for indirect purchaser counsel); In re Relafen Antitrust Litig., 231 F.R.D. at 82 (Young, J.) (awarding fees of $22,311,000, equaling one-third of settlement fund, for indirect purchaser counsel).

The First Circuit Court of Appeals does not require courts to cross check the percentage of the fund against the lodestar calculation to determine the reasonableness of the requested attorneys' fees. See In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 307 (1st Cir. 1995).

> Nevertheless, the Court will perform the lodestar calculation as the Court finds that it is a pragmatic cross-check to ensure that the Court is not creating a windfall for Lead Counsel.

In re Puerto Rican Cabotage Antitrust Litig., 815 F. Supp. 2d 448, 464 (D.P.R. 2011). See Vizcaino, 290 F.3d at 1050 ("While the primary basis of the fee award remains the percentage method, the lodestar may provide a useful perspective on the reasonableness of a given percentage award."); Manual for Complex Litigation (Fourth) § 14.122 (2004) ("The lodestar is . . . useful as a cross-check on the percentage method."). That reference is particularly helpful here due to the magnitude of attorneys' fees under consideration.

Compared to the other generic delay cases cited supra, the conclusion is clear: the requested lodestar multipliers are on the high end of those awarded and, in fact, the lodestar multiplier requested from counsel for EPPs is substantially higher than any of those figures. See In re Solodyn Antitrust Litig., at *2 (lodestar multiplier of 0.82); In re Asacol Antitrust Litig., at *4 (D. Mass. Dec. 7, 2017) (lodestar multiplier of less than 0.60); In re Prograf Antitrust Litig., at *1 (D. Mass. May 20, 2015) (lodestar multiplier of 2.35); In re Relafen Antitrust Litig., 231 F.R.D. at 82 (lodestar multiplier of 2.02).

The Court is undoubtedly influenced by the immensity of the requested fees at issue. The Court declines, however, to apply strictly the logic of the declining-percentage rule that some jurists have applied to cases involving so-called "megafunds," i.e. settlements exceeding $100 million. The First Circuit has not addressed the advisability of applying such a rule and courts in this District have declined to do so. See Arkansas Tchr. Ret. Sys., 512 F. Supp. 3d at 239; In re Lupron Mktg. & Sales Pracs. Litig., No. 01-CV-10861-RGS, 2005 WL 2006833, at *6 (D. Mass. Aug. 17, 2005). See generally Newberg and Rubenstein on Class Actions § 15:81 (6th ed.).

Nevertheless, empirical research has revealed that "fee percentage is strongly and inversely associated with settlement size among all cases" and, at least for awards for settlements between $250 million and $500 million in 2006 and 2007, the mean and median awards were 17.8% and 19.5%, respectively. See Brian T. Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee Awards, 7 J. Empirical Legal Stud. 811, 839 (2010).

The Court acknowledges the particularities of this litigation, the substantial benefit conferred on plaintiff classes by counsel, the legal uncertainties involved in prosecuting the case, the financial risks to which counsel were exposed and the extensive timeline of the litigation. Nevertheless, the Court concludes that it is appropriate here to adjust significantly downward the attorneys' fees due, in part, to the extent to which this litigation was the successor of a civil settlement and criminal plea agreement into which Ranbaxy entered with the federal government in 2013. Thus, while some of the specific legal theories at issue in this case were novel, the allegations of wrongdoing at the core of the case were based upon findings known at the outset of the litigation and the financial risks inherent to litigation of this scope were certainly mitigated.

For that reason, and others, the Court finds that the attorneys' fees requested are excessive and that attorneys' fees totaling 20 percent of the settlement funds—$68,000,000 for the DPPs and $29,000,000 for the EPPs—are reasonable. Those attorneys' fees, which represent lodestar multipliers of 1.55 for the DPPs and 2.10 for the EPPs, represent awards sufficient to compensate counsel and to incentivize future litigation on behalf of plaintiffs similarly situated.

ORDER

For the forgoing reasons, the motions for final approval of the settlement agreements (Docket Nos. 595 and 600) are **ALLOWED**. Furthermore, the motions for attorneys' fees (Docket Nos. 597 and 603) are **ALLOWED**, in part, and **DENIED**, in part. Class counsel are awarded attorneys' fees in the amount of 20% of each respective common fund, plus interest accrued thereon, if any. Furthermore, class counsel will be reimbursed for the reasonable litigation expenses set forth in their motions and class representatives will be paid the service awards requested.

Counsel for DPPs are awarded: (1) attorneys' fees of $68,000,000, (2) reimbursement of $3,550,713.47 in expenses and (3) $40,000 service awards for each of the two class representatives. Counsel for EPPs are awarded: (1) attorneys' fees of $29,000,000, (2) reimbursement of $2,268,845.61 in

expenses and (3) $50,000 service awards for each of the two class representatives.

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated September 19, 2022

TAB 47B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE: RANBAXY GENERIC DRUG APPLICATION ANTITRUST LITIGATION	MDL No. 2878
THIS DOCUMENT RELATES TO: All End-Payor Actions	Master File No. 19-md-02878-NMG

MEMORANDUM OF LAW IN SUPPORT OF END-PAYOR LEAD CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES AND PAYMENT OF LITIGATION EXPENSES, AND APPLICATION FOR SERVICE AWARDS

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Pursuant to Rule 23(h) of the Federal Rules of Civil Procedure, Lead Class Counsel[1] for the End-Payor Class Plaintiffs ("EPPs") respectfully submit this memorandum of law in support of their motion (hereinafter, the "Fee and Expense Application") seeking an award of 28% of the $145,000,000 common fund ($40,600,000.00 plus interest) as attorneys' fees and $2,268,845.61 (1.6% of the common fund) as payment for Class Counsel's[2] litigation expenses. End-Payor Class Plaintiffs[3] also seek Service Awards totaling $50,000 for the two Class Representatives, United Food and Commercial Works Health and Welfare Fund of Northeastern Pennsylvania ("UFCW NEPA") and Louisiana Health Service & Indemnity Company d/b/a Blue Cross and Blue Shield of Louisiana and HMO Louisiana, Inc. ("BCBS LA") (collectively, the "Plaintiffs" or "Class Representatives") as compensation for the service that Plaintiffs provided to the Classes and the risks they undertook as Class Representatives.

I. INTRODUCTION

EPPs are third-party payors, entities such as health insurers and union-sponsored health and welfare funds, that pay for prescription drugs their members and insureds purchase. This Action[4] was brought on behalf of all EPPs in the United States who paid more than they otherwise would have for brand or generic Diovan, Nexium, and Valcyte, as a result of the alleged misconduct of Defendants Sun Pharmaceutical Industries Ltd. and Ranbaxy, Inc. ("Ranbaxy" or "Defendants"). Class Counsel marshalled its resources and effectively prosecuted the case nearly to trial, leading to a Settlement that provides real, tangible benefits to the Classes of thousands of

[1] "Lead Class Counsel" are: (1) Lowey Dannenberg, P.C. and (2) The Dugan Law Firm, APLC.
[2] "Class Counsel" are: (1) Lowey Dannenberg, P.C., (2) The Dugan Law Firm, APLC, (3) Young Law Group, P.C. and (4) Aylstock, Witkin, Kreis & Overholtz, PLLC. Young Law Group and Aylstock, Witkin, Kreis & Overholtz, PLLC are hereinafter referred to as "Additional Counsel."
[3] Unless otherwise defined herein, capitalized terms have the same meaning as in the Settlement Agreement dated April 8, 2022 ("Settlement Agreement"). ECF No. 587-1. Unless otherwise indicated, internal citations and quotation marks are omitted and ECF citations are to the docket for this MDL.
[4] *In re Ranbaxy Generic Drug Application Antitrust Litig*., 19-md-02878-NMG (D. Mass.).

EPPs. The Net Settlement Fund will be distributed to eligible Class Members upon filing of valid proofs of claim.

Class Counsel's recovery is significant in light of the risks involved in litigating this Action. Defendants fiercely contested EPPs at every turn. The most immediate risk of a potential adverse ruling involved the impending jury trial, which was two weeks away when Lead Class Counsel and Defendants reached this Settlement and would have almost certainly resulted in an appeal regardless of the verdict. Despite these risks, Class Counsel—who proceeded on a contingent fee basis, advanced millions of dollars in costs for experts and other expenses to ready the case for trial, and, collectively, brought their decades of experience to bear to litigate this case—secured substantial benefits on behalf of the Classes.

II. BACKGROUND[5]

A. Case Investigation and Pleadings[6]

On November 6, 2018, Lowey Dannenberg filed the first action, on behalf of Plaintiff UFCW NEPA and EPPs in the Eastern District of Pennsylvania. The complaint asserted novel legal theories related to antitrust monopolization and racketeering, requiring Lowey Dannenberg to devote significant time prior to filing the complaint to ensure that there was a sound legal basis for the claims brought under every one of the twenty-one state antitrust laws, fifteen state consumer protection laws, and federal racketeering law. On February 11, 2019, the UFCW Action was transferred to this Court for coordinated proceedings with three actions of the Direct Purchaser Plaintiffs ("DPPs"). Following similar internal investigation and analyses from the perspective of

[5] The Court is aware of the background and procedural history of this case and so it will only be briefly summarized here. A more complete description is available in the Joint Declaration of Gerald Lawrence, Esq. and James R. Dugan II, Esq. in support of (A) End-Payor Plaintiffs' Unopposed Motion for Final Approval of Action Settlement and (B) End-Payor Lead Class Counsel's Motion for an Award of Attorneys' Fees, Litigation Expenses, and Service Awards (the "Joint Decl.") at ¶¶12-86.

[6] *See* Joint Decl., at ¶¶12-23.

a large health insurer, on February 13, 2019, The Dugan Law Firm filed an action on behalf of Plaintiff BCBS LA in this Court. Lead Class Counsel filed the Consolidated End-Payor Complaint with Jury Demand on April 19, 2019. After two rounds of fiercely contested motion to dismiss briefing, Lead Class Counsel sought leave to file the Second Amended Consolidated End-Payor Class Action Complaint and Jury Demand. Defendants opposed leave to amend, which the Court granted on March 1, 2021. On March 16, 2021, Defendants filed their Answer.

B. Class Counsel Engages in Significant Fact and Expert Discovery[7]

Beginning in April 2019, the parties engaged in substantial fact and expert discovery. Lead Class Counsel worked in conjunction with counsel for the DPPs (collectively with the EPPs, the "purchasers") to gather and synthesize facts, including documents, data and witness testimony from, among others: Defendants, alleged co-conspirators in the RICO enterprise, the FDA, and third-party drug manufacturers. In all, Lead Class Counsel, with assistance of Additional Counsel, reviewed millions of pages of documents produced by Defendants and third parties. Despite the challenges imposed by the COVID-19 pandemic, Lead Class Counsel overcame those challenges and twenty (20) fact witnesses and (20) expert witnesses were deposed.

C. The EPP Classes Are Certified[8]

Lead Class Counsel engaged in substantial work with their experts in order to prepare their class certification filing. First, Lead Class Counsel worked with their damages expert, Dr. Rena Conti, to show that there was injury to substantially all of the class members using common proof. Lead Class Counsel and Dr. Conti analyzed documents and data from the Class Representatives, Defendants, and third parties to demonstrate historic trends in the generic pharmaceutical marketplace and in third-party payor purchasing habits. Lead Class Counsel also worked with Dr.

[7] *See* Joint Decl. at ¶¶24-45.
[8] *See* Joint Decl. at ¶¶46-58.

Conti to utilize nationwide market claims data for the three drugs at issue to show impact and the scope of damages for nationwide and state-specific classes.

Lead Class Counsel recognized that recent class certification decisions in the First Circuit presented significant hurdles to proving class certification. To that end, Lead Class Counsel hired an additional expert, Ms. Laura Craft, to opine on matters related to ascertainability of the Class Members. This required Lead Class Counsel to invest hundreds of additional hours to analyze documents and data collected in discovery with their expert to show the richness of pharmaceutical data and the ease at which such data could be used to identify class members.

On November 2, 2020, Lead Class Counsel filed their motion for class certification. Lead Class Counsel also filed opening reports for both Dr. Conti and Ms. Craft on November 2, 2020. On February 10, 2021, Defendants filed their opposition. Defendants challenged EPPs' ability to show class-wide injury on several fronts, claiming that their expert's methodology of using average pricing masked significant variation in pricing, and that various subgroups, such as Medicare Part D plans and so-called "brand loyalists," within the EPPs' classes were not injured. Defendants also lodged multiple arguments rooted in EPPs' state law claims. Finally, relying on the First Circuit's recent decision in *In re Asacol Antitrust Litig.*,[9] Defendants claimed that EPPs' classes were not ascertainable because they had no administratively feasible methodology for applying class exclusions and eliminating uninjured class members.

Lead Class Counsel worked with both Ms. Craft and Dr. Conti to thoroughly rebut the assertions in Defendants' opposition and in the report from defense expert Dr. Bruce Strombom in their rebuttal reports. After oral argument from Lead Class Counsel, assisted with a slide presentation, the Court certified the EPP Classes.

[9] 907 F.3d 42, 53–54 (1st Cir. 2018).

On May 28, 2021, Defendants filed a petition pursuant to Fed. R. Civ. P. 23(f) seeking permission to appeal the class certification Order. While the Court's May 14, 2021 Order granted both the DPP and EPP class certification motions, Defendants only sought to appeal the certification of the End-Payor Classes under Rule 23(f), claiming the Court's decision conflicted with First Circuit precedent because the EPPs could not prove classwide injury through common proof, rebates were relevant to antitrust injury, and the EPPs could be "brand-loyal." Lead Class Counsel vigorously opposed Defendants' arguments and pointed to the substantial law developed within the First Circuit and others that agreed with this Court's decision, and the evidence adduced through discovery and in expert analysis that supported the EPPs' position. The First Circuit denied the petition on December 21, 2021.

While Defendants' Rule 23(f) petition was pending, this Court approved EPPs' plan for providing class notice of the certified class action and appointed A.B. Data, Ltd. as Notice Administrator on October 26, 2021. On or about November 5, 2021, notice was disseminated. Only three opt-out requests were filed before the deadline of December 20, 2021.

D. Summary Judgment and *Daubert* Motions are Filed[10]

The parties filed their respective motions for summary judgment on May 17, 2021. On the same day the parties also filed their *Daubert* motions to exclude the opposing parties' experts. After full briefing and oral argument held on October 22, 2021, the Court denied all summary judgment motions on November 22, 2021. At the Status Conference held on December 21, 2021, the Court denied all *Daubert* motions.

E. Trial Preparations[11]

Lead Class Counsel was actively engaged in every facet of trial preparations. This included

[10] *See* Joint Decl.at ¶¶59-65.
[11] *See* Joint Decl. at ¶¶66-80.

designating certain witness depositions, crafting portions of the exhibit list, drafting jury instructions, voir dire questions, and verdict slip questions. Lead Class Counsel was preparing to be primary examiner for six live witnesses at trial, and to deliver opening and closing arguments to the jury.

F. Settlement Negotiations[12]

Beginning in October 2021, Lead Class Counsel and Defendants began engaging in settlement discussions. On November 15-16, 2021, Lead Class Counsel engaged in a two-day in-person mediation with Kenneth Feinberg. After the parties failed to reach resolution at the mediation, periodic informal conversations between Lead Class Counsel and Mr. Feinberg continued.

Beginning on February 11, 2022, Lead Class Counsel and Defendants resumed active settlement negotiations through Mr. Feinberg until Defendants made an offer on March 21, 2022 that was within the range Lead Class Counsel had analyzed to be acceptable. After several additional days of negotiations, and with additional assistance from Mr. Feinberg to finalize certain terms, Lead Class Counsel executed their Settlement Agreement with Defendants on April 8, 2022. The Settlement was preliminarily approved on April 28, 2022.

Throughout the litigation, Lead Class Counsel conducted a thorough, efficient prosecution, and in the process avoided duplication of work among themselves or in their collaboration with DPPs' counsel. In light of their efforts throughout the litigation from inception through to the settlement, the Fee and Expense Application is reasonable. The attorneys' fee request is justified under the percentage-of-the-fund approach and reflects a reasonable multiplier on Class Counsel's lodestar. If awarded, Lead Class Counsel will allocate the fees among Class Counsel in proportion

[12] *See* Joint Decl. at ¶¶81-86.

to their contributions to this case.[13] The expenses for which Class Counsel seeks payment were reasonably incurred to achieve this excellent result for the Classes and should be paid. Finally, the Class Representatives devoted significant time and effort to this litigation, at substantial personal risk, and Service Awards of $25,000 to each Class Representative are also appropriate.

III. ARGUMENT[14]

A. THE REQUESTED ATTORNEYS' FEE AWARD IS FAIR AND REASONABLE

In class action litigation, attorneys whose work results in a common benefit for class members are entitled to fair and reasonable fees for their work, subject to the court's discretion.[15] The First Circuit generally favors the "percentage-of-the-fund" method, in which the parties' settlement establishes a "common fund" of money for the benefit of class members and the court may "shape[] the counsel fee based on what it determines is a reasonable percentage of the fund recovered for those benefitted by the litigation."[16] The percentage-of-the-fund method has distinct structural advantages for common fund cases due to its ease in administration and efficiency, as well as providing "appropriate financial incentives" necessary to "attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so."[17] From a policy standpoint, "the [percentage] method of calculating fees more

[13] *See In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 223 (2d Cir. 1987) (recognizing class counsel may distribute general fee award in "some relationship to the services rendered").
[14] Class Counsel's efforts on behalf of the Classes are described in the Joint Decl. and in the supporting Class Counsel declarations attached thereto as Exhibits 1 through 4.
[15] *See, e.g.*, FED. R. CIV. P. 23(h) ("[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."); *see also In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995) (attorneys in common fund cases entitled to reasonable attorney fees from fund); *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 349 (D. Mass. 2015) ("Attorneys in a certified class action may be awarded reasonable fees and costs."); *In re Volkswagen & Audi Warranty Extension Litig.*, 89 F. Supp. 3d 155, 164 (D. Mass. 2015) (reasonable fee is question in sound discretion of trial judge).
[16] *In re Thirteen Appeals*, 56 F.3d at 305; *see also Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980).
[17] *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005); *see also In re Thirteen Appeals*, 56 F.3d at 308.

appropriately aligns the interests of the class with the interests of class counsel—the larger the value of the settlement, the larger the value of the fee award."[18] Courts have discretion to cross-check the reasonableness of this award with the "lodestar" method, in which the court calculates the fee award by "determining the number of hours productively spent on the litigation and multiplying those hours by reasonable hourly rates."[19] The resulting lodestar may be increased by a multiplier based on factors including the risks related to pursuing contingent fees in the case, delay in payment, quality of representation, novelty of the law and public interest.[20] As discussed below, the requested fee award of $40,600,000 is objectively fair and reasonable under both the percentage-of-the-fund method and lodestar method.

1. The Percentage-of-the-Fund Method Supports the Lead Class Counsel's Fee Request

Although the First Circuit has not endorsed a specified set of factors to be used in evaluating a fee request's reasonableness, district courts in this Circuit generally consider the following factors: (1) the risk of the litigation and nonpayment; (2) the fee awards in similar cases; (3) the complexity and duration of the litigation; (4) the skill, experience, and efficiency of the attorneys involved; (5) the amount of time devoted to the case by counsel; (6) public policy considerations; and (7) the benefit to the class.[21] When many of these factors are present, courts will often award a larger percentage of the fund (under the percentage-of-the-fund method) and/or

[18] *Bussie v. Allmerica Fin. Corp*., No. 97-40204-NMG, 1999 WL 342042, at *2 (D. Mass. May 19, 1999).
[19] *In re Thirteen Appeals*, 56 F.3d at 305, 307 (noting percentage-of fund method "better approximates the workings of the marketplace" because it "is result-oriented rather than process-oriented, while lodestar method "encourages lawyers to expend excessive hours" on the case).
[20] *See Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 951 (1st Cir. 1984); *In re Volkswagen*, 89 F. Supp. 3d at 165 ("A case that does not involve any novel issues of law or implicate the public interest, for example, may be a poor candidate for an attorneys' fees multiplier.").
[21] *See In re Cabletron Sys., Inc. Sec. Litig*., 239 F.R.D. 30, 38 (D.N.H. 2006) (multi-factor test common approach to determine reasonableness of fee award); *accord In re Neurontin Mktg. & Sales Practices Litig*., 58 F. Supp. 3d 167, 170 (D. Mass. 2014) (same); *In re TJX Companies Retail Sec. Breach Litig*., 584 F. Supp. 2d at 401 (noting typical factors); *In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 457-58 (D.P.R. 2011) (same); *In re Relafen Antitrust Litig*., 231 F.R.D. 52, 79 (D. Mass. 2005) (same).

a higher multiplier (under the lodestar method).[22] Here, all of these factors favor Lead Class Counsel's fee request.

a) This Case Presented Substantial Risks from Inception through Trial

"[M]any cases recognize that the risk [of non-payment] assumed by an attorney is perhaps the foremost factor in determining an appropriate fee award."[23] "A contingency fee arrangement often justifies an increase in the award of attorneys' fees…[otherwise] very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money especially in light of the risks of recovering nothing."[24] "Where[] lead counsel undertook this action on a contingency basis and faced a significant risk of non-payment, this factor weighs more heavily in favor of rewarding litigation counsel."[25]

This case was litigated on a fully contingent basis and presented a substantial risk of non-payment. For almost four years, Lead Class Counsel, assisted by Additional Counsel, devoted thousands of hours of attorney time and millions of dollars in expenses investigating the facts underlying the EPPs' claims, defending against Defendants' various motions, certifying a litigation class and preparing for trial, work for which there was no guarantee counsel would ever be compensated. The complexity of generic delay suits as well as Ranbaxy's vigorous defense necessitated Lead Class Counsel's considerable investment of time and resources, to advance EPPs' claims and achieve the substantial settlement reached in this case.

Lead Class Counsel also bore challenges that were unique to litigating on behalf of classes of indirect purchasers. For instance, because *Illinois Brick Co. v. Illinois*[26] bars indirect

[22] *See Grendel's Den*, 749 F.2d at 951.
[23] *In re Lupron Mktg. & Sales Practices Litig*., No. MDL 1430, 2005 WL 2006833, at *4 (D. Mass. Aug. 17, 2005).
[24] *Id.*; *see also In re TJX*, 584 F. Supp. 2d at 398 (acknowledging that fee may be enhanced to account for the contingency risk).
[25] *Medoff v. CVS Caremark Corp*., No. 09-cv-554-JNL, 2016 WL 632238, at *9 (D.R.I. Feb. 17, 2016).
[26] 431 U.S. 720 (1977).

purchaser claims under federal antitrust law, Lead Class Counsel brought EPPs' antitrust claims under numerous individual state antitrust and consumer protection laws. This strategy required Lead Class Counsel to navigate several challenges. As just one example, it was unclear at the outset of the litigation whether the ruling on preemption in *Buckman Co. v. Plaintiffs' Legal Comm.*[27] and its progeny would apply to EPPs' state law claims.[28] Additionally, recent class certification decisions in the First Circuit, including the decisions in *In re Intuniv Antitrust Litig.*[29] and *In re Asacol Antitrust Litig.*,[30] presented significant hurdles to EPPs' prosecution of the case on a class-wide basis, as demonstrated by other decisions in currently pending matters.[31] Defendants' attempt to appeal only the EPPs' class certification ruling further highlights these risks.[32] Despite these additional uncertainties, Lead Class Counsel took the considerable risks of retaining a new expert to combat class certification, at their own expense, and invested hundreds of hours of additional attorney time, for which they might never have been compensated.

Trying this case would have presented considerable additional risks, as reflected in the mixed results of other recent antitrust trials.[33] Though contested by EPPs, in their proposed verdict slip Defendants asserted questions about the statute of limitations, *Noerr-Pennington* Immunity, and mail and wire fraud, concluding with byzantine damages questions that had disjunctive phrasing even counsel could not follow.[34] If even a single lay juror declined to find for EPPs on

[27] 531 U.S. 341, 347 (2001).
[28] *See* Joint Decl., at ¶19.
[29] No. 1:16-CV-12396-ADB, 2019 WL 3947262, at *1 (D. Mass. Aug. 21, 2019) (denying IPP class certification).
[30] 907 F.3d 42 (1st Cir. 2018) (denying EPP class certification).
[31] *See In re Niaspan Antitrust Litig.*, No. 13-MD-2460, 2020 WL 2933824 (E.D. Pa. June 2, 2020) (denying EPP class certification over predominance concerns).
[32] *See* Joint Decl., at ¶55.
[33] *See, e.g., In re Nexium Antitrust Litig.*, 842 F.3d 34 (1st Cir. 2016) (affirming verdict and entry of judgment for defendants following a six-week jury trial in another generic suppression suit); *In re Wholesale Grocery Prods. Antitrust Litig.*, 957 F.3d 879 (8th Cir. 2020) (affirming verdict and entry of judgment for defendants).
[34] At the point the Settlement was reached, the Court had not yet issued a final verdict slip.

any one of these issues, EPPs would have recovered nothing. In addition, even if EPPs were to succeed in establishing liability, the End-Payor Classes would have been required to prove damages. Defendants' expert asserted in his report, and likely would have at trial, that EPPs were entitled as little as no damages for all three drugs.[35]

Nor would a favorable verdict have resolved the litigation. Defendants appealed, or attempted to appeal, nearly every major ruling that went against them. When the DPP and EPP Classes were certified in the Court's May 14, 2021 class certification Order, Defendants only attempted to appeal EPPs' class certification. Defendants almost certainly would have appealed any verdict in favor of EPPs, and vice versa, further jeopardizing and delaying any class recovery.

b) The Fee Award Is Reasonable in Light of Fee Awards in Other Generic Suppression Lawsuits

Lead Class Counsel's twenty-eight percent attorneys' fee request is firmly supported by fee awards in similar cases.[36] In this Circuit, percentage fee awards range from 20% to 35% of the fund.[37] End-payor generic suppression cases share certain characteristics, such as subject matter complexity, voluminous discovery and experts, class certification difficulties, and sophisticated and aggressive defense counsel, so the most appropriate comparators are attorneys' fees awarded in such suits. Among comparable end-payor generic suppression class actions, fees of 28% or greater are by far the most common.[38] Lead Class Counsel are aware of attorneys' fee awards in eighteen end-payor generic suppression class actions over the past decade-and-a-half. In fifteen of these cases, fees of 33% or greater were awarded, including in all of the twelve most recent, four from this Circuit; in two cases, fees between 30% and 33% were awarded; and in three cases, fees

[35] *See* Strombom Report, ECF No. 331-13 at ¶8.
[36] *See* Exhibit 6 to the Joint Decl., Chart of Attorneys' Fee Awards in End-Payor Generic Suppression Class Action Cases.
[37] *In re Neurontin Mktg. & Sales Pracs. Litig.,* 58 F. Supp. 3d 167 (D. Mass. 2014).
[38] *See* Ex. 6 to Joint Decl.

between 25% and 30% were awarded.[39] Moreover, reflecting the quality of the results Lead Class Counsel obtained, the $145 million recovery is among the largest settlements in recent end-payor cases.[40]

Here, Class Counsel's unreimbursed efforts over the course of nearly four years culminated in one of the largest settlements for end payors in recent history and required considerable expenditure of skill, risk, time, and resources. Whether those efforts would result in any recovery was unknown up until two weeks before trial in this matter was set to begin. Under the circumstances, Class Counsel's fee request is not only in-line with fee awards in similar cases, but also extremely reasonable.

c) Class Counsel Are Highly Skilled and Possess Extensive Expertise Litigating Pharmaceutical Class Actions

Lead Class Counsel are among the most experienced class action and antitrust firms in the country. In this case, Lead Class Counsel brought to bear their decades of antitrust and complex litigation experience, including their extensive experience representing third party payors in similar suits against pharmaceutical manufacturers and serving as lead and executive committee counsel in many of the nation's largest and most significant pharmaceutical antitrust cases.[41]

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[39] *See* Ex. 6 to Joint Decl.; *see also In re Loestrin 24 Fe Antitrust Litig.*, No. 1:13-MD-2472-WES-PAS (D.R.I. Feb 6, 2020), ECF No. 1401-4 (awarding 33% attorney fees)*; In re Solodyn (Minocycline Hydrochloride) Antitrust Litig*., No. 1:14-md-02503-DJC (D. Mass. July 18, 2018), ECF No.1176.

[40] *See* Ex. 6 to Joint Decl. This Court has recognized that "no special standards or presumptions categorically to reduce fee awards" apply in so-called "mega-fund" cases, where the settlement is generally $100 million or more, and federal district courts across the country have routinely awarded class counsel fees in excess of 30% in these cases. *Arkansas Tchr. Ret. Sys. v. State St. Bank & Tr. Co.*, 512 F. Supp. 3d 196, 239 (D. Mass. 2020); *see also In re Urethane Antitrust Litig*., No. 04-1616-JWL, 2016 WL 4060156, at *6 (D. Kan. July 29, 2016) (awarding 33.33% fee on $835 million settlement and a 3.2 multiplier, noting "Counsel's expert has identified 34 megafund cases with settlements of at least $100 million in which the court awarded fees of 30 percent or higher"); *Dahl v. Bain Capital Partners, LLC*, No. 07-cv-12388 (D. Mass. Feb 2, 2015), ECF No. 1095 (awarding 33% fee of $590 million settlement).

[41] *See e.g. In re Generic Pharmaceuticals Pricing Antitrust Litigation*, No. 16-md-2724 (E.D. Pa.) (Lowey Dannenberg representing three direct-action plaintiffs and Dugan Law Firm on plaintiffs' steering committee); *Blue Cross Blue Shield Ass'n, et al. v. GlaxoSmithKline LLC*, No. 13-4663-JS (E.D. Pa.) (Lowey Dannenberg representing forty health insurance plans alleging RICO violations as a result of misrepresentations about safety of drugs manufactured at unsafe plant); *In re: National Prescription Opiate Litigation*, No. 17-md-02804 (N.D. Ohio) (Dugan Law Firm member of plaintiffs' executive committee).

Despite facing considerable obstacles, Class Counsel were able to employ their skill and experience here to obtain an excellent recovery for the End-Payor Classes. This suit was particularly complex, as it involved multiple liability theories (i.e., antitrust, consumer protection and RICO) and required a deep understanding of patent, antitrust, and pharmaceutical regulatory law, as well as the facts particular to this case. Ranbaxy, a multi-national pharmaceutical company, retained counsel who employed an aggressive litigation strategy. Accordingly, the quality of representation provided by Class Counsel supports the fee request.

d) This Case Was Extremely Complex

"The complexity of [] antitrust law is well known."[42] "[A]ntitrust class actions are notoriously complex, protracted, and bitterly fought."[43] In antitrust cases, "[t]he 'best' case can be lost and the 'worst' case can be won, and juries may find liability but no damages. None of these risks should be underestimated."[44] This case was no exception. Lead Class Counsel, on behalf of the EPPs, asserted an attempted monopolization theory. As to two of the three drugs, Lead Class Counsel would have had to persuade the jury that Defendants exerted monopoly power for drugs they had not yet sold. On top of antitrust law and damages economic damages theories that are present in antitrust cases, the case required mastery in patent and drug law, and competency in the science and manufacturing processes behind pharmaceutical products. For example, Lead Class Counsel was preparing an expert to testify at trial on bioequivalence testing of Nexium for administration through nasogastric tubes. The RICO claim further required an understanding of racketeering law. Defendants' aggressive litigation strategy added to this complexity.

[42] *Puerto Rican Cabotage*, 815 F. Supp. 2d at 459.
[43] *Id*.
[44] *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 127 (N.D. Ill. 1990); *see also In re Flonase Antitrust Litig*., 951 F. Supp. 2d 739, 743 (E.D. Pa. 2013) ("Antitrust class actions are particularly complex to litigate").

e) Class Counsel Litigated with Diligence and Efficiency

The extensive time and effort Class Counsel expended in prosecuting this action favors Counsel's requested fee award.[45] In total, Class Counsel devoted 18,733 hours to pursuing, and ultimately obtaining, a recovery on behalf of the End-Payor Classes. The amount of time Class Counsel invested was necessary and appropriate in light of the length of the litigation, the complexity of the claims and defenses, and the prowess of the Defendants' attorneys. The extensive efforts taken to achieve and maintain certification of the Classes, described in detail in section II.C above, is just one piece of the substantial work Class Counsel expended in all aspects of the case. Class Counsel actively litigated this case for almost four years. During that period, as described above and in the accompanying declaration, Lead Class Counsel, as assisted by Additional Counsel, briefed and largely defeated, two rounds of motions to dismiss; engaged in extensive discovery; successfully obtained certification of the End-Payor Classes and defeated an attempted appeal to the First Circuit; briefed summary judgment motions; filed and defended against *Daubert* challenges and motions *in limine*; prepared the case for trial, and successfully negotiated a substantial settlement for the End-Payor Classes.[46]

In performing these tasks for the benefit of the End-Payor Classes, Lead Class Counsel made every effort to be efficient, in terms of both time spent and ensuring counsel and staff handled these tasks with appropriate skill and experience. Lead Class Counsel reviewed the time to ensure that all work performed was for the common benefit, nonduplicative, or excessive. To that end, each firm was notified that billing spent in connection with the leadership negotiations, certain administrative tasks, and this attorneys' fee and expense request would be disallowed. In order to

[45] *Puerto Rican Cabotage*, 815 F. Supp. 2d at 461 (where counsel "spent significant, but not excessive, time prosecuting the instant action…this factor points in favor of Lead Counsel's fee request").
[46] *In re Relafen*, 231 F.R.D. at 80.

avoid duplication of effort, Lead Class Counsel worked together with counsel for the DPPs to divide tasks and focus on the pertinent legal questions and factual record. When appropriate, counsel for the EPPs and DPPs groups jointly retained experts, ensuring that the purchasers spoke with a single voice on common issues and reducing each group's costs.

f) The Classes Substantially Benefit from the Settlement

The benefits "actually accruing to the class is an important consideration in assessing the reasonableness of the fee award."[47] This is to ensure that the class action mechanism "delivers relief into the hands of those in whose name it was established-the class."[48]

The Settlement here represents an excellent recovery for End-Payor Class Members. Lead Class Counsel obtained a substantial recovery of $145,000,000 for the benefit of the thousands of EPPs constituting the Classes. The Settlement is all cash, is not based on the claims received, and does not permit any reversion of funds to Defendants. As a result, to the extent any Class Members do not submit claims, that portion of the Net Settlement Fund will be redistributed to those Class Members that do submit claims. The EPPs' $145 million Settlement is among the largest in recent generic suppression end-payor cases, and more than three times as large as the typical end-payor settlement.[49] Class Members will greatly benefit.

g) Class Counsel's Requested Fee Furthers the Public Interest in Incentivizing End-Payor Suits Challenging Anticompetitive Practices by Pharmaceutical Companies

Class Counsel's attorneys' fees request is consistent with public policy objectives. Courts have recognized that attorneys' fee awards should reflect the important goal of "providing lawyers with sufficient incentive to bring common fund cases that serve the public

[47] *In re TJX*, 584 F. Supp. 2d at 402.
[48] *Id*. at 406.
[49] *See* Joint Decl. at Ex. 6.

interest."[50] Antitrust class actions advance the public interest both by deterring predatory behavior and compensating those who have been wronged.[51] "In the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation."[52]

The rising cost of pharmaceuticals is among the most pressing issues facing our country.[53] The public interest in attracting experienced and sophisticated litigators is particularly salient in suits challenging anticompetitive practices in the health care industry, as drug companies think of new ways to game the system, at the expense of EPPs. Once they're found out, defendant pharmaceutical companies have vast resources and retain top-tier defense firms that typically pursue aggressive litigation strategies. Reasonable attorneys' fees are necessary to ensure that such suits attract equally adept class counsel who are incentivized to invest the time and resources necessary to obtain recoveries for the class. The End-Payor Classes contain not only health insurers, but also small employer and union-sponsored health and welfare funds, like Class Representative UFCW NEPA. Absent the class action vehicle, these small plans most likely would have no recourse against rampant industry abuse.[54] The benefits of these actions are felt not only by class members, but ripple out to the public and future plaintiffs, as favorable rulings push the law forward for future cases.[55]

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[50] *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 51 (2d Cir. 2000).
[51] *Lupron*, 2005 WL 2006833, at *6 ("The public interest is also served by the defendants' disgorgement of the proceeds of predatory marketplace behavior.").
[52] *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2d Cir. 1973).
[53] Ashley Kirzinger et al., *KFF Health Tracking Poll – May 2021: Prescription Drugs*, KAISER FAMILY FOUNDATION (June 3, 2021), https://www.kff.org/health-costs/poll-finding/kff-health-tracking-poll-may-2021/prescription.
[54] *See Puerto Rican Cabotage,* 815 F. Supp. 2d at 463 ("Class action plaintiffs' attorneys provide an invaluable service by aggregating the seemingly insignificant harms endured by a large multitude into a distinct sum where the collective injury can then become apparent."); *Mazola v. May Dep't Stores Co*., No. 97-cv-10872-NG, 1999 WL 1261312, at *4 (D. Mass. Jan. 27, 1999) (class actions "give[] voice to relatively small claimants who may not be aware of statutory violations or have an avenue to relief. . . . the only way in which to make such actions economically feasible is to award [attorneys' fees.]").
[55] Lead Class Counsel's efforts here benefitted class members in other pending litigation. *See, e.g.,* Notice of

2. The Lodestar Cross-Check Further Supports the Reasonableness of Class Counsel's Fee

Class Counsel's lodestar confirms the reasonableness of their fee request. When lodestar is used as a cross-check, "the focus is not on the 'necessity and reasonableness of every hour' of the lodestar, but on the broader question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys."[56] Class Counsel expended over 18,733 hours resulting in a total lodestar of more than $13,804,000.[57] These hours were reasonable and necessary to litigate this case effectively and to achieve the best possible recovery on behalf of the Classes. The Settlement was only reached after Class Counsel conducted an extensive factual investigation and legal analysis. As described above and in the Joint Declaration, Lead Class Counsel devoted significant time and efforts to litigating this action. Given the (relatively) short but intense duration of the case over the past four years, the hours Class Counsel accrued for all of this work are reasonable.

Additionally, the billing rates Class Counsel charged for this work are reasonable. Reasonable hourly rates are those rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."[58] When a case is national in scope, the relevant community may be a location other than the forum, or even the national legal community, and the relevant rates are the out-of-town or "nationally prevailing rates" for similar attorneys' services.[59] Here, the litigation required the expertise of counsel experienced in class

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Supplemental Authority in Support of Motion for Class Certification by End-Payor Plaintiffs, *In re: Opana ER Antitrust Litig.*, 1:14-cv-10150 (N.D. Ill. May 18, 2021), ECF No. 722.

[56] *Tyco Intern., Ltd. Multidistrict Litig.*, 535 F. Supp. 2d at 270.

[57] Joint Decl., at ¶¶91-93.

[58] *Giorgio v. Duxbury*, No. 12-11171-LTS, 2016 WL 3983232, at *2 (D. Mass. July 25, 2016).

[59] *See, e.g., Williams v. Poulous*, Nos. 94-2057, 94-2058, 1995 WL 281451, at *4 (1st Cir. May 12, 1995) ("out-of-town rates may be applied if the complexities of a particular case require that particular expertise of non-local counsel . . . or 'when the case is an undesirable one which capable attorneys within the forum community are not willing to prosecute or defend[.]'"); *Spruill v. Alexander*, No. 09-292S, 2011 WL 2413837, at *4-5 (D.R.I. Mar. 31, 2011); (applying out-of-town rates because of attorneys' expertise); *Lucas v. Kmart Corp.*, No. 99-cv-01923-JLK-

actions and the highly specialized area of generic drug suppression cases on behalf of EPPs. Class Counsel brought claims on behalf of nationwide classes, as well as state subclasses under the laws of several states. Class Counsel are based out-of-state, *i.e.*, New York, Pennsylvania, and Louisiana. Class Counsel's rates are comparable to those charged in national, complex class actions, and have been previously accepted by this Court.[60]

Class Counsel worked to ensure that the reported lodestar is based only on the time spent for the common benefit of the End-Payor Classes. As described above, each Class Counsel firm's time reports were reviewed by Lead Class Counsel and certain time was excluded. Class Counsel have also submitted declarations from each firm providing additional detail on the work performed, as well as support for their hourly rates.[61] The twenty-eight percent fee request represents only a moderate enhancement, a 2.94 multiplier, over Class Counsel's reported lodestar. This enhancement appropriately reflects the fact that counsel performed all work on a contingent basis, forgoing payment for several years. Indeed, courts, including this one, have recognized that multipliers greater than that requested here are reasonable in comparable suits, and so should it be deemed here.[62]

B. THE REQUESTED EXPENSES ARE REASONABLE

Class Counsel seeks reimbursement of $2,268,845.61 in litigation expenses that were

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CBS, 2006 WL 2729260, at *4 (D. Colo. July 27, 2006) ("[T]he relevant community for purposes of determining a reasonable billing rate for Class Counsel likely consists of attorneys who litigate nationwide, complex class actions.").

[60] *See Barr v. Drizly, LLC*, No. 1:20-CV-11492 (D. Mass. Nov. 4, 2021) (ECF. No. 72) (awarding attorney fees).

[61] *See* Exs. 1 through 4 to Joint Decl..

[62] *See, e.g., Mooney v. Domino's Pizza, Inc.,* No. 1:14-cv-13723, 2018 WL 10232918, at *1 (D. Mass. Jan. 23, 2018) (applying a lodestar multiplier of 4.77); *Gordan v. Mass. Mut. Life Ins. Co.,* No. 13-cv-30184, 2016 WL 11272044, at *3 (D. Mass. Nov. 3, 2016) (applying a lodestar multiplier of 3.66)*; In re Neurontin Mktg. and Sales Practices Litig.,* 58 F. Supp. 3d 167 (D. Mass. 2014) (applying a lodestar multiplier of 3.32;) *New England Carpenters Health Benefits Fund v. First Databank, Inc.,* No. 05-11148, 2009 WL 2408560, at *2 (D. Mass. Aug. 3, 2009) (applying a lodestar multiplier of 8.3); *Bussie*, 1999 WL 342042 (awarding fee 3.32 times attorney lodestar). *See also In re Relafen*, 231 F.R.D. at 81-82 (noting vast majority of fee awards in cases with $50-200 million common funds had multipliers between 1.0 and 4.0).

reasonably incurred in prosecuting this action. The First Circuit has recognized that "lawyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also to recover from the fund, as a general matter, expenses, reasonable in amount, that were necessary to bring the action to a climax."[63]

The substantial majority of expenses (75%) were paid out of common litigation funds, to which Class Counsel firms contributed. These funds were used to pay a variety of expenses that benefited the class, including the costs of testifying and consulting experts, the document review platform, remote deposition expenses, trial support, jury research and mediation services. Litigation fund expenses amounted to $1,698,955.64. In addition to those expenses, individual firms separately incurred a total of $569,889.97 in expenses. A more detailed breakdown of expenses is reflected in the attached Joint Declaration of Lead Class Counsel.[64] Lastly, the court-appointed claims administrator, A.B. Data, has advised Class Counsel that it estimates it will cost no more than $225,000 to complete the claims distribution process.[65]

C. THE REQUESTED SERVICE AWARDS ARE REASONABLE.

EPPs request Service Awards of $25,000 to each of the two Class Representatives in connection with the Settlement. Courts routinely approve service awards "to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation."[66] "In granting [service] awards to named plaintiffs in class actions, courts

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[63] *In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999); *see also Latorraca v. Centennial Techs. Inc.*, 834 F. Supp. 2d 25, 28 (D. Mass. 2011) ("In addition to attorneys' fees, lawyers who recover a common fund for a class are entitled to reimbursement of out-of- pocket expenses incurred during litigation.").

[64] *See* Joint Decl., at ¶¶100-101; *see also Bezdek*, 79 F. Supp. 3d at 351-52 (finding "costs associated with mediation, legal research, filing fees, consultation with experts, photocopying, and travel to hearings, depositions, and meeting…reasonable.").

[65] *See* Joint Decl., at ¶103; *see also* Exhibit 5 to Joint Decl., Declaration of Eric J. Miller Regarding (A) Mailing of the Postcard Notice; (B) Publication of Summary Notice; and (C) Report on Objections and Requests to Speak at Fairness Hearing Received To Date ("Miller Decl."), at ¶14.

[66] *Carlson v. Target Enter., Inc.*, No. 18-40139, 2020 WL 1332839, at *3 (D. Mass. Mar. 23, 2020).

consider not only the efforts of the plaintiffs in pursuing the claims, but also the important public policy of fostering enforcement of laws and rewarding representative plaintiffs for being instrumental in obtaining recoveries for persons other than themselves."[67]

The requested awards are consistent with those approved for class representatives in other end-payor generic delay suits,[68] as well as those approved in other class suits in this circuit.[69] Moreover, because they represent only 0.034% of the total value of the Settlement, the proposed Service Awards would have a negligible impact on other Class Members' recoveries. The substance of the Class Representatives' work on this litigation further supports the End-Payors' requested awards.[70] The Class Representatives actively participated in the litigation, stayed abreast of the progress of the case, collected and produced documents and responded to interrogatories, and prepared for and gave depositions. Because this case settled two weeks before trial, both Class Representatives expended considerable time and effort preparing to testify. The Class Representatives performed these services over many years despite the risk that there would be no recovery for the End-Payor Classes. Further, granting the Service Awards promotes a public policy of encouraging individuals to undertake the responsibility of representative lawsuits.[71]

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[67] *Bussie*, 1999 WL 342042, at *3.
[68] Order at 4, *In re Solodyn*, No. 1:14-md-02503-DJC (D. Mass. July 18, 2018), ECF No. 1176 ($20,000 service award to TPP class representative and $145,000 total in service awards); Order at 10, *In re Aggrenox Antitrust Litig.*, No. 3:14-md-02516-SRU (D. Conn. July 19, 2018), ECF No. 821 (awarding $100,000 total in service awards); *In re Neurontin*, 58. F. Supp. 3d 167 (awarding $25,000 to each TPP class representative).
[69] *See Spicer v. Chi. Bd. Options Exchange, Inc*., 844 F. Supp. 1226, 1267-68 (N.D. Ill. 1993) (collecting cases approving service awards ranging from $5,000 to $100,000); *Lauture v. A.C. Moore Arts & Crafts, Inc*., No. 17-CV-10219, 2017 WL 5900058, at *1 (D. Mass. Nov. 28, 2017) (reflecting service awards of $15,000 to each class representative; *In re Prudential Ins. Co. of Am. SGLI/VGLI Contract Litig*., No. 3:10-CV-30163, 2014 WL 6968424, at *7 (D. Mass. Dec. 9, 2014) (reflecting service awards of $10,000 to each of 10 class representatives).
[70] *See In re Lupron*, 2005 WL 2006833, at *7 ("[W]here, as here, the named plaintiffs participated actively in the litigation," such awards "serve an important function in promoting class action settlements.").
[71] *See In re Relafen*, 231 F.R.D. at 82 ("Because a named plaintiff is an essential ingredient of any class action, an incentive award can be appropriate to encourage or induce an individual to participate in the suit.").

IV. CONCLUSION

For the foregoing reasons, Lead Class Counsel respectfully requests: (i) attorneys' fees in the amount of $40,600,000 plus interest; (ii) expenses reimbursed in the amount of $2,268,845.61 and approval to expend up to $225,000 to complete the settlement distribution process; and (iii) Service Awards of $25,000 for each of the two Class Representatives.

Dated: June 27, 2022

Respectfully submitted,

LOWEY DANNENBERG, P.C.

By: */s/Renee A. Nolan*
Gerald Lawrence
Renee A. Nolan
William Olson
One Tower Bridge
100 Front Street, Suite 520
West Conshohocken, PA 19428
Tel. (215) 399-4770
glawrence@lowey.com
rnolan@lowey.com
wolson@lowey.com

Peter D. St. Phillip
44 South Broadway
Suite 1100
White Plains, New York 10601
Tel. 914-997-0500
PStPhillip@lowey.com

Counsel for Plaintiff United Food and Commercial Workers Health and Welfare Fund of Northeastern Pennsylvania and the End-Payor Classes

THE DUGAN LAW FIRM, APLC

James R. Dugan, II
David S. Scalia
TerriAnne Benedetto
One Canal Place – Suite 1000

365 Canal Street
New Orleans, LA 70130
Tel: 504-648-0180
Fax: 866-328-7670
jdugan@dugan-lawfirm.com
dscalia@dugan-lawfirm.com
tbenedetto@dugan-lawfirm.com

Counsel for Louisiana Health Service & Indemnity Company d/b/a Blue Cross and Blue Shield of Louisiana, and HMO La., Inc. and the End-Payor Classes

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2022, a true copy of the foregoing document was served on all counsel of record by electronic transmission and/or electronically filing the document with the Court's CM/ECF system.

/s/Renee A. Nolan

TAB 48A

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 01/13/2022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:

COMMODITY EXCHANGE, INC., GOLD FUTURES AND OPTIONS TRADING LITIGATION

This Document Relates To All Actions

Case No. 14-MD-2548 (VEC)
14-MC-2548 (VEC)

Hon. Valerie E. Caproni

ORDER AWARDING ATTORNEYS' FEES

Co-Lead Counsel's motion for attorneys' fees and litigation expenses (the "Fee and Expense Motion") came before the Court. The Court has considered all papers filed and proceedings held in connection with the above-captioned action, and is fully informed on these matters. Adequate notice having been giving to the Settlement Class, and having considered all papers and proceedings in these matters, the Court finds, concludes, and orders as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. This Order incorporates by reference the definitions in each Stipulation and Agreement of Settlement, which were previously filed with the Court ("Stipulations" or "Settlements") (ECF Nos. 174-1, 487-1), and all capitalized terms used, but not defined herein, shall have the same meanings as set forth in the Stipulations.

2. The Court has jurisdiction over the subject matter of the Action, and, for purposes of enforcing and administering the Settlements, this Court has jurisdiction over the parties to the Action, including members of the Settlement Class.

3. Notice of Co-Lead Counsel's Fee and Expense Motion was given to potential members of the Settlement Class in a reasonable manner, and such Notice complies with Rule 23 of the Federal Rules of Civil Procedure, due process requirements, and any other applicable law, as it constituted the best notice practicable under the circumstances, and constituted due and sufficient notice to persons and entities entitled thereto.

4. Members of the Settlement Class were given the opportunity to object to Fee and Expense Motion in compliance with Rule 23 of the Federal Rules of Civil Procedure.

5. The Fee and Expense Motion is granted with respect to attorneys' fees as described below.

6. The Court hereby awards attorneys' fees equal to $28,200,000 and interest on such attorneys' fees at the same rate as the earnings in the Settlement Funds, accruing from the inception of each such Fund. Co-Lead Counsel is authorized to allocate these awards with other firms that assisted them in a manner in which, in Co-Lead Counsel's judgment, reflects the contributions of such counsel to the prosecution and settlement of the Action.

7. In making this award of fees and expenses to Lead Counsel, the Court has considered and found that:

(a) the Settlements have created a fund of $102,000,000 in cash, and numerous members of the Settlement Class who submit, or have submitted, valid Proof of Claim and Release forms will benefit from the Settlements created by Co-Lead Counsel;

(b) The fee sought by Co-Lead Counsel is fair and reasonable;

(c) Over 18,000 copies of the Notice were disseminated to potential members of the Settlement Class as reasonably identified in Defendants' data, as well as many more sent in an abundance of caution in response to requests by intermediaries;

(d) The Notice indicates that Co-Lead Counsel would move for attorneys' fees in an amount not to exceed $28.2 million and for costs, charges and expenses in an amount not to exceed $11 million, plus interest on both amounts, and no objections to the fees or expenses were filed by members of the Settlement Class;

(e) Co-Lead Counsel has pursued the litigation and achieved the Settlements with skill, perseverance, and diligent advocacy, as reflected by the positive reception of the Settlement Agreements by the Settlement Class;

(f) Co-Lead Counsel has expended substantial time and effort pursuing the litigation on behalf of the Settlement Class;

(g) the litigation involves complex factual and legal issues and, in the absence of the settlements, would involve lengthy proceedings whose resolution would be uncertain;

(h) had Co-Lead Counsel not achieved the Settlements, there would remain a significant risk that the Settlement Class may have recovered less or nothing from Settling Defendants;

(i) public policy concerns favor the award of reasonable attorneys' fees and expenses in class action litigation;

(j) the amount of attorneys' fees is appropriate to the specific circumstances of this Action, and consistent with awards in similar cases.

8. This fee award is independent of the Court's consideration of the fairness, reasonability, and adequacy of the Settlements and is also independent of the Court's consideration of the Plan of Allocation. Any appeal or any challenge affecting this Court's approval regarding the fee award shall in no way disturb or affect the finality of the final judgments entered with respect to the Settlements, or any expense award.

9. The fee award and interest awarded herein shall constitute a final order and shall be payable to co-lead counsel from the Settlement Funds upon entry of final judgments related to the Deutsche Bank and HSBC Settlements.

10. In the event that any of the Settlements is terminated or does not become Final or the Effective Date does not occur in accordance with the terms of that particular Stipulation, this Order shall be rendered null and void to the extent provided in that Stipulation and shall be vacated in accordance with that Stipulation.

IT IS SO ORDERED.

DATED: January 13, 2022

HON. VALERIE E. CAPRONI
UNITED STATES DISTRICT JUDGE

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 01/13/2022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:

COMMODITY EXCHANGE, INC., GOLD FUTURES AND OPTIONS TRADING LITIGATION

This Document Relates To All Actions

Case No. 14-MD-2548 (VEC)
14-MC-2548 (VEC)

Hon. Valerie E. Caproni

ORDER AWARDING LITIGATION EXPENSES

Co-Lead Counsel's motion for attorneys' fees and litigation expenses (the "Fee and Expense Motion") came before the Court. The Court has considered all papers filed and proceedings held in connection with the above-captioned action, and is fully informed on these matters. Adequate notice having been giving to the Settlement Class, and having considered all papers and proceedings in these matters, the Court finds, concludes, and orders as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. This Order incorporates by reference the definitions in each Stipulation and Agreement of Settlement, which were previously filed with the Court ("Stipulations" or "Settlements") (ECF Nos. 174-1, 487-1), and all capitalized terms used, but not defined herein, shall have the same meanings as set forth in the Stipulations.

2. The Court has jurisdiction over the subject matter of the Action, and, for purposes of enforcing and administering the Settlements, this Court has jurisdiction over the parties to the Action, including members of the Settlement Class.

3. Notice of Co-Lead Counsel's Fee and Expense Motion was given to potential members of the Settlement Class in a reasonable manner, and such Notice complies with Rule 23 of the Federal Rules of Civil Procedure, due process requirements, and any other applicable law, as it constituted the best notice practicable under the circumstances, and constituted due and sufficient notice to persons and entities entitled thereto.

4. Members of the Settlement Class were given the opportunity to object to Fee and Expense Motion in compliance with Rule 23 of the Federal Rules of Civil Procedure.

5. The Fee and Expense Motion is granted with respect to litigation expenses as described below.

6. The Court hereby awards $8,027,282.81 in payment of litigation expenses and interest on such expenses at the same rate as the earnings in the Settlement Funds, accruing from the inception of each such Fund. Co-Lead Counsel is authorized to allocate this award with other firms that assisted them in a manner in which, in Co-Lead Counsel's judgment, reflects the contributions of such counsel to the prosecution and settlement of the Action.

7. In making this award of expenses to Co-Lead Counsel, the Court has considered and found that:

(a) the Settlements have created a fund of $102,000,000 in cash, and numerous members of the Settlement Class who submit, or have submitted, valid Proof of Claim and Release forms will benefit from the Settlements created by Co-Lead Counsel;

(b) The expenses sought by Co-Lead Counsel are reasonable and were necessarily incurred;

(c) Over 18,000 copies of the Notice were disseminated to potential members of the Settlement Class as reasonably identified in Defendants' data, as well as many more sent in an abundance of caution in response to requests by intermediaries;

(d) The Notice indicates that Co-Lead Counsel would move for attorneys' fees in an amount not to exceed $28.2 million and for costs, charges and expenses in an amount not to exceed $11 million, plus interest on both amounts, and no objections to the fees or expenses were filed by members of the Settlement Class;

(e) public policy concerns favor the award of reasonable expenses in class action litigation;

(f) the amount of expenses paid is appropriate to the specific circumstances of this Action, and consistent with awards in similar cases.

8. This expense award is independent of the Court's consideration of the fairness, reasonability, and adequacy of the Settlements, and is independent of the Court's consideration of the Plan of Allocation. Any appeal or any challenge affecting this Court's approval regarding the expense award shall in no way disturb or affect the finality of the final judgments entered with respect to the Settlements, or any fee award.

9. This expense award and interest awarded herein shall constitute a final order and shall be payable to co-lead counsel from the Settlement Funds upon entry of final judgments related to the Deutsche Bank and HSBC Settlements.

10. In the event that any of the Settlements is terminated or does not become Final or the Effective Date does not occur in accordance with the terms of that particular Stipulation, this Order shall be rendered null and void to the extent provided in that Stipulation and shall be vacated in accordance with that Stipulation.

IT IS SO ORDERED.

DATED: January 13, 2022

Valerie Caproni

HON. VALERIE E. CAPRONI
UNITED STATES DISTRICT JUDGE

TAB 48B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:

COMMODITY EXCHANGE, INC., GOLD FUTURES AND OPTIONS TRADING LITIGATION

This Document Relates To All Actions

Case No. 14-MD-2548 (VEC)
14-MC-2548 (VEC)

Hon. Valerie E. Caproni

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND LITIGATION EXPENSES

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PRELIMINARY STATEMENT

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Co-Lead Counsel respectfully move for an award of attorneys' fees and payment of litigation expenses from the common fund.[1] This case has its roots in Co-Lead Counsel's investigative efforts, working with industry and economic consultants, over seven years ago. The case likely would not exist without the investments and hard work both of counsel and their consultants.

Co-Lead Counsel did not just get the case off the ground, we vigorously litigated the case for almost two-and-half years before securing the first major settlement, and then litigated another four years before securing another settlement. The $102 million fund represents a tremendous result in light of the challenges facing this case. Indeed, the complexity of this case cannot be understated, as aptly demonstrated both by the case's length and the amount we have had to invest in out-of-pocket expenses. Those expenses were driven largely by the need for multiple non-testifying expert consultants to assist in investigating and evaluating the Plaintiffs' legal and economic theories. Such assistance was required at the investigation phase, in opposing the *Daubert*-like motions to dismiss, in amending the pleadings, in rebutting to Defendants' challenges to the statistical analyses, in responding to Defendants' press for discovery into our consultant work, and in prosecuting our requests for data from Defendants and numerous third parties.

As a result of the hard work and skill of Co-Lead Counsel, and our strategic choice to settle at key points in the case—one to lock in a recovery at the dismissal stage, and another prior to summary judgment and class certification—the Settlement Class is in line for substantial monetary recoveries. As the Second Circuit has explained:

[1] All capitalized terms not otherwise defined herein have the meanings set forth in the Stipulations and the Joint Declaration of Daniel L. Brockett and Merrill G. Davidoff ("Joint Declaration"), submitted herewith.

> [O]ne whose labors produce a favorable result deserves adequate recompense. Such a notion is particularly applicable in the area of antitrust class action, which depends heavily on the notion of the private attorney general as the vindicator of the public policy. In the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation.

Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc., 481 F.2d 1045, 1050 (2d Cir. 1973).

We respectfully submit that our $28,200,000 request, plus interest, is fair and reasonable to the Settlement Class. This request is supported by this Circuit's standards for evaluating fee applications and by fee schedules adopted by a range of courts in other complex antitrust litigation with comparable recoveries. Professor Charles Silver, whose extensive analyses of attorney-client fee agreements and class-action fee awards has been relied upon by courts and commentators alike, confirms this fee is reasonable and, if anything, *below* the applicable norms.

We also respectfully request that $8,242,755.81 in litigation expenses—all, incurred prior to the execution of the HSBC Settlement—be reimbursed, plus interest. Almost all of these expenses arise out of the work of our non-testifying expert consultants; as this Court is aware, this is a very complex case involving large amounts of data and specialized knowledge. Particularly in light of the risk of non-recovery, Co-Lead Counsel only made such investments because they believed, and still believe, they would benefit Plaintiffs and class members. Courts routinely recognize that class counsel should be reimbursed for their investments.

STATEMENT OF FACTS

Co-Lead Counsel's work at the pleading stage is described more fully in the accompanying Joint Declaration, Section I.A. Our investigation began in 2013, even before the government investigations or reports had been made public. Purchasing a large amount of data and working with multiple non-testifying expert consultants, a complaint was filed in March 2014. Case No. 14-cv-2213, ECF No. 2. After consolidation and leadership processes were

complete, a consolidated pleading—with a body of 108 pages and 86 pages of supporting appendices, nearly double the size of the initial complaint—was filed in December 2014. ECF No. 27. Another 40 pages were added, many of which again were filled with consultant analyses, in the Second Consolidated Class Action Complaint. ECF No. 44.

Throughout 2015 and into 2016, the parties briefed, held oral argument, and filed supplemental authority papers on Defendants' motions to dismiss. *See, e.g.*, ECF Nos. 72, 74, 76, 77 (motion papers); 82, 83, 84 (opposition papers); 88, 91, 92 (reply papers); 135, 136, 149, 150, 156, 157 (letters regarding supplemental authority and arguments). At the Court's request, Co-Lead Counsel worked with Defendants here, and the parties in the *Silver* action, to provide a "tutorial" to the Court in September 2015. *See, e.g.*, ECF No. 81.

The Court denied in large part the motions to dismiss in October 2016, but did dismiss certain claims. ECF No. 158. Co-Lead Counsel and our non-testifying expert consultants worked to successfully amend the pleading to bring the early-year claims back into the case, and to try unsuccessfully to amend to bring UBS back into the case. *E.g.*, ECF No. 183. In August 2017—almost four years after Co-Lead Counsel's investigations began—Defendants filed their first Answers. ECF Nos. 286-90.

Co-Lead Counsel's work during the discovery stage is described more fully in the accompanying Joint Declaration, Section I.B. Co-Lead Counsel made numerous attempts to move discovery along early, but various stays were put in place. *See, e.g.*, ECF Nos. 17-18, 270. As a result of the Court's directive at the conference in December 2016, Plaintiffs received certain limited documents, and by conferring throughout much of 2017 we learned background information concerning the identities of key witnesses and the existence of documents and audio

files. However, throughout the discovery process, there have been delays and multiple battles with Defendants over even the simplest of tasks.

For instance, negotiations with Defendants over search terms and protocols required multiple extensions and even then resulted in motion practice. *See, e.g.*, ECF Nos. 341, 343, 345, 375, 377, 399. Disputes over foreign privacy and bank secrecy laws required consultation with foreign-law advisors, and briefing. *See, e.g.*, ECF No. 366. Negotiations over discovery issues has required over 400 formal discovery communications between the parties, as well as countless informal conversations and e-mail communications. *See* Joint Decl. Section I.B.2. By exhaustively conferring, Co-Lead Counsel were able to reach agreements on many issues, saving the Court from having to get directly involved in even more disputes—though often even our extensive efforts failed to secure an agreement, requiring more investment by way of motion practice. *See id.* Section I.B.3.

Defendants alone produced 15 million pages of documents and 8,000 audio files. Even deploying numerous techniques to focus and streamline the review of such materials, understanding such a large effort required massive investments in time and resources. *See id.* Section I.B.4.

Co-Lead Counsel's work with our non-testifying expert consultants is described more fully in the accompanying Joint Declaration, Sections I.C and III.B. The operative Third Amended Complaint includes 180 paragraphs regarding statistical analyses of such things as pricing and volume behavior around the PM Fix, comparisons to how volume and prices acted at other times of day or in other markets, the degree to which the PM Fix prices were outliers on trading days, comparisons of price behaviors during the PM Fix and AM Fix, specific days on which manipulation potentially occurred, refutations of alternative explanations for the

abnormalities in the pricing data, analyses showing that Defendants were heavily invested in gold and had economic motives to manipulate the PM Fix based on their futures positions, and analyses showing that the conspiracy was ongoing in 2004 and 2005.

Both through correspondence and then motion practice, Defendants have waged a series of "discovery" battles over their disagreement with the pleading-stage analysis. Over 200 gigabytes of data, and even dozens of non-testifying expert consultant-prepared private memoranda, have been turned over to Defendants in connection with those requests, which also resulted in multiple briefs, letter-briefs, and oral arguments. *See* Joint Decl. Section I.C.2.

Beyond the pleading-stage work, Co-Lead Counsel also worked with non-testifying expert consultants during the discovery process—most particularly, regarding the data produced by Defendants and the CME. *See id.* Section I.C.3. Over 110 million data records, many with over 100 fields of information about each record, have been gathered in this case from Defendants alone—another 491 million records were negotiated for during the relevant period here from third parties, and produced in 2021. Complicating matters is, of course, the fact that the 110 million records were not all produced at once, by one party, in one format. To the contrary, each producing party only produced their own data from its own system—or, often, multiple systems—in whatever format that system happened to produce. Each potentially relevant datasets had to be loaded and analyzed, and then became the subject of extensive conferrals between the relevant parties as to what the produced data was (and was not) and what other data was (or was not) available. Those conferrals often included detailed letters or email exchanges, as well as conferences. Certain answers just led to more questions, or other datasets, forcing the process to start over.

Even once the productions were received, it was a massive project just to get *ready* to use so many records. *See id.* Following standard practices, once the data was understood the "raw" files were combined into a common database format, where, for instance, fields that held identical information would appear together in a single format even if two banks used a different naming convention or numbering conventions. Knowing whether the relevant data is being received and understood also requires at least some understanding of how the data is likely to be used at class certification, summary judgment, and/or trial. That is, it would be hard to know whether the needed data was received, without knowing what the case needs even are—further work requiring coordination between counsel and our consultants.

ARGUMENT

I. CO-LEAD COUNSEL'S FEE REQUEST IS FAIR AND REASONABLE

"Attorneys whose work created a common fund for the benefit of a group of plaintiffs' may receive reasonable attorneys' fees from the fund." *See In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *16 (S.D.N.Y. Apr. 26, 2016) ("*CDS*"). Fees can be awarded based on an interim settlement fund. *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *9 (E.D.N.Y. Oct. 23, 2012). Awarding reasonable attorneys' fees from the common fund recognizes and compensates Co-Lead Counsel's efforts in bringing and prosecuting this case, and advances the purpose of the antitrust laws, which rely on private actions like this one to further important public-policy goals. Without "adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation." *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2011 WL 2909162, at *6 (E.D.N.Y. July 15, 2011).

Ultimately, "market rates" are the "ideal proxy" for an attorney's compensation. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). As explained by Prof. Silver

in his declaration filed concurrently herewith (the "Silver Decl."), a "mimic the market" approach recognizes that sophisticated parties bargaining at arm's length yield the best indicia of how to properly align the incentives between counsel and client. Silver Decl. ¶ 17 ("The contingent fee's logic is simple and powerful: The client and lawyer prosper together."); *see also id.* ¶¶ 41-43 (discussing widespread adoption of percentage approach). By contrast, "sophisticated clients never use" a lodestar method. *Id.* ¶ 17.

Consistent with these observations, this Court has recognized that "[a]lthough courts award attorneys' fees under either the lodestar method or the percentage-of-the-fund method, the 'trend in this Circuit is toward the percentage method.'" *Melito v. Am. Eagle Outfitters*, 2017 WL 3995619, at * (S.D.N.Y. 2017) (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005)). The percentage method provides "appropriate financial incentives" necessary "to attract well-qualified plaintiffs' counsel who are able to take a case to trial," while also "directly align[ing] interests of the class and its counsel" by providing "a powerful incentive for the efficient prosecution and early resolution of litigation." *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355, 359 (S.D.N.Y. 2005).

A. The Fee Request is Reasonable Under the *Goldberger* Factors

Courts evaluating whether a fee is reasonable consider "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger*, 209 F.3d at 50.

1. Co-lead Counsel invested substantial time and resources

As discussed in Section II below almost 105,000 hours by Co-Lead Counsel's attorneys and professional support staff, and $8.2 million in expenses, have been invested in connection with the case. Such investments were required because of the complexity of the case, and its

length—it was almost four years from the start of our investigation to when Defendants filed their first answers, and the full end of fact discovery will be almost eight years after the start of our investigation. By contrast, most antitrust cases have reached *full resolution* within *seven* years. Silver Decl. ¶ 64. As in the Statement of Facts above and in the Joint Declaration, every step in that abnormally long history required constant interaction between attorneys and industry and other non-testifying expert consultants. Beyond the value created for the Settlement Class by way of the ongoing litigation, and in helping secure both the initial and second settlements on behalf of an overlapping group of investors, all this work both gave counsel sufficient knowledge to assess what the case was worth, and confirm the requested fee comes nowhere close to creating a "windfall" situation.

2. The case is incredibly complex

"[C]lass actions have a well-deserved reputation as being most complex," *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998), with antitrust cases being among the most "complex, protracted, and bitterly fought," *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 669 (S.D.N.Y. 2015). In cases that require more expertise, a larger percentage of the fund should be awarded to the lawyers who can competently prosecute the case. *See In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 379 (S.D.N.Y. 2013) ("The upshot is that the magnitude and complexity of the litigation also weigh in favor of a significant award.").

All the same facts discussed above also demonstrate that this case was a prime example of a complex and risky case. Not only has the case been ongoing for many years, but the conspiracy at issue now goes back seventeen years into the past, and the market for gold-related investments span not just billions of dollars, but many different instrument types. Defendants have and will argue that complicates—in their view, defeats—the alleged motive, means, and

effectiveness of the conspiracy. And as more fully detailed in the Joint Declaration, many issues here devolved into dragged-out battles.

The amount of out-of-pocket expenses incurred to gather, process, understand, and analyze the massive amounts of data in this case also speaks to the case's complexity. *See* Silver Decl. ¶¶ 66, 71.

For all these reasons, a fee award that accounts for the prosecution of litigation that was "extraordinary in both complexity and scope" is appropriate. *In re Holocaust Victim Assets Litig.*, 2007 WL 805768, at *46 (E.D.N.Y. Mar. 15, 2007). *See also NASDAQ*, 187 F.R.D. at 477 ("There can be no doubt that this class action would be enormously expensive to continue, extraordinarily complex to try, and ultimately uncertain of result.").

3. The case involved—and still involves—substantial risk

The Second Circuit has "historically labeled the risk of success as 'perhaps the foremost' factor to be considered in determining whether to award an enhancement." *Goldberger*, 209 F.3d at 54. Risk is also recognized by sophisticated clients as bearing on the rates they negotiate in private attorney-client agreements. Silver Decl. ¶ 61.

Many of the same factors demonstrating the complexity of this case also demonstrate its risk, including this case's length and the amount of investment needed to get the case to this point.

It should also be noted that, at the outset of our investigation, Co-Lead Counsel had little to go on but the review of the publicly available data—and by the dismissal stage Defendants were touting letters received about the closing of investigations against them. *See* Apr. 20, 2016 Tr. at 15:13-16:2. Co-Lead Counsel thus was investing resources into this case both before the government was known to be acting, as well as investing even more heavily for *years* after the government's own resources were (purportedly) directed elsewhere. This not only demonstrates

the increased risk of this case, but also the importance of the role of private attorneys general to the nation's antitrust laws. *See* Section I.A.6 below; Silver Decl. ¶¶ 72-76 ("Private law firms . . . can supplement and even take the place of public enforcers because they use the dollars they take in to maintain their capacities."); *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 441 (E.D.N.Y. 2014) (fact plaintiffs "did not piggyback on previous government action" to be in favor of fee award).

More generally, Defendants have throughout made clear their intent to challenge, among other things, whether any conspiracy existed at all; whether the data show prices were suppressed to an artificial degree at all; whether any manipulation would have a measurable impact on instruments not expressly tied to the PM FIX price; whether any manipulation would have a measurable impact on instruments traded at other times of day; and whether class members must "net" any gains (from buying) against losses (from selling). Many of these defense arguments will be raised both as they relate to the merits of the case, as well as the certifiability of the case. *See generally* Silver Decl. ¶¶ 77-80 (discussing risk at certification stage).

It is often said that antitrust cases involve a trial boiling down to a "battle of the experts" on proof of damages. *NASDAQ*, 187 F.R.D. at 476. Defendants' multi-year discovery on the pleading-stage non-testifying consultants further confirms this will be even more true here than in most antitrust cases. "In this 'battle of experts,' it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors . . . ." *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985) *aff'd*, 798 F.2d 35 (2d Cir. 1986). A successful *Daubert* challenge or effective cross-examination at trial could result in a

significantly reduced verdict even if liability is proved. "Indeed, the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal." *NASDAQ*, 187 F.R.D. at 476; *see U.S. Football League v. Nat. Football League*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) (jury award of $1.00 in damages), *aff'd,* 842 F.2d 1335, 1377 (2d Cir. 1988).

Co-Lead Counsel took this case on a fully contingent basis. *See* Joint Decl. Section III.A. "Counsel should be rewarded for undertaking [those risks] and for achieving substantial value for the class." *Payment Card*, 991 F. Supp. 2d at 441; *see also Jermyn v. Best Buy Stores, L.P.*, 2012 WL 2505644, at *10 (S.D.N.Y. June 27, 2012) ("[T]he risk of non-payment in cases prosecuted on a contingency basis where claims are not successful . . . can justify higher fees.").

4. *Co-Lead Counsel provided high-quality representation*

"[T]he quality of representation . . . may be measured in large part by the results that counsel achieved for the classes." *Payment Card*, 991 F. Supp. 2d at 441. As a general matter, Co-Lead Counsel are among the most experienced and skilled antitrust and class action litigators in the country. Each firm has led several prior mega-fund cases involving the financial markets and have tried class action cases, and the attorneys running the case are highly qualified litigators. *See generally* Brockett Decl. Ex. C & Davidoff Decl. Ex. D (sample summaries of firm and attorney biographies).

Beyond our general qualifications, this factor is again met because of the fact that Co-Lead Counsel obtained $102 million for the benefit of the Settlement Class. A study has found that the median full-case antitrust recovery is 19% of single damages. *See* John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries are Mostly Less Than Single Damages*, 100 Iowa L. Rev. 1997, 2010 (2015). Thus, Co-Lead Counsel would have had to establish at trial a recoverable single-damages figure of $537 million before the current

settlements fall behind the pace of a median *full-case* antitrust recovery rate. And of course, the Settlement Fund is *not* a full-case recovery—Plaintiffs may still recovery from the remaining Defendants. Thus, the above comparison understates the success of the Settlements. That the Settlement Class remains free to pursue all damages on a joint and several basis also speaks to the success of the current Settlements.

Co-Lead Counsel's ability to put the case on such a pace even while facing aggressive, well-funded Defendants represented by top-flight counsel is not just a testament to the merits of the Settlements, but also the skill with which Co-Lead Counsel have prosecuted this case. *See Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *22 (S.D.N.Y. Sept. 9, 2015) ("The quality of opposing counsel is also important in evaluating the quality of [Co] Lead Counsel's work."); *NASDAQ*, 187 F.R.D. at 489 (approving fee award where defense counsel included "the nation's biggest and best defense firms operating on a seemingly unlimited budget over a period of four years").

5. The effective percentage being requested is below the applicable norms

Again, "market rates" are the "ideal proxy" for an attorney's compensation. *Goldberger*, 209 F.3d at 50. Rational and sophisticated parties are best positioned to determine what terms beast align the interests between client and attorney. *See* Silver Decl. ¶¶ 31-36. Notably, sophisticated clients do not merely seek out the lowest percent; rather, the proper question is which percent is likely to sufficiently align incentives as to result in the largest total net recovery. *Id.* ¶¶ 27-30. Prof. Silver's declaration provides numerous datapoints as to what sophisticated clients have agreed to pay their attorneys on large contingency-fee cases. Years of study "shows that claimants typically agree to pay contingent fees in the range extending from 33 percent to 40

percent, even when sophisticated clients hire lawyers to handle complex commercial lawsuits with the potential to generate enormous recoveries." *Id.* ¶ 35.[2]

Co-Lead Counsel's $28,200,000 fee request was arrived at using the sliding-scale approach put forth by Judge Gleeson in *In re Payment Card*, 991 F. Supp. 2d at 445. That scale adjusts the percent fee downward as the size of the gross common fund increases. This Court has called this a "creative approach" that "effectively aligns counsel's incentives with those of the putative class." Case No. 14-cv-2213, ECF 23. Co-Lead Counsel's request—for what amounts to 27.6% of the total Settlement Fund Amount—is far below the "proxy" of what a privately negotiated contingency fee would have likely provided for in a case of this size, complexity, and risk.

Though it risks deviating from the "ideal proxy" of privately negotiated agreements, courts of course do often also want to often know what other courts are doing. *See* Silver Decl. ¶ 82. A 2017 study found that the mean and median awards in the Second Circuit are 28 percent and 30 percent, respectfully. *Id.* ¶ 83. This is true even though the mean recovery of the studied cases was $113 million, a similar amount at issue here. *Id.*

Surveys by courts themselves have reached similar results. *See Thornhill v. CVS Pharmacy, Inc.*, 2014 WL 1100135, at *3 (S.D.N.Y. Mar. 20, 2014) (collecting cases, noting: "In this Circuit, courts typically approve attorneys' fees that range between 30 and 33⅓%."); *Sanz v. Johny Utah 51 LLC*, 2015 WL 1808935, at *1 (S.D.N.Y. Apr. 20, 2015) (same). Courts

[2] *See also* Silver Decl. ¶¶ 20-24 (33% in large pharmaceutical cases), 47 ("broad agreement that in most types of plaintiff representations contingent fees range from 30 percent to 40 percent of the recovery," with higher percentages in cases where "costs and risks" are great), 50-52 (survey of patent cases), 53-58 (survey of other large complex actions), 59 (named plaintiffs).

recognize that large, complex antitrust cases present considerable risk and require extensive work. As a result, courts often award fees at or even above the percentage requested here.[3]

In sum, when viewed as against the "ideal proxy" of privately negotiated contracts, Co-Lead Counsel's request is far below the norm. Even when viewed against what other courts have awarded, Prof. Silver "can confidently report that [Co-Lead Counsel's] request . . . falls within the range that courts typically award." Silver Decl. ¶ 83.

6. Public policy supports approval of the fee request

Public policy also strongly supports the requested fee award. Although the PM Fix's existence was known, without private counsel taking on the risk of this lawsuit, and having the skill and resources to use consultants and other sources to uncover and then pursue the claims vigorously, the Settlement Class would have recovered nothing, and important public interests would not have been vindicated. *See CDS*, 2016 WL 2731524, at *18 ("It is important to encourage top-tier litigators to pursue challenging antitrust cases . . . . Our antitrust laws address issues that go to the heart of our economy.").

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[3] *See In re Urethane Antitrust Litig.*, 2016 WL 4060156, at *8 (D. Kan. July 29, 2016) (awarding 33.33% of $835 million settlement); *Klein v. Bain Capital Partners, LLC*, No.1:07-cv-12388, slip op. (D. Mass. Feb. 2, 2015) (ECF No. 1095) (awarding 33% of $590.5 million antitrust settlement); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 WL 1365900, at *20 (N.D. Cal. Apr. 3, 2013) (awarding 28.6% of $1.08 billion settlement); *In re Checking Acct. Overdraft Litig.*, 830 F. Supp. 2d 1330, 1358 (S.D. Fla. 2011) (awarding 30% of $410 million settlement); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding 33.3% of $510 million settlement); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1241 (S.D. Fla. 2006) (awarding 31.33% of $1.06 billion settlement); *In re Vitamins Antitrust Litig.*, 2001 WL 34312839, at *10 (D.D.C. July 16, 2001) (awarding 34.06% of $365 million settlement); *see also In re Oxford Health Plans, Inc. Sec. Litig.*, 2003 U.S. Dist. LEXIS 26795, at *13-*14 (S.D.N.Y. June 12, 2003) (awarding 28% of $300 million settlement); *Standard Iron Works v. Arcelormittal, et al.*, No. 1:08-cv-05214, slip op. at 5 (N.D. Ill. Oct. 22, 2014) (ECF No. 539) (awarding 33% of $164 million settlement); *In re Polyurethane Foam Antitrust Litig.*, 2015 WL 1639269, at *7 (N.D. Ohio Feb. 26, 2015) (awarding 30% of $147.8 million settlement); *In re CRT Antitrust Litig.*, 2016 WL 183285, at *2-*3 (N.D. Cal. Jan. 14, 2016) (awarding 30% of $127.5 million settlement); *In re Municipal Derivatives Antitrust Litig.*, No. 1:08-cv-02516, slip op. at 1 (S.D.N.Y. July 8, 2016) (ECF No. 2029) (awarding 33.33%).

Again, at the outset of our investigation, Co-Lead Counsel had little to go on but the review of the publicly available data—and by the dismissal stage Defendants were touting letters received about the closing of investigations against them. *See* Apr. 20, 2016 Tr. at 15:13-16:2. Co-Lead Counsel's efforts—which including probing the Fixing rules, the way the Fixing was actually carried out, and even analyzing many hours of audio files—are the only way allegedly injured investors will receive any compensation. This case is thus a prime example of why public policy favors enforcement of the antitrust laws through suits by private attorneys general.[4] *See* Silver Decl. ¶¶ 72-76 (discussing importance of private enforcement and Co-Lead Counsel's investments here). Awarding a reasonable percentage of the common fund properly motivates zealous enforcement of the antitrust laws and incentivizes skilled counsel to bring meritorious cases even where, at the outset, the prospect of any recovery is uncertain. *Cf. WorldCom*, 388 F. Supp. 2d at 359 ("In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives."). Accordingly, public policy supports Co-Lead Counsel's requested fee.

B. The Fee Request is Reasonable Under the Lodestar Cross-Check

The lodestar fee calculation method has "fallen out of favor particularly because it encourages bill-padding and discourages early settlements." *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 353 (S.D.N.Y. 2014). Accordingly, the lodestar method is used in this Circuit only "as a sanity check to ensure that an otherwise reasonable percentage fee would not lead to a windfall." *Id. See also* Silver Decl. ¶¶ 85-88 (arguing against use of lodestar method,

[4] *See F.T.C. v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013) (noting the "fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws"); *Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983) (emphasizing "the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws").

and noting it is not used in privately negotiated engagements). "[W]here used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger*, 209 F.3d at 50.

The cross-check in this case makes clear there is no windfall. To the contrary, the figures strongly support Co-Lead Counsel's fee request, as they confirm, as discussed above, the complexity and risk factors present here. A large survey has found that the mean multiplier for awards in the Second Circuit was 1.93, while the mean multiplier for awards for antitrust cases was 1.61. Silver Decl. ¶ 93. These awards over the attorneys' normal hourly rates are necessary to encourage attorneys to take cases on contingency, despite the risks—and to avoid incentivizing attorneys to settle cheaply early-on in the case. *E.g.*, *id.* ¶ 94. That is, courts recognize providing fee awards beyond standard hourly rates is necessary to incentivize attorneys to take cases despite the risks inherent in contingency-fee arrangements. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974) ("No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success."), *abrogated on other grounds by Goldberger*, 209 F.3d 43. *See also In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) (appropriate to take this contingent fee risk "into account in determining the appropriate fee to award").

Here, however, as demonstrated in the supporting declarations, Co-Lead Counsel's attorneys and professional support staff collectively spent over 105,000 hours on this matter before the HSBC Settlement was executed. Co-Lead Counsel turned this into a fees-equivalent using a very conservative methodology that included, for instance, a three-year rate freeze for

both firms, and a 20% discount on Quinn Emanuel's standard rates,[5] as described in Co-Lead Counsel's individual declarations. This all means the "rates" being used are below market, if anything. *See generally* Silver Decl. ¶¶ 90-92 (discussing datapoints as to hourly rates, finding rates used here to be "clearly reasonable"). We also calculate the lodestar based entirely on Co-Lead Counsel's work.[6] Using this conservative methodology, Co-Lead Counsel had invested the equivalent of approximately $39,722,235 by the time the HSBC Settlement was executed in attorney and staff hours. *See* Joint Decl. Section III.A.

This translates to a lodestar "multiplier" of only .71. In other words, Co-Lead Counsel are asking for *less* than their lodestar, even when calculated using very conservative methodologies.[7] This is, clearly, not a windfall situation. Given the request equates to a *below-1* multiplier, it should be unsurprising that Prof. Silver confirms that the multiplier is "easily justified" on the facts here, and that "judges presiding over antitrust cases with mega-fund settlements . . . have often awarded multipliers far larger than the one sought here." Silver Decl. ¶¶ 95. Indeed, Prof. Silver says the multiplier "by ordinary standards is minuscule," *id.* ¶ 88, and "[m]ultipliers this small are nearly unheard of in settlements of this magnitude," *id.* ¶ 93.

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[5] The potential for a "discount" and other aspects of these calculations were first raised in our initial leadership application. *See* Case No. 14-cv-2213, ECF 17. Berger Montague did not represent in the leadership application it would discount its fees, in large part because the default Berger Montague rate schedule was similar to Quinn Emanuel's discounted schedule. As set forth in the supporting declarations, we are including hours from vendor-provided attorneys in our lodestar calculations using modest hourly rates.

[6] No commitments have been made, but we may provide a portion of any fee award to certain firms who provided assistance at the request of Co-Lead Counsel. As we are not relying on the work of any other firm for the lodestar analysis at this time, only Co-Lead Counsel have filed supporting declarations.

[7] Co-Lead Counsel are providing the conservative methodology discussed herein to remove all doubt as to the absence of a "windfall" situation here. However, Co-Lead Counsel reserve the right to present alternative calculations in support of this or future applications.

C. The Fee Request is Below That Negotiated for by the Named Plaintiffs

As discussed in Section I.A above, the "ideal proxy" for a reasonable fee, *Goldberger*, 209 F.3d at 50, are market rates. As discussed in Section I.A.5 above, the request here is far below prevailing rates. Another fact supporting Co-Lead Counsel's request is that the effective 27.6% request is also below the terms negotiated for by our own sophisticated clients. None bargained to limit our fees to a lower percent of the recoveries, with many instead allowing a 33 1/3% request. *See* Joint Decl. ¶ 149. Fees negotiated specific to a case can be seen as "the best indication of the actual market value of counsel's services." *In re Comverse Tech., Inc. Sec. Litig.*, 2010 WL 2653354, at *4 (E.D.N.Y. June 24, 2010) (negotiated fee "is the best indication of the actual market value of counsel's services"); *see also CDS*, 2016 WL 2731524, at *17 (citing approvingly pre-negotiated fee schedule even where court would otherwise have found it to be "generous" given it resulted in a lodestar multiplier of over 6).

D. The Fee Request is Reasonable Even Considering the Time Gap Between the Deutsche Bank and HSBC Settlements

The HSBC and Deutsche Bank agreements benefit the *same people*. *Compare* ECF 174-1 ¶ 3(a) *with* 514-1 ¶ 3(a). There is thus no need to divide the fee being requested or the work performed into separate buckets, because all work was done for the benefit of the single Settlement Class. Indeed, assessing each fee application as a function of *all* fees requested and *all* lodestar ensures that the final end-result is fair and reasonable, rather than fluctuating based on attempts to strategically time, group, or disaggregate the calculations.

E. The Reaction of the Class

The Notice stated that Co-Lead Counsel may seek a fee of up to $28,200,000. Co-Lead Counsel will update the Court on the reaction of the class in our reply papers.

II. CO-LEAD COUNSEL'S REQUEST FOR AN AWARD OF THEIR LITIGATION EXPENSES IS REASONABLE

"Counsel are entitled to be reimbursed for the reasonable expenses advanced in class litigation." *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 469 (S.D.N.Y. 2004); *see also Vitamin C*, 2012 WL 5289514, at *11 ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course."). The Notice informed members of the Settlement Class that Co-Lead Counsel would move for an award of litigation costs of up to $11 million. We respectfully request an expense award of $8,242,755.81, plus interest thereon. As detailed in the individual declarations of Mr. Brockett and Mr. Davidoff, almost all of these expenses were incurred by Co-Lead Counsel, with only a small amount incurred by other firms working with us. All expenses were incurred prior to November 10, 2020, when the HSBC Settlement was executed. *See* Joint Decl. Section III.B (summarizing individual declarations and summing figures).

For the reasons discussed above, "substantial expenses were necessary in this complex antitrust case." *Meredith*, 87 F. Supp. 3d at 671. Most of these expenses are for Plaintiffs' non-testifying expert consultants who were instrumental in getting this case off the ground, through the dismissal stage, and into a massive discovery effort. *See CDS*, 2016 WL 2731524, at *18 (reimbursing over $10 million in expenses incurred even pre-certification of the class, and noting that "[m]ost of these expenses were incurred in connection with retention of experts" and that this "expert work was essential to the litigation and invaluable to the Class"). A more-detailed breakdown of the tasks the consultants worked on appears in Section III.B of the Joint Declaration.

Analysis of economic and other data formed a large part of the pleadings, and critiques and defenses of the statistical analyses was the main focus of Defendants' dismissal papers,

Plaintiffs' opposition, and the Court's orders. *See* Joint Decl. Sections I.C.1, I.C.2, and III.B. Non-testifying expert consultants were also needed at this stage to assist with oral argument and the Court "tutorial," and later to respond to Defendants' "discovery" battles over the accuracy and completeness of their work and productions. *See id.* Section I.C.2.

As discussed in the Joint Declaration, Sections I.C.3 and III.B, Co-Lead Counsel also had to work with our non-testifying expert consultants with respect to discovery in this case. For instance, much work was required in requesting, receiving, loading, scrubbing, consolidating and analyzing the ***110 million*** Defendant transactional records, many of which are associated with over 100 different "fields." This includes, among many other tasks: converting the raw data into a common format; reviewing the data to ensure completeness as to time, products, and fields; reconciling and matching data when the same transaction was included in productions coming out of different systems-such as information on Defendants' trades in Defendants' systems and in data produced by the CME; analyzing and driving conferrals regarding whether Defendants' data was sufficiently distinguishing between their own trades versus those done on behalf of their customers; scrubbing the data for outliers and errors, such as where prices were far outside the expected range; analyzing ways to identify links to the Fix; and analyzing publicly available data, and potential third-party subpoena targets, to fill data needs not left open by Defendants' productions. *See id.* ¶ 157.

Aside from the consulting and similar fees, the balance of the requested expenses are composed of industry-standard charges such as online legal research, document imaging and copying, travel expenses, and other litigation support services. These expenses are being submitted on a "at cost" basis, without any markup or profit component to our firms. These expenses have been reviewed by Co-Lead Counsel and were found to be reasonable.

In sum, there is thus "no reason to depart from the common practice in this circuit of granting expense requests." *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 525 (E.D.N.Y. 2003) (granting $18.7 million expense request where bulk of expenses were "experts and consultants, litigation and trial support services, document imaging and copying, deposition costs, online legal research, and travel expenses"), *aff'd sub nom.*, *Wal-Mart*, 396 F.3d at 96.

III. THE REQUEST IS CONSISTENT WITH CO-LEAD COUNSEL'S 2014 ESTIMATES AND REPRESENTATIONS, WITH ANY DEPARTURES PERFORMED IN THE BEST INTEREST OF THE CLASS

In our 2014 application to be appointed Co-Lead Counsel, we provided certain representations and estimations. *See* Case No. 14-cv-2213, ECF 17. We have reviewed this application to ensure it is consistent with our prior papers, and to be forthright with the Court where there have been necessary departures.

We represented in 2014 we would limit our fee request to that based on the *Payment Card* sliding scale. *See* Case No. 14-cv-2213, ECF 17 at 21. That is exactly the scale used to calculate the current fee request, even though it has resulted in a lodestar multiplier well below 1.0 given our substantial investments into the case.

We represented in 2014 that our firms would calculate lodestar in certain ways, such as by using a rate "freeze," and that Quinn Emanuel would provide a "discount" off our standard rates. *Id.* at 18-19. Not only did we use those discounts and rate-freezes in calculating our lodestar, but we did so in the most conservative way possible. For instance, for purposes of this application, we treated the freeze as even barring increases by way of a person becoming more senior—we did not in this period allow for "class promotion" increases, nor did we even change rates if someone elevated from associate to of-counsel or partner during that period. Such details were not fleshed out in our application, but where we saw ambiguity we tried to resolve it in the most conservative way possible in this application to demonstrate the lack of a "windfall" here.

We anticipated in 2014 we would provide hosting services in-house. But, in the interest of full disclosure, we highlight that some of our expenses are for third-party document vendors. This is because our analyses of what would be in the best interest of the class shifted over the long course of this case. For instance, third-party vendors could offer services that our in-house systems could not offer at the time discovery was ramping up. These features, including the ability to automatically transcribe audio files as well as perform continuous learning to speed the document review, meant that we determined the overall case would operate more efficiently, on the facts specific to this case and at the time we had to make the decision for this case, through the use of third-party vendors. *See* Joint Decl. Section III.B.

We estimated in 2014 what it would cost to get this case through trial. As an initial matter, the 2014 estimate is outdated for a myriad of reasons. It is unlikely anyone would have predicted the case would require multiple amendments and briefs, a full-day tutorial process, and four years to get Defendants to file Answers. Nor could anyone have anticipated the case would still be in discovery seven years after our investigation began. Nor could not have been known the exact scale of discovery in this case, or the exhaustive conferring that would be required over issues small and large. But our 2014 estimates are irrelevant for additional reasons.

For instance, as for expenses, Co-Lead Counsel have gone significantly out of pocket for the seven-year history of the case, with no guarantee we would ever have our incurred expenses recouped. We thus naturally were already incentivized to keep them under control, and to incur the costs only if we believed they were a wise investment to further the case. *See* Silver Decl. ¶ 71 ("Rationally, [the attorneys'] incentive is to incur only expenses that increase class members' expected recoveries by several multiples of the cost. It makes more sense to worry that contingent fee lawyers may devote too few resources to litigation than to fear that they will

spend too much."). As expounded in Section II above and in Sections I.C and III.B of the Joint Declaration, litigating this type of case in a way that forces Defendants to take it seriously requires significant investments. There is no cheap way of demanding, assembling, scrubbing, understanding, and analyzing 110 million transactional records, for example.

As for fees, our prior estimates are, we respectfully submit, even less relevant. We are not getting paid on an hourly basis. As discussed above, a percentage-based approach aligns the incentives of counsel and class. It is again worth noting here that even after, for example, Co-Lead Counsel's rate "freeze" and Quinn Emanuel's 20% discount and the other conservative adjustments, Co-Lead Counsel's lodestar is only .71, and would be even lower if a more traditional approach to calculating lodestar was used. Reducing our recoveries even further below our investments, merely because we did not accurately predict the multi-year history of this case, would only disincentivize attorneys from investing in complex cases requiring going toe-to-toe against multiple defendants and their nearly limitless legal defense budgets.

CONCLUSION

For the foregoing reasons, Co-Lead Counsel respectfully requests that the Court approve Co-Lead Counsel's application for the payment of attorneys' fees and expenses in the amounts set forth above, plus interest thereon. Co-Lead Counsel will submit a proposed order in connection with our reply papers.[8]

[8] Though the Notice referred to the potential request for incentive awards and expense reimbursements for named Plaintiffs, they are not at that this time making such a request, but reserve the right to do so in the event of a future recovery.

DATED: July 9, 2021

Respectfully submitted,

/s/ Merrill G. Davidoff

Merrill G. Davidoff
Martin I. Twersky
Michael C. Dell'Angelo
Candice J. Enders
Zachary D. Caplan
BERGER MONTAGUE PC
1818 Market Street
Philadelphia, Pennsylvania 19103
Telephone: (215) 875-3000
Fax: (215) 875-4604
mdavidoff@bm.net
mtwersky@bm.net
mdellangelo@bm.net
cenders@bm.net
zcaplan@bm.net

/s/ Daniel L. Brockett

Daniel L. Brockett
Sami H. Rashid
Alexee Deep Conroy
Christopher M. Seck
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
Telephone: (212) 849-7000
Fax: (212) 849-7100
danbrockett@quinnemanuel.com
samirashid@quinnemanuel.com
alexeeconroy@quinnemanuel.com
christopherseck@quinnemanuel.com

Jeremy D. Andersen
QUINN EMANUEL URQUHART & SULLIVAN, LLP
865 South Figueroa Street, 10th Floor
Los Angeles, California 90017
Telephone: (213) 443-3000
Fax: (213) 443-3100
jeremyandersen@quinnemanuel.com

Counsel for Gold Plaintiffs and Interim Co-Lead Counsel for the Proposed Gold Class

TAB 49A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: AUTOMOTIVE PARTS ANTITRUST LITIGATION	:	Master File No. 12-md-02311
PRODUCT(S):	:	
In Re: Instrument Panel Clusters	:	2:12-cv-00202
In Re: Heater Control Panels	:	2:12-cv-00402
In Re: Bearings	:	2:12-cv-00502
In Re: Occupant Safety Restraint Systems	:	2:12-cv-00602
In Re: Radiators	:	2:13-cv-01002
In Re: Automotive Lamps	:	2:13-cv-01202
In Re: Switches	:	2:13-cv-01302
In Re: Ignition Coils	:	2:13-cv-01402
In Re: Steering Angle Sensors	:	2:13-cv-01602
In Re: Hid Ballasts	:	2:13-cv-01702
In Re: Electric Powered Steering Assemblies	:	2:13-cv-01902
In Re: Fuel Injection Systems	:	2:13-cv-02202
In Re: Automatic Transmission Fluid Warmers	:	2:13-cv-02402
In Re: Valve Timing Control Devices	:	2:13-cv-02502
In Re: Air Conditioning Systems	:	2:13-cv-02702
In Re: Constant Velocity Joint Boot Products	:	2:14-cv-02902
In Re: Spark Plugs	:	2:15-cv-03002
In Re: Automotive Hoses	:	2:15-cv-03202
In Re: Shock Absorbers	:	2:16-cv-03302
In Re: Body Sealing Products	:	2:16-cv-03402
In Re: Interior Trim Products	:	2:16-cv-03502
In Re: Brake Hoses	:	2:16-cv-03602
In Re: Exhaust Systems	:	2:16-cv-03702
In Re: Ceramic Substrates	:	2:16-cv-03802
In Re: Power Window Switches	:	2:16-cv-03902
In Re: Automotive Steel Tubes	:	2:16-cv-04002
In Re: Access Mechanisms	:	2:16-cv-04102
In Re: Side Door Latches	:	2:17-cv-04302
This Document Relates to: ALL DEALERSHIP ACTIONS	:	Hon. Marianne O. Battani

ORDER REGARDING AUTO DEALERS' MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES FROM ROUND FOUR SETTLEMENTS

The above matter came before the Court on the Auto Dealers' motion for an award of attorneys' fees and reimbursement of litigation expenses relating to a fourth round of Auto Dealer settlements ("Round Four settlements").

The Court has reviewed the memorandum submitted by the Auto Dealers in support of their motion and has also reviewed the various declarations and submissions relating to that motion.

Based on the record before the Court, it is hereby **ORDERED:**

1. The Court has considered the relevant case law and authority and finds that awards of attorneys' fees and reimbursement of expenses to the Auto Dealers and their counsel are appropriate under Fed. R. Civ. P. 23(h) and Fed.R.Civ.P. 54(d)(2). Notice of the request for fees and reimbursement of expenses was provided to the potential class members via direct and published notice and a settlement web site that identified and provided copies of relevant documents and pleadings.

2. The Court has considered the reaction of the class members to this fee request and request for reimbursement of expenses.

3. The Court engages in a two-part analysis when assessing the reasonableness of a petition seeking an award of attorneys' fees. *In re Cardinal Health Ins. Sec. Litig.*, 528 F.Supp.2d 752, 760 (S.D. Ohio 2007). The Court first determines the method of calculating the attorneys' fees: it applies either the percentage of the fund approach or the lodestar method. *Id.*; *Van Horn v. Nationwide Prop. & Cas. Inc. Co.*, 436 F. App'x 496, 498 (6th Cir. 2011).

4. The Court has the discretion to select the appropriate method for calculating attorneys' fees "in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them." *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). In common fund cases, the award of attorneys' fees need only "be

reasonable under the circumstances." *Id.*, 9 F.3d at 516. The Court has also analyzed and weighed the six factors described in *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188 (6th Cir. 1974).

5. The Court will award fees to the Auto Dealers using the percentage-of-the-fund approach. This method of awarding attorneys' fees is preferred in this district because it eliminates disputes about the reasonableness of rates and hours, conserves judicial resources, and aligns the interests of class counsel and the class members. *Rawlings,* 9 F.3d at 515; *In re Packaged Ice Antitrust Litig.*, 08-MDL-01952, 2011 WL 6209188, at *16 (E.D. Mich. Dec. 13, 2011); *Delphi*, 248 F.R.D. at 502; *Cardinal*, 528 F.Supp.2d at 762 (the Sixth Circuit has "explicitly approved the percentage approach in common fund cases."); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 2014 WL 2946459, *1 (E.D. Tenn. Jun. 30, 2014).

6. The Court **GRANTS** the Auto Dealers' request for reimbursement of past litigation expenses in the amount of $153,720.12, as set forth in the declarations submitted by counsel for the Auto Dealers. The past litigation expenses incurred in the general prosecution of the cases with settlements currently before the Court shall be reimbursed on a *pro rata* basis from each of the Round Four settlements.

7. The Court authorizes class counsel for the Auto Dealers to pay the costs of the Round Four settlement notice and claims administration (being handled by KCC, LLC) from the Round Four settlement funds on a *pro rata* basis.

8. Counsel for the Auto Dealers request a fee award of 30 percent of the Round Four settlements, after the cost of class notice and claim administration have been deducted. The award requested is within the range of fee awards made by courts in this Circuit. *In re Prandin Direct Purchaser Antitrust Litig.*, 2015 WL 1396473 (E.D. Mich. Jan. 20, 2015) (awarding one-third of the fund); *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *19; *Skelaxin*, 2014 WL 2946459, at *1; *In re Se. Milk Antitrust Litig.*, 2013 WL 2155387, at *8 (E.D. Tenn. May 17, 2013); *Thacker v.*

Chesapeake Appalachia, L.L.C., 695 F. Supp. 2d, 521, 528 (E.D. Ky. 2010); *Bessey v. Packerland Plainwell, Inc.*, No. 4:06-CV-95, 2007 WL 3173972, at *4 (W.D. Mich. 2007); *Delphi*, 248 F.R.D. at 502-03; *In re National Century Financial Enterprises, Inc. Investment Litig.*, 2009 WL 1473975 (S.D. Ohio, May 27, 2009); *Kogan v. AIMCO Fox Chase, L.P.*, 193 F.R.D. 496, 503 (E.D. Mich. 2000). Other federal courts have approved fees in this range in complex antitrust class action litigation and this Court has used that percentage, or more, for other fee awards in this MDL. *See* 2:12-cv-00101-MOB-MKM (ECF Doc. No. 495, para. 22) (30 percent); 2:12-cv-00102-MOB-MKM (ECF Doc. No. 401, para. 11) (33 percent).

9. The Court has considered the six *Ramey* factors in weighing a fee award to counsel for the Auto Dealers: (1) the value of the benefits rendered to the class; (2) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (3) whether the services were undertaken on a contingent fee basis; (4) the value of the services on an hourly basis [the lodestar cross-check]; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel on both sides. *Ramey*, 508 F.2d at 1194–97.

10. The Court has carefully analyzed the Round Four settlements and the *Ramey* factors and concludes that the factors are met and justify a fee award to counsel for the Auto Dealers. The settlements total more than $86 million and provide substantial cash and non-monetary benefits including cooperation from the settling defendants and injunctive relief from some settling defendants to prohibit certain future conduct. Counsel has worked on a contingent basis and the results of this litigation have never been certain. The legal and factual issues are complicated, and the parties have zealously asserted their claims and defenses. Given the length and tenacity of this litigation, the Court is satisfied that the Round Four settlements were the result of arms' length and good faith negotiations between informed and experienced counsel.

Some of the settlements were only reached with the assistance of mediators and multiple mediation sessions.

11. Courts in the Sixth Circuit weigh "society's stake in rewarding attorneys [who obtain favorable outcomes for a class] in order to maintain an incentive to others," and counsel's success in complex antitrust litigation "counsels in favor of a generous fee." *Cardizem*, 218 F.R.D. at 534 (internal quotation marks omitted). The substantial Auto Dealer recoveries to-date serve a strong public policy of holding accountable those who violate United States antitrust laws, thereby promoting fair competition and pricing. *See* 2:12-cv-00103-MOB-MKM (ECF Doc. No. 578, para. 13).

12. This is an extremely complex litigation with more than 160 defendants and over 40 different Auto Dealer class actions involving different parts, different groups of alleged conspirators, and different time periods. Some of the defendants were indicted and pleaded guilty to antitrust violations while others were not indicted, did not plead guilty, or did not pay fines to a governmental entity. All defendants have vigorously disputed the applicability of Federal Rule 23 to litigated classes and have denied that the Auto Dealers sustained an antitrust injury.

13. Working on a contingent basis, counsel for the Auto Dealers have skillfully guided the cases before the Court in this motion to substantial settlements. When the Round Four settlements are added to the first three rounds of Auto Dealer settlements previously approved by the Court, nearly $385 million has been recovered for the benefit of eligible Auto Dealer settlement class members.

14. The *Ramey* factors and a cross-check of the lodestar incurred by counsel for the Auto Dealers indicate that the fee requested constitutes fair and reasonable compensation for the risks assumed, the work done, and the benefits achieved for the members of the settlement

classes. The total lodestar of counsel for the Auto Dealers presently exceeds $86,502,565.17 when using counsel's current customary rates.

15. When performing the lodestar cross-check, the Court reviewed the hourly rates of Auto Dealer counsel and find that they are reasonable for attorneys with specialized experience in bringing antitrust cases. "A reasonable hourly rate is determined according to the prevailing market rates in the relevant community. To ascertain that community, district courts 'are free to look to a national market, an area of specialization market, or any other market they believe appropriate to fairly compensate particular attorneys in individual cases." *Ford v. Fed.-Mogul Corp.*, No. 2:09-cv-14448, 2015 U.S. Dist. LEXIS 3399, at *2-3 (E.D. Mich. Jan. 7, 2015) (quoting *McHugh v. Olympia Entm't, Inc.*, 37 F. App'x 730, 740 (6th Cir. 2002)). Even if counsel's "requested rates are high for this district. . . Class Counsel should be compensated at rates that reflect their skill and their success." *Schumacher v. AK Steel Corp. Ret. Accumulation Pension Plan*, 995 F. Supp. 2d 835, 847 (S.D. Ohio 2014).

16. The rates used by Auto Dealer counsel in this MDL are well within the parameters of reasonableness. In national markets, "partners routinely charge between $1,200 and $1,300 an hour, with top rates at several large law firms exceeding $1,400.[1] In specialties such as "antitrust and high-stakes litigation and appeals . . . [f]or lawyers at the very top of those fields, hourly rates can hit $1,800 or even $1,950." *Id.* Some "difference makers" in the most complex fields, including antitrust litigation, even charge $2,000 an hour.[2] This Court has recognized that rates in this matter

[1] *See* Sara Randazzo & Jacqueline Palank, *Legal Fees Cross New Mark: $1,500 an Hour*, The Wall Street Journal (Feb. 16, 2016), https://www.wsj.com/articles/legal-fees-reach-new-pinnacle¬1-500-an-hour-1454960708; see also Martha Neil, *Top partner billing rates at BigLaw firms approach $1,500 per hour*, ABA Journal (Feb. 8, 2016), http://www.abajournal.comnews/article/toppartner billing rates at biglaw firms nudge 1500 per hour.

[2] *See* Natalie Rodriguez, *Meet the $2,000 An Hour Attorney: What it Takes to Earn Top Dollar in the Rate-Crunch Era*, Law360, June 11, 2016, https://www.1aw360.com/in-depth/articles/804421 ("[E]arlier this year, BTI Consulting Group found that a handful of in-house counsel had paid as much as

"are well in line with the market, with recent reports explaining that senior lawyers at top law firms routinely charge well over $1,000." *See, e.g.,* 2:12-cv-00103-MOB-MKM (Doc. No. 578) at 7.

17. Interim Co-Lead Counsel for the Auto Dealers performed a thorough analysis of the Auto Dealers' attorneys' time submissions and have, in this motion and in prior motions, provided the Court with detailed information supporting their lodestar. The rates are justified by the many years of experience, expertise, and results in prosecuting antitrust class actions. Counsel for the Auto Dealers achieved excellent results while litigating claims against Defendants that are represented by some of the most skilled and prominent antitrust defense lawyers in the world.

18. The Court **GRANTS** an award of attorneys' fees to counsel for the Auto Dealers in the amount of $26,170,859.00. These attorneys' fees shall be paid on a *pro rata* basis from the net settlement funds available for each Round Four settlement currently before the Court.

19. Using the lodestar cross-check methodology and reviewing the total fees awarded with the lodestar incurred from the inception of the litigation to September 30, 2019, the 30 percent fee awarded results in a lodestar multiplier of approximately 1.19 when using counsel's customary rates. This modest multiplier is well within, if not below, the range of reasonable multipliers awarded in similar contingent fee cases. *See, e.g., In re Cardinal Health Ins. Sec. Litig.*, 528 F. Supp. 2d at 767-68 (approving multiplier of 6, and observing that "[m]ost courts agree that the typical lodestar multiplier" on a large class action "ranges from 1.3 to 4.5"); *In re Prandin Direct Purchase Antitrust Litig.*, 2015 WL 1396473, at *4 (3.01 multiplier). This fee award is reasonable considering the complexity of this litigation, the results achieved for the class members, the risks assumed by counsel for the Auto Dealers, and the work remaining to be done in this litigation.

20. If the Auto Dealers receive money from the $16,800,000.00 general, unsecured, non-priority claim in the TKH bankruptcy proceeding, counsel for the Auto Dealers are awarded,

$2,000 per hour, after discounts, to attorneys in the past year. Several other in-house counsel, meanwhile, had paid highs of $1,900 per hour or $1,800 per hour.")

without further order of the Court, attorneys' fees of 30 percent of any money paid pursuant to that claim.

21. Interim Co-Lead Counsel for the Auto Dealers are authorized to allocate the attorneys' fees and expenses awarded herein among counsel who performed work on behalf of the Auto Dealers in accordance with Interim Co-Lead Counsel's assessment of each firm's contribution to the prosecution of the cases involved in the settlements.

IT IS SO ORDERED.

Date: December 29, 2019

s/Marianne O. Battani
MARIANNE O. BATTANI
United States District Judge

TAB 49B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: AUTOMOTIVE PARTS ANTITTRUST LITIGATION	:	Master File No. 12-md-02311
PRODUCT(S):	:	
In Re: Instrument Panel Clusters	:	2:12-cv-00202
In Re: Heater Control Panels	:	2:12-cv-00402
In Re: Bearings	:	2:12-cv-00502
In Re: Occupant Safety Restraint Systems	:	2:12-cv-00602
In Re: Radiators	:	2:13-cv-01002
In Re: Automotive Lamps	:	2:13-cv-01202
In Re: Switches	:	2:13-cv-01302
In Re: Ignition Coils	:	2:13-cv-01402
In Re: Steering Angle Sensors	:	2:13-cv-01602
In Re: Hid Ballasts	:	2:13-cv-01702
In Re: Electric Powered Steering Assemblies	:	2:13-cv-01902
In Re: Fuel Injection Systems	:	2:13-cv-02202
In Re: Automatic Transmission Fluid Warmers	:	2:13-cv-02402
In Re: Valve Timing Control Devices	:	2:13-cv-02502
In Re: Air Conditioning Systems	:	2:13-cv-02702
In Re: Constant Velocity Joint Boot Products	:	2:14-cv-02902
In Re: Spark Plugs	:	2:15-cv-03002
In Re: Automotive Hoses	:	2:15-cv-03202
In Re: Shock Absorbers	:	2:16-cv-03302
In Re: Body Sealing Products	:	2:16-cv-03402
In Re: Interior Trim Products	:	2:16-cv-03502
In Re: Brake Hoses	:	2:16-cv-03602
In Re: Exhaust Systems	:	2:16-cv-03702
In Re: Ceramic Substrates	:	2:16-cv-03802
In Re: Power Window Switches	:	2:16-cv-03902
In Re: Automotive Steel Tubes	:	2:16-cv-04002
In Re: Access Mechanisms	:	2:16-cv-04102
In Re: Side Door Latches	:	2:17-cv-04302
This Document Relates to: ALL DEALERSHIP ACTIONS	:	Hon. Marianne O. Battani

AUTO DEALERS' MOTION FOR FINAL APPROVAL OF SETTLEMENTS (ROUND FOUR) WITH CERTAIN DEFENDANTS AND FOR CERTIFICATION OF SETTLEMENT CLASSES

Pursuant to Rules 23 and 54 of the Federal Rules of Civil Procedure, the Interim Co-Lead Counsel for the Auto Dealers will move the Court for an Order granting final approval to settlements reached with certain of the Defendants, certifying settlement classes in the settlements, and the appoint settlement class counsel and settlement class representatives. The Auto Dealers will also seek entry of final judgment, pursuant to Rule 65 of the Federal Rules of Civil Procedure, in the cases for which final approval is sought against certain Defendants.

Dated: December 6, 2019.

By: */s/ Gerard V. Mantese*
Gerard V. Mantese (P34424)
MANTESE HONIGMAN, P.C.
1361 E. Big Beaver Road
Troy, MI 48083
Telephone: (248) 457-9200 Ext. 203
Facsimile: (248) 457-9201
gmantese@manteselaw.com

Interim Liaison Counsel for the Automobile Dealer Plaintiffs

Jonathan W. Cuneo
CUNEO GILBERT & LADUCA, LLP
4725 Wisconsin Ave., NW
Suite 200
Washington, DC 20016
Telephone: (202) 789-3960
Facsimile: (202) 789-1813
jonc@cuneolaw.com

Don Barrett
BARRETT LAW GROUP, P.A.
P.O. Box 927
404 Court Square
Lexington, MS 39095
Telephone: (662) 834-2488
Facsimile: (662)834.2628
dbarrett@barrettlawgroup.com

Shawn M. Raiter
LARSON KING, LLP
2800 Wells Fargo Place
30 East Seventh Street
St. Paul, MN 55101
Telephone: (651) 312-6500
Facsimile: (651) 312-6618
sraiter@larsonking.com

Interim Co-Lead Counsel for the Automobile Dealer Plaintiffs

CERTIFICATE OF SERVICE

I, Gerard V. Mantese, hereby certify that I caused a true and correct copy of **Auto Dealers' Motion for Final Approval of Settlements (Round Four) With Certain Defendants and for Certification of Settlement Classes** to be served via e-mail upon all registered counsel of record via the court's cm/ECF system on **December 6, 2019.**

/s/Gerard V. Mantese
Gerard V. Mantese

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: AUTOMOTIVE PARTS ANTITRUST LITIGATION	:	Master File No. 12-md-02311
PRODUCT(S):	:	
In Re: Instrument Panel Clusters	:	2:12-cv-00202
In Re: Heater Control Panels	:	2:12-cv-00402
In Re: Bearings	:	2:12-cv-00502
In Re: Occupant Safety Restraint Systems	:	2:12-cv-00602
In Re: Radiators	:	2:13-cv-01002
In Re: Automotive Lamps	:	2:13-cv-01202
In Re: Switches	:	2:13-cv-01302
In Re: Ignition Coils	:	2:13-cv-01402
In Re: Steering Angle Sensors	:	2:13-cv-01602
In Re: Hid Ballasts	:	2:13-cv-01702
In Re: Electric Powered Steering Assemblies	:	2:13-cv-01902
In Re: Fuel Injection Systems	:	2:13-cv-02202
In Re: Automatic Transmission Fluid Warmers	:	2:13-cv-02402
In Re: Valve Timing Control Devices	:	2:13-cv-02502
In Re: Air Conditioning Systems	:	2:13-cv-02702
In Re: Constant Velocity Joint Boot Products	:	2:14-cv-02902
In Re: Spark Plugs	:	2:15-cv-03002
In Re: Automotive Hoses	:	2:15-cv-03202
In Re: Shock Absorbers	:	2:16-cv-03302
In Re: Body Sealing Products	:	2:16-cv-03402
In Re: Interior Trim Products	:	2:16-cv-03502
In Re: Brake Hoses	:	2:16-cv-03602
In Re: Exhaust Systems	:	2:16-cv-03702
In Re: Ceramic Substrates	:	2:16-cv-03802
In Re: Power Window Switches	:	2:16-cv-03902
In Re: Automotive Steel Tubes	:	2:16-cv-04002
In Re: Access Mechanisms	:	2:16-cv-04102
In Re: Side Door Latches	:	2:17-cv-04302
This Document Relates to: ALL DEALERSHIP ACTIONS	:	Hon. Marianne O. Battani

AUTO DEALERS' MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENTS (ROUND FOUR) WITH CERTAIN DEFENDANTS AND FOR CERTIFICATION OF SETTLEMENT CLASSES

Gerard V. Mantese (P34424)
Mantese Honigman, P.C.
1361 E. Big Beaver Road
Troy, MI 48083
Telephone: (248) 457-9200 Ext. 203
gmantese@manteselaw.com

Interim Liaison Counsel For The Automobile Dealer Plaintiffs

Jonathan W. Cuneo
Cuneo Gilbert & Laduca, LLP
4725 Wisconsin Ave., NW
Suite 200
Washington, DC 20016
Telephone: (202) 789-3960
jonc@cuneolaw.com

Don Barrett
Barrett Law Group, P.A.
P.O. Box 927
404 Court Square
Lexington, MS 39095
Telephone: (662) 834-2488
dbarrett@barrettlawgroup.com

Shawn M. Raiter
Larson King, LLP
2800 Wells Fargo Place
30 East Seventh Street
St. Paul, MN 55101
Telephone: (651) 312-6500
Facsimile: (651) 312-6618
sraiter@larsonking.com

Interim Co-Lead Counsel for the Automobile Dealer Plaintiffs

Statement of the Issues Presented

1. Whether the Round Four settlements between the Auto Dealer Plaintiffs and certain Defendants are fair, reasonable, and adequate and should be granted final approval under Fed. R. Civ. P. 23?

   Answer: Yes

2. Whether the Court should grant final certification to the Auto Dealer settlement classes it previously conditionally certified?

   Answer: Yes

Controlling or Most Appropriate Authorities

Griffin v. Flagstar Bancorp, Inc., No. 2:10-cv-10610, 2013 WL 6511860 (E.D. Mich. Dec. 12, 2013)

In re Cardizem CD Antitrust Litig., 218 F.R.D. 508 (E.D. Mich. 2003)

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Introduction

In this fourth group of settlements ("Round Four"), the Automobile Dealer Plaintiffs respectfully seek final approval of provisionally-approved settlements with 23 groups of Defendants. These settlements provide more than $86 million in cash benefits to eligible automobile dealerships. They also provide meaningful cooperation, which affords the Auto Dealers detailed information about the anti-competitive conduct of the Defendants. Each of the proposed settlements is fair, reasonable, adequate, and should be granted final approval.

The settlements provide excellent benefits in light of the conduct, damage, and litigation risks related to each of the settling Defendants. The cash components of the settlements are reasonable compromises of the liability claims in light of the volume of commerce believed to be affected by each settling Defendant's conduct. The settlements also reflect the value of the cooperation and the value of receiving money and cooperation now, which benefit the Auto Dealers' claims against any new or non-settling Defendants.

Notice of these settlements, as required by Rule 23, was provided through the notice plan previously approved by the Court. The response from the members of the settlement classes was positive. There were no objections to the settlements, attorneys' fees, litigation expenses, or the request to set aside funds for future class representative service awards. This is remarkable considering that the members of the Auto Dealer settlement classes are sophisticated businesses with their own counsel who can analyze the merits of these settlements. A small number of dealerships that opted out of the Round Two and Round Three settlements elected to opt out of Round Four. The favorable reception of these settlements provides good evidence that final approval should be granted.

The Court should certify, for settlement purposes, the settlement classes that it previously conditionally certified in the preliminary approval orders. The settlements meet the Rule 23 requirements for settlement classes and class-wide resolutions are the superior method for resolving the claims against these Defendants. In doing so, the Court should confirm the appointment of settlement class counsel and the class representatives for the Auto Dealers.

Background

I. The Administration of Prior Settlement Rounds.

The initial payments for Round One settlements were made in April 2018. (Raiter Decl.) More than 3,400 eligible dealerships submitted valid claims in Round One. (Declaration of Alan Vasquez, para. 19.) Recognizing the substantial benefits available, an additional 1,260 eligible dealerships submitted valid claims in the Round Two settlements. *Id.* Claim payments have now been made for the Round Three settlements approved by the Court and more than 5,000 eligible dealerships have received payments in this litigation. (Raiter Decl.)

The monetary payments in the first three rounds of settlements were substantial. Some large dealership groups have already received millions of dollars in claim payments. (Raiter Decl.) Even modest sized dealerships have received tens of thousands of dollars in prior settlement rounds. *Id.*

II. The Round Four Settlements Provide Substantial Benefits to Auto Dealers.

A. Cash Benefits.

In a prior series of orders, the Court preliminarily approved settlements (the "Settlements") between the Auto Dealers and a number of the Defendants and their affiliates (the "settling Defendants"). Those Settlements are now before the Court for final approval. The Settlements involve 28 of the component parts that the Auto Dealers contend were the subject of coordination, bid-rigging, and price-fixing.

For the Round Four Settlements currently before the Court, the settling Defendants and settlement amounts by part are:

Auto Parts Settlements and Settlement Funds			
Automotive Parts Case	**Settling Defendant**	**Amount Settled**	**Settlement Fund**
Access Mechanisms	Alpha	$852,000.00	$1,092,000.00
	Valeo	$240,000.00	
Air Conditioning Systems	Calsonic	$1,627,534.94	$6,895,534.94
	MAHLE Behr	$468,000.00	
	Mitsubishi	$2,160,000.00	
	Panasonic	$240,000.00	
	Sanden	$2,400,000.00	
ATF Warmers	Calsonic	$120,115.87	$120,115.87
Automotive Hoses	Toyoda Gosei	$1,714,157.85	$1,714,157.85
Automotive Lamps	Stanley	$3,889,541.05	$3,889,541.05
Automotive Steel Tubes	Maruyasu	$1,645,728.00	$5,965,728.00
	Sanoh	$2,640,000.00	
	Usui	$1,680,000.00	
Bearings	Nachi	$1,020,000.00	$3,420,000.00
	SKF	$2,400,000.00	
Body Sealing Products	Green Tokai	$300,000.00	$8,873,258.96
	Toyoda Gosei	$8,573,258.96	
Brake Hoses	Toyoda Gosei	$208,249.33	$208,249.33
Ceramic Substrates	Corning	$8,400,000.00	$8,400,000.00
Constant Velocity Joint Boots	Toyoda Gosei	$226,264.76	$226,264.76

Electronic Power Steering Assemblies	Showa	$1,305,390.12	$1,305,390.12
Exhaust Systems	Bosal	$48,000.00	$6,276,000.00
	Faurecia	$468,000.00	
	Meritor	$240,000.00	
	Tenneco	$5,520,000.00	
Fuel Injection Systems	Keihin	$264,000.00	$1,143,072.00
	Maruyasu	$34,272.00	
	Mikuni	$844,800.00	
Heater Control Panels	Tokai Rika	$431,550.97	$431,550.97
HID Ballasts	Stanley	$910,458.95	$910,458.95
Ignition Coils	Delphi	$240,000.00	$480,000.00
	Toyo Denso	$240,000.00	
Instrument Panel Clusters	Continental	$1,200,000.00	$1,200,000.00
Interior Trim Products	Toyoda Gosei	$1,607,208.53	$1,607,208.53
Occupant Safety Restraint Systems	TKH[1]	$16,800,000.00	$27,708,370.24
	Tokai Rika	$9,077,509.67	
	Toyoda Gosei	$1,830,860.57	
Power Window Switches	Toyo Denso	$1,392,000.00	$1,392,000.00
Radiators	Calsonic	$1,764,509.19	$1,764,509.19
Shock Absorbers	KYB	$9,120,000.00	$12,254,609.88
	Showa	$3,134,609.88	
Side Door Latches	Brose	$720,000.00	$720,000.00
Spark Plugs	NGK	$4,020,000.00	$4,020,000.00
Steering Angles Sensors	Tokai Rika	$214,014.95	$214,014.95
Switches	Tokai Rika	$1,076,924.41	$1,076,924.41
Valve Timing Control Devices	Mikuni	$211,200.00	$211,200.00
		Total	**$103, 520,160.00, including TKH bankruptcy claim**

The Court granted preliminary approval to these settlements with the date of preliminary approval and case number shown below:

[1] The potential payment by TKH is a general, unsecured, non-priority claim under the TKH bankruptcy plan and the expected bankruptcy payout is expected to be considerably less than the settlement amount.

Defendant	Date Preliminary Approval Motion Granted	Case Number	Case Name / Parts
Alpha	September 24, 2019	2:16-cv-04102	Access Mechanisms
Bosal	September 24, 2019	2:16-cv-03702	Exhaust Systems
Brose	September 18, 2018	2:17-cv-04302	Door Latches
Calsonic	June 22, 2018	2:13-cv-01002 2:13-cv-02402 2:13-cv-02702	Radiators ATF Warmers Air Conditioning
Continental	March 28, 2018	2:12-cv-00202	Instrument Panel Clusters
Corning	July 18, 2019	2:16-cv-03802	Ceramic Substrates
Delphi	August 15, 2019	2:13-cv-01402	Ignition Coils
Faurecia	June 22, 2018	2:16-cv-03702	Exhaust Systems
Green Tokai	October 18, 2018	2:16-cv-03402	Body Sealings
Keihin	August 15, 2019	2:13-cv-02202	Fuel Injection Systems
KYB	April 1, 2019	2:15-cv-03302	Shock Absorbers
MAHLE Behr	October 18, 2018	2:13-cv-02702	Air Conditioning Systems
Maruyasu	February 21, 2019	2:13-cv-02202 2:16-cv-04002	Fuel Injection Systems Automotive Steel Tubes
Meritor	September 18, 2018	2:16-cv-03702	Exhaust Systems
Mikuni	August 15, 2019	2:13-cv-02202 2:13-cv-02502	Fuel Injection Systems Valve Timing Control Devices
Mitsubishi Heavy	July 18, 2019	2:13-cv-02702	Air Conditioning Systems
Nachi	September 24, 2019	2:12-cv-00502	Bearings
NGK	June 22, 2018	2:15-cv-03002	Spark Plugs
Panasonic	July 18, 2019	2:13-cv-02702	Air Conditioning Systems
Sanden	March 15, 2018	2:13-cv-02702	Air Conditioning Systems
Sanoh	May 16, 2019	2:16-cv-04002	Automotive Steel Tubes
Showa	September 24, 2019	2:13-cv-01902 2:16-cv-03302	Electronic Powered Steering Assemblies Shock Absorbers
SKF	September 24, 2019	2:12-cv-00502	Bearings
Stanley	May 6, 2019	2:13-cv-01202 2:13-cv-01702	Automotive Lamps HID Ballasts
TKH	September 24, 2019	2:12-cv-00602	Occupational Safety Restraint Systems
Tenneco	September 17, 2018	2:16-cv-03702	Exhaust Systems

Tokai Rika	March 7, 2019	2:12-cv-00402 2:12-cv-00602 2:13-cv-01302 2:13-cv-01602	Heather Control Panels Occupational Restraint Safety Systems Switches Steering Angle Sensors
Toyo Denso	June 22, 2018	2:13-cv-01402 2:16-cv-03902	Ignition Coils Power Window Switches
Toyoda Gosei	October 18, 2018	2:12-cv-00602 2:14-cv-02902 2:15-cv-03202 2:16-cv-03402 2:16-cv-03502 2:16-cv-03602	Occupational Restraint Safety Systems CVJ Boots Automotive Hoses Body Sealing Products Interior Trim Products Brake Hoses
Usui	February 27, 2018	2:16-cv-04002	Automotive Steel Tubes
Valeo	September 24, 2019	2:16-cv-04102	Access Mechanisms

The different parts and settling Defendants result in 48 different settlement classes in the Settlements (the "Settlement Classes"). The Auto Dealers negotiated the Settlements in tandem with the End Payors to allow the settling Defendants to resolve the indirect purchaser claims in the litigation. (*See* Raiter Decl.) As part of these negotiations, the Auto Dealers considered the particular Defendants' conduct, the amount of commerce affected by that conduct, and the value of other settlement terms, like cooperation, being offered by the settling Defendant. (*Id.*)

The Settlements provide more than $86 million in gross settlement funds for eligible dealerships in the Settlement Classes. The total guaranteed money recovered in Auto Dealer settlements in Round One ($58,947,900.00), Round Two ($124,730,927.00), Round Three ($115,180,799.90), and Round Four ($86,720,160.00) of this litigation is $385,579,786.00. When the $16,800,000.00 general, unsecured, non-priority claim in the TKH bankruptcy from the Round Four settlements is included, the amount recovered for Auto Dealers could total as much as $402,389,786.00. (Raiter Decl.) In the opinion of counsel for the Auto Dealers,

the Settlements provide an excellent result for the Settlement Classes and are fair, reasonable, and adequate. *Id.*

B. Cooperation and Other Terms.

In addition to the cash payments, the settling Defendants are required to provide the Auto Dealers with various forms of cooperation that include: (1) the production of certain documents and data relevant to the ongoing claims against the non-settling Defendants; (2) interviews with representatives of the settling Defendants; (3) the assistance in understanding certain data and other information produced to Auto Dealers; and (4) facilitating the use of such data and information at trial. Those terms were set out in detail in the preliminary approval motions and the settlement agreements between the parties (the "Settlement Agreements").

II. The Notice Plan was Carried Out and Provided Adequate Notice of the Settlements.

The Settlements provide cash benefits to automobile dealerships that purchased certain parts and/or new vehicles containing those parts in jurisdictions that the Auto Dealers contend allow antitrust indirect purchasers to seek money damages: Arizona, Arkansas, California, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin (the "Included States").

Through class action notice consultant Gilardi & Co., potential automobile dealer class members in the Included States were identified and were mailed a long form notice that provided information about the Round Four Settlements. (*See* Vasquez Decl.) The notice

consultant also sent long form notices to email addresses associated with automobile dealerships that may have purchased new vehicles and parts in the Included States. (*Id.*) A multi-faceted notice program intended to provide the best notice practicable under the circumstances was therefore carried out and included:

- Direct mail notice to approximately 14,000 postal addresses of automobile dealerships potentially eligible for money benefits under the Settlements;
- Email notice to approximately 44,600 email addresses associated with automobile dealerships potentially eligible for money benefits under the Settlements;
- Published notice in trade magazines like *Ward's AutoWorld*, *Automotive News*, and *Auto Dealer Monthly* and digital media designed to target new car automobile dealerships nationwide;
- Online media efforts through outlets like Facebook and Twitter; and
- Earned media efforts through a national press release and the settlement web site, www.AutoDealerSettlement.com

(*See* Vasquez Decl.) The notice plan "reached" between 90 and 95 per cent of the potentially eligible automobile dealers in the Included States. (*Id.*, para. 23)

III. The Reaction of Settlement Class Members was Positive.

The reaction to the Round Four Settlements was positive. There were no objections to any of the 48 different Settlement Classes. (*See* Vasquez Decl., para. 21). No class member objected to the terms of the Settlements, the notice plan, or the requested attorneys' fees. (*Id.*) No class member requested an opportunity to be heard at the final fairness hearing. (*Id.*)

Despite efforts by attorneys who solicit class members to opt-out of antitrust settlements, only a small percentage of the potential Settlement Class members from the Included States requested exclusion. Three dealership groups—represented by the same law

firms—elected to opt out. (Vasquez Decl., para. 20 & Ex. 7). Those groups are believed to operate at most 168 new vehicle dealerships at locations in the Included States. (Raiter Decl.)[2] Even with these requests for exclusion, nearly 99 per cent of the dealerships in the Included States elected to remain in the Settlement Classes. (*Id.*)

Legal Standard

The Sixth Circuit and courts in the Eastern District of Michigan "have recognized that the law favors the settlement of class action lawsuits." *Griffin v. Flagstar Bankcorp, Inc.*, No. 2:10-cv-10610, 2013 WL 6511860, at *2 (E.D. Mich. Dec. 12, 2013); *see also In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2011 WL 717519, at *7 (E.D. Mich. Feb. 22, 2011); *UAW v. General Motors Corp.*, 497 F.3d 615, 632 (6th Cir. 2007) (federal policy favors settlement of class actions).

To be given final approval, a class action settlement must be "fair, reasonable, and adequate." *Sheick v. Auto. Component Carrier LLC*, No. 2:09-CV-14429, 2010 WL 4136958, at *14 (E.D. Mich. Oct. 18, 2010); *see also In re Packaged Ice*, 2011 WL 717519, at *8. "There are three steps which must be taken by the court in order to approve a settlement: (1) the court must preliminarily approve the proposed settlement, (2) members of the class must be given notice of the proposed settlement, and (3) after holding a hearing, the court must give its final approval of the settlement." *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 1026 (S.D. Ohio 2001) (citing *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983)); *In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2010 WL 3070161, at *4 (E.D. Mich. Aug. 2, 2010).

[2] Many of the dealerships requesting exclusion have the same address. It is therefore not clear exactly how many dealership locations have requested exclusion but the number totals 168 or less in the Included States. *See* Vasquez Decl., Exhibit 7.

The court considers whether the proposed settlement is "fair, adequate, and reasonable to those it affects and whether it is in the public interest." *Lessard v. City of Allen Park*, 372 F. Supp. 2d 1007, 1009 (E.D. Mich. 2005) (citing *Williams*, 720 F.2d at 921–23). This determination requires consideration of "whether the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 522 (E.D. Mich. 2003) (citation omitted); *Sheick*, 2010 WL 4136958, at *14–15.

The court has broad discretion when approving a class action settlement. *UAW*, 497 F.3d at 636; *Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir. 1975). In exercising this discretion, courts give considerable weight and deference to the view of experienced counsel as to the merits of an arm's-length settlement. *Dick v. Sprint Commc'ns Co. L.P.*, 297 F.R.D. 283, 297 (W.D. Ky. 2014) ("The Court defers to the judgment of the experienced counsel associated with the case, who have assessed the relative risks and benefits of litigation"). Indeed, a "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's length negotiations between experienced, capable counsel after meaningful discovery." *New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 632 (W.D. Ky. 2006) (citations omitted); *see also In re Auto. Refinishing Paint Antitrust Litig.*, No. MDL 1426, 2003 WL 23316645, at *6 (E.D. Pa. Sept. 5, 2003).

The court must "carefully scrutinize" whether the settlement is fair, reasonable, and adequate and whether the named plaintiffs and their counsel have met their fiduciary obligations to the class. *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 309 (6th Cir. 2016). Because a settlement represents an exercise of judgment by the negotiating

parties, a judge reviewing a settlement will not "substitute his or her judgment for that of the litigants and their counsel," *IUE-CWA v. General Motors Corp.*, 238 F.R.D. 583, 593 (E.D. Mich. 2006), or "decide the merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n. 14 (1981). Because of the uncertainties and risks inherent in any litigation, courts take a common sense approach and approve class action settlements if they fall within a "range of reasonableness." *Sheick*, 2010 WL 4136958, at *15 (citation omitted). The court should guard against demanding too large a settlement, because a settlement "represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution." *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Ford Motor Co.*, No. 05-74730, 2006 WL 1984363, at *23 (E.D. Mich. July 13, 2006) (citation omitted); *accord Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 324 (3d Cir. 2011).

Argument

I. The Settlements are Fair, Reasonable, and Adequate and Should be Given Final Approval.

The Round Four Auto Dealer settlements before the Court meet the criteria required for final approval under Rule 23 of the Federal Rules of Civil Procedure. They provide meaningful benefits and were reached after negotiations between experienced counsel who were armed with sufficient background about the merits and defenses to the claims asserted. The settlements reflect a reasonable compromise in light of the liability, damages, and procedural uncertainties facing both the Auto Dealers and the settling Defendants.

Courts in the Sixth Circuit consider a number of factors when determining whether a settlement should be granted final approval: (1) the likelihood of success on the merits weighed against the amount and form of the relief offered in the settlement; (2) the complexity,

expense, and likely duration of further litigation; (3) the opinions of class counsel and class representatives; (4) the amount of discovery engaged in by the parties; (5) the reaction of absent class members; (6) the risk of fraud or collusion; and (7) the public interest. *Packaged Ice*, 2011 WL 717519, at *8; *see also UAW*, 497 F.3d at 631; *Griffin*, 2013 WL 6511860, at *3; *Cardizem*, 218 F.R.D. at 522. No single factor is determinative and the court may weigh each factor based on the circumstances of the case. *Int'l Union,* 2006 WL 1984363, at *21. The court may "choose to consider only those factors that are relevant to the settlement at hand." *Id.* at *22; *see also Grenada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205–06 (6th Cir. 1992) (holding that a district court enjoys wide discretion in assessing the weight and applicability of factors).

A. The Likelihood of the Auto Dealers' Success on the Merits Weighed Against the Relief Offered in the Settlements Supports Approval.

The court assesses class action settlements "with regard to a 'range of reasonableness,' which 'recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs inherent in taking any litigation to completion.'" *Sheick*, 2010 WL 4136958, at *15 (quoting *IUE-CWA*, 238 F.R.D. at 594; *Int'l Union,* 2006 WL 1984363, at *21). The fairness of such a settlement "turns in large part on the bona fides of the parties' legal dispute." *UAW*, 497 F.3d at 6331. When considering the likelihood of plaintiffs' success on the merits of the litigation, the ultimate question is whether the interests of the class as a whole are better served if the litigation is resolved by settlement rather than pursued. *Sheick*, 2010 WL 4136958, at *16 (citing *IUE-CWA*, 238 F.R.D. at 595).

The Auto Dealers believed they would prevail in these cases. But they also recognized that success is not guaranteed in any complex litigation. Although there were illegal

conspiracies to coordinate bidding and other activities on component parts, the Defendants have vigorously defended these cases. Some Defendants have claimed that the Auto Dealers could prove that the bid rigging caused them an antitrust injury. Others previewed arguments about class certification, which they contended should not be granted in the Auto Dealer cases. The Settlements reflect both the strengths of the Auto Dealers' claims and the risk that the settling Defendants may prevail on some of their arguments.

The settling Defendants are represented by experienced and competent counsel and were prepared to defend these cases through trial. While there is risk in any litigation, antitrust class actions are inherently high-stakes and high-risk. Auto Dealers have been optimistic about the outcome of these cases, but must acknowledge that the settling Defendants could prevail on certain legal or factual arguments and by doing so, could reduce or eliminate potential recoveries for the Auto Dealers. The certainty and substantial benefits provided by the Settlements support a finding that they were reasonable and adequate.

For some of these parts, there have been only a few settlements, making the Round Four settlements important. *Packaged Ice*, 2011 WL 717519, at *10; *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003). The cooperation that the settling Defendants have agreed to provide is a "substantial benefit" to the class and "strongly militates toward approval" of the Settlements. *Linerboard*, 292 F. Supp. 2d at 643. This cooperation will enhance and strengthen the Auto Dealers' prosecution of claims against any Defendants who continue to litigate these cases. *Linerboard*, 292 F. Supp. 2d at 643; *Packaged Ice*, 2011 WL 717519, at *10 (noting that cooperation by the settlement defendant "has already been beneficial to the Plaintiffs in their continued prosecution of their claims against the non-

settling Defendants"); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 584 F. Supp. 2d 697, 702 (M.D. Pa. 2008) ("the benefit of obtaining the cooperation of the Settling Defendants tend to offset the fact that they would be able to withstand a larger judgment.").

The more than $86 million being made available to eligible dealership in the Round Four settlements is a reasonable compromise of the disputed claims against the settling Defendants. As previously noted, the Defendants contend that although there may have been coordination of bids, that coordination did not result in artificially inflated prices for the parts at issue. The Defendants have also argued that the Auto Dealers passed any price increases on to consumers. Finally, some of the Defendants focus on the relatively limited scope of bid coordination on some parts and the corresponding amount of affected commerce, which they contend was not significant.

For each of these Settlements, counsel for the Auto Dealers analyzed, among other things, the strength of the liability claims against the particular Defendant, the volume of affected commerce, the value of the particular cooperation being provided, and the range of damage that could be proven at trial against the Defendant. The money being paid and the cooperation for future claims provide substantial value in light of the risks of continuing the litigation. Interim Co-Lead Class Counsel for the Auto Dealers believe that the Settlements represent an excellent recovery for Auto Dealers. Weighing the benefits of the Settlements against the risks of continued litigation tilts the scale heavily toward final approval. *See Griffin*, 2013 WL 6511860, at *4; *Packaged Ice*, 2011 WL 717519, at *9.

B. The Complexity, Expense, and Likely Duration of Continued Litigation Favor Final Approval.

"Settlement should represent 'a compromise which has been reached after the risks, expense and delay of further litigation have been assessed.'" *Cardizem*, 218 F.R.D. at 523 (quoting *Williams*, 720 F.2d at 922); *Levine v. United States*, 137 F. Supp. 955, 1013 (Ct. Cl. 1956) (settlement avoid the costs, delays, and multitude of other problems associated with class actions, which are "inherently complex."); *Cardizem*, 218 F.R.D. at 533 ("Moreover, the complexity of this case cannot be overstated. Antitrust class actions are inherently complex . . . .").

The Court has had substantial opportunity to consider the claims and defenses in this litigation and knows that complex antitrust litigation of this scope has many inherent risks that settlements extinguish. These cases would likely continue for even more years, at great additional expense, if they were litigated through an adversarial judgement and any appeals. The fact that the Auto Dealers achieved substantial recoveries, which eliminate risk while ensuring substantial payments, supports final approval of the Settlements.

C. The Judgment of Experienced Counsel Who Have Evaluated the Strength of the Claims, Defenses, and Risks Supports Approval.

The Settlements were reached by experienced counsel after arm's-length negotiations and are therefore provided deference. *Dick*, 297 F.R.D. at 296 ("Giving substantial weight to the recommendations experienced attorneys, who have engaged in arms-length settlement negotiations, is appropriate . . . .") (quoting *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, No. 3:08-MD01998, 2010 WL 3341200, at *4 (W.D. Ky. Aug. 23, 2010)); *see also In re Auto. Refinishing Paint Antitrust Litig.*, 617 F. Supp. 2d 336, 341 (E.D. Pa. 2007).

In deciding whether a proposed settlement warrants approval, "[t]he Court should also consider the judgment counsel and the presence of good faith bargaining between the contending parties." *In re Delphi Corp. Sec., Deriv. & "ERISA" Litig.*, 248 F.R.D. 483, 498 (E.D. Mich. 2008). Counsel's judgment "that settlement is in the best interest of the class 'is entitled to significant weight, and supports the fairness of the class settlement.'" *Packaged Ice*, 2011 WL 717519, at *11 (quoting *Sheick*, 2010 WL 4136958, at *18). "In the absence of evidence of collusion (there is none here) this Court 'should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs.'" *Date v. Sony Electronics, Inc.*, No. 07-15474, 2013 WL 3945981, at *9 (E.D. Mich. July 31, 2013) (quoting *Williams*, 720 F.2d at 922–23).

Interim Co-Lead Counsel for the Auto Dealers are experienced in handling class action antitrust and other complex litigation. They have represented the interests of Auto Dealers from the inception of this litigation and negotiated the Settlements at arms' length with well-respected and experienced counsel for the settling Defendants. Interim Co-Lead Counsel believe that the Settlements each provide an excellent result in light of the circumstances of each settling Defendant's conduct and potential liability. (Raiter Decl.)

The amount of discovery in the cases involved in the Settlements varied, but in each case counsel for the Auto Dealers was armed with important information about the conspiracies through review of documents produced to the Department of Justice, proffers of information by cooperating Defendants, and/or discovery from this litigation. The amount of discovery completed is a factor to be considered in the settlement approval process, but there is no baseline required to satisfy this factor. *In re Packaged Ice Antitrust Litig.*, 2010 WL

3070161, at *5-6. The "question is whether the parties had adequate information about their claims." *Griffin*, 2013 WL 6511860, at *4 (quoting *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 458 (S.D.N.Y. 2004)).

This litigation has been pending for more than seven years. Much has been done and the parties are well-acquainted with the facts, claims, and defenses. The discovery and available information allowed Interim Co-Lead Counsel for the Auto Dealers to evaluate the strengths and weaknesses of the claims and defenses and to evaluate the benefits of the Settlements. These are not settlements reached without substantial discovery and investigation. Interim Co-Lead Counsel for the Auto Dealers believe that the Settlements are fair, reasonable, and in the best interests of Auto Dealers who purchased new vehicles containing the parts at issue in the Settlements. (Raiter Decl.) The opinion of counsel supports final approval of the Settlements.

D. Class Member Reaction.

There were no objections to any of the settlements. This is remarkable because there are often at least a few objections to class settlements. "A certain number of opt-outs and objections are to be expected in a class action. If only a small number are received, that fact can be viewed as indicative of the adequacy of the settlement." *Cardizem*, 218 F.R.D. at 527. This reaction from the members of the settlement classes strongly supports the adequacy of the settlements. *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118–19 (3d Cir. 1990) (holding that objections by about 10% of class "strongly favors settlement"); *see also TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 458, 462 (2d Cir. 1982) (approving settlement despite objections of

large number of class); *Taifa v. Bayh*, 846 F. Supp. 723, 728 (N.D. Ind. 1994) (approving class settlement despite objections from more than 10% of class).

Notice of these settlements was sent by direct mail to approximately 14,000 addresses and 44,600 email addresses connected to new car dealerships in the Included States. (Vasquez Decl., para. 11) These dealerships are sophisticated businesses with their own attorneys (inside or outside counsel) who were well-equipped to evaluate the reasonableness of the Round Four settlements. The lack of objections speaks loudly about the benefits of the Settlements. The same dealership groups that opted out of the Round Two and Round Three settlements elected to opt out again. (*Id.*, para. 20 & Ex. 7). The absence of any objections and the small number of opt-outs supports the adequacy of the Settlements.

E. The Public Interest Supports Granting Final Approval to the Settlements.

"[T]here is a strong public interest in encouraging settlement of complex litigation and class action suits because they are 'notoriously difficult and unpredictable' and settlement conserves judicial resources." *Cardizem*, 218 F.R.D. at 530 (quoting *Granada*, 962 F.2d at 1205); *see aslo Griffin*, 2013 WL 6511860, at *5; *Packaged Ice*, 2011 WL 717519, at *12. In light of the conduct at issue and guilty pleas related to the claims here, there is no countervailing public interest that provides a reason to disapprove the Settlements. *Griffin*, 2013 WL 6511860, at *5. This factor also supports final approval.

F. The Settlements are not the Product of Collusion.

There is a presumption that settlement negotiations were conducted in good faith and that the resulting agreement was reached without collusion unless there is contrary evidence. *Griffin*, 2013 WL 6511860, at *3; *Packaged Ice*, 2011 WL 717519, at *12; *Int'l Union,*, 2006 WL

1984363, at *26; *Sheick*, 2010 WL 4136958, at *19–20. The Settlements here were reached after adversarial litigation and often contentious discovery. The negotiations leading to the Settlements were entirely arms' length and often took many months of settlement proposal exchanges and, in some cases, the involvement of mediators. The Settlements were negotiated in good faith with counsel on each side zealously representing the interests of their clients.

II. Notice of the Settlements was Proper Under Rule 23 and Met Due Process Requirements.

Fed. R. Civ. P. 23(e)(1) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the [proposed settlement]." For Rule 23(b)(3) actions, "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B).

The purpose of notice in a class action is to "afford members of the class due-process which, in the context of the Rule 23(b)(3) class action, guarantees them the opportunity to be excluded from the class action and not be bound by any subsequent judgment." *Peters v. Nat'l R.R. Passenger Corp.*, 966 F.2d 1483, 1486 (D.C. Cir. 1992) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173–74, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)). Due process requires that absent class members be provided the best notice practicable, reasonably calculated to apprise them of the pendency of the action, and affording them the opportunity to opt out or object. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985); *see also UAW*, 497 F.3d at 629 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)).

The "best notice practicable" does not mean actual notice, nor does it require individual mailed notice where there are no readily available records of class members' individual addresses or where it is otherwise impracticable. *Fidel v. Farley*, 534 F.3d 508, 514 (6th Cir. 2008); *In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. 534, 548–53 (N.D. Ga. 1992); Manual for Complex Litigation (4th) § 21.311 ("Manual"). The mechanics of the notice process "are left to the discretion of the court subject only to the broad 'reasonableness' standard imposed by due-process." *Grunin v. Int'l House of* Pancakes, 513 F.2d 114, 121 (8th Cir. 1975). Each class member need not receive actual notice for the due-process standard to be met, "so long as class counsel acted reasonably in selecting means likely to inform persons affected." *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 164 F.R.D. 362, 368 (S.D.N.Y. 1996).

Where names and addresses of known or potential class members are reasonably available, direct-mail notice should be provided. *See, e.g.*, *Eisen*, 417 U.S. at 175–76; Manual, § 21.311. If the names and addresses of class members cannot be determined by reasonable efforts, notice by publication is sufficient to satisfy the requirements of the due-process clause and Rule 23. *Mullane*, 339 U.S. at 317–18; *Carlough v. Amchem Prod., Inc.*, 158 F.R.D. 314, 325 (E.D. Pa. 1993).

A. There Were No Objections to the Notice Content or Plan.

As with the prior rounds of Auto Dealer settlements, no member of the Settlement Class objected to or criticized the notice program. (*See* Vasquez Decl., para. 21). The program was primarily a direct mail program that targeted class members and was supplemented by published notice in industry-specific publications. The notice program easily satisfied the

requirements of Rule 23 and due process. *Packaged Ice*, 2011 WL 717519, at *5; *Sheick*, 2010 WL 4136958, at *15.

B. Timing of CAFA Notices and Final Approval Orders.

Each of the Defendant groups involved in the Settlements have provided the notices to public officials required by 28 U.S.C. § 1715. (Raiter Decl.) None of the state attorney generals have responded or requested an opportunity to be heard about the terms of the settlements. *Id.*

III. Certification of Settlement Classes is Appropriate.

In its preliminary approval orders, the Court found that Rule 23's requirements were met and provisionally certified, for purposes of settlement only, Settlement Classes relating to the parties and parts covered by the Settlements. It is well-established that a class may be certified for purposes of settlement. *See, e.g.*, *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997); *Int'l Union,*, 2006 WL 1984363, at *3, *18; *Cardizem*, 218 F.R.D. at 516–19; *Thacker v. Chesapeake Appalachia, L.L.C.*, 259 F.R.D. 262, 266–70 (E.D. Ky. 2009). The Settlements meet the requirements of Rule 23(a) as well as the requirements of Rule 23(b)(2) and 23(b)(3) for settlement purposes.

A. The Auto Dealer Settlement Classes Satisfy Rule 23(a).

Certification of a class requires meeting the requirements of Fed. R. Civ. P. 23(a) and one subsection of Rule 23(b). *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 722 F.3d 838, 850-51 (6th Cir. 2013); *Griffin*, 2013 WL 6511860, at *5; *Int'l Union*, 2006 WL 1984363, at *19 (citing *Sprague v. Gen Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998)). Certification is appropriate under Rule 23(a) if: (1) the class is so numerous that joinder of all

members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interest of the class. *Griffin*, 2013 WL 6511860, at *5; *Date*, 2013 WL 3945981, at *3.

1. The Settlement Classes are Numerous.

Class certification under Rule 23(a)(1) is appropriate where a class contains so many members that joinder of all would be "impracticable." Fed. R. Civ. P. 23(a)(1). There is no strict numerical test to satisfy the numerosity requirement, and the most important factor is whether joinder of all the parties would be impracticable. *Whirlpool*, 722 F.3d at 852 (noting that "substantial" number of class members satisfies numerosity). Numerosity is determined by the number and geographic location of class members. *Marsden v. Select Med. Corp.*, 246 F.R.D. 480, 484 (E.D. Pa. 2007). The notice for these Settlements was mailed to approximately 14,000 automobile dealership entities and emailed to 44,600 addresses, geographically dispersed throughout the United States. (*See* Vasquez Decl.) There are thousands of Settlement Class members and joinder of all of them would be impracticable, satisfying Rule 23(a)(1).

2. Common Questions of Law and Fact Exist.

Fed. R. Civ. P. 23(a)(2) requires that a proposed class action involve "questions of law or fact common to the class." "We start from the premise that there need be only one common question to certify a class," *Whirlpool*, 722 F.3d at 853, and "the resolution of [that common issue] will advance the litigation." *Sprague*, 133 F.3d at 397; *accord Exclusively Cats Veterinary Hosp. v. Anesthetic Vaporizer Servs., Inc.*, 2010 WL 5439737, at *3 (E.D. Mich. Dec. 27,

2010) ("[T]here need be only a single issue common to all members of the class") (citing *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1080 (6th Cir. 1996).

"[A]llegations concerning the existence, scope and efficacy of an alleged conspiracy present questions adequately common to class members to satisfy the commonality requirement." *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 478 (W.D. Pa. 1999) (citing 4 NEWBERG ON CLASS ACTIONS §§ 18.05-15 (3d ed. 1992)). Whether the settling Defendants entered into illegal agreements to rig bids and artificially fix prices of automobile component parts presents questions common to all members of the Settlement Classes. *Packaged Ice*, 2011 WL 717519, at *6 (holding that the commonality was satisfied by questions concerning "whether Defendants conspired to allocate territories and customers and whether their unlawful conduct caused Packaged Ice prices to be higher than they would have been absent such illegal behavior and whether the conduct caused injury to the Class Members"). "Indeed, consideration of the conspiracy issue would, of necessity focus on defendants' conduct, not the individual conduct of the putative class members." *Flat* Glass, 191 F.R.D. at 484.

Because there are common legal and factual questions related to potential liability, the commonality requirement of Rule 23(a)(2) is met for the Settlement Classes.

3. Auto Dealer Plaintiffs' Claims are Typical of Those of the Settlement Class.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "If there is a strong similarity of legal theories, the requirement [of typicality] is met, even if there are factual distinctions among named and absent class members." *Griffin*, 2013 WL 6511860, at *6 (quoting *Int'l* Union, 2006 WL 1984363, at * 19); *Date*, 2013 WL 3945981, at *3. "Typicality

is met if the class members' claims are "'fairly encompassed by the named plaintiffs' claims.'" *Whirlpool*, 722 F.3d at 852 (quoting *Sprague*, 133 F.3d at 399).

The claims of the named plaintiff Auto Dealers arise from the same course of conduct as the claims of the members of the Settlement Classes. Rule 23(a)(3)'s typicality requirement is satisfied for the Settlement Classes.

4. Auto Dealer Class Representatives and Their Counsel Have Fairly and Adequately Represented the Interests of the Class Members.

Rule 23(a)(4) requires that the class representative fairly and adequately protect the interests of the class. "There are two criteria for determining adequacy of representation: (1) the proposed class representative must have common interests with the other class members; and (2) it must appear that the class representative will vigorously prosecute the interests of the class through qualified counsel." *Sheick v. Auto. Component Carrier, LLC*, 2010 WL 3070130, at *3 (E.D. Mich. Oct. 18, 2010) (quoting *Senter v. Gen. Motors Copr.*, 532 F.2d 511, 524-25 (6th Cir. 1976)). These requirements are met.

The interests of the Auto Dealer representatives are the same as those of other Settlement Class members. These Plaintiffs are indirect purchasers of the parts and new vehicles at issue in this litigation and they, like the other Settlement Class members, claim that they were injured as a result of the alleged conspiracies and seek to prove that the settling Defendants violated antitrust and consumer laws. The named Auto Dealer Plaintiffs have the same interests as those of the members of the Settlement Classes. The Auto Dealer Plaintiffs have retained qualified and experienced counsel to pursue these cases. Counsel for the Auto Dealers have vigorously pursued this litigation and will continue to represent the interests of Auto Dealers. Adequate representation under Rule 23(a)(4) is therefore satisfied.

The Settlements do not provide preferential treatment to the named representatives. Under the Plans of Allocation, all similarly situated dealerships in the Included States will receive the same amount of money—calculated based on the number of type of vehicles and parts they purchased—regardless of whether they are named plaintiffs or absent class members. The named plaintiffs' interests were and are aligned with those of the absent class members. *See, e.g., Shane*, 825 F.3d at 309.

B. Automobile Dealer Plaintiffs' Claims Satisfy the Prerequisites of Rule 23(b)(3) for Settlement Purposes.

In addition to satisfying Rule 23(a), plaintiffs must show that the class falls under at least one of the three subsections of Rule 23(b). The Settlement Classes qualify under Rule 23(b)(3), which authorizes class certification if "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 535 (6th Cir. 2008); *Hoving v. Lawyers Title Ins. Co.*, 256 F.R.D. 555, 566 (E.D. Mich. 2009).

1. Common Legal and Factual Questions Predominate.

The Rule 23(b)(3) requirement that common issues predominate insures that a proposed class is "sufficiently cohesive to warrant certification." *Amchem Products, Inc.*, 521 U.S. at 623. The predominance requirement is met where "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof." *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564 (6th Cir. 2007) (citation omitted).

Horizontal price-fixing cases are particularly well-suited for class certification because proof of the conspiracy presents a common, predominating question. *Scrap Metal*, 527 F.3d 517, 535 (6th Cir. 2008); *Packaged Ice*, 2011 WL 717519, at *6; *In re Se. Milk Antitrust Litig.*, No. 2:07-CV-208, 2010 WL 3521747, at *5, 9–11 (E.D. Tenn. Sept. 7, 2010). Affirming class certification in *Scrap Metal*, the Sixth Circuit observed that the "district court found that the 'allegations of price-fixing and market allocation . . . will not vary among class members' . . . Accordingly, the court found that the 'fact of damages' was a question common to the class even if the amount of damages sustained by each individual class member varied." 527 F.3d at 535 (emphasis in original).

Here, the same set of core operative facts and theory of liability apply in each of the Settlements. Whether the settling Defendants entered into illegal agreements presents questions common to all Settlement Class members. *See, e.g.*, *Packaged Ice*, 2011 WL 717519, at *6. If Automobile Dealer Plaintiffs and the other Settlement Class members brought individual actions, they would each be required to prove the same claims in order to establish liability. For settlement purposes, common issues predominate.

2. Class Action Settlements Are Superior to Other Methods of Adjudication.

Rule 23(b)(3) lists factors to be considered in determining the superiority of proceeding as a class action compared to individual methods of adjudication: (1) the interests of the members of the class in individually controlling the prosecution of separate actions; (2) the extent and nature of other pending litigation about the controversy by members of the class; (3) the desirability of concentrating the litigation in a particular forum; and (4) the difficulties likely to be encountered in management of the class action. Fed. R. Civ. P. 23(b)(3).

The Auto Parts litigation has been centralized in this Court and the only other known individual cases asserted against the Settling Defendants are those claims brought by the dealerships who elected to opt out of the prior settlements. Thus, consideration of factors (1) - (3) demonstrates the superiority of these Settlement Classes. The fourth Rule 23(b)(3) factor is not relevant in a settlement-only class because the potential difficulties in managing a trial of the case is extinguished by the settlement. *Cardizem*, 218 F.R.D. at 517.

In addition, "[g]iven the complexities of antitrust litigation, it is not obvious that all members of the class could economically bring suits on their own." *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 325 (E.D. Mich. 2001) (quoting *Paper Sys. Inc. v. Mitsubishi Corp.*, 193 F.R.D. 601, 605 (E.D. Wis. 2000)). Certifying the Settlement Classes will conserve judicial and private resources and will provide a single outcome that is binding on all Settlement Class members. *Cardizem*, 200 F.R.D. at 351. The alternatives to these Settlements are a multiplicity of separate lawsuits or no recourse for many class members for whom the cost of pursuing individual litigation would be prohibitive. *See In re Flonase Antitrust Litig.*, 284 F.R.D. 207, 234 (E.D. Pa. 2012); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 169 F.R.D. 493, 527 (S.D.N.Y. 1996). The certification of Settlement Classes is superior to the alternatives in this litigation.

IV. The Court Should Appoint Settlement Class Counsel and Auto Dealer Class Representatives.

At preliminary approval, the Court provisionally appointed Interim Co-Lead Counsel for the Auto Dealers as class settlement counsel and appointed the named Auto Dealer representatives in those cases as the representatives of the provisionally certified class settlements. As part of the final approval process, the Court should appoint Cuneo Gilbert & LaDuca, LLP, Barrett Law Group, P.A., and Larson · King, LLP as Settlement Class Counsel.

These firms have represented the Auto Dealers throughout the litigation and satisfy the requirements of Rule 23(g). The Court should also appoint the Automobile Dealer Plaintiffs named in the operative complaints in the Settlements as class representatives of their respective Settlement Classes.

Conclusion

For the foregoing reasons, Automobile Dealer Plaintiffs respectfully request that the Court: (1) grant final approval of the Round Four Settlements, (2) certify the Settlement Classes for purposes of settlement, and (3) enter judgment in each of the relevant parts cases.

Dated: December 6, 2019

By: */s/ Gerard V. Mantese*
Gerard V. Mantese (P34424)
MANTESE HONIGMAN, P.C.
1361 E. Big Beaver Road
Troy, MI 48083
Telephone: (248) 457-9200 Ext. 203 Facsimile: (248) 457-9201
gmantese@manteselaw.com

Interim Liaison Counsel for the Automobile Dealer Plaintiffs

Jonathan W. Cuneo
CUNEO GILBERT & LADUCA, LLP
4725 Wisconsin Ave., NW
Suite 200
Washington, DC 20016
Telephone: (202) 789-3960
Facsimile: (202) 789-1813
jonc@cuneolaw.com

Don Barrett
BARRETT LAW GROUP, P.A.
P.O. Box 927
404 Court Square
Lexington, MS 39095
Telephone: (662) 834-2488
Facsimile: (662)834.2628
dbarrett@barrettlawgroup.com

Shawn M. Raiter
LARSON KING, LLP
2800 Wells Fargo Place
30 East Seventh Street
St. Paul, MN 55101
Telephone: (651) 312-6500
Facsimile: (651) 312-6618
sraiter@larsonking.com

Interim Co-Lead Counsel for the Automobile Dealer Plaintiffs

CERTIFICATE OF SERVICE

I, Gerard V. Mantese, hereby certify that I caused a true and correct copy of **Auto Dealers' Memorandum in Support of Motion for Final Approval of Settlements (Round Four) With Certain Defendants and for Certification of Settlement Classes** to be served via e-mail upon all registered counsel of record via the Court's CM/ECF system on December 6, 2019

/s/Gerard V. Mantese
Gerard V. Mantese

TAB 50A

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DONALD R. CAMERON, ET. AL.,

Plaintiffs,

v.

APPLE INC.,

Defendant.

CASE NO. 19-cv-3074-YGR

ORDER:
GRANTING MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT;
GRANTING IN PART AND DENYING IN PART MOTION FOR ATTORNEY'S FEES, COSTS, AND SERVICE AWARD; AND

JUDGMENT

Re: Dkt. Nos. 465 and 471

The Court previously granted plaintiffs' Motion for Preliminary Approval of the Class Action Settlement in this matter on November 16, 2021. (Order Granting Preliminary Approval of Class Action Settlement ("Preliminary Approval Order"), Dkt. No 453.) As directed by the Preliminary Approval Order, on February 14, 2022, plaintiffs filed their Motion for Attorney's Fees, Costs, and Service Award. (Dkt. No. 465.) Two weeks later, on February 28, 2022, Apple filed a response to plaintiffs' motion, objecting to the amount of attorney fee's as high. (Dkt. No. 467.)

On March 25, 2022, Steven Wytyshyn, a U.S. Developer, Founder, & CEO of Cosmosent Labs, Inc., filed an objection to the settlement. (DKt. No. 469.) On April 29, 2022, plaintiffs filed their Motion for Final Settlement Approval and a response to Mr. Wytyshyn's objection. (Dkt. No. 471.) The Court held a hearing on June 7, 2022 on the pending motions.

Having considered the motion briefing, the terms of the Settlement Agreement, the arguments of counsel, and the other matters on file in this action, the Court **GRANTS** the Motion for Final Approval. In general, the Court finds the settlement fair, adequate, and reasonable. The provisional appointments of the class representatives and class counsel are confirmed. The Motion for Attorney's fees, Costs, and Service Award is **GRANTED IN PART AND DENIED IN PART**. The Court **ORDERS** that class counsel shall be paid $26,000,000 in attorney's fees and

$3,500,000 in litigation costs and that named plaintiffs Donald Cameron and Pure Sweat Basketball, Inc., shall each be paid a $5,000 incentive award.

I. BACKGROUND

Plaintiffs filed their initial class action complaint on June 4, 2019, and their consolidated amended complaint on September 30, 2019, against defendant Apple, Inc. alleging that Apple willfully acquired and maintained monopoly power, or attempted to gain monopoly power, by refusing to allow iOS device users to purchase iOS apps and in-app products other than through its own App Store. Plaintiffs' amended complaint alleges the following claims against Apple: (1) violation of the Sherman Act –Monopolization/ Monopsonization (15 U.S.C. § 2); (2) violation of the Sherman Act-Attempted Monopolization/ Monopsonization (15 U.S.C. § 2); (3) unlawful business practices and violations under California Business and Professions Code, § 17200, et seq. ("UCL"); and (4) unfair competition under California Business and Professions Code, § 17200, et seq. ("UCL").

Following class and merits-based discovery, plaintiffs moved for class certification on June 1, 2021. On August 11, 2021, Apple filed its opposition to class certification. After extensive negotiations, the parties reached a settlement, and plaintiffs moved for preliminary approval of the class settlement on August 26, 2021. On November 16, 2021, the Court granted plaintiffs' Motion for Preliminary Approval of the Class Settlement.

II. TERMS OF THE SETTLEMENT AGREEMENT

A. Monetary and Structural Relief

The settlement provides $100,000,000 in monetary relief and structural relief in six areas of particular concern to the iOS developer community. (*See* Ex. A, Settlement Agreement). The Settlement Agreement appears to have been the product of arm's length and informed negotiations with the assistance of an experienced mediator. The relief provided for the Class appears to be adequate, taking into account:

(i) the costs and risks associated with trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreements required to be identified under Rule 23(e)(3) (in this case, none).

Moreover, the Settlement Agreement appears to treat class members equitably relative to each other. The Court notes that it is particularly aware of the risks of trial in this case having tried and written a 185-page decision in *Epic Games v. Apple*, Case No. 4:20-cv-5640-YGR.

In terms of structural relief, under the Settlement, Apple has agreed to maintain the 15-percent commission tier for U.S. developers enrolled in the Small Business Program for at least three years after Final Approval. (*See* Ex. A § 5.1.1.) Next, Apple has agreed to revise its App Store Guidelines to permit developers of all app categories to communicate with consenting customers outside their app, including via email and other communication services, about purchasing methods other than in-app purchase. (*See id.* § 5.1.3.) Third, for at least three years after Final Approval, Apple will continue to "conduct robust experimentation to drive continuous improvement" in App discoverability, including in ways that will "give new and high-quality apps a chance to be found." (*See id.* § 5.1.2.) Fourth, Apple will expand its pricing tiers from 100 to 500 (by March 31, 2023),[1] and maintain those tiers for at least three years from Final Approval. (*See id.* § 5.1.4.) This enhanced pricing freedom will allow iOS developers to more carefully calibrate their prices to compete and enhance revenues. Fifth, Apple will create an appeal process, which will be available to any developer who "believes that there has been unfair treatment by Apple in the review of any of the U.S. developer's apps, or in-app products, or updates." (*See id.* 5.1.5.) Apple will be required under the Settlement to maintain this appeal process, and the website callout, for at least three years. (*See id.)* Finally, in terms of transparency, for at least three years from Final Approval, Apple will publish an annual "transparency report" that (at a minimum) will provide (a) meaningful statistics on the number of apps rejected and reasons why, (b) the number of customer and developer accounts deactivated, and (c) objective data regarding search queries and results, and the number of apps removed from the App Store. (*See id.* § 5.1.6.) The Court finds these structural benefits are valuable to the settlement class.

[1] *See* Dkt. No. 478, Order Granting Joint Stipulation for Extension of Time Relating to Settlement Agreement Provision 5.1.4.

B. Attorney's Fees and Costs

Under the Settlement Agreement, class counsel agreed to seek attorney's fees plus reimbursement of class counsel's costs and expenses. The parties also agreed that Apple shall pay named plaintiffs up to $5,000 each as an incentive award in exchange for a general release of all claims against Apple.

C. Class Member Release

Settlement Class Members and their respective heirs, executors, administrators, representatives, agents, partners, successors, and assigns shall have fully, finally, and forever released, relinquished, and discharged any and all past, present, and future claims, actions, demands, causes of action, suits, debts, obligations, damages, rights and liabilities, that were brought, could have been brought, or arise from the same facts underlying the claims asserted in the action, known or unknown, recognized now or hereafter, existing or preexisting, expected or unexpected, pursuant to any theory of recovery (including, but not limited to, those based in contract or tort, common law or equity, federal, state, territorial, or local law, statute, ordinance, or regulation), against Apple, Inc. for any type of relief that can be released as a matter of law, including. without limitation, claims for monetary relief, damages (whether compensatory, consequential, punitive, exemplary, liquidated, and/or statutory), costs, penalties, interest, attorneys' fees, litigation costs, restitution, or equitable relief.

D. Class Notice and Claims Administration

Pursuant to the Settlement Agreement, the Court appointed Angeion Group to administer the settlement and to contact the class members in the manner set forth therein and including the attachments contained within the Preliminary Approval Order. Class members were given until March 21, 2022, to object to or exclude themselves from the Settlement Agreement. Only thirteen of the total class members opted out and only one member objected to the class settlement.

III. FINAL APPROVAL OF SETTLEMENT

A. Legal Standard

A court may approve a proposed class action settlement of a class proposed to be certified only "after a hearing and on finding that it is fair, reasonable, and adequate," and that it meets the

requirements for class certification. Fed. R. Civ. P. 23(e)(2). In reviewing the proposed settlement, a court need not address whether the settlement is ideal or the best outcome, but only whether the settlement is fair, free of collusion, and consistent with plaintiff's fiduciary obligations to the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998), o*verruled on other grounds by Dukes*, 564 U.S. at 131. The *Hanlon* court identified the following factors as relevant to assessing a settlement proposal: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceeding; (6) the experience and views of counsel; (7) the presence of a government participant; and (8) the reaction of class members to the proposed settlement. *Id.* at 1026 (citation omitted); *see also Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004). In reviewing such settlements, in addition to considering the above factors, a court also must ensure that "the settlement is not the product of collusion among the negotiating parties." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946–47 (9th Cir. 2011).

Settlements that occur before formal class certification also "require a higher standard of fairness." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000). In reviewing such settlements, in addition to considering the above factors, a court also must ensure that "the settlement is not the product of collusion among the negotiating parties." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 946–47.

B. Class Definition and Basis for Certification

The Settlement Agreement, attached hereto as **Exhibit A**, defines the class as:

> All former or current U.S. developers of any Apple IOS application or in-app product (including subscriptions) sold for a non-zero price via Apple's IOS App Store that earned, through all Associated Developer Accounts, proceeds equal to or less than $1,000,000 through the App Store U.S. storefront in every calendar year in which the U.S. developer had a developer account between June 4, 2015 to the date of the Agreement (August 24, 2021). For class definition purposes, the 2015 calendar year consist of June 4, 2015 through December 31, 2015. The 2021 calendar year shall consist of January 1, 2021 through April 26, 2021. Additionally, excluded from the Settlement Class are (a) directors, officers, and employees

> of Apple or its subsidiaries and affiliated companies, as well as Apple's legal representatives, heirs, successors, or assigns, (b) the Court, the Court staff, as well as any appellate court to which this matter is ever assigned and its staff, (c) Defense Counsel, as well as their immediate family members, legal representatives, heirs, successors, or assigns, (d) any Developers who validly request exclusion ("opt out") from the Settlement Class, and (e) any other individuals whose claims already have been adjudicated to a final judgment.

The Court finds that, for purposes of settlement, plaintiffs have satisfied the requirements of Rule 23(a) as well as the requirements for certification under one or more subsections of Rule 23(b). With respect to numerosity under Rule 23(a)(1), the settlement class includes approximately 67,000 members, making it so numerous that joinder of all members is impracticable.

Rule 23(a)(2) commonality requires "questions of fact or law common to the class," though all questions of fact and law need not be in common. *See Hanlon,* 150 F.3d at 1026. Plaintiffs brought the following causes of action: (i) Violation of the Sherman Act – Monopolization/ Monopsonization (15 U.S.C. § 2); (ii) Violation of the Sherman Act-Attempted Monopolization/ Monopsonization (15 U.S.C. § 2); (iii) Unlawful business practices and violations under California Business and Professions Code, § 17200, et seq. ("UCL"); and (iv) Unfair competition under California Business and Professions Code, § 17200, et seq. ("UCL"). (*See* Dkt. No. 53) ("Consolidated Class Complaint"). The focus of this action—whether Apple willfully acquired and maintained monopoly power, or attempted to gain monopoly power, by refusing to allow iOS device users to purchase iOS apps and in-app products other than through its own App Store—is common to all class members. Antitrust actions are particularly appropriate for class treatment as the allegations regarding the defendant's conduct, and the evidence of the same, which typically is expert heavy, impacts the class generally.

Rule 23(a)(3) requires that the plaintiffs show that the claims or defenses of the representative parties are typical of the claims or defenses of the class. Plaintiffs' and members of the settlement class claims all stem from the same alleged conduct, *i.e.* antitrust injury, making plaintiffs' claims typical of class members. Here, while the settlement class is narrower than that alleged in the consolidated complaint, the class representatives themselves are typical of those

members represented herein, namely the subgroup of 99% of the developers.

With respect to Rule 23(a)(4), the Court finds the representative parties and class counsel have fairly and adequately represented the interests of the class. No conflicts of interest appear as between plaintiffs and the members of the settlement class. Class counsel are deeply versed in this area of the law and have routinely demonstrated that they are qualified and have experience with prosecuting class actions of this kind and therefore adequate to represent the settlement class as well. The parties engaged in extensive discovery during the almost 2.5-year course of this litigation. More than 5 million documents and 20 million pages have been produced in this litigation. Dkt. No. 465-1, Declaration of Steve Berman, ¶ 17. Apple has produced 13 terabytes of transactional data that plaintiffs and their experts have analyzed. *Id.*

The settlement class further satisfies Rule 23(b)(3) in that common issues predominate and "a class action is superior to other available methods for fairly and efficiently adjudicating" the claims here.

Based on the foregoing, the proposed settlement class is certified pursuant to Rule 23(c).

C. Adequacy of Notice

A court must "direct notice [of a proposed class settlement] in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). "The class must be notified of a proposed settlement in a manner that does not systematically leave any group without notice." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 624 (9th Cir. 1982). Adequate notice requires: (i) the best notice practicable; (ii) reasonably calculated, under the circumstances, to apprise the Class members of the proposed settlement and of their right to object or to exclude themselves as provided in the settlement agreement; (iii) reasonable and constitute due, adequate, and sufficient notice to all persons entitled to receive notice; and (iv) meet all applicable requirements of due process and any other applicable requirements under federal law. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

The Court approved the parties' proposed notice procedures when it granted preliminary approval. Pursuant to those procedures, the class administrator provided class members with individual direct notice via both email and mail. The class administrator also utilized a targeted social media campaign, using Facebook, Instagram, and LinkedIn, and an online class settlement website to provide notice to the class and engaged in numerous actions to follow-up and find missing class members, where able. Apple also posted a message to its developer news website on April 25, 2022, directing developers to the settlement website.

Based upon the foregoing, the Court finds that the settlement class has been provided adequate notice.

D. Settlement Agreement Appears Fair and Reasonable

As to the *Hanlon* factors, the Court finds that they indicate the settlement here is fair and reasonable. Absent the settlement, plaintiffs would have been required to show that Apple willfully acquired and maintained monopoly power, or attempted to gain monopoly power, by refusing to allow iOS device users to purchase iOS apps and in-app products other than through its own App Store. Antitrust cases such as this one are "particularly risky, challenging, and widely acknowledge[d] to be among the most complex actions to prosecute." *In re Lithium Ion Batteries Antitrust Litig.*, 2020 WL 7264559, at *15 (N.D. Cal. Dec. 10, 2020). Further, proceeding to trial would have been costly; recovery was not guaranteed; and there was the possibility of protracted appeals.

The Settlement Agreement appears to have been the product of arm's length and informed negotiations. The settlement occurred only after extensive litigation including: the exchange of more than 5 million documents and 20 million page, more than fifty depositions, including depositions of Apple's senior management. Following protracted negotiations, and motion practice, Apple produced a 13-terabyte transactional dataset that plaintiffs and their experts have extensively analyzed. Thus, the parties have vetted their claims and know the strengths and weaknesses of their case. Further, they settled after monitoring the trial in *Epic Games v. Apple* but before the Court issued its final decision.

In addition, the parties engaged in four mediation sessions conducted by the Honorable Layn Phillips which demonstrates that the settlement reached by the parties was a result of serious, informed, non-collusive, and arms-length negotiation. Counsel for both parties are highly experienced. Accordingly, the Court finds that the record does not indicate collusion or self-dealing. *See In re Bluetooth*, 654 F.3d at 946-47.

The relief provided for the Class appears to be adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreements required to be identified under Rule 23(e)(3). Moreover, the Settlement Agreement appears to treat Class members equitably relative to each other.

The reaction of the class was entirely positive. As noted, the Court received thirteen opt-outs and one objection after a vigorous notice plan. Given the press regarding the settlement, the Court is confident that the class had adequate notice and would have advised the Court had significant objections existed. "[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *In re Omnivision Techs., Inc.*, 559 F.Supp.2d 1036, 1043 (N.D. Cal. 2008) (citation omitted); *see also Churchill Vill.*, 361 F.3d at 577 (holding that approval of a settlement that received 45 objections (0.05%) and 500 opt-outs (0.56%) out of 90,000 class members was proper).

E. Objection to Settlement

With respect to the one objection from Steven Wytyshyn, a U.S. Developer, Founder, & CEO of Cosmosent Labs, Inc. (Dkt. 469), the Court notes that the objection does not argue that the settlement is necessarily unfair, unreasonable, or inadequate. Rather, Mr. Wytyshyn criticizes certain aspects of the App Store and suggests improvements that he would have liked to see addressed as part of the settlement. Specifically, the objection criticizes Apple's suppression of certain apps on the App Store, Apple's control of app ratings, and the desire to have Apple disclose per-category revenue numbers on a weekly basis.

The Ninth Circuit has made clear that the fairness of a proposed settlement "is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators" explaining that "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.' " *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998). Thus, while the Court understands Mr. Wytyshyn's concerns and desire for additional relief, the objection itself does not provide a basis to deny final approval.

F. Other Findings

Notice to Government Agencies: The settlement administrator provided the required notice to federal and state attorneys general under the Class Action Fairness Act ("CAFA"). 28 U.S.C. § 1715(b). (Dkt. No. 471-2 ¶ 6.) Notice occurred more than 90 days before the date of this order, as required by 28 U.S.C. § 1715(d).

G. Certification is Granted and the Settlement is Approved

After reviewing all of the required factors, the Court finds the Settlement Agreement to be fair, reasonable, and adequate, and certification of the settlement class as defined therein to be proper. Accordingly, the Court grants class certification to the following settlement class:

> All former or current U.S. developers of any Apple IOS application or in-app product (including subscriptions) sold for a non-zero price via Apple's IOS App Store that earned, through all Associated Developer Accounts, proceeds equal to or less than $1,000,000 through the App Store U.S. storefront in every calendar year in which the U.S. developer had a developer account between June 4, 2015 to the date of the Agreement (August 24, 2021). For class definition purposes, the 2015 calendar year consist of June 4, 2015 through December 31, 2015. The 2021 calendar year shall consist of January 1, 2021 through April 26, 2021. Additionally, excluded from the Settlement Class are (a) directors, officers, and employees of Apple or its subsidiaries and affiliated companies, as well as Apple's legal representatives, heirs, successors, or assigns, (b) the Court, the Court staff, as well as any appellate court to which this matter is ever assigned and its staff, (c) Defense Counsel, as well as their immediate family members, legal representatives, heirs, successors, or assigns, (d) any Developers who validly request exclusion ("opt out") from the Settlement Class, and (e) any other individuals whose claims already have been adjudicated to a final judgment.

IV. MOTION FOR ATTORNEY'S FEES, COSTS, AND CLASS REPRESENTATIVE AWARDS

A. Attorney's Fees

Attorney's fees and costs may be awarded in a certified class action under Federal Rule of Civil Procedure 23(h). Such fees must be found "fair, reasonable, and adequate" in order to be approved. Fed. R. Civ. P. 23(e); *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003). To "avoid abdicating its responsibility to review the agreement for the protection of the class, a district court must carefully assess the reasonableness of a fee amount spelled out in a class action settlement agreement." *Id.* "[T]he members of the class retain an interest in assuring that the fees to be paid class counsel are not unreasonably high," since unreasonably high fees are a likely indicator that the class has obtained less monetary or injunctive relief than they might otherwise. *Id.* at 964.

The Court analyzes an attorney's fee request based on either the "lodestar" method or a percentage of the total settlement fund made available to the class, including costs, fees, and injunctive relief. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). The Ninth Circuit encourages courts to use another method as a cross-check in order to avoid a "mechanical or formulaic approach that results in an unreasonable reward." *In re Bluetooth*, 654 F.3d at 944–45 (citing *Vizcaino*, 290 F.3d at 1050–51.)

Under the lodestar approach, a court multiplies the number of hours reasonably expended by the reasonable hourly rate. *Kelly v. Wengler*, 822 F.3d 1085, 1099 (9th Cir. 2016) ("[A] court calculates the lodestar figure by multiplying the number of hours reasonably expended on a case by a reasonable hourly rate. A reasonable hourly rate is ordinarily the 'prevailing market rate [] in the relevant community.'"). Under the percentage-of-the-fund method, courts in the Ninth Circuit "typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying a departure." *In re Bluetooth*, 654 F.3d at 942 (citing *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990)). The benchmark should be adjusted when the percentage recovery would be "either too small or too large in light of the hours devoted to the case or other relevant factors." *Six (6) Mexican Workers*, 904 F.2d at 1311. When using the percentage-of-recovery

method, courts consider a number of factors, including whether class counsel "'achieved exceptional results for the class,' whether the case was risky for class counsel, whether counsel's performance 'generated benefits beyond the cash settlement fund,' the market rate for the particular field of law (in some circumstances), the burdens class counsel experienced while litigating the case (e.g., cost, duration, foregoing other work), and whether the case was handled on a contingency basis." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 954-55 (9th Cir. 2015) (quoting *Vizcaino*, 290 F.3d at 1047-50. "[T]he most critical factor [in determining appropriate attorney's fee awards] is the degree of success obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). The Ninth Circuit has made clear that in "megafund" cases, courts may "employ the lodestar method instead" of the percentage-of-recovery method if rote application of the 25% benchmark "would yield windfall profits for class counsel in light of the hours spent on the case." *In re Bluetooth,* 654 F.3d at 942.

Here, class counsel advocates applying the percentage-of-the-fund method. Class counsel requests $27 million which is 27 percent of the $100 million class cash fund. The attorney's fees sought reflect a multiplier of 2.47 of the actual lodestar totaling $10,923,265. Class counsel argues that the Court should award the requested fees because the requested amount is only 19.9 percent of the $135.44 million in quantifiable relief when you factor in the $35.44 million in savings to the class by way of the structural relief that is part of the settlement.

Here, the Court applies the percentage-of-the-fund method. As a starting point, the Court finds that 25% of the cash fund method is inherently reasonable. *See, e.g., In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d at 941–42 ("[C]ourts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying a departure."). However, the Court maintains its discretion to adjust upward or downward. *Haralson v. U.S. Aviation Servs. Corp.*, 2021 WL 5033832, at *7 (N.D. Cal. Feb. 3, 2021).

In applying the percentage-of-the-fund method, the Court finds that an award of $26 million is appropriate. This amount constitutes 26% of the common fund or roughly 19.2 percent of the settlement if you include the $35.44 million in value of the structural relief. A 1% increase

over the presumptively reasonable 25% benchmark is warranted in light of the significant value of the non-monetary relief conferred to the class by way of the structural relief. Some of the key benefits of the structural relief include: Apple's maintenance of the small business program; transparency in the form of annual transparency reports containing data on Apple's app review, search, security, and more; an appeal process that allows developers to appeal rejections of apps; Apple's expansion of price points; Apple's change in policy that will now permit U.S. developers to communicate with their customers via email and other means outside their apps about alternatives to in-app purchasing methods; and relief relating to app discoverability that will make it easier for newer and smaller apps to be found.

While the exact value of this information is difficult to quantify, plaintiffs' expert, Nicholas Economides, opined that the settlement class will save approximately $177.2 million in commissions by way of Apple maintaining its Small Business Program for three years post settlement. (Dkt. No. 459-7, Declaration of Nicholas Economides, at 8.) He also opined that other aspects of the structural relief such as allowing developers to communicate with customers outside the app store will also lead to developers paying less in commission fees. (*Id*. at 9.) While Apple disputes whether Mr. Economides' figures are accurate, Apple does not dispute the structural relief also confers substantial benefits to the settlement class. Thus, the Court finds that a slight increase is the standard benchmark is warranted here. As such, the Court awards class counsel $26 million in attorney's fees.

The Court also applies the lodestar method as a cross-check. *In re Bluetooth*, 654 F.3d at 944–45. Class counsel has submitted several declarations describing its billing rates and hours worked for this case. Having reviewed the billing rates, the Court finds them reasonable in light of the prevailing market rates in this district and that class counsel has submitted adequate documentation justifying those rates. The Court also finds that the billing records adequately reflect the amount of time reasonably spent on this litigation. Accordingly, the Court finds that class counsel's reported total lodestar of $10,923,265, which covers 20,531 hours of time worked, reasonable.

The Court's award of $26 million represents a positive multiplier of 2.38. As indicated

above, the Court may "adjust" the lodestar figures "upward or downward by an appropriate positive or negative multiplier reflecting a host of 'reasonableness' factors, 'including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment.'" *In re Bluetooth*, 654 F.3d at 941-42. The Ninth Circuit in *Vizcaino* conducted a survey of attorney's fees awards in "megafund cases." *See* 290 F.3d at 1052-54. This survey involved common fund cases ranging from $50–200 million between 1996 and 2001. *See id.* In 83% of the settlements (20 of 24), the court found that the multiplier ranged from 1.0–4.0, and in 54% of the settlements (13 of 24), the multiplier ranged from 1.5–3.0 range. *Id.* at 1051 n.6.

The Court concludes that a positive multiplier of 2.38 is appropriate for class counsel and is consistent with the vast majority large settlements such as this one and would adequately reward class counsel for the work performed in this litigation. The Court recognizes that class counsel has achieved significant benefits for the class and that class counsel assumed a risk of nonpayment while litigating this case for nearly three years. In the end, class counsel achieved a significant result for the class. According to plaintiffs, the $100 million cash fund represents approximately 30 to 34 percent of the maximum potential damages for the class.

Based on the foregoing, the Court awards class counsel $26 million in attorney's fees which represents 26% of the class cash fund (approximately 19.2 percent if you include the value of the structural relief) and a 2.38 multiplier to class counsel's lodestar of $10,923,265.

B. Costs Award

Class counsel is entitled to reimbursement of reasonable out-of-pocket expenses. Fed. R. Civ. P. 23(h); *see Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (holding that attorneys may recover reasonable expenses that would typically be billed to paying clients in non-contingency matters). Costs compensable under Rule 23(h) include "nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Here, class counsel seeks reimbursement for litigation expenses, and provides records documenting those expenses in the amount of $3,713,173.84. However, class counsel only seeks reimbursement for $3,500,000 The Court finds an award of $3,500,000 in costs reasonable, fair, and adequate.

C. Service Awards

The district court must evaluate named plaintiffs' requested award using relevant factors including "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions . . . [and] the amount of time and effort the plaintiff expended in pursuing the litigation." *Staton*, 327 F.3d at 977. "Such awards are discretionary . . . and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958-959 (9th Cir. 2009). The Ninth Circuit has emphasized that district courts must "scrutiniz[e] all incentive awards to determine whether they destroy the adequacy of the class representatives." *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1163 (9th Cir. 2013).

Here, both class representatives are current App Store developers who took significant risks in bringing this action in their own names. Further, both class representatives devoted substantial time to litigating the action. They both sat for deposition, attended numerous meetings to prepare for the depositions, compiled documents, regularly corresponded with counsel, and neither derived a personal benefit beyond any recovery to the class. Because the laws are not self-enforcing, it is appropriate to give incentives to those who come forward with little to gain and who work to achieve a settlement that confers substantial benefits on others. Thus, the Court approves the requested incentive award payment for plaintiffs Donald Cameron and Pure Sweat Basketball, Inc.

V. CONCLUSION

Based upon the foregoing, the motion for final approval of class settlement is **GRANTED**. The motion for attorney's fees, costs, and service awards is **GRANTED IN PART AND DENIED IN PART** as follows: Class Counsel is awarded $26,000,000 in attorney's fees and $3,500,000 in litigation costs. Plaintiffs Donald Cameron and Pure Sweat Basketball, Inc. are each granted an incentive award of $5,000.

Without affecting the finality of this order in any way, the Court retains jurisdiction of all matters relating to the interpretation, administration, implementation, effectuation and enforcement of this order and the Settlement.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that final judgment is **ENTERED** in accordance with the terms of the Settlement, the Order Granting Preliminary Approval of Class Action Settlement issued on November 16, 2021, and this Order. This document will constitute a final judgment (and a separate document constituting the judgment) for purposes of Rule 58, Federal Rules of Civil Procedure.

The parties shall file a post-distribution accounting in accordance with this District's Procedural Guidance for Class Action Settlements no later than **OCTOBER 28, 2022**. The Court **SETS** a compliance deadline on **OCTOBER 21, 2022** on the Court's 9:01 a.m. calendar to verify timely filing of the post-distribution accounting.

This terminates Docket Nos. 465 and 471.

IS SO ORDERED.

Dated: June 10, 2022

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

United States District Court
Northern District of California

EXHIBIT A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

Donald R. Cameron, et al., Plaintiffs, v. Apple Inc., Defendant.	Case No. 4:19-cv-03074-YGR The Honorable Yvonne Gonzalez Rogers **STIPULATION OF SETTLEMENT**

SETTLEMENT AGREEMENT AND RELEASE

The Parties, by and through their respective counsel, in consideration for and subject to the promises, terms, and conditions contained in this Settlement Agreement, hereby warrant, represent, acknowledge, covenant, stipulate and agree, subject to Court approval pursuant to Rule 23 of the Federal Rules of Civil Procedure, as follows:

1. DEFINITIONS

As used herein the following terms have the meanings set for below:

1.1 "Action" shall mean the litigation styled Donald R. Cameron, Pure Sweat Basketball, Inc., and Barry Sermons, on behalf of themselves and all others similarly situated v. Apple Inc., Case No. 4:19-cv-03074-YGR, filed in the United States District Court for the Northern District of California (the "Court").

1.2 "Apple" means Apple Inc.

1.3 "Approved Claims" means those Claims which are approved by the Settlement Administrator for payment.

1.4 "Associated Developer Accounts" means any U.S. Apple Developer Program account that an individual or legal entity owns or controls, or any U.S. Apple Developer Program account that owns or controls a given individual's or legal entity's account.

1.5 "Attorneys' Fees" means any award of attorneys' fees, costs, and expenses of any kind or description incurred by Class Counsel or other attorneys, experts, consultants, or agents of the Named Plaintiffs or the Settlement Class.

1.6 "Claim Form" means the proof of claim and release form(s) in a form mutually agreeable to the parties, to be attached as an exhibit to the Motion for Preliminary Approval.

1.7 "Claim" means any claim submitted by a Settlement Class Member.

1.8 "Claims Period" means the period between the Notice Date until the deadline set forth in paragraph 7.4.

1.9 "Class Counsel" means the law firm of Hagens Berman Sobol Shapiro LLP, who has any and all authority and capacity necessary to execute this Settlement Agreement and bind all of the Named Plaintiffs who have not personally signed this Settlement Agreement, as if each of those individuals had personally executed this Settlement Agreement.

1.10 "Class Notice" means the Notice of Pendency and Proposed Settlement of Class Action in a form mutually agreeable to the parties, to be attached as an exhibit to the Motion for Preliminary Approval.

1.11 "Court" means the United States District Court for the Northern District of California.

1.12 "Defense Counsel" means the law firm of Gibson, Dunn & Crutcher LLP.

1.13 "Developer" means a person or entity who has registered for a Developer Program Account with Apple, and shall include all Associated Developer Accounts. A "U.S. Developer" means a Developer who self-identified as U.S.-based when registering for the Developer Program.

1.14 "Effective Date" shall mean the first day after which all of the following events and conditions of this Settlement Agreement have been met or occurred:

(a) Apple, Class Counsel, and Defense Counsel have executed this Settlement Agreement;

(b) The Court has conditionally certified the Settlement Class, preliminarily approved the Settlement, and approved notice to the Settlement Class;

(c) The time period for members of the Settlement Class to exclude themselves has expired;

(d) The Settlement Administrator has delivered the spreadsheet(s) and information to Defense Counsel and Class Counsel as specified in Section 7.9 and 7.10;

(e) All disputed Claims have been resolved;

(f) The Court has entered the Final Approval Order and Final Judgment;

(g) The time for appeal or writ of the Final Approval Order and Final Judgment has expired or, if an appeal and/or petition for review is taken and the Settlement is affirmed, the time period during which further petition for hearing, appeal, or writ of certiorari can be taken has expired;

(h) The time for appeal or writ of any order regarding Attorneys' Fees and Expenses and/or Named Plaintiff Service Awards has expired or, if an appeal and/or petition for review is taken and the order is affirmed, the

time period during which further petition for hearing, appeal, or writ of certiorari can be taken has expired;

(i) The Action is dismissed with prejudice and a final judgment is entered; and

(j) The time for appeal or writ of the final judgment in the Action has expired or, if an appeal and/or petition for review is taken and the dismissal is affirmed, the time period during which further petition for hearing, appeal, or writ of certiorari can be taken has expired.

1.15 "Final Approval Order and Final Judgment" means the final approval order and judgment dismissing and closing the Action.

1.16 "Final Hearing" means the hearing(s) held by the Court to consider and determine whether the requirements for certification of the Settlement Class have been met and whether the Settlement should be approved as fair, reasonable, and adequate; whether Class Counsel's Attorneys' Fees should be approved; and whether the Final Approval Order and Final Judgment should be entered. The Final Hearing may, from time to time and without further notice to the Settlement Class (except those who have filed timely and valid objections and requested to speak at the Final Hearing), be continued or adjourned by order of the Court.

1.17 "Named Plaintiffs" means Donald R. Cameron and Pure Sweat Basketball, Inc.

1.18 "Net Small Developer Assistance Fund" means the Small Developer Assistance Fund, reduced by the sum of the following amounts: (1) the costs of notice and the costs of administering the Settlement, as set forth in Sections 7.1 and 7.2 below; (2) any Attorneys' Fees (which may include separate awards for fees and expenses) to Class Counsel, as set forth in

Sections 9.1 and 9.2 below; and (3) any Service Awards provided to Named Plaintiffs with the authorization of the Court.

1.19 "Notice Date" means the date set forth in the Preliminary Approval Order for commencing the transmission of the Email Notice.

1.20 "Parties" means Apple and the Named Plaintiffs.

1.21 "Proceeds" means a Developer's net revenues on the U.S. App Store storefront, after subtracting out any commission paid to Apple.

1.22 "Preliminary Approval Order" means an order preliminarily approving the Settlement, providing for notice to the Settlement Class, and preliminarily approving a proposed disposition of the Small Developer Assistance Fund.

1.23 "Released Parties" means (a) Apple and its past, present, and future parents, subsidiaries, affiliates, divisions, joint ventures, licensees, franchisees, and any other legal entities, whether foreign or domestic, that are owned or controlled by Apple; and (b) the past, present, and future shareholders, officers, directors, members, agents, employees, independent contractors, consultants, administrators, representatives, fiduciaries, insurers, predecessors, successors, and assigns of the entities in part (a) of this paragraph.

1.24 "Service Award" means a payment from the Small Developer Assistance Fund to either or both of the two Named Plaintiffs, in an amount not to exceed $5,000.00, in recognition of their service in prosecuting this action as developer businesses, exclusive of any other payments to which they might be entitled under this Agreement, if approved by the Court.

1.25 "Settlement" and "Settlement Agreement" mean the settlement described in this Stipulation of Settlement.

1.26 "Settlement Administrator" means Angeion Group, which shall provide settlement notice and administration services pursuant to the terms of this Settlement Agreement.

1.27 "Settlement Class" means all former or current U.S. Developers of any Apple iOS application or in-app product (including subscriptions) sold for a non-zero price via Apple's iOS App Store that earned, through all Associated Developer Accounts, Proceeds equal to or less than $1,000,000.00 through the App Store U.S. storefront in every calendar year in which the U.S. Developer had a Developer Account between June 4, 2015 to the date of this Agreement. For class definition purposes, the 2015 calendar year shall consist of June 4, 2015 through December 31, 2015. The 2021 calendar year shall consist of January 1, 2021 through April 26, 2021, the last date in 2021 for which there are available developer transactional data as produced in this Action. Additionally, excluded from the Settlement Class are (a) directors, officers, and employees of Apple or its subsidiaries and affiliated companies, as well as Apple's legal representatives, heirs, successors, or assigns, (b) the Court, the Court staff, as well as any appellate court to which this matter is ever assigned and its staff, (c) Defense Counsel, as well as their immediate family members, legal representatives, heirs, successors, or assigns, (d) any Developers who validly request exclusion ("opt out") from the Settlement Class, and (e) any other individuals whose claims already have been adjudicated to a final judgment.

1.28 "Settlement Class Member" means and includes every member of the Settlement Class who does not validly and timely request exclusion ("opt out") from the Settlement Class.

1.29 "Small Developer Assistance Fund" means a non-reversionary cash fund total of $100,000,000.00 to be paid by Apple and administered by the Settlement Administrator in accordance with the terms of this Settlement Agreement.

1.30 "Settlement Website" means an Internet website that the Settlement Administrator shall establish to inform the Settlement Class of the terms of this Settlement, their rights, dates, deadlines, and related information.

1.31 "Summary Notice" means the Summary Notice of Settlement in a form mutually agreeable to the parties, to be attached as an exhibit to the Motion for Preliminary Approval.

2. RECITALS

This Agreement is made for the following purposes and with reference to the following facts:

2.1 On June 4, 2019, plaintiffs Donald Cameron and Pure Sweat Basketball, Inc. filed the first complaint in the Action in the United State District Court for the Northern District of California. On September 30, 2019, Named Plaintiffs filed a Consolidated Amended Complaint. The Consolidated Amended Complaint alleged that Apple had monopolized an alleged iOS app and in-app-product distribution services market in violation of Section 2 of the Sherman Act; that Apple had attempted to monopolize an alleged iOS app and in-app-product distribution services market in violation of Section 2 of the Sherman Act; and that Apple's conduct violated Section 17200 of the California Business and Professions Code.

2.2 The Parties engaged in extensive discovery in the Action, which was consolidated with *Epic v. Apple Inc.*, Case No. 4:20-CV-05640-YGR, and *In re Apple iPhone Antitrust Litigation*, Case No. 4:11-cv-06714-YGR, for purposes of discovery. Apple produced more than 20 million pages of documents and the Parties deposed almost 50 individuals.

2.3 On January 1, 2021, Apple introduced the App Store Small Business Program ("SBP"). The structure and timing of the SBP was driven by Apple's desire to accelerate innovation and help propel small businesses forward with the next generation of groundbreaking

apps on the App Store, in light of the Coronavirus pandemic. Apple also acknowledges that the pendency of this lawsuit was a factor in its decision to adopt the SBP. Under the Small Business Program:

- Existing developers who made up to $1,000,000.00 in proceeds in 2020 for all their apps, as well as developers new to the App Store, can qualify for the program and a reduced commission rate of fifteen percent (15%) on paid apps and in-app purchases.
- If a participating developer surpasses the $1,000,000.00 threshold, Apple's standard commission rate will apply to future sales.
- If a developer's proceeds fall below the $1,000,000.00 threshold in a future calendar year, they can requalify for the fifteen percent (15%) commission the year after.
- Developers must identify any Associated Developer Accounts to determine proceeds eligibility.

2.4 On June 1, 2021, Named Plaintiffs filed a motion for class certification in the Action, seeking certification of a class of all U.S. developers of any Apple iOS application or in-app product (including subscriptions) sold for a non-zero price via Apple's iOS App Store at any time on or after June 4, 2015. On August 10, 2021, Apple filed its opposition to Plaintiffs' motion for class certification, along with a motion to exclude Plaintiffs' experts and a motion to compel a trial plan.

2.5 The Parties engaged in extensive, arm's-length negotiations over the course of the Action, with the assistance of the Hon. Layn R. Phillips (Ret.) of Phillips ADR, a former United States District Court Judge and one of the most experienced mediators in the United States. As a

result of these arm's-length negotiations, the Parties reached the Settlement set forth in this Settlement Agreement, which memorializes the Parties' agreement. The Parties intend that this Settlement completely resolve any and all claims that were, or could have been, asserted in the Action on behalf of the Settlement Class.

2.6 Apple vigorously disputes the claims alleged in the Action and is entering into this Settlement to avoid burdensome and costly litigation. The Settlement is not an admission of wrongdoing, fault, liability, or damage of any kind. Among other things, Apple disputes that Named Plaintiffs' claims have merit, that Named Plaintiffs will be able to certify any class in this Action for litigation purposes, and that Named Plaintiffs and the putative class would be entitled to any relief. Without admitting any of the allegations made in the Action or any liability whatsoever, Apple is willing to enter into this Settlement solely in order to eliminate the burdens, distractions, expense and uncertainty of protracted litigation and in order to obtain the releases and final judgment contemplated by this Settlement, and to provide additional assistance to the small developer community that is an integral part of the iOS ecosystem.

2.7 Class Counsel and the Named Plaintiffs believe that the claims asserted in the Action have merit and have examined and considered the benefits to be obtained under this Settlement, the risks associated with the continued prosecution of this complex and potentially time-consuming litigation, and the likelihood of ultimate success on the merits, and have concluded that the Settlement is fair, adequate, reasonable and in the best interests of the Settlement Class.

2.8 The Parties desire to settle the Action in its entirety with respect to all potential claims arising out of the same facts alleged in the complaints filed in the Action. The Parties

intend this Settlement Agreement to bind Apple, the Named Plaintiffs, and all other Settlement Class Members.

3. CONFIDENTIALITY

3.1 The Parties must comply with all portions of the Stipulated Protective Order (Dkt. 252) (as well as all Supplemental Protective Orders entered in the Action), including but not limited to Section 14 of the Stipulated Protective Order, which requires the return, destruction, or deletion of Protected Material (as defined in the Protective Order) within sixty (60) days of the final disposition of the Action.

3.2 This Settlement Agreement and its terms, including the fact of the proposed Settlement, shall remain completely confidential until all documents are executed and the Motion for Preliminary Approval is filed with the Court. Pending the filing of that Motion, Class Counsel may disclose this Settlement Agreement and its terms to their respective clients and experts as necessary for the implementation of this Settlement Agreement, who will also maintain the complete confidentiality of this Settlement Agreement and its terms, including the fact of the proposed Settlement.

4. CERTIFICATION OF THE SETTLEMENT CLASS

4.1 The Parties stipulate and agree that, subject to Court approval, the Settlement Class should be conditionally certified pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure solely for purposes of the Settlement embodied in this Settlement Agreement. If, for any reason, this Settlement Agreement is not approved by the Court, the stipulation for certification and all of the agreements contained herein shall be considered null and void as provided in Section 8.5.

4.2 Apple does not consent to certification of the Settlement Class (or to the propriety of class treatment) for any purpose other than to effectuate this Settlement. For the avoidance of

doubt, Apple does not agree that this (or any) class of Developers could be certified for litigation purposes or that a trial of these claims would be manageable. Apple's agreement to provisional certification for purposes of settlement does not constitute an admission of wrongdoing, fault, liability, or damage of any kind, or that any class certification would be appropriate for litigation or any other purpose other than to effectuate this Settlement.

4.3 If for any reason the Effective Date does not occur or this Settlement Agreement is terminated, disapproved by any court (including any appellate court), or not consummated for any reason, the order certifying the Settlement Class for purposes of effectuating the Settlement (and all preliminary and final findings regarding that class certification order) shall be automatically vacated upon notice of the same to the Court. The Action shall then proceed as though the Settlement Class had never been certified pursuant to this Settlement Agreement and such findings had never been made, and the Action shall return to their procedural postures on the date this Settlement Agreement was signed. Additionally, the Parties and their counsel shall not contend that certification (or agreement to certification) of the Settlement Class supports certification of any litigation class if this Settlement Agreement is not consummated and the Action is later litigated and certification is contested by Apple under Rule 23 or any equivalent statute or rule.

5. SETTLEMENT CONSIDERATION

5.1 **Structural Relief**. In consideration of the releases and dismissals set forth in this Settlement Agreement, subject to Court approval, and subject to the other terms and conditions of this Settlement Agreement, Apple agrees that for a period of at least three (3) years following the Final Approval Order, Apple shall:

5.1.1 Maintain a commission rate of no greater than fifteen percent (15%) for U.S. Developers who are enrolled participants in the Small Business Program,

pursuant to the terms and conditions of the Small Business Program and subject to program participation requirements.

5.1.2 Continue to drive App Store search results primarily by objective characteristics, including but not limited to downloads, star ratings, text relevance, and user behavior signals. Apple may also continue to include apps based on other characteristics, such as similar goals or developer association, as well as to give new and high-quality apps a chance to be found. Apple will also continue to conduct robust experimentation to drive continuous improvement.

5.1.3 Permit all U.S. Developers to communicate with their customers via email and other communication services outside their app about purchasing methods other than in-app purchase, provided that the customer consents to the communication and has the right to opt out. In-app communications, including via Apple Push Notification service, are outside the scope of this provision. Apple will revise its App Store Guidelines to permit the foregoing for all app categories, including by deleting from Guideline 3.1.3 the following language: "Developers cannot use information obtained within the app to target individual users outside of the app to use purchasing methods other than in-app purchase (such as sending an individual user an email about other purchasing methods after that individual signs up for an account within the app)."

5.1.4 Expand the choice of price points for subscriptions, in-app purchases, and paid apps from fewer than 100 to more than 500 (by December 31, 2022).

5.1.5 Maintain the option for U.S. Developers to appeal the rejection of an app based on unfair treatment and add online content to the app review portion of Apple's developer website (https://developer.apple.com/app-store/review/) to explicitly note that a developer can appeal the rejection of an app when the developer believes that there has been unfair treatment by Apple in the review of any of the U.S. Developer's apps, in-app products, or updates.

5.1.6 Publish an annual transparency report that, at a minimum, will convey meaningful statistics such as the number of apps rejected for different reasons, the number of customer and developer accounts deactivated, objective data regarding search queries and results, and the number of apps removed from the App Store.

5.2 **Covenant Not to Sue.** The members of the Settlement Class expressly agree to the appropriateness of Apple's commission structure, including but not limited to the Small Business Program, as it applies to the Settlement Class. In light of the structural and monetary relief afforded by Apple pursuant to this Settlement Agreement, the members of the Settlement Class covenant not to sue Apple on any claim that was or could have been asserted in the Action.

5.3 **Small Developer Assistance Fund.** In light of the contributions made by Settlement Class Members to the app economy, particularly as the economy continues to suffer the effects of the Coronavirus pandemic, and in further consideration of the releases and dismissals set forth in this Settlement Agreement, subject to Court approval, and subject to the other terms and conditions of this Settlement Agreement, Apple shall establish a Small Developer Assistance Fund ("Small Developer Assistance Fund").

5.3.1 Within thirty (30) days after an Order granting Preliminary Approval, Apple shall transfer $2,000,000.00 into an account established by the Settlement Administrator for payment of the costs of settlement administration. Within thirty (30) days after the Effective Date, Apple shall transfer $98,000,000.00 into an account established by the Settlement Administrator for the Small Developer Assistance Fund. Apple's total financial commitment under this Settlement Agreement shall be $100,000,000.00.

5.3.2 The Settlement Administrator shall agree to hold the Small Developer Assistance Fund in an interest-bearing account and administer the Small Developer Assistance Fund, subject to the continuing jurisdiction of the Court and from the earliest possible date, as a qualified settlement fund as defined in Treasury Regulation § 1.468B-1 et seq. Any taxes owed by the Small Developer Assistance Fund shall be paid by the Settlement Administrator out of the Small Developer Assistance Fund. The interest earned in the aforementioned account shall be added to the Small Developer Assistance Fund.

6. DISPOSITION OF THE SMALL DEVELOPER ASSISTANCE FUND

6.1 The Small Developer Assistance Fund shall be applied as follows:

6.1.1 to pay the costs of notice and the costs of administering the Settlement, as set forth in Section 7 below;

6.1.2 to pay any approved Attorneys' Fees to Class Counsel as set forth in Section 9 below;

6.1.3 to pay any Court-approved Service Awards to Named Plaintiffs; and

6.1.4 to distribute the Net Small Developer Assistance Fund to Settlement Class Members as set forth in Section 6.2 and 6.3 below.

6.2 The Small Developer Assistance Fund will be distributed to all Settlement Class Members who have Approved Claims, with each such U.S. Developer entitled to a minimum payment of $250.00 from the Net Small Developer Assistance Fund. U.S. Developers may qualify for a higher payment based on their historic participation in the App Store ecosystem. For all Approved Claims, the following amounts will be calculated based on Settlement Class Members' Proceeds from June 4, 2015 to December 31, 2020:

6.2.1 A Settlement Class Member who earned Proceeds of no more than $100.00 from all of their Associated Developer Accounts will receive a minimum payment of $250.00.

6.2.2 A Settlement Class Member who earned Proceeds of between $100.01 and $1,000.00 from all of their Associated Developer Accounts will receive a minimum payment of $500.00.

6.2.3 A Settlement Class Member who earned Proceeds of between $1,000.01 and $5,000.00 from all of their Associated Developer Accounts will receive a minimum payment of $1,000.00.

6.2.4 A Settlement Class Member who earned Proceeds of between $5,000.01 and $10,000.00 from all of their Associated Developer Accounts will receive a minimum payment of $1,500.00.

6.2.5 A Settlement Class Member who earned Proceeds of between $10,000.01 and $50,000.00 from all of their Associated Developer Accounts will receive a minimum payment of $2,000.00.

6.2.6 A Settlement Class Member who earned Proceeds of between $50,000.01 and $100,000 from all of their Associated Developer Accounts will receive a minimum payment of $3,500.00.

6.2.7 A Settlement Class Member who earned Proceeds of between $100,000.01 and $250,000.00 from all of their Associated Developer Accounts will receive a minimum payment of $5,000.00.

6.2.8 A Settlement Class Member who earned Proceeds of between $250,000.01 and $500,000.00 from all of their Associated Developer Accounts will receive a minimum payment of $10,000.00.

6.2.9 A Settlement Class Member who earned Proceeds of between $500,000.01 and $1,000,000.00 from all of their Associated Developer Accounts will receive a minimum payment of $20,000.00.

6.2.10 A Settlement Class Member who earned Proceeds of over $1,000,000.01 from all of their Associated Developer Accounts will receive a minimum payment of $30,000.00.

6.3 The minimum payment amounts set forth in Section 6.2 above assume that one hundred percent (100%) of Settlement Class Members have an Approved Claim. If not all Settlement Class Members have an Approved Claim, then the minimum payment amounts to Settlement Class Members with Approved Claims shall increase

proportionally in correspondence with the same categories of Developer Proceeds as contained in Section 6.2.

6.4 The minimum payment amounts set forth in Section 6.2 above assume that the Net Small Developer Assistance Fund is approximately $68 million. The actual amount could be greater or less depending on the costs of administration, any Service Awards, and the amounts awarded by the Court for attorneys' fees and expenses pursuant to Section 9.1.

6.5 Within sixty (60) days after receiving the Small Developer Assistance Funds pursuant to Section 5.3, the Settlement Administrator shall have substantially completed the issuance of the initial payments to the Settlement Class Members with Approved Claims, which shall be sent to Settlement Class Members through electronic distribution, or in the form of physical checks mailed to the Settlement Class Member's mailing address as contained in Apple's company records or set forth on the Claim Form for those Settlement Class Members for whom electronic distribution is not available. To the extent economically and practically feasible, the Settlement Administrator shall follow up and communicate with Settlement Class Members who have not cashed their checks within sixty (60) days of distribution. Unused checks shall expire not later than the first anniversary of the initial date of distribution.

6.6 Following distribution of the Small Developer Assistance Fund as set forth in Sections 6.1-6.3, if approved by the Court, any remaining funds (including any funds from uncashed checks) will be used as a *cy pres* distribution to Girls Who Code, a nonprofit organization working to close the gender gap in technology and to change the image of what a programmer looks like and does, or another similar charitable organization

as approved by the Court. Under no circumstances will Small Developer Assistance Funds revert to Apple.

7. NOTICE AND SETTLEMENT ADMINISTRATION.

7.1 **Neutral Settlement Administrator.** Subject to Court approval, the Settlement Administrator shall provide settlement notice and administration services, in accordance with the terms of this Settlement Agreement and as ordered by the Court in the Preliminary Approval Order. As provided in Section 6.1.1, the reasonable costs of notice and the costs of administering the Settlement shall be paid out of the Small Developer Assistance Fund.

7.2 **Notice Procedures.** The Parties agree to the following forms and methods of notice to the Settlement Class:

7.2.1 A copy of the Class Notice, together with the Claim Form, the Settlement, the motions for Final Approval Order and Final Judgment, and Attorneys' Fees, and Court orders pertaining to the Settlement, shall be posted and available for download on the Settlement Website maintained by the Settlement Administrator.

7.2.2 The Settlement Administrator shall send a copy of the Summary Notice to the email and physical addresses for Associated Developer Accounts of developers who are or reasonably may be members of the Settlement Class. The electronic version of the Summary Notice shall contain a direct link to the Settlement Website and the instructions for the Claim Form. To facilitate the distribution of the Summary Notice, within thirty (30) days of the date of execution of the Settlement Agreement, Apple shall provide the Settlement Administrator with the email and physical addresses for Associated Developer Accounts of

developers who are or reasonably may be members of the Settlement Class, along with transactional data produced in this Action sufficient to calculate Proceeds for purposes of implementing this Agreement.

7.2.3 The names, email addresses, physical mailing addresses, and Proceeds of Associated Developer Accounts are personal information about the potential members of the Settlement Class and shall be provided to the Settlement Administrator solely for the purposes of providing notice, processing requests for exclusion, and administering payment. The Settlement Administrator shall execute the Stipulated Protective Order (Dkt. 252), treat all such information as "Highly Confidential – Attorneys' Eyes Only," and take all reasonable steps to ensure that all such information is used solely for the purpose of administering this Settlement.

7.2.4 The Settlement Administrator shall commence the notice by the Notice Date. If, despite using best efforts, the Settlement Administrator is unable to commence the notice by the Notice Date, the Settlement Administrator shall inform the Parties of the status of the notice, and notify the Parties when the notice has been commenced.

7.2.5 In addition to the notice required by the Court, the Parties may jointly agree to provide additional notice to the members of the Settlement Class, although Class Counsel and Apple must both approve any additional notice.

7.2.6 If this notice plan is not approved, or is modified in a material way by the Court, the Parties shall have the right to terminate the Settlement.

7.3 **Claim Form.** Settlement Class Members who wish to receive a cash payment will be required to submit a Claim Form. The Claim Form shall, among other things, require the Settlement Class Member to certify, under penalty of perjury, that (a) they have only one Associated Developer Account, or (b) if they have more than one Associated Developer Account, that they have identified all Associated Developer Accounts in a manner to be specified in the Claim Form. The Claim Forms shall be submitted to the Settlement Administrator via U.S. mail or electronically through the Settlement Website.

7.4 **Claims Period.** To be valid, Claim Forms, requests to opt out, and objections must be received by the Settlement Administrator within one hundred and twenty (120) days from the Notice Date.

7.5 **Process for Opting Out of Settlement.** The Class Notice shall provide a procedure whereby members of the Settlement Class may exclude themselves from the Settlement. The members of the Settlement Class shall have no less than sixty (60) days following the Notice Date to exclude themselves. Any member of the Settlement Class who does not timely and validly request exclusion shall be a Settlement Class Member and shall be bound by the terms of this Settlement. As soon as practicable after the opt-out deadline, the Settlement Administrator shall provide the Court and the Parties with a list of Settlement Class Members who timely and validly requested exclusion from the Settlement.

7.6 **Process for Objections.** The Class Notice shall provide a procedure whereby Settlement Class Members may object to the Settlement. All objections shall be filed with the Court ~~and served on Class Counsel and Defense Counsel~~ within ~~sixty (60)~~ sixty-six (66) days from the Notice Date. Any objection shall, at a minimum, require the individual to provide: (a) a detailed statement of such Settlement Class Member's specific objections to any matters before the Court;

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(b) the grounds for such objections and the reason such Settlement Class Member desires to appear and to be heard; and (c) proof of membership in the Settlement Class, as well as all other materials the Settlement Class Member wants the Court to consider.

7.7 **Review of Claims Submitted.** The Settlement Administrator shall determine whether a submitted Claim Form meets the requirements set forth in this Settlement Agreement. Each Claim Form shall be submitted to and reviewed by the Settlement Administrator, who shall determine whether each Claim shall be allowed. The Settlement Administrator shall use best practices and all reasonable efforts and means to identify and reject duplicate and/or fraudulent claims.

7.8 **Rejection of Claims Forms.** Claim Forms that do not meet the requirements set forth in this Settlement and/or in the Claim Form instructions shall be rejected by the Settlement Administrator. The Settlement Administrator shall have thirty (30) days from the end of the Claims Period to exercise the right of rejection. The Settlement Administrator shall notify the claimant using the contact information provided in the Claim Form of the rejection. Class Counsel and Defense Counsel shall be provided with copies of all such notifications of rejection, provided that the copies do not contain the name, email address, mailing address, or other personal identifying information of the claimant. If any claimant whose Claim Form has been rejected, in whole or in part, desires to contest such rejection, the claimant must, within ten (10) days from receipt of the rejection, transmit to the Settlement Administrator by email or U.S. mail a notice and statement of reasons indicating the claimant's grounds for contesting the rejection, along with any supporting documentation, and requesting further review by the Settlement Administrator, in consultation with Class Counsel and Defense Counsel, of the denial of the Claim. If Class Counsel and Defense Counsel cannot agree on a resolution of the claimant's notice contesting the rejection,

the disputed Claim shall be presented to the Court or a referee appointed by the Court for summary and non-appealable resolution. No person shall have any claim against Apple, Defense Counsel, the Named Plaintiffs, Class Counsel, and/or the Settlement Administrator based on any eligibility determinations, distributions, or awards made in accordance with this Settlement. This provision does not affect or limit in any way the right of review by the Court or referee of any disputed Claim Forms as provided in this Settlement.

7.9 **Information Regarding Claims Submitted, Approved, and Rejected.** Within forty-five (45) days from the end of the Claims Period, the Settlement Administrator shall provide a spreadsheet to Class Counsel and Defense Counsel that contains information sufficient to determine: (a) the number of Settlement Class Members that submitted a claim; (b) the number of submitted Claim Forms that are valid and timely and the number that were not valid and/or timely; (c) the number of submitted Claim Forms the Settlement Administrator intends to treat as Approved Claims; and (d) the number of submitted Claim Forms the Settlement Administrator has denied and the reason(s) for the denials. The Settlement Administrator shall provide supplemental spreadsheets with respect to the resolution of any rejected claims or any Claim Forms submitted after the expiration of the deadline, within a reasonable time after such resolution or receiving such Claim Forms. The materials that the Settlement Administrator provides to Class Counsel pursuant to this paragraph shall not contain the names, email addresses, mailing addresses, or other personal identifying information of the Settlement Class Members. The Settlement Administrator shall retain the originals of all Claim Forms (including envelopes with postmarks, as applicable), and shall make copies available to Class Counsel or Defense Counsel (with redactions to remove the names, email addresses, mailing addresses, or other personal identifying information of the Settlement Class Members) upon request. All such spreadsheets and related materials (including

Claim Forms) shall be designated as "Highly Confidential – Attorneys' Eyes Only" as provided in Section 7.2.3. Should Class Counsel believe they require the name, email address, mailing address, or other personal identifying information of any particular Settlement Class Member, the Parties shall meet-and-confer, on a case-by-case basis, to determine whether the release of such personal identifying information is necessary. Any disputes regarding whether such information may be released to Class Counsel shall be presented to the Court or a referee appointed by the Court for summary and non-appealable resolution. The Settlement Administrator shall only release personal identifying information upon authorization of Apple and/or the authorization of the Court or referee.

7.10 **Opportunity for Review.** Defense Counsel and Class Counsel shall have fourteen (14) days after receiving the spreadsheet(s) and information specified in Section 7.9 to contest the Settlement Administrator's determination with respect to any of the submitted Claims. Defense Counsel and Class Counsel shall meet and confer in good faith within ten (10) days to reach resolution of any such disputed Claim(s). If Class Counsel and Defense Counsel cannot agree on a resolution of any such disputed Claim(s), the disputed Claim(s) shall be presented to the Court or a referee appointed by the Court for summary and non-appealable resolution.

8. COURT APPROVAL

8.1 The Parties agree to recommend approval of the Settlement to the Court as fair and reasonable and to undertake their best efforts to obtain such approval. "Best efforts" includes that the Parties may not oppose any application for appellate review by one of the Parties in the event the Court denies preliminary or final approval. The Parties therefore agree that, at 5:00 PM Pacific time on August 26, 2021, the Named Plaintiffs shall submit this Settlement Agreement to the Court and shall apply for entry of the Preliminary Approval Order.

8.2 Class Counsel shall draft the Motion for Preliminary Approval requesting issuance of the Preliminary Approval Order as soon as practicable after execution of this Settlement Agreement, and shall provide that draft to Defense Counsel on or before August 24, 2021. The Motion for Preliminary Approval shall be written in a neutral manner that does not contain inflammatory language about the Parties or their perceived conduct in the Action. The Parties shall agree on the form of all exhibits attached to the Motion for Preliminary Approval, including but not limited to the Notice, the Summary Notice, and the Claims Form.

8.3 Upon filing of the Motion for Preliminary Approval, Apple shall provide timely notice of the Settlement as required by the Class Action Fairness Act, 28 U.S.C. § 1711, *et seq*.

8.4 In accordance with the schedule set in the Preliminary Approval Order, Class Counsel shall draft the motion for Final Approval Order and Final Judgment and shall provide that draft to Defense Counsel at least seven (7) days before filing such motion with the Court.

8.5 In the event that the Settlement is not approved (following the exhaustion of any appellate review), then (a) this Settlement Agreement shall be null and void and of no force or effect, (b) any payments made to the Settlement Administrator, including any and all interest earned thereon less monies expended toward settlement administration and/or Small Developer Assistance Fund, shall be returned to Apple within ten (10) days from the date the Settlement Agreement becomes null and void, (c) any release shall be of no force or effect, and (d) neither the Settlement Agreement nor any facts concerning its negotiation, discussion, terms or documentation shall be referred to or used as evidence or for any other purpose whatsoever in the Action or in any other action or proceeding. In such event, the Action will proceed as if no settlement has been attempted, and the Parties shall be returned to their respective procedural postures existing on the date the Settlement is executed, so that the Parties may take such litigation steps that they otherwise

would have been able to take absent the pendency of this Settlement. However, any reversal, vacatur, or modification on appeal of (a) any amount of the Attorneys' Fees and Expenses awarded by the Court to Class Counsel, or (b) any determination by the Court to award less than the amounts requested in Attorneys' Fees and Expenses or Named Plaintiff Service Awards shall not give rise to any right of termination or otherwise serve as a basis for termination of this Settlement.

9. ATTORNEYS' FEES

9.1 Class Counsel may submit an application or applications to the Court for distribution to them from the Small Developer Assistance Fund of an award of attorneys' fees and expenses incurred in connection with prosecuting the Action and as may be awarded by the Court (the "Fee and Expense Award"). Apple reserves the right to object to or oppose a request for attorneys' fees and expenses.

9.2 The Fee and Expense Award, as approved by the Court, shall be paid solely from the Small Developer Assistance Fund to an account designated by Class Counsel within forty-five (45) days after the Effective Date.

9.3 Class Counsel has the authority and responsibility to allocate and distribute the awarded funds to other counsel based, in its sole discretion, on counsel's efforts and contributions in the Action, provided that the allocation and distribution is consistent with the Court's order(s) regarding the Fee and Expense Award. Apple and Defense Counsel shall have no liability or other responsibility for allocation of any such awarded funds, and, in the event that any dispute arises relating to the allocation of fees or costs, Class Counsel and the Settlement Administrator agree to hold Apple and Defense Counsel harmless from any and all such liabilities, costs, and expenses of such dispute.

9.4 Apple shall not be liable for any additional fees or expenses of the Named Plaintiffs or any Settlement Class Member in connection with the Action. Class Counsel agree that they will not seek any additional fees, expenses, or costs from Apple in connection with the Action or the settlement of the Action beyond the approved Fee and Expense Award. Apple expressly agrees that it will not seek to recover its attorneys' fees, expenses, or costs from the Named Plaintiffs or Class Counsel once this Settlement Agreement becomes effective pursuant to the Effective Date.

9.5 The Court's Fee and Expense Award shall be separate from its determination of whether to approve the Settlement. In the event the Court approves the Settlement, but declines to award Class Counsel's attorneys' fees or expenses in the amounts requested by Class Counsel, the Settlement will nevertheless be binding on the Parties.

10. RELEASES AND DISMISSAL OF ACTION

10.1 As of the Effective Date, the Settlement Class Members and their respective heirs, executors, administrators, representatives, agents, partners, successors, and assigns shall have fully, finally, and forever released, relinquished, and discharged any and all past, present, and future claims, actions, demands, causes of action, suits, debts, obligations, damages, rights and liabilities, that were brought, could have been brought, or ~~are related to~~ arise from the same facts underlying the claims asserted in the Action, known or unknown, recognized now or hereafter, existing or preexisting, expected or unexpected, pursuant to any theory of recovery (including, but not limited to, those based in contract or tort, common law or equity, federal, state, territorial, or local law, statute, ordinance, or regulation), against the Released Parties, for any type of relief that can be released as a matter of law, including, without limitation, claims for monetary relief, damages (whether compensatory, consequential, punitive, exemplary, liquidated, and/or statutory), costs, penalties, interest, attorneys' fees, litigation costs, restitution, or equitable relief. By example only,

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and without limitation, the Settlement Class Members expressly release any claim, contention, argument, or theory that the commissions charged by Apple on paid downloads or in-app purchases of digital content (including subscriptions) through the App Store are supracompetitive, inflated, or otherwise set at unlawful amounts. Accordingly, the Settlement shall terminate the Action. Notwithstanding the foregoing, the release shall not include any claims relating to the continued enforcement of the Settlement or the Protective Orders.

10.2 As of the Effective Date, the Named Plaintiffs and their respective heirs, executors, administrators, representatives, agents, partners, successors, and assigns shall have fully, finally, and forever released, relinquished, and discharged any and all past, present, and future claims, actions, demands, causes of action, suits, debts, obligations, damages, rights and liabilities, that were brought, could have been brought, or ~~are related to~~ arise from the same facts underlying the claims asserted in the Action regarding the App Store, known or unknown, recognized now or hereafter, existing or preexisting, expected or unexpected, pursuant to any theory of recovery (including, but not limited to, those based in contract or tort, common law or equity, federal, state, territorial, or local law, statute, ordinance, or regulation), against the Released Parties, for any type of relief that can be released as a matter of law, including, without limitation, claims for monetary relief, damages (whether compensatory, consequential, punitive, exemplary, liquidated, and/or statutory), costs, penalties, interest, attorneys' fees, litigation costs, restitution, or equitable relief. Notwithstanding the foregoing, the release shall not include any claims relating to the continued enforcement of the Settlement or the Protective Orders.

HG 11-5-21
SBL-5-24

10.3 After entering into this Settlement, the Settlement Class Members and/or Named Plaintiffs may discover facts other than, different from, or in addition to, those that they know or believe to be true with respect to the claims released by this Settlement, but they intend to release

fully, finally and forever any and all such claims. The Settlement Class Members and Named Plaintiffs expressly agree that, upon the Effective Date, they waive and forever release any and all provisions, rights, and benefits conferred by:

(a) Section 1542 of the California Civil Code, which reads:

> **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.**

and

(b) any law of any state, territory, or possession of the United States (or for the non-U.S. Named Plaintiffs, their respective country, province, or state), or principle of common law, which is similar, comparable, or equivalent to Section 1542 of the California Civil Code.

10.4 Upon the Effective Date, the Action shall be dismissed with prejudice. Class Counsel shall have the responsibility for ensuring that the Action is dismissed with prejudice in accordance with the terms of this Settlement.

10.5 The Court shall retain jurisdiction over this Action to enforce the terms of this Settlement. In the event that any applications for relief are made, such applications shall be made to the Court. To avoid doubt, the Final Judgment applies to and is binding upon the Parties, the Settlement Class Members, and their respective heirs, successors, and assigns.

11. DEFENDANT'S DENIAL OF LIABILITY; AGREEMENT AS DEFENSE IN FUTURE PROCEEDINGS

11.1 Apple has indicated its intent to vigorously contest each and every claim in the Action, and denies all of the material allegations in the Action. Apple enters into this Settlement

Agreement without in any way acknowledging any fault, liability, or wrongdoing of any kind. Apple nonetheless has concluded that it is in its best interests that the Action be settled on the terms and conditions set forth herein in light of the expense that would be necessary to defend the Action, the benefits of disposing of protracted and complex litigation, and the desire of Apple to conduct its business and provide additional assistance to the small developer community unhampered by the distractions of continued litigation.

11.2 Neither this Settlement Agreement, nor any of its terms or provisions, nor any of the negotiation or proceedings connected with it, shall be construed as an admission or concession by Apple of the truth of any of the allegations in the Action, or of any liability, fault, or wrongdoing of any kind.

11.3 To the extent permitted by law, this Settlement Agreement may be pleaded as a full and complete defense to, and may be used as the basis for an injunction against, any action, suit, or other proceeding which may be instituted, prosecuted, or attempted for claims, causes of action, and/or theories of relief covered by the covenant not to sue and/or the releases in this Settlement Agreement.

12. MODIFICATION OR TERMINATION OF THE SETTLEMENT

12.1 Apple may, at its sole discretion, terminate this Settlement Agreement if the number of Developers who seek exclusion from the Settlement Class exceeds 10% of the total number of Developers in the Settlement Class.

12.2 The terms and provisions of this Settlement Agreement may be amended, modified, or expanded by written agreement of the Parties and approval of the Court; provided, however, that after entry of the Final Approval Order and Final Judgment, the Parties may by written agreement effect such amendments, modifications, or expansions of this Settlement Agreement

and its implementing documents (including all exhibits) without further notice to the Settlement Class or approval by the Court if such changes are consistent with the Court's Final Approval Order and Final Judgment and do not materially alter, reduce, or limit the rights of Settlement Class Members.

12.3 If any of the non-monetary terms of this Agreement are affected by a change in legislation, regulation, law, court or agency order, or any material change in circumstances, the Parties agree to meet and confer in good faith regarding an appropriate modification of the Agreement.

12.4 In the event the terms or conditions of this Settlement Agreement, other than terms pertaining to the Attorneys' Fees, are materially modified by any court, the Parties may within thirty (30) days of such material modification, declare this Settlement null and void as provided in Section 8.5. For purposes of this paragraph, material modifications include any modifications to the definitions of the Settlement Class, Settlement Class Members, Released Parties, or the scope of the releases (as provided in Sections 10.1 and 10.2), any modifications to the terms of the Settlement consideration (as provided in Sections 5.1 - 5.3). In the event of any modification by any court, and in the event Apple does not exercise its unilateral option to withdraw from this Settlement, the Parties shall meet and confer within fourteen (14) days of such modification to attempt to reach an agreement as to how best to effectuate the court-ordered modification.

12.5 If the Effective Date is not reached, this Settlement Agreement is without prejudice to the rights of any party hereto, and all terms, negotiations, and proceedings connected therewith shall not be deemed or construed to be an admission by any Party or evidence of any kind in this Action or any other action or proceeding.

13. NOTICES

13.1 All notices to Named Plaintiffs shall be delivered to:

Steve W. Berman
Robert F. Lopez
Hagens Berman Sobol Shapiro LLP
1301 Second Ave., Suite 2000
Seattle, WA 98101

13.2 All notices to Apple shall be delivered to:

Heather Grenier
Senior Director, Commercial Litigation
Apple Inc.
One Apple Park Way, MS 60-1AL
Cupertino, CA 95014

With a copy to:

Mark A. Perry
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave., NW
Washington, D.C. 20036

13.3 The notice recipients and addresses designated in paragraphs 13.1 and 13.2 may be changed upon written notice provided to all individuals identified in those paragraphs.

14. MISCELLANEOUS

14.1 This Settlement Agreement may not be modified in any respect except upon the written consent of the Parties.

14.2 The undersigned each represent and warrant that each has authority to enter into this Settlement Agreement on behalf of the Party indicated below his or her name.

14.3 If, prior to the Effective Date, Class Counsel knows, or has reason to know, of any Named Plaintiff who intends to exclude himself or herself from the Settlement or who intends to submit an objection to the Settlement, Class Counsel shall promptly notify Defense Counsel within three (3) days. The Parties shall thereafter meet and confer within seven (7) days of such

notification to determine whether any modifications to the Settlement, or any other actions or filings, are required.

14.4 Class Counsel and the Named Plaintiffs represent and warrant that they have not assigned or transferred, or purported to assign or transfer, to any person or entity, any claim or any portion thereof or interest therein, including, but not limited to, any interest in the Action or any related action, and they further represent and warrant that they know of no such assignments or transfers on the part of any member of the Settlement Class.

14.5 The Parties, together with Class Counsel and Defense Counsel, have jointly participated in the drafting of this Settlement Agreement. No Party hereto shall be considered the drafter of this Settlement Agreement or any provision hereof for the purpose of any statute, case law or rule of interpretation or construction that would or might cause any provision to be construed against the drafter hereof.

14.6 As used in this Settlement Agreement, the masculine, feminine, or neutral gender, and the singular or plural wording, shall each be deemed to include the others whenever the context so indicates.

14.7 Unless otherwise noted, all references to "days" in this Settlement Agreement shall be to calendar days. In the event any date or deadline set forth in this Settlement Agreement falls on a weekend or federal legal holiday, such date or deadline shall be on the first business day thereafter.

14.8 Any and all disputes arising from or related to this Settlement Agreement must be brought by the Parties, Class Counsel, Defense Counsel, and/or members of the Settlement Class exclusively to the Court. The Parties, Class Counsel, Defense Counsel and members of the Settlement Class irrevocably submit to the exclusive and continuing jurisdiction of the Court for

any suit, action, proceeding, or dispute arising out of or relating to this Settlement Agreement. All terms of this Settlement Agreement and any suit, action, proceeding, or dispute arising out of or relating to this Settlement Agreement shall be governed by and interpreted according to the substantive laws of the State of California without regard to choice of law or conflicts of laws principles; however, nothing in this Settlement Agreement shall operate as a waiver of any Party's position regarding the applicable law governing the underlying claims at issue in the Action.

14.9 Unless otherwise ordered by the Court, the Parties may jointly agree to reasonable extensions of time to carry out any of the provisions of this Settlement Agreement.

14.10 Unless otherwise ordered by the Court, all motions, discovery, and other proceedings in the Action shall be stayed until the Court enters the Final Approval Order and Final Judgment, or this Settlement Agreement is otherwise terminated.

14.11 Nothing in this Settlement Agreement shall alter or abrogate any prior Court orders entered in the Action.

14.12 This Settlement Agreement may be executed in counterparts. Facsimile or PDF signatures shall be considered valid as of the date they bear.

14.13 The Parties, together with Class Counsel and Defense Counsel, agree to prepare and execute all documents, to seek Court approvals, to defend Court approvals, and to do all things reasonably necessary to complete the Settlement.

14.14 This Settlement Agreement is executed voluntarily by each of the Parties without any duress or undue influence on the part, or on behalf, of any of them. The Parties represent and warrant to each other that they have read and fully understand the provisions of this Settlement Agreement and have relied on the advice and representation of legal counsel of their own choosing.

14.15 This Settlement Agreement may be amended or modified only by a written instrument signed by Defense Counsel and Class Counsel and approved by the Court.

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The Parties have agreed to the terms of this Settlement Agreement and have signed below.

For the Named Plaintiffs:

Steve W. Berman
Hagens Berman Sobol Shapiro LLP
1301 Second Ave., Suite 2000
Seattle, WA 98101

Dated: August 24, 2021

For Apple:

Heather Grenier
Senior Director, Commercial Litigation
Apple Inc.
One Apple Park Way, MS 60-1AL
Cupertino, CA 95014

Dated: August 24, 2021

TAB 50B

Steve W. Berman (*pro hac vice*)
Robert F. Lopez (*pro hac vice*)
Ted Wojcik (*pro hac vice*)
HAGENS BERMAN SOBOL SHAPIRO LLP
1301 Second Avenue, Suite 2000
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslaw.com
robl@hbsslaw.com
tedw@hbsslaw.com

Shana E. Scarlett (SBN 217895)
Benjamin J. Siegel (SBN 256260)
Ben M. Harrington (SBN 313877)
HAGENS BERMAN SOBOL SHAPIRO LLP
715 Hearst Avenue, Suite 202
Berkeley, CA 94710
Telephone: (510) 725-3000
Facsimile: (510) 725-3001
shanas@hbsslaw.com
bens@hbsslaw.com
benh@hbsslaw.com

Interim Lead Class Counsel

[Additional Counsel Listed on Signature Page]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

DONALD R. CAMERON, *et al.*,

Plaintiffs,

v.

APPLE INC.,

Defendant.

Case No. 4:19-cv-03074-YGR

DEVELOPER PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND SERVICE AWARDS

Date: June 7, 2022
Time: 2:00 p.m.
Judge: Hon. Yvonne Gonzalez Rogers
Location: Courtroom 1- 4th Floor

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on June 7, 2022, at 2:00 p.m. or as soon thereafter as the matter may be heard by the Honorable Yvonne Gonzalez Rogers of the United States District Court for the Northern District of California, located in Courtroom 1, at 1301 Clay Street, Oakland, CA 94612, Developer Plaintiffs will and hereby do move the Court for an award of attorneys' fees, reimbursement of expenses, and service awards. This motion is based on this notice of motion and motion, the accompanying memorandum of points and authorities, the declarations in support of the motion, argument by counsel at the hearing before this Court, any papers filed in reply, such oral and documentary evidence as may be presented at the hearing of this motion, and all papers and records on file in this matter.

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GLOSSARY OF TERMS

Term	Description
Berman Decl.	Declaration of Steve W. Berman in Support of Developer Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses, and Service Awards, concurrently filed herewith.
Cameron Decl.	Declaration of Donald R. Cameron in Support of Developer Plaintiffs' Motion for Attorneys' Fees, Expenses and Service Awards, concurrently filed herewith.
Carroll Decl.	Declaration of Katrina C. Carroll in Support of Developer Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses, and Service Awards on Behalf of Lynch Carpenter LLP, concurrently filed herewith.
Class Counsel	Hagens Berman Sobol Shapiro LLP, Sperling & Slater, P.C., Saveri & Saveri, Inc., Freed Kanner London & Millen LLC, Lynch Carpenter LLP.
Consumer Action	*In re Apple iPhone Antitrust Litigation,* No. 4:11-cv-6714-YGR (N.D. Cal.).
Czeslawski Decl.	Declaration of Richard Czeslawski in Support of Developer Plaintiffs' Motion for Attorneys' Fees, Expenses and Service Awards, concurrently filed herewith.
ECF No.	Unless otherwise noted, all "ECF No." citations refer to this case: *Cameron et al. v. Apple Inc.*, No. 4:19-cv-0374-YGR (N.D. Cal.).
Epic Action	*Epic Games, Inc. v. Apple, Inc.*, No. 4:20-cv-5640-YGR (N.D. Cal.).
Jagher Decl.	Declaration of Jonathan M. Jagher in Support of Developer Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses, and Service Awards on Behalf of Freed Kanner London & Millen LLC, concurrently filed herewith.
Kelly Decl.	Declaration of Eamon P. Kelly in Support of Developer Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses, and Service Awards on Behalf of Sperling & Slater, P.C., concurrently filed herewith.
Lead Class Counsel	Hagens Berman Sobol Shapiro LLP.
Saveri Decl.	Declaration of R. Alexander Saveri in Support of Developer Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses, and Service Awards on Behalf of Saveri & Saveri, Inc., concurrently filed herewith.

I. PRELIMINARY STATEMENT

After more than two years of hard-fought litigation, Class Counsel for the Developer Plaintiffs reached a settlement with Apple that secures a $100 million non-reversionary cash fund for the Settlement Class and valuable structural relief that commits Apple to a range of reforms that will enable developers to better create, distribute, and monetize their apps. As part of the structural relief, Apple agreed to relax its anti-steering rules, acknowledged that this litigation was a driver behind its Small Business Program (SBP), and agreed to maintain the SBP's 15 percent commission rate for at least another three years, among other reforms. Although not all of the structural relief in the settlement can be valued with precision, the SBP elements can be valued and, most conservatively, they deliver at least an additional $35.44 million to the Settlement Class. In light of the substantial risks and challenges faced down to obtain these strong results, Plaintiffs respectfully request: (1) an award of $27,000,000 in attorneys' fees—equivalent to 19.9 percent of the $135.44 million in quantifiable relief for the Class and 27 percent of the non-reversionary cash fund; (2) reimbursement of $3,500,000 to cover most (but not all) of the out-of-pocket litigation expenses incurred in this case; and (3) service awards of $5,000 for the two class representatives.

Class Counsel's $27 million fee request is reasonable. An award of 19.9 percent of the $135.44 million in quantifiable relief (which includes the $35.44 million in SBP savings counted as part of the common fund under Ninth Circuit law) is below this Circuit's benchmark of 25 percent. But even if one were to disregard the SBP savings, the results obtained for the Settlement Class justify a modest increase from the benchmark to 27 percent. The $100 million non-reversionary cash fund alone constitutes between 30.4 and 34.6 percent of the maximum potential single damages for the Settlement Class. That is a superb recovery, exceeding recoveries deemed sufficient to justify awards of 30 or 33 percent of the common fund in other antitrust class actions. Moreover, the Settlement's structural relief elements (individually, and collectively) confer additional economic and practical benefits on the Settlement Class.

Counsel achieved these results despite facing significant risks and challenges. Developer Plaintiffs presented novel monopolization claims challenging the fundamental business model of one of the most well-resourced companies in the world, all on a contingency basis. This Court

explained in the preliminary approval order that "it is particularly aware of the risks of trial in this case having tried and written a 185-page decision in the *Epic Games v. Apple* dispute."[1] Class Counsel confronted these challenges with dogged and efficient work, culminating in a comprehensive class certification motion supported by three detailed expert reports. Recognizing the strength of their motion, but also the risks of a negative outcome in the *Epic v. Apple* trial, Class Counsel settled strategically just weeks before this Court's post-trial rulings. This strategy worked to the Class's benefit because the Court's rulings, adverse to Epic on many key issues, would have substantially diminished Plaintiffs' settlement leverage in any future negotiations.

The reasonableness of the requested award is further confirmed by a "lodestar cross-check." The requested award would lead to a modest multiplier of 2.47, which is well within the range of multipliers approved in this district and affirmed by the Ninth Circuit. It is reasonable here given the excellent results obtained for the Settlement Class in the face of serious risks and challenges.

Beyond fees, the requested expenses—the majority of which were for the experts whose reports provided the foundation for Plaintiffs' class certification motion—were all necessary to the representation of the Class. Additionally, the requested $5,000 service award to the two class representative is also reasonable given the significant commitment to the Class and investment of time provided to this case. Plaintiffs respectfully request that their motion be granted.

II. PROCEDURAL HISTORY

Developer Plaintiffs filed their initial complaint on June 4, 2019, and their Consolidated Amended Complaint on September 30, 2019. *See* ECF No. 53. Asserting claims under the Sherman Act and California's Unfair Competition Law, Developer Plaintiffs contended that Apple monopolizes a relevant market for iOS app and in-app-product distribution services, charging iOS app developers supracompetitive commissions.

Apple filed its answer on November 11, 2019. ECF No. 74. The Court subsequently coordinated this action with *In re Apple iPhone Antitrust Litigation*, No. 4:11-cv-6714 and *Epic Games, Inc. v. Apple, Inc.*, No. 4:20-cv-5640, for discovery purposes.

[1] ECF No. 453 at 4.

Following class and merits-based discovery, Developer Plaintiffs moved for class certification on June 1, 2021, one week after closing arguments in the *Epic* trial. *See* ECF No. 331. On August 11, 2021, Apple filed its opposition to class certification. *See* ECF No. 376.

After extensive negotiations culminated in a final settlement agreement with Apple, Developer Plaintiffs moved for preliminary approval of the settlement on August 26, 2021. ECF No. 396. Approximately two weeks later, on September 10, this Court issued its Rule 52 Order regarding the *Epic v. Apple* trial. *See Epic* Action, ECF No. 812. On November 16, 2021, this Court granted Developer Plaintiffs' motion for preliminary approval of the settlement and set deadlines for notice, objections, exclusions, and the final fairness hearing. ECF No. 453.

III. THE WORK UNDERTAKEN BY THE DEVELOPER PLAINTIFFS

A. Class Counsel completed a substantial pre-litigation investigation that led to a comprehensive, well-pleaded complaint.

The initial complaint brought by Lead Class Counsel Hagens Berman followed a detailed, independent investigation into the facts and law underlying Plaintiffs' claims and the conduct at issue. Berman Decl. ¶ 14. That investigation resulted in the comprehensive complaint filed on June 4, 2019. ECF No. 1. When Apple raised its intention to move to dismiss, this Court described the complaint as setting forth an "articulated theory" of antitrust liability, *see* Oct. 7, 2019 Hrg. Tr. at 15:7, and indicated that the complaint would likely endure a 12(b)(6) motion. *See* Oct. 7, 2019 Hrg. Tr. at 19:9-22 ("You know, a motion to dismiss, I don't -- that's not how this case is going to get resolved."). Ultimately, Apple decided to answer the complaint, rather than file a motion to dismiss. ECF No. 74. More than a year later, Epic brought individual claims against Apple under similar theories. *See Epic* Action, ECF No. 1 (Aug. 13, 2020).

B. Class Counsel engaged in substantial discovery efforts on behalf of the Settlement Class.

1. Class Counsel coordinated with counsel for Consumer Plaintiffs and Epic to obtain critical discovery.

From the beginning of the case, Class Counsel sought to maximize efficiency and avoid duplication by coordinating discovery efforts with the Consumer Plaintiffs. For example, Developer and Consumer Plaintiffs jointly drafted proposed orders and protocols for coordinated

discovery, protection of confidential materials, expert discovery, and a discovery schedule. After the *Epic* case was related and the Court ordered discovery coordinated, Class Counsel continued to work collaboratively, now with two plaintiff groups, to aggressively pursue discovery. Berman Decl. ¶ 15. Apple often resisted these efforts, and Plaintiffs brought a series of discovery motions that were instrumental in developing a strong record in support of Plaintiffs' claims. *Id*.

2. Class Counsel completed substantial written and document discovery.

Developer Plaintiffs propounded detailed written discovery, including 89 document requests and thirteen interrogatories. Class Counsel also issued subpoenas to third parties for data and documents, including subpoenas to Google, Amazon, App Annie, and Epic. *Id.* ¶ 16.

Class Counsel spent thousands of hours analyzing Apple's written discovery responses and the documents produced by Apple and third parties. In total, Plaintiffs obtained documents from at least 19 Apple custodians and several third parties. Five million documents constituting 20 million pages were ultimately produced in this litigation. Apple also produced a 13-terabyte transactional dataset that Developer Plaintiffs and their experts have extensively analyzed. *Id.* ¶ 17.

To obtain this discovery, Developer Plaintiffs brought and prevailed, at least in part, on seven contested motions to compel, with some of the results summarized below.

Discovery letter brief	Date filed	Outcome
Joint Statement Regarding Apple's Production of Documents Responsive to Consumer Plaintiffs' 2nd Set of Requests for Production of Documents, ECF No. 145	Nov. 13, 2020	Granted in part, ECF No. 192
Joint Letter Brief Regarding Apple's Production of Cost and Expense Documents and Data, ECF No. 146	Nov. 13, 2020	Granted in part, ECF No. 192
Joint Statement Regarding Apple's Production of Transactional Data, ECF No. 147	Nov. 13, 2020	Granted, ECF No. 192
Joint Discovery Letter Brief Regarding Additional Apple Custodians, ECF No. 177	Dec. 7, 2020	Granted, ECF No. 192
Joint Discovery Letter Brief Re: Number of Apple Depositions, ECF No. 199	Dec. 17, 2020	Granted, ECF No. 200
Joint Discovery Letter Brief Regarding Cue and Federighi Depositions, ECF No. 241	Jan. 20, 2021	Granted, ECF No. 268
Joint Discovery Letter Brief Regarding Cook Deposition, ECF No. 242	Jan. 20, 2021	Granted, ECF No. 268

These motions necessitated large amounts of time for meet-and-confers, briefing, and hearing preparation. Often, Plaintiffs coordinated briefing and argument with the Consumer Plaintiffs and/or Epic. Berman Decl. ¶ 19. In part due to the accelerated Epic discovery schedule, disputes had to brought to the court over a very short period of time, requiring intensive work by Class Counsel. The seven joint discovery letter briefs identified in the chart, for example, were filed in a two-month period that included the winter holidays. Moreover, as explained in Section III.B.3 *infra*, as these disputes were being briefed and argued, Counsel was also taking depositions of high-ranking Apple executives, intensifying the workload for Plaintiffs' core team of lawyers and staff.

For these and other reasons, Plaintiffs prioritized their discovery disputes based on issues critical to the case. For instance, following protracted negotiations with Apple over several months, on November 13, 2020, Plaintiffs filed two joint letter briefs in pursuit of materials germane to class certification and the merits: (1) ECF No. 146: Joint Letter Brief Regarding Apple's Production of Cost and Expense Documents and Data, and (2) ECF No. 147: Joint Statement Regarding Apple's Production of Transactional Data. The former joint letter brief involved a dispute over the data fields that Apple would produce in its transactional database, and the latter cost and expense information for the App Store that Apple claimed not to maintain.[2] The court largely granted Plaintiffs' motions,[3] and the data and information Apple was compelled to produce proved essential to Developer Plaintiffs' expert reports supporting class certification and, in particular, their showing of classwide impact and damages. Berman Decl. ¶ 20.

Other motion practice by Plaintiffs led to favorable discovery orders, including orders compelling Apple to produce documents from additional custodians (ECF No. 192); compelling Apple to produce additional deponents (ECF No. 200); and an order, after hotly contested briefing, compelling the full-length depositions of high-ranking Apple executives, including CEO Tim Cook, Senior Vice President of Services Eddy Cue, and Senior Vice President of Engineering

[2] *See* ECF No. 192 at 7.

[3] *See id.* at 6-7.

Craig Federighi (ECF No. 268). These depositions elicited testimony that featured prominently in Plaintiffs' motion for class certification. Berman Decl. ¶ 21.

3. Class Counsel took and defended more than twenty fact and 30(b)(6) depositions.

Developer Plaintiffs took 15 fact depositions (many of which lasted ten hours), with 484 exhibits introduced by the plaintiff groups at these depositions. To increase efficiency, Developer Plaintiffs, Epic, and the Consumer Plaintiffs coordinated on the topics for examination and split the allocated hours. In all, there were 44 fact and expert depositions in the coordinated cases up to date of settlement. Berman Decl. ¶ 22.

Because of the requirement to coordinate depositions with Epic and Epic's abbreviated discovery schedule, Developer Plaintiff took these depositions in rapid succession, with ten of them—including the depositions of the highest-level Apple executives—compressed within a two-week period from the January 28 to February 12, 2021. Berman Decl. ¶ 23. As a result, prior to moving for class certification, Developer Plaintiffs had already taken most, if not all, of the depositions needed for the merits. Moreover, Developer Plaintiffs' questioning at these depositions was important because Epic only asserted individual injunctive-relief claims; by contrast, Developer Plaintiffs had to show that class certification, and classwide damages, were appropriate. Plaintiffs elicited testimony critical for their theory of common impact and damages from several of Apple's most senior executives, including Eddy Cue and Phil Schiller, among others. *Id.*

In part to establish the facts needed for class certification, Developer Plaintiffs also served a 30(b)(6) deposition notice with 40 topics. Apple chose to spread these topics over several witnesses, so Class Counsel questioned these witnesses as individuals as well as corporate representatives of Apple. Plaintiffs also prepared extensively for, and defended, three expert and two class representative depositions. *Id.* ¶ 24.

C. Class Counsel and their experts undertook a large amount of expert discovery and analysis critical to class certification.

Over the course of this litigation, Plaintiffs' experts provided critical support. These experts included Einer Elhauge, Professor of Law at Harvard University, and Nicholas Economides, Professor of Economics at NYU's Stern School of Business, and their team at Legal Economics, as

well as accounting expert Christian Tregillis and his team at Hemming Morse, LLP. The experts provided insights into the cutting-edge technology markets at issue, informing Plaintiffs' legal analyses and the discovery taken. For example, the experts assisted counsel with multiple rounds of questions and answers with Apple about transactional and cost data, including meet and confers that ultimately led to the successful motion to compel discussed *supra* (*see* Section III.B.2). Plaintiffs' experts also assisted Class Counsel in preparing for the Rule 30(b)(6) depositions of Apple's corporate designees, particularly with regard to issues affecting class certification, impact, and damages. Plaintiffs and their economic and accounting experts also conducted extensive analyses of the 13-terabyte transactional dataset produced by Apple, Apple's accounting documents, and other documents and data produced in the course of discovery. Berman Decl. ¶ 25.

The experts' work culminated in the reports filed in support of Developer Plaintiffs' motion for class certification, which totaled 472 pages. Professor Elhauge submitted a report that assessed the core issues of defining the relevant market and assessing market power, common impact, and other liability related topics. ECF No. 459-3. Professor Economides, in turn, assessed whether damages to class members could be accurately determined using common evidence, and developed a methodology for doing so. ECF No. 459-2. Finally, Mr. Tregillis analyzed financial information available in this matter to calculate the operating profit and operating margin of both the App Store and other internet marketplace platforms. ECF No. 459-4. These calculations were essential inputs for one of Professor Economides's damages models.

D. Class Counsel conducted extensive work on an amicus brief and a comprehensive motion for class certification and settled strategically with Apple to maximize recovery for the Settlement Class.

Understanding the impact the *Epic v. Apple* trial could have on their case, on February 5, 2021, Class Counsel submitted an amicus brief regarding trial elements. *Epic* Action, ECF No. 326. Responding to Epic and Apple's Joint Submission, Class Counsel provided legal authority on the relevant market analysis, the law governing Sherman Act claims, the Foreign Trade Antitrust Improvements Act, California's Unfair Competition Law, and developer-focused issues. *Id.*

Then, on June 1, 2021, Developer Plaintiffs submitted a comprehensive motion for class certification, just one week after closing arguments in the *Epic* trial. *See* ECF No. 331. As

explained above, Developer Plaintiffs' motion was supported by three detailed expert reports. The motions and the supporting reports provided strong support for the propositions that, *inter alia*, Apple's unlawful conduct caused injury to all or nearly all developers and that there was common evidence and a common methodology to prove damages.

Following the motion, Class Counsel prepared for and defended depositions of their three experts, each of which was taken by seasoned antitrust counsel. Berman Decl. ¶ 29. On August 10, 2021, Apple filed its opposition to class certification along with seven supporting expert reports. ECF No. 376. Apple simultaneously moved to compel Plaintiffs to produce a "trial plan" and to exclude certain of Developer Plaintiffs' experts' opinions under *Daubert*. ECF Nos. 371 & 380. Developer Plaintiffs filed administrative motions to strike these motions on August 13. ECF Nos. 382 & 384. Consumer Plaintiffs refiled these motions to strike in their own action, and the Court granted the former by Order dated November 8, 2021. *See* Consumer Action, ECF No. 573.

At that point, Plaintiffs had presented a strong motion for class certification, and had seen not only Apple's opposition to class certification, but also the bench trial of one developer's (Epic's) claims. Counsel understood the strengths and vulnerabilities of the developer case and settled strategically at that point—with the Settlement signed on August 24, 2021— to maximize recovery for the Settlement Class. ECF No. 451-1 at 36. This was an opportune time to settle. Just two weeks later, the Court issued its post-trial order in *Epic v. Apple*. The Court's rulings, adverse to Epic on many key issues, would have substantially diminished Plaintiffs' settlement leverage.

IV. THE SETTLEMENT OBTAINED VALUABLE MONETARY AND STRUCTURAL RELIEF.

The proposed Settlement establishes a $100 million monetary fund—the Small Developer Assistance Fund (SDAF)—from which Settlement Class members will receive direct distributions. The fund is non-reversionary; under no circumstances will any portion of the fund return to Apple. ECF No. 451-1 at § 1.29.

The Settlement also contains valuable structural relief. It acknowledges that this lawsuit was one driver behind Apple's 2021 launch of its Small Business Program, under which small developers (those earning up to $1 million per year) qualify for a lower 15% commission rate.

Under the Settlement, Apple has committed to maintain the Small Business Program's 15% rate for at least another three years. Apple has also committed to revise its "anti-steering" Guidelines to permit app developers to communicate directly with their customers regarding alternative payment options. Apple has further agreed to institute and maintain a range of structural reforms that will enable developers to better create, distribute, and monetize their apps. *Id.* at § 5.1.[4]

Professor Economides estimates that the SBP, coupled with Apple's three-year commitment under the Settlement to maintain its 15% tier, will save the Settlement Class $177.2 million in commissions. ECF No. 459-7 at ¶ 21. Developer Plaintiffs recognize that this case may not be solely responsible for the SBP. Apple has cited two other contributing factors—the Coronavirus and a desire to propel innovation by small developers. ECF No. 451-1 at § 2.3. Weighing this litigation equal to these factors would be reasonable, but even assuming the case played a lesser role, it still conferred millions of additional dollars on the Class. For example, even if the litigation was 20% responsible for the SBP, that would mean that the litigation delivered an additional $35.44 million to the Settlement Class ($177.2m x 0.20). Combining that amount with the $100 million SDAF yields at least $135.44 million in quantifiable relief for the Class.

V. ARGUMENT

Developer Plaintiffs respectfully request an award of $27 million in attorneys' fees—equal to 19.9 percent of the $134.55 million in quantifiable relief obtained by the settlement.[5] Applying a lodestar crosscheck, the requested fee award would result in a 2.47 multiplier of Class Counsel's total lodestar of $10,923,265, not including fees spent on this motion, or fees Developer Plaintiffs will incur through final approval, settlement distribution, and appeals. Plaintiffs also request reimbursement of expenses incurred in this litigation of $3.5 million, which is approximately $213,000 less than the expenses actually incurred by Class Counsel ($3,713,173.84). Finally, Plaintiffs request that this Court grant service awards of $5,000 to the two class representatives.

[4] *See also* ECF No. 396 at 5-8 (discussing structural reforms in detail).

[5] Plaintiffs explain below that under Ninth Circuit case law, the total value of the settlement should include both the $100 million value of the SDAF and at least $35.44 million of the quantifiable value of SBP. *See infra* at Section V.A.1.

A. Class Counsel's fee request is reasonable.

Federal Rules of Civil Procedure 23(h) and 54(d) permit courts overseeing class actions to award reasonable attorneys' fees and costs. The Supreme Court has explained that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."[6]

In the Ninth Circuit, district courts may employ two different methods to calculate reasonable attorneys' fees: (1) the "lodestar" method, which multiplies the number of hours reasonably expended on the litigation by reasonable hourly rates, or (2) the "percentage-of-recovery" method.[7] "[C]ourts have discretion to choose which calculation method they use," but "their discretion must be exercised so as to achieve a reasonable result."[8] However, "the primary basis of the fee award remains the percentage method," with the lodestar used "merely [as] a cross-check on the reasonableness of a percentage figure."[9]

The benefits of applying the percentage-of-recovery method in this case are threefold. **First**, the method "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation."[10] **Second**, employing the percentage-of-recovery method incentivizes counsel to take cases on behalf of classes because it is consistent "with contingency fee calculations in the private market."[11] **Third**, it "reduc[es] the burden on the courts that a complex lodestar calculation requires," permitting courts to instead

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[6] *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

[7] *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941-42 (9th Cir. 2011); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015).

[8] *Bluetooth*, 654 F.3d at 942.

[9] *Vizcaino*, 290 F.3d at 1050 & n.5; *accord Perez v. Rash Curtis & Assocs*, 2020 WL 1904533, at *15 (N.D. Cal. Apr. 17, 2020) (Gonzalez Rogers, J.) (quoting *Vizcaino*, 290 F.3d at 1050).

[10] *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (citation omitted); *In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3960068, at *5 (N.D. Cal. Aug. 17, 2018) (percentage-of-recovery method ensures that "Class Counsel's interests are aligned with the Class, and Class Counsel are incentivized to achieve the best possible result").

[11] *In re Apple Inc. Device Performance Litig.*, 2021 WL 1022866, at *2 (N.D. Cal. Mar. 17, 2021); *Anthem*, 2018 WL 3960068, at *5 ("[M]any courts utilize a percentage approach, which approximates the manner in which plaintiff contingent fee lawyers undertake work outside the class action context." (quoting 5 NEWBERG ON CLASS ACTIONS § 15:62 (5th ed. 2018))).

"focus on showing that a fund conferring benefits on a class was created through the efforts of plaintiffs' counsel."[12] "In contrast, the lodestar [method] create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in a gimlet-eyed review of line-item fee audits."[13]

In this case, while Plaintiffs believe that the percentage-of-the-fund method should be the primary one used, both methods support Class Counsel's fee request.

1. The requested fee award is reasonable under a percentage-of-the-fund analysis.

The fees requested by Plaintiffs are reasonable under a percentage-of-the-fund analysis. The Ninth Circuit has established a benchmark of 25 percent to be used as a "helpful 'starting point'" for analysis.[14] "That percentage amount can then be adjusted upward or downward depending on the circumstances of the case."[15] Courts in this district have recognized that "in most common fund cases, the award exceeds the benchmark."[16] At bottom, the Ninth Circuit asks district courts to "reach[] a reasonable percentage" after "consider[ing] all the circumstances of the case."[17]

As a starting point, to determine the value of the common fund for the purpose of the percentage-of-the-fund analysis, courts in the Ninth Circuit have included nonmonetary relief, in addition to monetary compensation where, as here, it can be reasonably ascertained and valued.[18] The Ninth Circuit held in *Staton* that the precise question is whether the value of the relief for class

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[12] *Apple*, 2021 WL 1022866, at *2 (internal quotation marks omitted). As the Supreme Court has cautioned, requests for attorneys' fees "should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

[13] *Wal-Mart*, 396 F.3d at 121 (internal quotation marks omitted).

[14] *Online DVD*, 779 F.3d at 949, 955.

[15] *de Mira v. Heartland Emp't Serv., LLC*, 2014 WL 1026282, at *1 (N.D. Cal. Mar. 13, 2014).

[16] *Id.* (quoting *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008)).

[17] *Vizcaino*, 290 F.3d at 1048.

[18] *See, e.g.*, *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Pracs., & Prod. Liab. Litig.*, 2013 WL 12327929, at *29 & n.7 (C.D. Cal. July 24, 2013) (citing *Staton v. Boeing Co.*, 327 F.3d 938, 973-74 (9th Cir. 2003), and *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998), *overruled in part on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)) (holding that plaintiffs' experts appropriately included non-monetary benefits in calculating total value of common fund).

members can be "accurately ascertained."[19] In *Toyota Motor*, for example, the court held that the *Staton* test was satisfied where plaintiffs submitted expert reports that calculated the value of two types of nonmonetary relief at $877 million.[20] Analogously here, Professor Economides used Apple's transactional data and reasonable projections based on that data to calculate the savings on commissions due to the SBP at $177.2 million for Settlement Class Members (from inception through the three future years of existence guaranteed by the Settlement). Apple has identified this litigation as one of three factors prompting the SBP (ECF 451-1 at § 2.3), but Counsel has conservatively attributed 20% of the savings to the litigation and Settlement, equivalent to $35.44 million.[21] Combining that amount with the $100 million SDAF yields a total common fund of $135.44 million against which the reasonableness of Class Counsel's fee request may be assessed.

Class Counsel's $27 million fee request is 19.9% of the $135.44 million common fund, which is well below the Ninth Circuit's 25% benchmark. But even if one were not to count any of the SBP savings for the Class as part of the common fund, Counsel's 27% fee request ($27 million of the $100 SDAF) would be reasonable under each of the factors district courts may consider in the Ninth Circuit: (1) whether counsel achieved exceptional results for the class; (2) whether the settlement generated benefits beyond the cash settlement fund; (3) whether the case was risky for class counsel; (4) the market rate for the particular field of law; (5) whether the case was handled on a contingency basis; and (6) the burdens class counsel experienced while litigating the case.[22]

a. Class Counsel achieved exceptional results for the Settlement Class, including generating benefits beyond the cash settlement fund.

Class Counsel achieved an excellent outcome for the Settlement Class. Indeed, the $100 million SDAF established under the proposed Settlement is by itself an excellent result. According to Professor Economides's calculations, even if the Settlement Class were to obtain class certification, survive summary judgment, and prevail at trial, its members would stand to recover

[19] *Staton*, 327 F.3d at 974.

[20] *See Toyota Motor*, 2013 WL 12327929, at 29 & n.7. That $877 million was a large portion of a common fund valued at over $1.6 billion. *See id.*

[21] *See supra* at Section IV (explaining basis for that attribution).

[22] *Online DVD*, 779 F.3d at 954-55.

between approximately $289 million and $329 million in single damages.[23] Thus, the $100 million SDAF is equivalent to between 30.4 and 34.6 percent of potential single damages, and that is a superb monetary recovery in an antitrust class action. In *In re Cathode Ray Tube (CRT) Antitrust Litigation*, the court approved a settlement representing 20% of single damages and cited a survey of 71 settled antitrust cases which showed a weighted mean recovery of 19% of single damages.[24] This Court recently described a recovery of 11.7% of single damages as an "excellent" result and awarded Class Counsel just under 30% of the settlement fund.[25] Other courts have explained that in this district, even in megafund cases,[26] "[f]ar lesser results (with 20% recovery of damages or less) have justified upward departures from the 25% benchmark."[27] In fact, courts, including in antitrust action in this district, have awarded *33 percent* or more in fees where class plaintiffs recovered less than 20 percent of potential single damages for the class.[28]

Moreover, as set forth above, the relief afforded by this Settlement is not limited to the SDAF. The Settlement's structural relief elements (individually, and collectively) confer additional economic and practical benefits on the Settlement Class. To begin with, when the $35.44 million of the SBP savings is counted as part of the common fund, the total $135.44 million fund represents 41.2 to 46.9 percent of the Settlement Class's potential single damages.

But even if the Court concludes that this relief should not be counted as part of the common

[23] *See* ECF No. 459-7 at ¶ 10. These calculations are based on the transactional data Apple has produced in this action, which extends through April 26, 2021. *See id.* ¶ 8.

[24] *See* 2016 WL 3648478, at *7 & n.19 (N.D. Cal. July 7, 2016).

[25] *In re Lithium Ion Batteries Antitrust Litig.*, 2020 WL 7264559, at *19-*20, *23 (N.D. Cal. Dec. 10, 2020).

[26] A megafund is generally defined as a "common fund[] of $100 million or more." *See Stop & Shop Supermarket Co. v. Smithkline Beecham Corp.*, 2005 WL 1213926, at *9 (E.D. Pa. May 19, 2005).

[27] *See In re NCAA Grant-in-Aid Cap Antitrust Litig.*, 2017 WL 6040065, at *3 (N.D. Cal. Dec. 6, 2017), *aff'd*, 768 F. App'x 651 (9th Cir. 2019) (citing cases).

[28] *See* Order Granting Award of Attys.' Fees, Reimb. of Expenses & Incentive Payments, *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. 07-md-1819-CW (N.D. Cal. Oct. 14, 2011), ECF No. 1407 (33 percent awarded to IPP counsel); *Id.* at ECF No. 1375 (showing that 33 percent awarded, $41.322 million, was 15% of possible damages estimated by IPPs' expert in *SRAM*); *In re Corel Corp., Inc. Secs. Litig.*, 293 F. Supp. 2d 484, 489-90, 498 (E.D. Pa. 2003) (1/3 fee awarded from settlement fund that comprised about 15% of damages).

fund, the Ninth Circuit has held that the value of nonmonetary relief should be considered as a "'relevant circumstance' in determining what percentage of the common fund class counsel should receive as attorneys' fees, rather than as part of the fund itself."[29] Indeed, the Ninth Circuit has held that "whether counsel's performance 'generated benefits beyond the cash settlement fund'" is an independent factor "courts may consider in assessing a request for attorneys' fees that was calculated using the percentage-of-recovery method."[30] Courts have cited non-monetary relief obtained in settlements as a factor supporting an upward departure from the 25 percent benchmark.[31] As attested to by the Named Plaintiffs, the broad benefits of the SBP, including the Settlement locking in the program for an additional three years, is of substantial value to the Settlement Class and other developers as well.[32]

This is not the only valuable structural relief obtained by the Settlement. As set forth in more detail in the preliminary approval motion, and in the declarations of the Named Plaintiffs accompanying that motion, commitments in the Settlement to improve app discoverability, pricing freedom, app review, and transparency will all assist the Settlement Class in monetizing and distributing their apps.[33] To provide one example, as Class Counsel and Counsel for Apple discussed with the Court at the preliminary approval hearing, Apple's commitment to publishing an annual transparency report will provide developers with objective data on, *inter alia*, search queries and results, so that developers can determine whether Apple is making meaningful improvements

[29] *Staton*, 327 F.3d at 974.

[30] *Online DVD*, 779 F.3d at 954-55 (quoting *Vizcaino*, 290 F.3d at 1049).

[31] *See, e.g.*, *Vizcaino*, 290 F.3d at 1049 (awarding counsel 28% of the cash settlement fund and explaining: "During the litigation, Microsoft agreed to hire roughly 3000 class members as regular employees and to change its personnel classification practices . . . ."); *Larsen v. Trader Joe's Co.*, 2014 WL 3404531, at *9 (N.D. Cal. July 11, 2014) (awarding counsel 28% and discussing that "[t]he settlement agreement also provides the equitable relief that Trader Joe's will stop using the disputed labels.")).

[32] *See* ECF No. 396 at 5-6, 12-13 (citing Declaration of Named Plaintiff Pure Sweat Basketball's CEO, Richard Czeslawski).

[33] *See id.* at 5-8.

to the search and discoverability of apps, common issues raised by developers.[34]

The Settlement also secured Apple's commitment to permit outside-app communications—specifically authorizing developers of all apps to alert customers to alternative payment mechanisms—which will confer additional economic benefits on the Settlement Class.[35] By informing customers of alternative payment options, developers can avoid paying Apple's commissions and, moreover, exert competitive pressure on Apple to discipline its pricing. Mr. Czeslawski—Named Plaintiffs Pure Sweat Basketball's CEO—considers this a "game changer" because the "ability to effectively communicate with [his] customers is the lifeblood of [his] business."[36] In its preliminary approval order, this Court "f[ound] [that] these structural benefits are valuable to the settlement class."[37]

b. This case posed enormous risks and challenges.

That this recovery was obtained despite the case's risks, challenges, and complexities also supports the reasonableness of the fee request.[38] As this Court knows, "[a]ntitrust cases are particularly risky, challenging, and widely acknowledge[d] to be among the most complex actions to prosecute."[39] "The 'best' case can be lost and the 'worst' case can be won, and juries may find liability but no damages. None of these risks should be underestimated."[40] And this case was

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[34] *See* ECF No. 451-1 at § 5.1.6; Nov. 2, 2021 Hr'g Tr. ("Prelim. Approval Hr'g Tr.") at 6-7. At the hearing, counsel for Apple and the Class committed to showing at final approval what the transparency report will look like, which Plaintiffs will do. *See* Prelim. Approval Hr'g Tr. at 6-7.

[35] *See* ECF No. 45-1 at § 5.1.3; ECF No. 459-7 at ¶¶ 23-24.

[36] *See* ECF No. 396-4 at ¶¶ 9, 12; *see also* ECF No. 459-7 at ¶ 24 (describing this structural relief as "a major change from Apple's previous policies [that] could bring substantial benefits to developers").

[37] ECF No. 453 at 5.

[38] *See Online DVD*, 779 F.3d at 955 (identifying this factor).

[39] *Batteries*, 2020 WL 7264559, at *15; *see also In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *10 (E.D. Pa. June 2, 2004) (the "antitrust class action is arguably the most complex action to prosecute" (quoting *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000)); *In re Auto. Refinishing Paint Antitrust Litig.*, 617 F. Supp. 2d 336, 341 (E.D. Pa. 2007) ("[A]ntitrust class action is arguably the most complex action to prosecute. The legal and factual issues involved are always numerous and uncertain in outcome." (citation omitted)).

[40] *Batteries*, 2020 WL 7264559, at *15 (quoting *In re Super. Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 127 (N.D. Ill. 1990)); *see also Wal-Mart Stores*, 396 F.3d at 118 ("Indeed, the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on

particularly challenging and risky.

First, Plaintiffs' liability theories challenged core principles of Apple's business model in the iOS ecosystem, presenting novel and complex issues of antitrust law. Thus, Apple had every incentive to expend the enormous resources of one of the largest companies in the world defending this case, which it did. And if the Court disagreed with Plaintiffs' positions on these legal issues, that alone could lead to zero recovery for the Settlement Class.

Second, and relatedly, the bench trial of one developer's claims versus Apple (Epic's) presented many of the same legal issues as in the Developer Plaintiffs' case, and a trial outcome adverse to Epic could pose an obstacle to Developer Plaintiffs' ability to establish liability or substantial damages for any class of developers. At the time of settlement, Developer Plaintiffs had seen the full trial and understood the strengths of their case, but also recognized potential deficiencies in Epic's showing. The Court issued its Rule 52 post-trial order approximately two weeks after Plaintiffs reached the settlement with Apple, and that decision, which rejected Epic's Sherman Act claims, confirmed the hurdles that Plaintiffs would have faced in prevailing on the merits in this Court.

Third, at the time of settlement, Developer Plaintiffs had not passed the class certification threshold. Developer Plaintiffs presented a class certification motion supported by three outstanding experts, who had all been deposed by the time of settlement, and Plaintiffs had reviewed Apple's opposition to Plaintiffs' class certification motion. Plaintiffs believe that the strength of their class certification papers is one factor that led to the excellent monetary and nonmonetary relief obtained by the Settlement. However, Class Counsel also understood experience, including in the *Batteries* case, that class certification is never certain and that if the Court denied certification, counsel's likelihood of obtaining significant monetary or structural relief for developers would vastly decrease.

Class Counsel's ability to secure a large settlement fund and structural relief in the face of

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appeal." (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 475 (S.D.N.Y. 1998)).

these risks supports the fee award requested.[41]

c. The market rate for antitrust class action lawyers supports the fee request.

Whether the Court holds that the percentage of fees sought from the common fund is 19.9 or 27 percent, both fall well within the market rate for class counsel in the "particular field of law," which often includes comparisons to the fee percentages awarded in analogous cases.[42] In a 2021 analysis for the 2020 Antitrust Annual Report, Professor Joshua Davis found that among antitrust class action settlements surveyed between 2009 and 2020, the median fee awarded for settlements between $100 million and $249 million was *30 percent*—and only in the range from $250 million to $499 million (and higher) did that median fee percentages drop to 25% (here, the fee request is 19.9% if the common fund is considered $135.44 million and 27% if considered $100 million). *See* Berman Decl., Ex. 14 at 29. Professors Theodore Eisenberg, Geoffrey Miller, and Roy Germano found in an earlier 2017 study discussed in an NYU Law Review article (EMG Study), that of the 19 antitrust settlements surveyed between 2009 and 2013 with a mean recovery of $501.09 million and a median recovery of $37.3 million, the mean and median percentages awarded were 27 percent and 30 percent, respectively.[43]

In large antitrust class actions, courts within this district, including by this Court, have awarded fees exceeding what is requested here. Data from analogous cases show that Counsel's percentage fee request—whether identified as 27 or 19.9 percent of the common fund—is

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[41] The *en banc* court in *In re Hyundai & Kia Fuel Economy Litigation*, 926 F.3d 539, 571 (9th Cir. 2019) (alteration in original), noted that upward departures are not unusual in high-risk cases:

> We have affirmed fee awards totaling a far greater percentage of the class recovery than the fees here. *See, e.g.*, *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047-48 (9th Cir. 2002) (no abuse of discretion to award fees constituting 28% of the class's recovery given "risk" assumed in litigating); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (no abuse of discretion where the "$ 4 million award (thirty-three percent [of the class's recovery]) for attorneys' fees is justified because of the complexity of the issues and the risks").

[42] *See Online DVD*, 779 F.3d at 955; *Vizcaino*, 290 F.3d at 1049-50.

[43] Theodore Eisenberg *et al.*, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 952 (2017).

reasonable.[44] And counsel here obtained structural relief for the Class as well.

d. Counsel's litigation on a contingency basis supports the fee request.

The Ninth Circuit has held that a fair fee award should consider the contingent nature of the fee.[45] It is also well established that attorneys who take on the risk of a contingency case should be compensated for the risk they assume.[46] As the *NCAA* court recently explained,

> In short, contingent fees are good for clients and the public alike. In exchange for increased predictability, decreased bean counting, and unlimited protection against downside risks—including the risk of a zero[-]dollar recovery—a client agrees to pay its attorneys an enhanced fee if and only if the client recovers. And because contingent fees are almost always determined as a percentage of the client's recovery, such fees are necessarily aligned with and proportional to the results achieved for that client—in short, the client only pays for what it gets. Lest contingent fees disappear altogether, the law must recognize both sides of the bargain—namely, a significant upside fee for successful contingent representations.[47]

Class Counsel litigated this case purely on a contingency fee basis—with no upfront retainer fees or allowance for expenses. Berman Decl. ¶ 6. The contingent nature of Class Counsel's engagement incentivized counsel to both achieve excellent results for the Class and to do so as efficiently as possible. It also presented a very real risk that Counsel would receive nothing at all, including no reimbursement for the substantial cash outlays this case required for experts and other litigation expenses.[48] The market rate for contingency representation is generally 33 percent,

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[44] *See, e.g.*, *In re Lidoderm Antitrust Litig.*, 2018 WL 11375216, at *3 (N.D. Cal. Sept. 20, 2018) (27.5 percent for direct purchaser settlement); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 WL 4126533, at *1 (N.D. Cal. Aug. 3, 2016) (27.5 percent for IPP settlement); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 WL 1365900, at *8 (N.D. Cal. Apr. 3, 2013) (28.6 percent for IPP settlement); Order Granting Award of Attys.' Fees, Reimb. of Expenses & Incentive Payments, *supra* note 28 (33 percent for IPP settlement); *Meijer, Inc. v. Abbott Labs. (Norvir)*, 2011 WL 13392313, at *2 (N.D. Cal. Aug. 11, 2011) (33 percent for direct purchaser settlement).

[45] *See, e.g.*, *Online DVD*, 779 F.3d at 954-55 & n.14; *Vizcaino*, 290 F.3d at 1050.

[46] *See In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994); *see also, e.g.*, *Ching v. Siemens Indus., Inc.*, 2014 WL 2926210, at *8 (N.D. Cal. June 27, 2014) ("Courts have long recognized that the public interest is served by rewarding attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk that they might be paid nothing at all for their work.").

[47] *NCAA*, 2017 WL 6040065, at *4 (citation omitted).

[48] *Id.* at *5 ("[C]ounsel for the classes have spent more than three years investigating and litigating this case, without receiving any compensation to do so. Such burdens are significant, even for law firms of the stature of plaintiffs' counsel").

which further confirms the reasonableness of the fee request here.[49]

e. The burdens faced by Class Counsel support the fee request.

The Ninth Circuit instructs district courts to consider the burdens class counsel experienced while litigating the case (e.g., cost, duration, and foregoing other work). This litigation has been pending for two-and-a-half years. As explained in Section V.A.2, *infra*, Class Counsel has advanced substantial sums out-of-pocket (more than $3.71 million) and devoted substantial time to this litigation—20,531 hours, for a lodestar of more than $10.92 million—and foregone other work while litigating this case. Berman Decl., ¶ 6.

2. A lodestar cross-check confirms the reasonableness of the requested fees.

The Ninth Circuit has held that "a crosscheck using the lodestar method can confirm that a percentage of recovery amount does not award counsel an exorbitant hourly rate."[50] Here, Class Counsel invested 20,531 hours, representing $10,923,265 in attorneys' fees, in this litigation. This does not include time on this fee motion, and the lodestar will increase through final approval, distribution of the settlement funds, and any appeals. Plaintiffs' fee request equates to a 2.47 multiplier of the current lodestar, which is within the range of multipliers awarded in similar cases.

Lodestar is calculated "by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer."[51] The lodestar calculation here is reasonable. First, Class Counsel's current billing rates, summarized in each firm's declaration, are within the

[49] *Vizcaino*, 290 F.3d at 1049 (explaining that fees requested were at or below "the standard contingency fee for similar cases," supporting the reasonableness of the request); F. Patrick Hubbard, *Substantive Due Process Limits on Punitive Damages Awards: "Morals Without Technique"?*, 60 Fla. L. Rev. 349, 383 (2008) (discussing "'the usual 33-40 percent contingent fee'" (quoting *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003))); Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DePaul L. Rev. 267, 286 (1998) (reporting the results of a survey of Wisconsin lawyers, which found that "[o]f the cases with a [fee calculated as a] fixed percentage [of the recovery], a contingency fee of 33% was by far the most common, accounting for 92% of those cases"); *Hopkins v. Stryker Sales Corp.*, 2013 WL 496358, at *3 (N.D. Cal. Feb. 6, 2013) (awarding 30% fee because the "case was conducted on an entirely contingent fee basis against a well-represented Defendant").

[50] *Online DVD*, 779 F.3d at 949 (internal quotation marks and citation omitted).

[51] *Bluetooth*, 654 F.3d at 941.

range that have been approved as reasonable by courts in this judicial district.[52] Second, the lodestar in this case reflects the meaningful steps that Lead Class Counsel took to ensure that Class Counsel's work was efficient, and the hours expended for only reasonable and necessary work. Lead Class Counsel, Hagens Berman, limited work on this case to only five firms, with 60.5 percent of the hours billed by Lead Class Counsel. Berman Decl. Ex. 6. Class Counsel also audited the hours included in the lodestar, deleting potentially duplicative, less efficient, or non-compensable time. *Id.* ¶ 46. Lastly, this lodestar is supported by detailed time records. *Id.* ¶ 44.

A court may give an upwards adjustment to a lodestar (through a positive multiplier) to reflect a host of "reasonableness" factors, including: (1) the amount involved and the results obtained, (2) the time and labor required, (3) the novelty and difficulty of the questions involved, (4) the skill requisite to perform the legal service properly, (5) the preclusion of other employment by the attorney due to acceptance of the case, (6) the customary fee, (7) the experience, reputation, and ability of the attorneys, and (8) awards in similar cases.[53] These are referred to as the *Kerr* "reasonableness" factors after the Ninth Circuit's opinion in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975).[54] Each of these factors supports the requested multiplier of 2.47.

Results for the Class. The first factor—"benefit obtained for the class"—is the most

[52] Berman Decl., Ex. 1; Saveri Decl., Ex. 2; Jagher Decl., Ex. B; Kelly Decl., Ex. A; Carroll Decl., Ex. B; *see, e.g.*, *In re Animation Workers Antitrust Litig.*, 2016 WL 6663005, at *6 (N.D. Cal. Nov. 11, 2016) (hourly rates ranging from $275 to $1,200 were "fair, reasonable, and market-based, particularly for the 'relevant community' in which counsel work" more than five years ago); *NCAA*, 2017 WL 6040065, at *9 (reputable survey of 2015 rates for California attorneys showed range of $200 to $1,080). Class Counsel's lodestar is based on the 20,531 hours they have invested in prosecuting this action, multiplied by the *current* hourly rates for the timekeepers that worked on this case, consistent with Ninth Circuit law. Berman Decl. ¶ 42; *Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th Cir. 2016) ("The lodestar should be computed either using an hourly rate that reflects the prevailing rate as of the date of the fee request, to compensate class counsel for delays in payment inherent in contingency-fee cases, or using historical rates and compensating for delays with a prime-rate enhancement."); *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 740 (9th Cir. 2016) (same, holding that it is an abuse of discretion for a district court to calculate lodestar otherwise).

[53] *Bluetooth*, 654 F.3d at 941-42.

[54] The Supreme Court has since called into question the relevance of two of the original *Kerr* factors: the contingent nature of the fee, and the "desirability" of the case. *See Resurrection Bay Conserv. Alliance v. City of Seward*, 640 F.3d 1087, 1095 n.5 (9th Cir. 2011). Other factors such as "time limitations imposed by the client or the circumstances" and "the nature and length of the professional relationship with the client" do not readily apply here.

important consideration in assessing fees.[55] As outlined above (*see supra*, Section V.A.1.a), Class Counsel obtained exceptional results, including a substantial monetary recovery, as well as several important structural reforms. These results alone support an upwards lodestar adjustment.

Counsel's Expenditure of Resources. Class Counsel has devoted substantial resources to this case during the pendency of more than two years of litigation. Class Counsel prevailed on seven fiercely contested motions to compel, leading to the discovery of documents and data critical to Developer Plaintiffs' case. Class Counsel also took the depositions of fifteen Apple employees, including some of highest-ranking Apple executives, and elicited testimony that was relied on in Plaintiffs' class certification motion. Class Counsel and their dedicated team also reviewed millions of pages of documents produced by Apple and subpoenaed third parties. This same team gathered an enormous amount of evidence that was used in support of Developer Plaintiffs' comprehensive motion for class certification and the supporting expert reports.

Attorneys and professionals at Class Counsel's firms have spent 20,531 hours working on this case toward the lodestar of $10,923,265 (no hours in connection with this fee motion are being counted toward the lodestar). *See* Berman Decl. ¶ 42, Ex. 6. Class Counsel also has $3,713,173.84 in unreimbursed expenses. *See id.* ¶ 52, Exs. 4 & 7.

Comparison to other cases. The sixth and eighth *Kerr* factors—the customary fee and awards in similar cases—both support Class Counsel's fee request. Class Counsel's requested lodestar multiplier of 2.47 is within the range of multipliers approved in this district and affirmed by the Ninth Circuit.[56] For example, in *Vizcaino*, the Ninth Circuit upheld a 28% fee award that constituted a 3.65 multiplier. The court also surveyed the multipliers applied in common fund settlements between $50 and $200 million, and found that 20 of the 24 cases it surveyed had a

[55] *Bluetooth*, 654 F.3d at 942.

[56] *See, e.g.*, *Steiner v. Am. Broad. Co., Inc.*, 248 F. App'x 780, 783 (9th Cir. 2007) (affirming fee award with multiplier of 6.85 as "fall[ing] well within the range of multipliers that courts have allowed"); *Perez*, 2021 WL 4503314, at *5 (approving fees of 37% of $75 million settlement fund, a lodestar multiplier of 4.8); *Steinfeld v. Discover Fin. Servs.*, 2014 WL 1309692, at *2 (N.D. Cal. Mar. 31, 2014) (approving fee that resulted in a 3.5 multiplier); *Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 334 (N.D. Cal. 2014) (finding a 2.83 multiplier appropriate).

multiplier between 1.0 and 4.0.[57] Similarly, a decision in the Southern District of New York explained that "Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers."[58] A recent empirical study of attorneys' fees in class action settlements found that the mean multiplier for recoveries greater than $67.6 million was 2.72.[59]

High Level of Skill Required. Class Counsel explained in detail in Section V.A.1.b, *supra*, that this case was risky and presented novel and difficult challenges that had to be met head on to achieve this Settlement. These risks include those that attend antitrust cases in general, widely acknowledged as some of the most complex cases. In addition, here Plaintiffs challenged the business model of one of the largest and most well-lawyered companies in the world, presenting novel and complex issues of procedural and antitrust law. Developer Plaintiffs also faced the added risk of being undercut by an adverse outcome in the *Epic v. Apple* trial, which would pose an enormous obstacle to establishing liability and proving damages. In the preliminary approval order, the Court explained that "it is particularly aware of the risks of trial in this case having tried and written a 185-page decision in the *Epic Games v. Apple* dispute." ECF No. 453 at 4.

Class Counsel has foregone other employment for this case. Hagens Berman dedicated a core team of experienced antitrust attorneys to this action, supported by attorneys and staff from only four other firms. The consequence of this is that several of these professionals worked nearly exclusively on this case and forwent other employment while doing so. Class Counsel have dedicated a total of 20,531 hours to this case, and many attorneys and other professionals have devoted many thousands of hours each. *See, e.g.*, Berman Decl. ¶ 47, Exs. 1, 6. Counsel's choice to commit resources to the Settlement Class in lieu of other work supports the request for fees.

Class Counsel's Reputation. Class Counsel Hagens Berman, Sperling & Slater, Saveri &

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[57] *Vizcaino*, 290 F.3d at 1050-51 & n.6.

[58] *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) (collecting cases); *see also, e.g.*, *Wal-Mart Stores*, 396 F.3d at 123 (finding 3.5 multiplier reasonable); *King Drug Co. of Florence v. Cephalon, Inc. (Provigil)*, 2015 WL 12843830, at *6 (E.D. Pa. Oct. 15, 2015) (awarding a $140.8 million fee equating to 27.5% of the settlement fund and a 4.12 multiplier); *In re Aremissoft Corp. Secs. Litig.*, 210 F.R.D. 109, 134-35 (D.N.J. 2002) (awarding 28% of a settlement, resulting in a lodestar multiplier of 4.3).

[59] EMG Study, 92 N.Y.U. L. Rev. at 967.

Saveri, Freed Kanner, and Lynch Carpenter are among the most well-respected class action litigation firms in the country. The firms have been recognized in courts throughout the U.S. for their ability and experience in handling major class litigation efficiently and obtaining outstanding results for their clients. *See* Berman Decl., Ex. 13; Saveri Decl., Ex. 1; Jagher Decl., Ex. A; Kelly Decl., ¶ 2; Carroll Decl., Ex. A.

B. Lead Class Counsel requests authorization to distribute fees among Class Counsel.

Consistent with customary practice, including by this Court, Lead Class Counsel requests the Court's authorization to distribute any awarded attorneys' fees in a manner that, in the judgment of Lead Class Counsel, fairly compensates each law firm for its contribution to the prosecution of Plaintiffs' claims. "[F]ederal courts routinely affirm the appropriateness of a single fee award to be allocated among counsel and have recognized that lead counsel are better suited than a trial court to decide the relative contributions of each firm and attorney."[60]

C. The litigation expenses advanced were reasonable and necessary to secure the benefits obtained for the Class.

Counsel who have created a common fund for the benefit of a class are entitled to be reimbursed for out-of-pocket expenses reasonably incurred in obtaining the settlement.[61] As the Ninth Circuit has recognized, in class actions litigated on a wholly contingent basis, "litigation expenses make the entire action possible."[62] Here, Class Counsel's unreimbursed expenses were reasonably incurred and necessary for the litigation of the case. Berman Decl. ¶ 52. Class Counsel advanced these expenses, described in detail in the declarations of Class Counsel, interest free, and with no assurance that they would ever be reimbursed. *Id*.

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[60] *Hartless v. Clorox Co.*, 273 F.R.D. 630, 646 (S.D. Cal. 2011), *aff'd in part*, 473 F. App'x 716 (9th Cir. 2012); *see, e.g.*, *Batteries*, 2020 WL 7264559, at *23 (Gonzalez Rogers, J.) (authorizing Co-Lead Counsel to allocate awarded fees and expenses among themselves and supporting counsel).

[61] *See Vincent v. Hughes Air W.*, 557 F.2d 759, 769 (9th Cir. 1977); *Omnivision*, 559 F. Supp. 2d at 1048 ("Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters." (citing *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994))).

[62] *Online DVD*, 779 F.3d at 953.

Expert witnesses constitute the largest expenditures, $3.37 million, or 89 percent of the expenses incurred. *Id.* ¶ 59. The work of these experts supported Plaintiffs' strong class certification motion, which is likely responsible in part for the excellent Settlement obtained. Other notable expenses include the creation and maintenance of an electronic document database, which hosted the voluminous discovery produced in this litigation, and deposition costs. *Id.* ¶ 57.

Reasonable litigation expenses in this case total $3,713,173.84. *See* Berman Decl. ¶ 52, Exs. 4 & 7. However, Plaintiffs only seek reimbursement of $3.5 million, the amount identified in the class notice. Class Counsel respectfully request that the Court approve reimbursement of these reasonable litigation expenses, to be deducted from the gross settlement fund.

D. Plaintiffs request that the two class representatives be awarded reasonable service awards to compensate them for their dedication to this case.

Plaintiffs request modest service awards for each of the two class representatives in the amount of $5,000 each. "[Service] *awards* are fairly typical in class action cases."[63] In the Ninth Circuit, service awards "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general."[64]

In this case, the $5,000 service awards are well-deserved. Both class representatives are current App Store developers and took a significant risk by bringing an action in their names against one of the world's largest corporations. In addition, each class representative took his responsibilities seriously and devoted substantial time to the case. Apple deposed both class representatives, and each spent several sessions preparing for these depositions with counsel. Defendants also propounded 165 document requests and three interrogatories to each class representative. The class representatives provided valuable input throughout the case, reviewed pleadings, and, in consultation with counsel, reviewed and approved of the Settlement. In light of the value of the settlement proceeds and the class representatives' extraordinary service to the

[63] *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (emphasis in original).

[64] *Id.* at 958-59.

Settlement Class and developers writ large, the requested awards are reasonable. Berman Decl. ¶¶ 61-65; Cameron Decl. ¶ 4-10; Czeskawski Decl. ¶¶ 4-10.

E. The Class received appropriate notice of Class Counsel's fee application.

Class Counsel's notice to the Settlement Class through the class notice and this motion for fees, expenses, and service awards has been sufficient to provide Class Members with an opportunity to review and evaluate this fee request prior to the deadline for objections.[65] The class notice advised Settlement Class Members that Class Counsel would seek attorneys' fees of "no more than 30% of the Small Developer Assistance Fund," costs and expenses of "no more than $3.5 million," and service awards "up to $5,000.00 from the Settlement Fund."[66] As required by the Court and described in the notice, this motion is being filed thirty-five days before the deadline for requests for exclusion or objections to the settlement.[67]

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request an award of $27,000,000 in attorneys' fees, reimbursement of expenses incurred in the amount of $3,500,000, and $5,000 in service awards to each of the two class representatives.

DATED: February 14, 2022

HAGENS BERMAN SOBOL SHAPIRO LLP

By */s/ Steve W. Berman*
STEVE W. BERMAN (*pro hac vice*)
Robert F. Lopez (*pro hac vice*)
Theodore Wojcik (*pro hac vice*)
1301 Second Avenue, Suite 2000
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslaw.com
robl@hbsslaw.com
tedw@hbsslaw.com

[65] *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 995 (9th Cir. 2010); U.S. District Court for the Northern District of California, *Procedural Guidance for Class Action Settlements* ¶¶ 6, 9 (updated Dec. 5, 2018), http://www.cand.uscourts.gov/ClassActionSettlementGuidance.

[66] ECF No. 453, Ex. B at ¶ 15.

[67] *See* ECF No. 453 at 7; *see also* Procedural Guidance, *supra* note 66, at ¶ 9.

Shana E. Scarlett (SBN 217895)
Benjamin J. Siegel (SBN 260260)
Ben M. Harrington (SBN 313877)
HAGENS BERMAN SOBOL SHAPIRO LLP
715 Hearst Avenue, Suite 202
Berkeley, CA 94710
Telephone: (510) 725-3000
Facsimile: (510) 725-3001
shanas@hbsslaw.com
bens@hbsslaw.com
benh@hbsslaw.com

Interim Lead Class Counsel

Joseph M. Vanek (*pro hac vice*)
Eamon P. Kelly (*pro hac vice*)
Alberto Rodriguez (*pro hac vice*)
SPERLING & SLATER, P.C.
55 W. Monroe Street, 32nd Floor
Chicago, IL 60603
Telephone: (312) 676-5845
Facsimile: (312) 641-6492
jvanek@sperling-law.com
ekelly@sperling-law.com
arodriguez@sperling-law.com

R. Alexander Saveri (SBN 173102)
Cadio Zirpoli (SBN 179108)
Travis L. Manfredi (SBN 281779)
SAVERI & SAVERI, INC.
706 Sansome Street
San Francisco, CA 94111
Telephone: (415) 217-6810
Facsimile: (415) 217-6813)
rick@saveri.com
cadio@saveri.com
travis@saveri.com

Kimberly A. Justice
Jonathan M. Jagher (*pro hac vice*)
FREED KANNER LONDON & MILLEN LLC
923 Fayette Street
Conshohocken, PA 19428
Telephone: (610) 234-6487
Facsimile: (224) 632-4521
kjustice@fklmlaw.com
jjagher@fklmlaw.com

Douglas A. Millen (*pro hac vice*)
Brian M. Hogan (*pro hac vice*)
FREED KANNER LONDON & MILLEN LLC
2201 Waukegan Road, #130
Bannockburn, IL 60015
Telephone: (224) 632-4500
Facsimile: (224) 632-4521
dmillen@fklmlaw.com
bhogan@fklmlaw.com

Plaintiffs' Executive Committee

TAB 51A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE AUTOMOTIVE PARTS ANTITRUST LITIGATION	:	Master File No. 12-md-02311
	:	Honorable Marianne O. Battani
	:	
In Re: Wire Harness	:	Case No. 2:12-cv-00102
In Re: Instrument Panel Clusters	:	Case No. 2:12-cv-00202
In Re: Fuel Senders	:	Case No. 2:12-cv-00302
In Re: Heater Control Panels	:	Case No. 2:12-cv-00402
In Re: Bearings	:	Case No. 2:12-cv-00502
In Re: Alternators	:	Case No. 2:13-cv-00702
In Re: Anti Vibrational Rubber Parts	:	Case No. 2:13-cv-00803
In Re: Windshield Wiper Systems	:	Case No. 2:13-cv-00902
In Re: Radiators	:	Case No. 2:13-cv-01002
In Re: Starters	:	Case No. 2:13-cv-01102
In Re: Ignition Coils	:	Case No. 2:13-cv-01402
In Re: Motor Generators	:	Case No. 2:13-cv-01502
In Re: HID Ballasts	:	Case No. 2:13-cv-01702
In Re: Inverters	:	Case No. 2:13-cv-01802
In Re: Electronic Powered Steering Assemblies	:	Case No. 2:13-cv-01902
In Re: Air Flow Meters	:	Case No. 2:13-cv-02002
In Re: Fan Motors	:	Case No. 2:13-cv-02102
In Re: Fuel Injection Systems	:	Case No. 2:13-cv-02202
In Re: Power Window Motors	:	Case No. 2:13-cv-02302
In Re: Automatic Transmission Fluid Warmers	:	Case No. 2:13-cv-02402
In Re: Valve Timing Control Devices	:	Case No. 2:13-cv-02502
In Re: Electronic Throttle Bodies	:	Case No. 2:13-cv-02602
In Re: Air Conditioning Systems	:	Case No. 2:13-cv-02702
In Re: Windshield Washer Systems	:	Case No. 2:13-cv-02802
In Re: Spark Plugs	:	Case No. 2:15-cv-03002
In Re: Automotive Hoses	:	Case No. 2:15-cv-12893
In Re: Power Window Switches	:	Case No. 2:16-cv-03902
In Re: Ceramic Substrates	:	Case No. 2:16-cv-12194

THIS DOCUMENT RELATES TO
AUTOMOBILE DEALERSHIP ACTIONS

ORDER REGARDING AUTO DEALERS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND A SET ASIDE FOR FUTURE LITIGATION EXPENSES

The above matter came before the Court on the Auto Dealers' motion for an award of attorneys' fees, reimbursement of litigation expenses, and a set aside for future litigation expenses.

The Court has reviewed the memorandum submitted by the Auto Dealers in support of their motion and has also reviewed the various declarations and submissions relating to that motion. The Court held a hearing on November 16, 2016.

Based on the record and proceedings before the Court, it is hereby **ORDERED:**

1. The Court has considered the relevant case law and authority and finds that awards of attorneys' fees and reimbursement of expenses to the Auto Dealers and their counsel are appropriate under Fed. R. Civ. P. 23(h) and Fed.R.Civ.P. 54(d)(2). Notice of the request for fees and reimbursement of expenses was provided to the potential class members via direct and published notice and a settlement web site that identified relevant documents and pleadings.

2. The Court has considered the reaction of the class members to this fee request.

3. The Court engages in a two-part analysis when assessing the reasonableness of a petition seeking an award of attorneys' fees. *In re Cardinal Health Inc. Sec. Litig.*, 528 F.Supp.2d 752, 760 (S.D. Ohio 2007). The Court first determines the method of calculating the attorneys' fees: it applies either the percentage of the fund approach or the lodestar method. *Id.*; *Van Horn v. Nationwide Prop. & Cas. Inc. Co.*, 436 F. App'x 496, 498 (6th Cir. 2011).

4. The Court has the discretion to select the appropriate method for calculating attorneys' fees "in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them." *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). In common fund cases, the award of attorneys' fees need only "be reasonable under the circumstances." *Id.*, 9 F.3d at 516. The Court has also analyzed and weighed the six factors described in *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188 (6th Cir. 1974).

5. The Court will award fees to the Auto Dealers using the percentage-of-the-fund approach. This method of awarding attorneys' fees is preferred in this district because it eliminates disputes about the reasonableness of rates and hours, conserves judicial resources, and aligns the interests of class counsel and the class members. *Rawlings,* 9 F.3d at 515; *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, No. 10-cv-14360, 2015 WL 1498888 at * 15 (E.D. Mich. March 31, 2015); *In re Packaged Ice Antitrust Litig.*, 08-MDL-01952, 2011 WL 6209188, at *16 (E.D. Mich. Dec. 13, 2011); *Delphi*, 248 F.R.D. at 502; *Cardinal*, 528 F.Supp.2d at 762 (the Sixth Circuit has "explicitly approved the percentage approach in common fund cases."); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 2014 WL 2946459, *1 (E.D. Tenn. Jun. 30, 2014).

6. The Court **GRANTS** the Auto Dealers' request for reimbursement of past litigation expenses in the amount of **$450,046.88.** The past litigation expenses incurred in specific parts cases involved in these settlements, as set forth in the declarations submitted by counsel for the Auto Dealers, shall be deducted from the settlement funds available in those cases. The past litigation expenses incurred in the general prosecution of the cases with settlements currently before the Court shall be reimbursed on a pro rata basis from each of the settlements.

7. The Court **GRANTS** the Auto Dealers' request to establish a fund for future litigation expenses in the amount of **$9,978,474.16**. The money used to create the future litigation fund shall also be deducted from the settlements on a pro rata basis. As indicated in the memorandum submitted in support of this motion, the future litigation expenses will only be used in the cases at issue in the settlements currently before the Court. If the future litigation fund is not fully used, the money shall be returned to the members of those settlement classes that contributed to the future litigation fund.

8. The Court authorizes class counsel for the Auto Dealers to pay the costs of the settlement notice and claims administration (being handled by Gilardi & Co.) from the settlement funds on a pro rata basis.

9. Counsel for the Auto Dealers request a fee award of one-third of the settlement funds remaining after the future litigation fund and the cost of class notice and claim administration have been deducted. The award requested is within the range of fee awards made by courts in this Circuit. *In re Prandin Direct Purchaser Antitrust Litig.*, 2015 WL 1396473 (E.D. Mich. Jan. 20, 2015) (awarding one-third of the fund); *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *19; *Skelaxin*, 2014 WL 2946459, at *1; *In re Southeastern Milk Antitrust Litig.*, 2013 WL 2155387, at *8 (E.D. Tenn. May 17, 2013); *Thacker v. Chesapeake Appalachia*, L.L.C., 695 F. Supp. 2d, 521, 528 (E.D. Ky. 2010); *Bessey v. Packerland Plainwell, Inc.*, No. 4:06-CV-95, 2007 WL 3173972, at *4 (W.D. Mich. 2007); *Delphi*, 248 F.R.D. at 502-03; *In re National Century Financial Enterprises, Inc. Investment Litig.*, 2009 WL 1473975 (S.D. Ohio, May 27, 2009); *Kogan v. AIMCO Fox Chase, L.P.*, 193 F.R.D. 496, 503 (E.D. Mich. 2000). Other federal courts have approved fees in this range in complex antitrust class action litigation.

10. The Court has considered the six *Ramey* factors in weighing a fee award to counsel for the Auto Dealers: (1) the value of the benefits rendered to the class; (2) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (3) whether the services were undertaken on a contingent fee basis; (4) the value of the services on an hourly basis [the lodestar cross-check]; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel on both sides. *Ramey*, 508 F.2d at 1194–97.

11. The Court has carefully analyzed the settlements and the *Ramey* factors and concludes that the factors are met and justify a fee award to counsel for the Auto Dealers. The settlements total nearly $125 million and provide substantial cash and non-monetary benefits

including cooperation from the settling defendants and injunctive relief prohibiting certain conduct. Counsel has worked on a contingent basis and the results of this litigation have never been certain. The legal and factual issues are complicated and the parties have zealously asserted their claims and defenses. Given the length and tenacity of this litigation, the Court is satisfied that these settlements were the result of arms' length negotiations between informed and experienced counsel.

12. The *Ramey* factors and a cross-check of the lodestar incurred by counsel for the Auto Dealers indicate that the fee requested constitutes fair and reasonable compensation for the risks assumed, the work done, and the benefits achieved for the members of the settlement classes. The lodestar currently totals $48,406,942 when using counsel's customary rates. Using normalized and blended hourly rates presented in the brief submitted by the Auto Dealers with this motion results in a current lodestar of $41,136,875.

13. The Court **GRANTS** an award of attorneys' fees to counsel for the Auto Dealers in the amount of 20 per cent of the settlement funds. These attorneys' fees, totaling **$24,946,196** shall be paid on a pro rata basis from the net settlement funds available for each settlement currently before the Court.

14. As the Court indicated during the hearing on this motion and at the November 16, 2016 status conference, the Court reserves ruling on the Auto Dealers' request for additional fees from these settlements. The Court may, or may not, grant additional fees from these settlements. Interim Co-Lead Counsel for the Auto Dealers are authorized to hold in reserve the difference between the fees requested in this motion and the fees currently awarded by the Court.

15. Using the lodestar cross-check methodology and reviewing the total fees awarded with the lodestar generated on these cases from the inception of the litigation to September 1, 2016, the 20 per cent fee awarded results in a negative lodestar multiplier when using counsel's

customary rates and when using the normalized and blended rates. Such a multiplier is well within the range of reasonable multipliers awarded in similar contingent fee cases. This interim fee award is reasonable in light of the complexity of this litigation, the results achieved for the class members, the risks assumed by counsel for the Auto Dealers, and the work remaining to be done on these cases and for which fees may or may not be available.

16. Interim Co-Lead Counsel for the Auto Dealers are authorized to allocate the attorneys' fees awarded herein among counsel who performed work on behalf of the Auto Dealers in accordance with Interim Co-Lead Counsel's assessment of each firm's contribution to the prosecution of the cases involved in these settlements.

Date: November 29, 2016

s/Marianne O. Battani
MARIANNE O. BATTANI
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Order was served upon counsel of record via the Court's ECF System to their respective email addresses or First Class U.S. mail to the non-ECF participants on November 29, 2016.

s/ Kay Doaks
Case Manager

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE AUTOMOTIVE PARTS ANTITRUST LITIGATION	:	Master File No. 12-md-02311
	:	Honorable Sean F. Cox
	:	
In Re: Wire Harness	:	Case No. 2:12-cv-00102
In Re: Instrument Panel Clusters	:	Case No. 2:12-cv-00202
In Re: Fuel Senders	:	Case No. 2:12-cv-00302
In Re: Heater Control Panels	:	Case No. 2:12-cv-00402
In Re: Bearings	:	Case No. 2:12-cv-00502
In Re: Alternators	:	Case No. 2:13-cv-00702
In Re: Anti Vibrational Rubber Parts	:	Case No. 2:13-cv-00802
In Re: Windshield Wiper Systems	:	Case No. 2:13-cv-00902
In Re: Radiators	:	Case No. 2:13-cv-01002
In Re: Starters	:	Case No. 2:13-cv-01102
In Re: Ignition Coils	:	Case No. 2:13-cv-01402
In Re: Motor Generators	:	Case No. 2:13-cv-01502
In Re: HID Ballasts	:	Case No. 2:13-cv-01702
In Re: Inverters	:	Case No. 2:13-cv-01802
In Re: Electronic Powered Steering Assemblies	:	Case No. 2:13-cv-01902
In Re: Air Flow Meters	:	Case No. 2:13-cv-02002
In Re: Fan Motors	:	Case No. 2:13-cv-02102
In Re: Fuel Injection Systems	:	Case No. 2:13-cv-02202
In Re: Power Window Motors	:	Case No. 2:13-cv-02302
In Re: Automatic Transmission Fluid Warmers	:	Case No. 2:13-cv-02402
In Re: Valve Timing Control Devices	:	Case No. 2:13-cv-02502
In Re: Electronic Throttle Bodies	:	Case No. 2:13-cv-02602
In Re: Air Conditioning Systems	:	Case No. 2:13-cv-02702
In Re: Windshield Washer Systems	:	Case No. 2:13-cv-02802
In Re: Spark Plugs	:	Case No. 2:15-cv-03002
In Re: Automotive Hoses	:	Case No. 2:15-cv-12893
In Re: Power Window Switches	:	Case No. 2:16-cv-03902
In Re: Ceramic Substrates	:	Case No. 2:16-cv-12194

THIS DOCUMENT RELATES TO AUTOMOBILE DEALERSHIP ACTIONS

ORDER REGARDING AUTO DEALERS' MOTION TO AWARD FEES PLACED IN RESERVE IN 2016 FOR ROUND TWO SETTLEMENTS

This matter came before the Court on the Auto Dealers' Motion to Award Fees Placed in Reserves in 2016 for Round Two Settlements in the above matters. The Court has reviewed the memorandum submitted by the Auto Dealers in support of their motion. The Court has considered the motion on the papers.

Based on the entire record of these proceedings and in consideration of all submissions and filings made with respect to Auto Dealers' current motion and their Round Two final approval filings and argument, and good cause appearing therefor,

IT IS HEREBY ORDERED:

1. The Court has considered the present motion and considered the filings and proceedings associated with the final approval of the Round Two settlements submitted by the Auto Dealers in 2016. *See* 2:12-cv-00102-SFC-RSW (ECF Doc. No. 514); 2:12-cv-00102-SFC-RSW (ECF Doc. No. 514-2); 2:12-cv-00102-SFC-RSW (ECF Doc. No. 514-3).

2. The Court adopts and reiterates its analysis of the Auto Dealers' request for an award of attorneys' fees for the Round Two settlements as set out in the Court's Order dated November 29, 2016. *See* 2:12-cv-00102-SFC-RSW (ECF Doc. No. 523).

3. After being provided adequate notice of the Round Two settlements reached in the Auto Dealer cases, no class member objected to or commented about the requested attorneys' fees equal to 1/3 of the Round Two settlement funds, after the costs of notice and claim administration had been deducted.

4. The Court **GRANTS** the motion currently before the Court and authorizes the award and distribution of the Round Two fees held in reserve by the Auto Dealers since 2016.

5. The Court finds that awarding counsel for the Auto Dealers a total fee of 30 percent of the Round Two settlement funds is reasonable and complies with the *Ramey* factors. The Court again references and adopts the findings it made in November 2016. *See* 2:12-cv-00102-SFC-RSW (ECF Doc. No. 523).

6. Interim Co-Lead Counsel for the Auto Dealers are authorized to allocate the attorneys' fees awarded herein among counsel who performed work on behalf of the Auto Dealers in accordance with Interim Co-Lead Counsel's assessment of each firm's contribution to the prosecution of the cases involved in the Round Two settlements.

IT IS SO ORDERED.

Dated: August 7, 2020

s/Sean F. Cox
Sean F. Cox
U. S. District Judge

TAB 51B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE AUTOMOTIVE PARTS ANTITRUST LITIGATION	:	Master File No. 12-md-02311
	:	Honorable Marianne O. Battani
	:	
In Re: Wire Harness	:	Case No. 2:12-cv-00102
In Re: Instrument Panel Clusters	:	Case No. 2:12-cv-00202
In Re: Fuel Senders	:	Case No. 2:12-cv-00302
In Re: Heater Control Panels	:	Case No. 2:12-cv-00402
In Re: Bearings	:	Case No. 2:12-cv-00502
In Re: Alternators	:	Case No. 2:13-cv-00702
In Re: Anti Vibrational Rubber Parts	:	Case No. 2:13-cv-00803
In Re: Windshield Wiper Systems	:	Case No. 2:13-cv-00902
In Re: Radiators	:	Case No. 2:13-cv-01002
In Re: Starters	:	Case No. 2:13-cv-01102
In Re: Ignition Coils	:	Case No. 2:13-cv-01402
In Re: Motor Generators	:	Case No. 2:13-cv-01502
In Re: HID Ballasts	:	Case No. 2:13-cv-01702
In Re: Inverters	:	Case No. 2:13-cv-01802
In Re: Electronic Powered Steering Assemblies	:	Case No. 2:13-cv-01902
In Re: Air Flow Meters	:	Case No. 2:13-cv-02002
In Re: Fan Motors	:	Case No. 2:13-cv-02102
In Re: Fuel Injection Systems	:	Case No. 2:13-cv-02202
In Re: Power Window Motors	:	Case No. 2:13-cv-02302
In Re: Automatic Transmission Fluid Warmers	:	Case No. 2:13-cv-02402
In Re: Valve Timing Control Devices	:	Case No. 2:13-cv-02502
In Re: Electronic Throttle Bodies	:	Case No. 2:13-cv-02602
In Re: Air Conditioning Systems	:	Case No. 2:13-cv-02702
In Re: Windshield Washer Systems	:	Case No. 2:13-cv-02802
In Re: Spark Plugs	:	Case No. 2:15-cv-03002
In Re: Automotive Hoses	:	Case No. 2:15-cv-12893
In Re: Power Window Switches	:	Case No. 2:16-cv-03902
In Re: Ceramic Substrates	:	Case No. 2:16-cv-12194

THIS DOCUMENT RELATES TO
AUTOMOBILE DEALERSHIP ACTIONS

AUTO DEALERS' MEMORANDUM IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND SET ASIDE FOR FUTURE LITIGATION EXPENSES

Gerard V. Mantese (P34424)
Mantese Honigman, P.C.
1361 E. Big Beaver Road
Troy, MI 48083
Telephone: (248) 457-9200 Ext. 203
gmantese@manteselaw.com

Interim Liaison Counsel For The Automobile Dealer Plaintiffs

Jonathan W. Cuneo
Cuneo Gilbert & LaDuca, LLP
4725 Wisconsin Ave., NW
Suite 200
Washington, DC 20016
Telephone: (202) 789-3960
jonc@cuneolaw.com

Don Barrett
Barrett Law Group, P.A.
P.O. Box 927
404 Court Square
Lexington, MS 39095
Telephone: (662) 834-2488
dbarrett@barrettlawgroup.com

Shawn M. Raiter
Larson King, LLP
2800 Wells Fargo Place
30 East Seventh Street
St. Paul, MN 55101
Telephone: (651) 312-6500
Facsimile: (651) 312-6618
sraiter@larsonking.com

Interim Co-Lead Counsel For The Automobile Dealer Plaintiffs

Statement of the Issues Presented

1. Should counsel for the Auto Dealers, who obtained nearly $125 million in this group of Auto Dealer class settlements, be awarded a portion of those settlements for attorneys' fees?

2. Should counsel for the Auto Dealers be awarded the unreimbursed out-of-pocket expenses they have paid in pursuing the cases in which settlements have been presented?

3. Should a portion of the settlement funds be used for future expenses incurred on behalf of the Auto Dealers in the cases involved in these settlements?

Controlling or Most Apposite Authorities

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Boeing Co. v. Van Gemert, 444 U.S. 472, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980)

In re Delphi Corp. Sec., Derivative & "ERISA" Litig., 248 F.R.D. 483 (E.D. Mich. 2008)

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Background

Persevering in this hard-fought litigation, counsel for the Auto Dealers have negotiated and presented a second group of settlements totaling nearly $125 million. While these settlements do not fully resolve the Auto Dealers' claims, they represent a substantial step forward: the settlements cover ten Defendant groups and 28 different parts. Like the first group of dealership settlements approved by the Court, these settlements also provide significant non-cash benefits, such as fulsome cooperation from the settling Defendants and injunctive relief prohibiting anti-competitive behavior. All of the net proceeds from the settlements will be paid to eligible new car automobile dealerships—unlike many class action settlements, there is no *cy pres* reversion to Defendants or third-party charities.

Auto Dealer counsel have zealously pursued this complex antitrust litigation and the Defendants have mounted aggressive defenses. Although Defendants' antitrust violations are indisputable, the Defendants have resolutely maintained that the Plaintiffs did not suffer an antitrust injury and that, even if they did, litigation classes cannot be certified. The settlements now before the Court provide substantial benefits to auto dealer class members and are remarkable in light of the Defendants' unflagging opposition.

Defendants have focused their discovery efforts on the Auto Dealer Plaintiffs and therefore the Court is familiar with much of the work done by counsel for the Auto Dealers. Responding to Defendants' nearly constant fusillade of discovery has required the Auto Dealers and their attorneys to devote an enormous amount of time and resources. Defendants have already taken well over 100 depositions of non-party Auto Dealers and continue to conduct the depositions of the class representatives.

Pursuant to Rules 23(h) and 54(d)(2) of the Federal Rules of Civil Procedure, Interim Co-Lead Counsel for the Auto Dealers submit this motion in support of their request for: (1)

reimbursement of litigation expenses already incurred in the cases involved in these settlements; (2) leave to set aside eight percent of the settlement funds for future litigation expenses; and (3) an award of attorneys' fees of $38,299,350 from the settlements (30.6% of the gross settlement proceeds). As discussed herein, the case law from the Sixth Circuit and other federal courts supports counsel's requests.

The Court has previously applied the "percentage-of-the-fund" approach for fees granted to the Plaintiff groups in this litigation. Counsel for the Auto Dealers again seek a fee award based on a percentage of the settlement funds that remain after the deduction of: (1) notice and administration costs, and (2) future litigation expenses. This approach is supported by Sixth Circuit precedent, *see Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993), and the requested award is well within the range of fee awards made by courts in this and other Circuits. *See, e.g.*, *In re Prandin Direct Purchaser Antitrust Litig.*, No. 2:10-CV-12141-AC-DAS, 2015 WL 1396473 (E.D. Mich. Jan. 20, 2015) (awarding one-third of the fund). Finally, a lodestar cross-check confirms that the amount sought is reasonable in light of the work performed and the results achieved for the class members.

In this group of settlements, counsel for the Auto Dealers have recovered more than twice the amount approved by the Court in the first group of dealership settlements. Since the first group of settlements, counsel have continued to pursue the litigation vigorously; succeeded in motion practice; reviewed, analyzed, and coded hundreds of thousands of documents provided by the Defendants; obtained cooperation from certain Defendants; attended and defended numerous depositions; and negotiated beneficial settlements. Counsel for the Auto Dealers have substantially prosecuted dealership claims, all on a contingent fee basis.

A. Counsel for Auto Dealers Have Advanced Significant Resources to Obtain the Auto Dealer Settlements in this Litigation.

The Department of Justice has described its investigation of the bid-rigging and price-fixing conspiracies at issue here as the largest criminal investigation it has ever undertaken. The DOJ has collected billions of dollars in fines from the Defendants. The conduct involves a large number of parts, affected models, and conspiring participants. Most of the Defendant groups have had one or more of their employees or corporate affiliates convicted of a serious crime in the United States, Europe, and/or Asia. The list of settling and non-settling Defendants' includes well-known companies that are dominant players in their industries.

Although the DOJ has prosecuted the criminal aspects of the price-fixing and bid rigging, it did not seek restitution for those injured by the conduct. The guilty pleas specifically note that "[i]n light of the availability of civil causes of action, which potentially provide for a recovery of multiple actual damages, the recommended sentence does not include a restitution order . . ." *See, e.g.,* Plea Agreement, Yazaki Corp., *United States v. Yazaki Corp.*, No. 2:12-cr-20064 (E.D. Mich. 2012), ECF No. 6. Thus, without these franchised actions, automobile dealerships affected by the Defendants' conduct would have been left without a remedy unless they any of them decided to sue these more than 100 Defendants in an individual case.

Antitrust litigation is inherently risky, with high stakes, and the outcome of this litigation has been far from certain. From the outset, counsel for the Auto Dealers worked on a contingent basis to advance the claims of automobile dealerships authorized by OEMs to sell new vehicles. While working efficiently, they could not have effectively represented these class members without the commitment of a substantial amount of time, effort, and money.

The Auto Dealers asserted damage claims under the laws of 30 states and the District of Columbia, as well as a federal claim for injunctive relief. Some states permit indirect purchaser actions under state antitrust laws; others permit them under state consumer protection laws; and

others permit them under general laws of restitution. Nearly every Defendant moved to dismiss the Auto Dealers' claims, while others challenged personal jurisdiction. For the most part, the Auto Dealers prevailed on those motions.

Since 2011, some of the attorneys for the Auto Dealers have worked nearly full-time on this litigation. It has been and will continue to be a huge undertaking as the cases progress through discovery, to class certification, and then to trial if necessary. Counsel for the Auto Dealers have performed the following work to advance these cases:

- Research and investigation of the automotive parts supply industry and the sale of new vehicles through franchised automotive dealerships;
- Collecting information from a variety of sources, including the Department of Justice indictments, guilty pleas, and evidence that Defendants produced;
- Extensive research on the various aspects of the antitrust and other laws of more than 30 states and the District of Columbia, and drafting and editing the initial and amended complaints;
- Analyzed and prepared liability and damages claims against more than 100 Defendants;
- Collecting and analyzing information and discovery including voluminous discovery produced by the Defendants and third parties, such as the OEMs;
- Consultation with economic and other liability and damages experts;
- Drafting and negotiating key case-management documents, protocols, and stipulations;
- Review, in conjunction with the other plaintiff groups, of millions of pages of foreign-language and translated documents produced by the Defendants;
- Receipt of cooperation materials from amnesty applicants, and attending in-person proffers from amnesty applicants who disclose the details of the conspiracies;
- Drafting, preparing for, and arguing numerous oppositions to motions to dismiss;
- Drafting and opposing numerous discovery motions, motions to quash, and other discovery sought by the Defendants from the Auto Dealers;
- Negotiating dealership and discovery issues with defense counsel including innumerable meet-and-confer sessions, each of which required substantial preparation;

- Preparing correspondence with respect to timing, stipulations, and case planning issues;
- Corresponding and attending calls with dealership co-counsel regarding client discovery and trial preparation issues;
- Obtaining and analyzing documents and data from over 40 class representative dealerships, including many in-person trips to the dealerships;
- Locating, review, redaction, and production of nearly 1 million pages of documents from class representative dealerships;
- Exchanging information and coordinating with end-payor, direct purchaser, truck and equipment dealers, City of Richmond, California, Florida, and Ford counsel regarding various issues;
- Attending calls and meetings to help formulate OEM subpoenas and discovery from third-parties;
- Responding to hundreds of discovery emails from Defendants demanding Auto Dealer discovery;
- Innumerable telephone calls with Defendants regarding Auto Dealer discovery and motion practice before the Special Master and appeals to Judge Battani;
- Attending MDL status conferences with Judge Battani;
- Preparing for, traveling to, and attending more than 100 depositions of third-party automobile dealerships and class representative dealerships;
- Preparing for, traveling to, and attending depositions of Defendants and their representatives;
- Performing all the tasks necessary to reach these settlements, including formulating demands, negotiating, in some cases mediation, dozens of in-person meetings, exchange of drafts, preparing escrow agreements;
- Drafting settlement agreements, preliminary approval motions, and in some cases attend and argue preliminary approval motions;
- Receiving cooperation materials from settling Defendants, attend in-person proffers from settling Defendants who disclose the details of the conspiracies, and review and analyze cooperation materials from settling Defendants and incorporate that information into the ongoing case strategy; and

- Drafting notices, claim forms, and other settlement-related documents and consult with the special allocation consultant and claims administrator

(*See generally*, Raiter Decl.)

The Auto Dealers have been the primary target of Defendants' discovery efforts and have responded to countless discovery requests relating to nearly every aspect of an automobile dealers' business. Counsel for the Auto Dealers have weathered ongoing motions to compel, meet and confers, and innumerable communications from defense counsel about the Auto Dealers and their data, documents, and information. Defendants sought documents and data located on any computer, database, or back-up tape anywhere in the dealerships, as well as hard copy documents located all over the dealerships. Defendants also sought documents and other electronic data from the automobile dealership class representatives, including: (1) invoices documenting new car purchases; (2) hundreds of fields of dealership management system (DMS) data; (3) data from back-up media going back to 1999; (4) monthly OEM financial statements submitted by dealers to the OEMs for 15 years; and (5) documents located in OEM portals showing monetary and non-monetary incentives, promotions and rebates offered to customers purchasing new cars and showing incentives, promotions and rebates offered to the dealers and advertisements showing special offers, promotions and incentives on new car purchases advertised to customers. (Raiter Decl.)

Over the Auto Dealers' objection, the Defendants insisted on taking an unlimited number of depositions of non-party automobile dealerships. The Court granted the Defendants' request and Defendants have already taken more than 100 such depositions. Counsel for the Auto Dealers prepared for and attended these depositions, while at the same time defending the depositions of the Auto Dealer class representatives. (Raiter Decl.)

Counsel for the Auto Dealers have also invested considerable time, effort, and money in the prosecution of discovery and liability claims against the Defendants. This work has included the

review, translation, and analysis of millions of pages of documents produced by the Defendants to the DOJ and to the Plaintiffs in this litigation. Counsel for the Auto Dealers have prepared the questioning and attended the depositions of Defendant representatives and have received numerous informal witness statements from cooperating and settling Defendants. Counsel for the Auto Dealers have received, analyzed, and put to use in the litigation the documents and other information received from the settling and cooperating Defendants. Finally, counsel for the Auto Dealers have worked with their experts in the preparation of the opinions and models that will be used to support class certification, damages, and at trial. (Raiter Decl.)

B. The Settlements Were Reached After Arms-Length Negotiation and Adversarial Proceedings.

In this second round of settlements, the Auto Dealers seek final approval of settlements with 10 different Defendants and their affiliates. These settlements involve Auto Dealer claims covering 28 different parts and total $124,730,980. The Auto Dealer Settlements at issue in this motion are listed by Defendant and by part in Appendix A to this brief.

These settlements were reached after substantial litigation and were negotiated by experienced counsel. Some of the Defendants involved in these settlements had been at the forefront of the defense of the Auto Dealer claims and had mounted vigorous defenses. The settlements were reached through lengthy negotiations and in each case, counsel was armed with transactional data, documents produced in discovery, cooperation materials, and a strong understanding of the claims and defenses. (Raiter Decl.)

Argument

I. Attorneys' Fees and Expenses Standard of Review.

Rule 23(h) of the Federal Rules of Civil Procedure provides that "[i]n a certified class action, the court may award reasonable attorney's fees and non-taxable costs that are authorized . . . by law." District courts may award reasonable attorneys' fees and expenses from the settlement of a class

action upon motion under Fed. R. Civ. P. 54(d)(2) and 23(h). The court engages in a two-part analysis when assessing the reasonableness of a petition seeking an award of attorneys' fees. *In re Cardinal Health Inc. Sec. Litig.,* 528 F. Supp. 2d 752, 760 (S.D. Ohio 2007). The court first determines the method of calculating the attorneys' fees: it applies either the percentage of the fund approach or the lodestar method. *Id.; Van Horn v. Nationwide Prop. and Cas. Inc. Co.,* 436 F. App'x 496, 498 (6th Cir. 2011).

The court has the discretion to select the appropriate method for calculating attorneys' fees "in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them." *Rawlings*, 9 F.3d at 513, 516. In common fund cases, the award of attorneys' fees need only "be reasonable under the circumstances." *Rawlings*, 9 F.3d at 516. The court will then analyze and weigh the six factors described in *Ramey v. Cincinnati Enquirer, Inc.,* 508 F.2d 1188 (6th Cir. 1974); see also *Rawlings*, 9 F.3d at 516.

II. The Court Should Reimburse Class Counsel for Unreimbursed Past Expenses and Should Approve a Set Aside for Future Litigation Expenses.

The Court allowed a portion of the proceeds from the first group of settlements to be used to fund some of the ongoing litigation expenses for the cases involved in those settlements. Nearly that entire fund has been depleted to fund ongoing litigation expenses for the cases involved in those settlements. (See Declaration of Marie Thomas). However, because some of the settlements in this second group relate to different parts / cases not involved in the first group of settlements, counsel for the Auto Dealers have funded the expenses required to advance the litigation for those cases. Having achieved the settlements currently before the Court, counsel for the Auto Dealers should be awarded the amount of the unreimbursed litigation expenses incurred in the settled cases for which a set aside expense fund was not previously established.

Auto Dealers also request that the Court authorize counsel to set aside eight percent of the current settlement proceeds to be used for future litigation expenses in the claims remaining

against the non-settling Defendants, to be used only in those cases / parts included in the current settlements. The requested amount to be set aside is $9,978,474.16, which would be deducted on a pro rata basis from the settlements. A table showing these deductions is set forth at Appendix B to this brief.

A. Reimbursement of Costs Already Incurred.

Unreimbursed litigation expenses incurred in the cases involved in the settlements should be awarded to counsel for the Auto Dealers. *See, e.g.*, Fed. R. Civ. P. 23(h); *In re Delphi Corp. Sec. Derivative & ERISA Litig*, 248 F.R.D. 483, 504 (E.D. Mich. 2008) ("Under the common fund doctrine, class counsel are entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and in obtaining settlement, including expenses incurred in connection with document production, consulting with experts and consultants, travel and other litigation-related expenses." (Citation and internal quotation marks omitted.)); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 535 (E.D. Mich. 2003); *B & H Med., L.L.C. v. ABP Admin., Inc.,* No. 02–73615, 2006 WL 123785, at *3 (E.D. Mich. Jan.13, 2006).

The future litigation fund previously allowed by the Court totaled $2,947,395 and has been used to fund ongoing litigation expenses for the cases in the first group of settlements. That fund is nearly depleted following the payment of litigation expenses in those cases. (See Thomas Decl.). Counsel for the Auto Dealers have funded the expenses required to advance the litigation for the different parts / cases not involved in the first group of settlements and not reimbursed from the expense fund set aside from the first settlements. (Thomas Decl.; Raiter Decl.)

Counsel for the Auto Dealers should be returned the unreimbursed litigation expenses incurred to-date in the settled cases for which a set aside expense fund was not established. Counsel for the Auto Dealers have paid $450,046.88 in unreimbursed litigation expenses for the benefit of the settlement class members in those cases. (*See* Thomas Decl.; Raiter Decl.;

Declarations of Don Barrett, Jon Cuneo, Gerard Mantese, Dewitt Lovelace, Tom Thrash, John Kakinuki, Charles Barrett, Brian Herrington, and Pierce Gore). These costs included expenses related to experts, document gathering and production, domestic and international travel, and other reasonable litigation expenses. (*Id.*) These new unreimbursed expenses are properly awarded from this group of settlements and, in particular, from those settlements in the cases in which the costs were incurred.

B. Future Litigation Expenses.

Counsel for the Auto Dealers request that eight percent ($9,978,474) be set aside from these settlements and be used to pay future expenses only in cases in which the settlements before the Court have been reached. This Court has granted similar requests by the Auto Dealer, End Payors, and Direct Purchasers. Allowing a portion of the settlement funds to be used for future expenses is a well-accepted practice. *See*, *e.g., In re Packaged Ice Antitrust Litig.*, 08-MD-01952, 2011 WL 717519, at *13-14 (E.D. Mich. Feb. 22, 2011) (approving class counsel's request to use proceeds from early settlement to pay litigation expenses); *see also* MANUAL (Fourth) at § 13.21 ("[p]artial settlements may provide funds needed to pursue the litigation . . . . "); *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003) (concluding that a partial "settlement provides class plaintiffs with an immediate financial recovery that ensures funding to pursue the litigation against the non-settling defendants"); *Newby v. Enron Corp.*, 394 F.3d 296, 302-03 (5th Cir. 2004) (affirming 37.5% set aside for establishment of a $15 million litigation expense fund from the proceeds of a partial settlement); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 584 F. Supp. 2d 697, 702 (M.D. Pa. 2008) (approving request to set aside to pay outstanding and future litigation costs); *In re WorldCom, Inc. Sec. Litig.*, No. 02 CIV 3288 (DLC), 2004 WL 2591402, at *22 (S.D.N.Y. Nov. 12, 2004) (creating a $5 million fund for the continuation of litigation against non-settling defendants); *In re California Micro Devices Sec. Litig.*, 965 F.Supp. 1327, 1337 (N.D. Cal. 1997) (approving 7.9% of approximately $19 million

settlement fund for future litigation expenses).

The Auto Dealers have spent approximately $4.5 million in reasonable litigation expenses to-date.[1] The size and complexity of this litigation has already necessitated very significant expenses, as set forth above, and, as the cases progress to class certification, the expenses—particularly those associated with experts—will increase exponentially. In antitrust cases, experts typically create economic and damages models that describe the mechanisms and impact of the anti-competitive behavior. Given the scope and complexity of the issues in these cases, counsel for the Auto Dealers expect that the future cost of this work by their experts will be in the millions of dollars. (Raiter Decl.)

In addition, the Auto Dealers expect to incur significant costs related to ongoing discovery from dealerships, OEMs, and the Defendants and their representatives. These costs include the significant expense of hosting and reviewing documents and data, as well as travel expenses for the many depositions that have yet to be taken. (Raiter Decl.) Counsel for the Auto Dealers therefore believe that the amount they are requesting be set aside for future expenses is reasonable.[2]

III. The Court Should Award Attorneys' Fees to Counsel for the Auto Dealers.

The Court has settlements before it totaling approximately $125 million for the benefit of the Auto Dealers. Counsel for the Auto Dealers litigated these cases on a contingent basis, some for more than five years, and have spent thousands of hours in the cases in which settlements have been reached. Although the Court awarded fees from the first group of settlements, the work done by counsel for the Auto Dealers still exceeds the fees awarded. Counsel for the Auto Dealers request

[1] The Court previously awarded reimbursement of approximately $1.6 million in expenses that counsel for the Auto Dealers had advanced and allowed a fund of approximately $2.9 million for future expenses.

[2] Like their prior request for a future expense set aside, the Auto Dealers will use these funds for only the cases involved in this second group of settlements. Unspent money would be returned to the funds used to pay class member claims.

an interim award of attorneys' fees based on the work done to achieve these settlements, which includes work performed prior to the Auto Dealers' first group of settlements.

Fee awards for settlements like these are appropriate in large-scale litigation in which settlements are reached periodically. *See In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 JG VVP, 2011 WL 2909162, at *5–7 (E.D.N.Y. July 15, 2011) (interim fee award granted); *In re Sterling Foster & Company, Inc. Sec. Litig.*, 238 F. Supp. 2d 480, 484-85, 489-90 (E.D.N.Y. 2002) (interim attorneys' fees awarded). Counsel for the Auto Dealers have litigated these cases for five years and will continue to vigorously represent the interests of the dealership class members. An award of fees on these settlements is appropriate. *See In re Air Cargo Shipping Serv. Litig.* , No. 06-md-1775, 2015 WL 5918273 (E.D.N.Y. Oct. 9, 2015) (awarding fourth round of interim fees); *In re Diet Drugs Prod. Liab. Litig.*, No. 1203, 2002 WL 32154197, at *12 (E.D. Pa., Oct. 3, 2002) (awarding an interim fee after four years of litigation, noting that "to make them wait any longer for at least some award would be grossly unfair").

A. The Court Should Again Use the Percentage-of-the-Fund Approach.

The Supreme Court recognizes that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980); *see also Delphi*, 248 F.R.D. at 502. When calculating attorneys' fees under the common fund doctrine, "a reasonable fee is based on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 900 n.16, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984).

The Court has previously awarded fees in this litigation using the percentage-of-the-fund approach and counsel for the Auto Dealers believe that the same method should be applied to this second group of settlements. The courts in this Circuit have expressed a preference for this method of awarding attorneys' fees because it eliminates disputes about the reasonableness of rates and

hours, conserves judicial resources, and aligns the interests of class counsel and the class members. *See, e.g.*, *Rawlings,* 9 F.3d at 515; *In re Packaged Ice Antitrust Litig.*, 08-MDL-01952, 2011 WL 6209188, at *16 (E.D. Mich. Dec. 13, 2011); *Delphi*, 248 F.R.D. at 502; *Cardinal*, 528 F. Supp. 2d at 762 (the Sixth Circuit has "explicitly approved the percentage approach in common fund cases"); *In re Skelaxin (Metaxalone) Antitrust Litig.*, No. 2:12-CV-83, 2014 WL 2946459, at *1 (E.D. Tenn. June 30, 2014) ("the lodestar method is cumbersome; the percentage-of-the-fund approach more accurately reflects the result achieved; and the percentage-of-the-fund approach has the virtue of reducing the incentive for plaintiffs' attorneys to over-litigate or 'churn' cases.") (citations omitted).

The lodestar method, on the other hand, "has been criticized for being too time-consuming of scarce judicial resources," as it requires that courts "pore over time sheets, arrive at a reasonable hourly rate, and consider numerous factors in deciding whether to award a multiplier." *Rawlings,* 9 F.3d at 516-17. *In re Cardizem CD Antitrust Ltig.,* 218 F.R.D. 508, 532 (E.D. Mich. 2003) ("the lodestar method is too cumbersome and time-consuming of the resources of the Court" and "more importantly, the `percentage of the fund' approach more accurately reflects the result achieved."); see also *Fournier v. PFS Invs., Inc.*, 997 F.Supp. 828, 831-32 (E.D. Mich. 1998) (the percentage of recovery method "allows for a more accurate approximation of a reasonable award of fees.").

Moreover, "[w]ith the emphasis it places on the number of hours expended by counsel rather than the results obtained, it also provides incentives for overbilling and the avoidance of early settlement." *Id.* at 517; *see also* Manual for Complex Litigation (Third) § 24.12 at 189 (West 1995). There is a "'trend towards adoption of a percentage-of-the-fund method in [common fund] cases.'" *Delphi*, 248 F.R.D. at 502 (quoting *Rawlings*, 9 F.3d at 516-517).

B. The Fee Requested by Counsel for the Auto Dealers is Appropriate.

The Court is well-versed with the complexity of this litigation; on just the cases at issue in these settlements, counsel for the Auto Dealers have worked for more than five years and have

dedicated more than 77,000 attorney hours and 11,000 hours for paralegals and law clerks.[3] Among other things, Interim Co–Lead Counsel coordinated the efforts of counsel representing the Auto Dealers to maximize efficiency and to avoid duplicative efforts and unnecessary billing. (Raiter Decl.) They have also monitored counsel to avoid unauthorized work and have been mindful of the Auto Dealers' role in this litigation and the potential recoveries for their clients. (*Id.*)

Counsel for the Auto Dealers request that the Court award fees totaling one-third of the settlement funds remaining after the deduction of: (1) notice and administration costs, and (2) costs set aside for future litigation expenses.[4] Reasonable fee awards range from 20 to 50 per cent of the common fund. *In re Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig.,* 137 F.Supp.2d 1029, 1046 (S.D. Ohio 2001); *In re Cincinnati Gas & Elec. Co. Sec. Litig.,* 643 F. Supp. 148, 150 (S.D. Ohio 1986); Alba Conte & Herbert Newberg, *Newberg on Class Actions* (4th ed. 2002), §14:6 at 551 ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.").

Courts in the Sixth Circuit routinely approve attorneys' fees in antitrust class actions of one-third of the common fund created for the settlement class. *In re Packaged Ice Antitrust Litig.,* 2011 WL 6209188, at *19; *Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d, 521, 528 (E.D. Ky. 2010); *Bessey v. Packerland Plainwell, Inc.*, No. 4:06-CV-95, 2007 WL 3173972, at *4 (W.D. Mich. 2007); *Delphi*, 248 F.R.D. at 502-03; *In re National Century Financial Enterprises, Inc. Investment Litig.*,

[3] *See* Declarations of Jon Cuneo, Don Barrett, Shawn Raiter, Gerard Mantese, Dewitt Lovelace, Tom Thrash, John Kakinuki, Charles Barrett, Brian Herrington, and Pierce Gore.

[4] Although not sought here, precedent supports applying the selected percentage to the settlement fund *before* deducting the litigation costs and expenses from the funds. *See, e.g., In re Sulzer Orthopedics, Inc.,* 398 F.3d 778, 780-82 (6th Cir. 2005) (affirming fee awards from a common benefit fund based on the gross settlement amount); *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *17 ("The fee percentage is applied to the settlement fund before the separate award of litigation costs and expenses are deducted from the fund."); *Delphi*, 248 F.R.D. at 505 (attorneys' fees awarded on gross settlement fund); *In re Cardizem CD Antitrust Litigation*, 218 F.R.D. at 531–535 (awarding costs in addition to percentage of the fund fee).

2009 WL 1473975 (S.D. Ohio, May 27, 2009); *New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 635 (W.D. Ky. 2006) ("[A] one-third fee from a common fund case has been found to be typical by several courts.') (citations omitted), *aff'd*, 534 F.3d 508 (6th Cir. 2008)*; Kogan v. AIMCO Fox Chase, L.P.,* 193 F.R.D. 496, 503 (E.D. Mich. 2000). For example, in *Prandin*, the court awarded one-third of a $19 million settlement fund and in *Skelaxin*, 2014 WL 2946459, at *1, the court awarded one-third of a $73 million settlement fund, finding that a "counsel fee of one-third is fair and reasonable and fully justified" and "within the range of fees ordinarily awarded." *See also In re Se. Milk Antitrust Litig.*, No. 2:07-CV 208, 2013 WL 2155387, at *8 (E.D. Tenn. May 17, 2013) (one-third fee from settlements totaling $158.6 million and finding that 33 percent "is certainly within the range of fees often awarded in common fund cases both nationwide and in the Sixth Circuit").[5]

Fee awards of more than one-third are also common. *See*, *e.g.*, *In re Combustion, Inc.*, 968 F. Supp. 1116, 1133, 1142 (W.D. La. 1997) (awarding fee of 36 per cent and noting that "50 percent of the fund is the upper limit on a reasonable fee award from a common fund . . . . [D]istrict courts in

[5] The same is true in other districts. *See Standard Iron Works v. Arcelormittal*, 2014 WL 77815572, at *1 (N.D. Ill. Oct. 22, 2014) (attorneys' fee award of one-third of $163.9 million settlement); *In re Fasteners Antitrust Litig.*, No. CIV.A. 08-MD-1912, 2014 WL 296954, at *7 (E.D. Pa. Jan. 27, 2014) ("Co-Lead Counsel's request for one third of the settlement fund is consistent with other direct purchaser antitrust actions."); *In re Titanium Dioxide Antitrust Litig.*, No. 10-CV-00318 RDB, 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) (one-third fee from $163.5 million fund); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 748-52 (E.D. Pa. 2013) (noting that "in the last two-and-a-half years, courts in eight direct purchaser antitrust actions approved one-third fees" and awarding one-third fee from $150 million fund); *Heekin v. Anthem, Inc.*, No. 1:05-CV-01908-TWP, 2012 WL 5878032 (S.D. Ind. Nov. 20, 2012) (awarding one-third fee from $90 million settlement fund); *In re Ready-Mixed Concrete Antitrust Litig.*, No. 1:05-CV-00979-SEB, 2010 WL 3282591, at *3 (S.D. Ind. Aug. 17, 2010) (approving one-third fee); *Williams v. Sprint/United Mgmt. Co.*, No. CIV. 03-2200-JWL, 2007 WL 2694029, at *6 (D. Kan. Sept. 11, 2007)(awarding fees equal to 35 per cent of $57 million common fund); *Lewis v. Wal-Mart Stores, Inc.*, No. 02-CV-0944 CVE FHM, 2006 WL 3505851, at *1 (N.D. Okla. Dec. 4, 2006) (awarding one-third of the settlement fund and noting that a "one-third [fee] is relatively standard in lawsuits that settle before trial."); *In re AremisSoft Corp., Sec., Litig.*, 210 F.R.D. 109, 134 (D.N.J. 2002) ("Scores of cases exist where fees were awarded in the one-third to one-half of the settlement fund.") (citations omitted); *Moore v. United States*, 63 Fed. CI. 781, 787 (2005) ("one-third is a typical recovery").

the Fifth Circuit have awarded percentages of approximately one-third contingency fee"); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (fee of 36 percent); *Waters v. Intern. Precious Metals Corp.*, 190 F.3d 1291, 1292-94 (11th Cir. 1999); *In re Vitamins Antitrust Litig.*, 2001 WL 34312839, at *10 (D.D.C. 2001) (awarding one third of $359 million antitrust recovery, which is "within the fifteen to forty-five percent range established in other cases."); *In re Ampicillin Antitrust Litig.*, 526 F. Supp. 494, 498 (D.D.C. 1981) (awarding fee of 45 per cent).

The one-third attorney fee (of the net proceeds) is also fair in reasonable in light of the work performed by counsel for the Auto Dealers, the results achieved, and the work undertaken. Since 2011, some of the attorneys for the Auto Dealers have worked nearly full-time on this litigation. As described earlier in this brief, counsel for the Auto Dealers have performed, and continue to perform, an enormous amount of work to achieve the settlements and to move these cases to conclusion. (Raiter Decl.)

C. Consideration of The Factors Used by the Sixth Circuit Supports The Requested Fee Award.

When using the percentage-of-the-fund approach, the Court will consider the six *Ramey* factors: (1) the value of the benefits rendered to the class; (2) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (3) whether the services were undertaken on a contingent fee basis; (4) the value of the services on an hourly basis [the lodestar cross-check]; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel on both sides. *Ramey*, 508 F.2d at 1194-97. When applied here, these factors indicate that the fee requested is fair.

1. Counsel Secured Valuable Benefits for Auto Dealers.

The result achieved for the class members is the principal consideration. *Delphi*, 248 F.R.D. at 503. As discussed in the memoranda filed in support of the preliminary approval of the settlements, counsel for the Auto Dealers have achieved excellent recoveries. These are cash

settlements coupled with meaningful cooperation and injunctive relief. The settlement funds totaling nearly $125 million represent a significant recovery for automobile dealerships that sell new vehicles in the indirect purchaser states.

After the deduction of fees, notice and claims administration costs, and expenses, all of the net settlement funds will be paid to eligible dealerships that file a valid claim. None of the money will revert to the settling Defendants or to a *cy pres* designee. Minimum payments of $350 will be made to eligible dealerships that file a claim for new vehicles and parts purchased in the indirect purchaser states. In addition to the money benefits, the cooperation terms of these settlements provide significant value to Auto Dealers in their prosecution of the claims against non-settling Defendants.

With this second group of settlements, nearly $184 million has been recovered for the benefit of members of the Auto Dealer settlement classes who are eligible to receive money benefits. The monetary recovery alone is substantial but, when coupled with the cooperation and injunctive relief, the value of these settlements is considerable.

2. Society Has An Important Stake in Rewarding Attorneys With Reasonable Fees In This Litigation.

There is a "need in making fee awards to encourage attorneys to bring class actions to vindicate public policy (e.g., the antitrust laws) as well as the specific rights of private individuals." *In re Folding Carton Antitrust Litig.*, 84 F.R.D. 245, 260 (N.D. Ill. 1979). Courts in the Sixth Circuit weigh "society's stake in rewarding attorneys who [win favorable outcomes in antitrust class actions] in order to maintain an incentive to others . . . . Society's stake in rewarding attorneys who can produce such benefits in complex litigation such as in the case at bar counsels in favor of a generous fee . . . . Society also benefits from the prosecution and settlement of private antitrust litigation." *In re Cardizem*, 218 F.R.D. at 534 (internal quotation marks omitted); see *Ramey,* 508 F.2d at 1196; *Delphi*, 248 F.R.D. at 504; see also Declaration of Arthur J. Miller, 2:12-md-02311-MOB-MKM,

Doc. # 1398-1; Declaration of Frank J. Kelley, 2:12-md-02311-MOB-MKM, Doc. # 1398-2. Without the willingness of counsel to assume the risks inherent to these cases (or in other cases of similar magnitude and complexity) the settlement class members would not have recovered anything, let alone the substantial recoveries secured here.

The Department of Justice did not seek restitution from the settling Defendants. Any recovery for Auto Dealers needed to come through the work of lawyers working on a contingent basis. The significant expenses, combined with the high degree of uncertainty of ultimate success, make contingent fees a virtual necessity for cases like these. Compensation in an amount appropriate to encourage skilled attorneys to assume the risks of this litigation is in the public interest. The substantial recoveries counsel for the Auto Dealers have achieved have helped serve the public policy of holding those who violate antitrust laws in the United States accountable. Society benefits when those who have violated laws fostering fair competition and honest pricing are required to reimburse affected consumers in civil proceedings. *Vendo v. Lektro-Vend Corp.*, 433 U.S. 623, 635 (1977) ("Section 16 undoubtedly embodies congressional policy favoring private enforcement of the antitrust laws, and undoubtedly there exists a strong national interest in antitrust enforcement."); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 122 (2d Cir. 2005) (concluding that it is "especially important to provide appropriate incentives to attorneys pursuing antitrust actions because public policy relies on private sector enforcement of the antitrust laws.")

3. Counsel For The Auto Dealers Have Worked On A Contingent Basis.

Counsel for the Auto Dealers have and will continue to pursue this litigation on a contingent basis. The risk inherent therein supports a reasonable fee award from a common fund. *See In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *19 (risk of non-payment a factor supporting the requested fee). The contingency factor "stands as a proxy for the risk that attorneys will not recover compensation for the work they put into a case." *Cardinal*, 528 F. Supp. 2d at 766. Indeed, "'some

courts consider the risk of non-recovery as the most important factor in fee determination.'" *Kritzer v. Safelite Solutions, LLC*, 2012 WL 1945144, at *9 (S.D. Ohio May 30, 2012) (quoting *Cardinal*, 528 F. Supp. 2d at 766). "[W]ithin the set of colorable legal claims, a higher risk of loss does argue for a higher fee." *In re Trans Union Corp. Privacy Litig.*, 629 F. 3d 741, 746 (7th Cir. 2011). "This antitrust litigation, like all litigation of its species, promises to be extremely complex and time intensive and there is no question that if settlement fails, the Defendants will mount a strong defense." *In re Packaged Ice*, 2011 WL 6209188, at *19. The Sixth Circuit has held that the specific characteristics of a class action case can govern the appropriateness of a fee award. *Rawlings*, 9 F.3d at 516 (finding that the district court can determine the appropriate method for calculating attorneys' fees in light of the "unique characteristics of class actions").

The legal and factual issues surrounding these cases are extremely complex. Being rewarded only for success in litigation this complex creates a high degree of risk. The substantial risk undertaken by counsel for the Auto Dealers strongly favors the fees requested. *Delphi*, 248 F.R.D. at 503-54.

4. The Complexity of the Litigation Supports the Requested Fee.

The Court is well-familiar that "[a]ntitrust class actions are inherently complex . . . ." *In re Cardizem*, 218 F.R.D. at 533; *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *19; *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 639 (E.D. Pa. 2003) ("An antitrust class action is arguably the most complex action to prosecute. The legal and factual issues involved are always numerous and uncertain in outcome.") (citations and internal quotation marks omitted).

Although any antitrust action is complex, the scale of this MDL litigation magnifies that complexity. The DOJ has described the anti-competitive conduct at issue here as the largest criminal cartel it has ever prosecuted. This litigation is decidedly complex given the numerous

conspiracies and parts involved, the international Defendants, and the sheer magnitude of the conduct and regulatory investigations. This factor also supports the fee requested.

5. Skill and Experience of Counsel.

The skill and experience of counsel on both sides of the litigation is a factor courts consider in determining a reasonable fee award. *In Re Polyurethane Foam Antitrust Litig.*, No. 1:10 MD 2196, 2015 WL 1639269 at * 7; *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *19. The Court has found Interim Co-Lead Counsel for the Auto Dealers to have the requisite skill and experience in class action and antitrust litigation to serve effectively as class counsel for the Auto Dealers. In assessing this *Ramey* factor, courts also look to the qualifications of the defense counsel opposing the class. Defense counsel here are also well-qualified and experienced antitrust and class action firms. The Court has seen first-hand the skill of the attorneys and the quality of the work done to represent their respective clients. This factor supports the fee being requested by counsel for the Auto Dealers.

6. A Lodestar Crosscheck Confirms that the Requested Fee Is Reasonable.

Some courts apply a lodestar "cross-check" on the reasonableness of the fee calculated as a percentage of the fund. *Cardinal*, 528 F. Supp. 2d at 764; *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *18. A lodestar cross-check is optional, however, and the Court is not required to engage in a detailed scrutiny of time records. *Cardinal*, 528 F. Supp. 2d at 767. The cross-check does not require mathematical precision and it allows the Court to rely on summaries submitted by the attorneys and not review actual billing records. *In re Prudential Ins. Co. of America Sales Prac. Litig.*, 148 F.3d 283, 342 (3d Cir. 1998). Here, however, the time counsel for the Auto Dealers had to expend confirms that the fee requested is well "aligned with the amount of work the attorneys contributed" to the recovery, and does not constitute a "windfall." *Id.*

To calculate a reasonable fee under the lodestar method, the court determines the base amount of the fee by multiplying the number of hours counsel reasonably expended by their hourly rate. *Isabel v. City of Memphis*, 404 F.3d 404, 415 (6th Cir. 2005). In multi-district cases involving multiple cases and defendants, the courts consider requests for attorneys' fees from partial settlements by looking at all of the work done on those cases to-date. *See, e.g., Air Cargo*, 2015 WL 5918273 (granting fees from settlements with multiple defendants based on an analysis of all of the work done on the cases); *In re Processed Eggs Prods. Antitrust Litig.*, No. 08-md-2002, 2012 U.S. Dist. LEXIS 160764, at *18 (E.D. Pa. Nov. 9, 2012) (granting motion for attorneys' fees from settlement with single defendant based upon all work on case to-date).

The law firms that have worked to advance the claims of the Auto Dealers have done so under the direction of Interim Co-Lead Counsel for the Auto Dealers. There has been an enormous amount of work done. Discovery has been extensive and Defendants have been relentless in their pursuit of discovery and motion practice directed at the Auto Dealers. Counsel for the Auto Dealers have received substantial cooperation provided by amnesty applicants and the settling Defendants and are using that information to prosecute the claims against non-settling Defendants. All the while, counsel for the Auto Dealers have been preparing to certify classes and bring these cases to trial.

Counsel for the Auto Dealers have vigorously prosecuted these case but have done so while being efficient and avoiding duplication. As shown in the declarations submitted with this motion, counsel representing the Auto Dealers and their professional staff have worked more than 89,000 hours in the cases involved in these settlements (up to September 15, 2016). (*See* Raiter Decl.;

Declarations of Don Barrett, Jon Cuneo, Gerard Mantese, Dewitt Lovelace, Tom Thrash, John Kakinuki, Charles Barrett, Brian Herrington, and Pierce Gore).[6]

To calculate a lodestar for this optional cross-check, Auto Dealer attorneys and their firms provided declarations that set forth the timekeepers, customary rates, and hours worked to advance the litigation for the Auto Dealers. The following table provides an aggregated summary of that lodestar:

Lodestar Using Customary Auto Dealer Rates		
Category of Timekeeper	**Number of Hours**	**Lodestar**
Partner	31,685.44	$23,830,159.58
Associate	43,272.75	$21,315,006.67
Paralegal	11,604.70	$1,956,883.50
Of Counsel	2,668.85	$1,304,892.50
Total	**89,231.74**	**$48,406,942.25**

As an alternative way for the Court to calculate a lodestar for this optional cross-check, counsel for the Auto Dealers also provide the Court with the option to consider capped, normalized rates for the categories of time keepers performing the work. Although the Auto Dealer attorneys and their firms customarily charge higher rates, for purposes of the Court's lodestar cross-check, the Auto Dealers applied the following blended rates to each category of legal professional below:

Normalized Auto Dealer Rates			
Category of Timekeeper	**Rate**	**Number of Hours**	**Lodestar**
Partner	$675	$31,685.44	$21,387,672.00
Associate	$375	$43,272.75	$16,227,281.25
Paralegal	$200	$11,604.70	$2,320,940.00
Of Counsel	$450	$2,668.85	$1,200,982.50
	Total	**$89,231.74**	**$41,136,875.75**

[6] Counsel have provided declarations and summaries of the time spent on this litigation. Unlike the lodestar-based fee request in *Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299 (6th Cir. 2016), the cross-check used in a percentage-of-the-fund request may be based on summaries of time spent by counsel. *Cardinal*, 528 F. Supp. 2d at 767; *In re Prudential*, 148 F.3d at 342.

Applying these normalized rates to the hours reasonably expended on the cases involved in these settlements yields a "lodestar" of approximately $41.1 million for the work done on these cases from their inception.[7]

The requested fee is $38,299,350, which represents one-third of the funds remaining after deducting the fund for future litigation expenses and the costs of notice and claims administration. (*See* Raiter Decl.) If applied to the gross amount of the settlements, the requested fee is 30.6% of the settlements currently before the Court. A chart that illustrates the pro rata reduction of those fees from the settlements at issue is provided with this brief as Appendix C.[8]

The Court previously awarded counsel for the Auto Dealers attorneys' fees of $18,500,168 for the initial group of Auto Dealer settlements. Adding that award to the fees sought here results in a total award of $56,799,518. Using that fee award total, and comparing it to the total normalized lodestar for the work done on the cases in which Auto Dealer settlements have been approved or for which final approval is currently being sought, results in a lodestar multiplier of time spent to-date on these cases of 1.38. Using the same fee award total, and comparing it to the total lodestar using counsel's customary rates for the work done on the cases in which Auto Dealer settlements have been approved or for which final approval is currently being sought, results in a lodestar multiplier of time spent to-date on these cases of 1.17.

Whether analyzed as a "cross-check" on the percentage-of-the-fund method—or under the lodestar method—the requested fee is reasonable. The requested fee represents a modest "multiplier" of either 1.17 or 1.38 of the lodestar. This multiplier is reasonable and much lower than

[7] The use of current rates is appropriate to compensate counsel for inflation and the delay in receipt of the funds. *Missouri v. Jenkins*, 491 U.S. 274, 282-84 (1989); *see also Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 716 (1987).

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[8] The terms of the settlement with DENSO require, as a condition of finality, that the parallel End Payor settlement be approved by the Court. The Auto Dealers will, therefore, only disburse the attorneys' fees, expenses, and future litigation set asides on a pro rata basis from the other settlements until the End Payor settlement with DENSO receives an order of final approval.

the positive multipliers approved in other cases. *See*, *e.g.*, *Cardinal*, 528 F. Supp. 2d at 767-68 (approving multiplier of 6, and observing that "[m]ost courts agree that the typical lodestar multiplier" on a large class action "ranges from 1.3 to 4.5"); *Prandin*, 2015 WL 1396473, at *4 (3.01 multiplier); see also Order Granting Interim Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Costs and Expenses, 2:12-cv-00601-MOB-MKM, Doc. No. 128 (awarding direct purchaser fees of 2.09 times the lodestar).

The lodestar here is conservative because it does not include the time spent prosecuting these cases since September 1, 2016 or the time that will continue to be needed to bring the cases to a conclusion. While the hours already worked are substantial, they are reasonable and reflect the challenging nature of the litigation. Defendants are represented by able counsel who have asserted vigorous defenses. Defendants' efforts have required the Auto Dealers to expend considerable effort and skill in prosecuting these cases.

Given the excellent results achieved, the complexity of the claims and defenses, the real risk of non-recovery, the formidable defense teams, the delay in receipt of payment, and the substantial experience and skill of counsel, the requested multiplier on the lodestar and the resulting fee is reasonable compensation for the work done by counsel for the Auto Dealers. With no guarantee about the extent of work required to conclude these cases or the fees that will be generated from that work, it is possible that any positive multiplier on the current lodestar will be eroded.

Conclusion

For the foregoing reasons, Interim Co-Lead Counsel for the Auto Dealers respectfully request that the Court grant their motion and award attorneys' fees, reimburse litigation expenses, and allow the creation of a future litigation fund.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE AUTOMOTIVE PARTS ANTITRUST LITIGATION	:	Master File No. 12-md-02311
	:	Honorable Marianne O. Battani
	:	
In Re: Wire Harness	:	Case No. 2:12-cv-00102
In Re: Instrument Panel Clusters	:	Case No. 2:12-cv-00202
In Re: Fuel Senders	:	Case No. 2:12-cv-00302
In Re: Heater Control Panels	:	Case No. 2:12-cv-00402
In Re: Bearings	:	Case No. 2:12-cv-00502
In Re: Alternators	:	Case No. 2:13-cv-00702
In Re: Anti Vibrational Rubber Parts	:	Case No. 2:13-cv-00803
In Re: Windshield Wiper Systems	:	Case No. 2:13-cv-00902
In Re: Radiators	:	Case No. 2:13-cv-01002
In Re: Starters	:	Case No. 2:13-cv-01102
In Re: Ignition Coils	:	Case No. 2:13-cv-01402
In Re: Motor Generators	:	Case No. 2:13-cv-01502
In Re: HID Ballasts	:	Case No. 2:13-cv-01702
In Re: Inverters	:	Case No. 2:13-cv-01802
In Re: Electronic Powered Steering Assemblies	:	Case No. 2:13-cv-01902
In Re: Air Flow Meters	:	Case No. 2:13-cv-02002
In Re: Fan Motors	:	Case No. 2:13-cv-02102
In Re: Fuel Injection Systems	:	Case No. 2:13-cv-02202
In Re: Power Window Motors	:	Case No. 2:13-cv-02302
In Re: Automatic Transmission Fluid Warmers	:	Case No. 2:13-cv-02402
In Re: Valve Timing Control Devices	:	Case No. 2:13-cv-02502
In Re: Electronic Throttle Bodies	:	Case No. 2:13-cv-02602
In Re: Air Conditioning Systems	:	Case No. 2:13-cv-02702
In Re: Windshield Washer Systems	:	Case No. 2:13-cv-02802
In Re: Spark Plugs	:	Case No. 2:15-cv-03002
In Re: Automotive Hoses	:	Case No. 2:15-cv-12893
In Re: Power Window Switches	:	Case No. 2:16-cv-03902
In Re: Ceramic Substrates	:	Case No. 2:16-cv-12194

THIS DOCUMENT RELATES TO
AUTOMOBILE DEALERSHIP ACTIONS

AUTO DEALERS' MEMORANDUM IN SUPPORT OF MOTION TO AWARD FEES PLACED IN RESERVE IN 2016 FOR ROUND TWO SETTLEMENTS

Gerard V. Mantese (P34424)
Mantese Honigman, P.C.
1361 E. Big Beaver Road
Troy, MI 48083
Telephone: (248) 457-9200 Ext. 203
gmantese@manteselaw.com

Interim Liaison Counsel for The Automobile Dealer Plaintiffs

Jonathan W. Cuneo
Cuneo Gilbert & LaDuca, LLP
4725 Wisconsin Avenue NW, Suite 200
Washington, DC 20016
Telephone: (202) 789-3960
jonc@cuneolaw.com

Don Barrett
Barrett Law Group, P.A.
P.O. Box 927
404 Court Square
Lexington, MS 39095
Telephone: (662) 834-2488
dbarrett@barrettlawgroup.com

Shawn M. Raiter
Larson King, LLP
2800 Wells Fargo Place
30 East Seventh Street
St. Paul, MN 55101
Telephone: (651) 312-6500
Facsimile: (651) 312-6618
sraiter@larsonking.com

Interim Co-Lead Counsel for The Automobile Dealer Plaintiffs

Statement of the Issues Presented

1. Should the Court award to counsel for the Auto Dealers the attorneys' fees held in reserve for the Round Two settlements since 2016?

   Answer: Yes.

Controlling or Most Appropriate Authorities

Ramey v. Cincinnati Enquirer, Inc., 508 F.2d 1188 (6th Cir. 1974)

In re Delphi Corp. Sec., Derivative & ERISA Litig., 248 F.R.D. 483 (E.D. Mich. 2008)

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Introduction

The Auto Dealers have disbursed the initial settlement funds from the first three rounds of the settlements approved by the Court. They are also preparing to disburse the funds held in reserve for those settlements. Some dealership groups have already received millions of dollars from these settlements and numerous others have received hundreds of thousands of dollars. The Round Four settlement funds will be disbursed to eligible automobile dealerships in the next few months. As a result, the Auto Dealers have nearly completed their portion of this litigation.

Counsel for the Auto Dealers move the Court to award money held in reserve since 2016 for a potential attorneys' fees award. In 2016, the Court had not decided how it would consider and award attorneys' fees to class counsel when settlements were achieved. The Court requested briefing from the plaintiffs' groups about how fees should be awarded as this litigation progressed and additional settlements were reached.

At the November 2016 final approval hearing for the Auto Dealers' Round Two settlements, the Court granted an interim fee award of 20 percent of the settlement funds, while it considered how it would handle future fee awards. The Court directed counsel for the Auto Dealers to hold in reserve the difference between the 20 percent award and the fees they had sought. The subsequent fee awards granted by the Court all equaled or exceeded 30 percent. Interim Class Counsel for the Auto Dealers hereby seeks an award of the reserved 10 percent of the Round Two settlements.

Background

A. The Court's Consideration of Attorneys' Fees in 2016.

Following the final approval of the first groups of settlements reached by the various plaintiff groups, the Court requested supplemental briefing about how attorneys' fee awards should be made and analyzed in this litigation. Each of the three main groups of plaintiffs (Direct Purchasers, Auto Dealers, and End Payors) submitted briefs, declarations, and other materials for the Court's consideration. (*See* 2:12-md-02311-MOB-MKM (ECF Doc. No. 1398); 2:12-md-02311-MOB-MKM (ECF Doc. No. 1399); 2:12-cv-00103-MOB-MKM (ECF Doc. No. 491)).

At the November 2016 status conference, the Court heard motions for final approval of numerous settlements presented by the End Payors and Auto Dealers. When considering the requests for an award of attorneys' fees and expenses from the settlements of the plaintiff's groups, the Court indicated that it had not yet concluded what percentage it would award as fees and would instead award a minimum amount: "But in further consideration of this I have decided to do this until I make the final percentage and that is to give you 20 percent." (Transcript of Status Conference, Motion Hearing, Final Approval Hearing - November 16, 2016, p. 25) ("November 2016 transcript").

B. Round Two Auto Dealer Settlements.

In the second round of Auto Dealer settlements ("Round Two settlements") the Court granted final approval to settlements totaling nearly $125 million. The notices approved by the Court for those settlements advised that counsel for the Auto Dealers would seek up to one-third (33.33 percent) of the settlement funds as attorneys' fees. (*See* 2:12-cv-00102-MOB-

MKM (ECF Doc. No. 519-2, pp. 22-23). No class member objected to a 33.33 percent fee or to the terms of the settlements. (*See* 2:12-cv-00102-MOB-MKM (ECF Doc. No. 519-2, para. 8); 2:12-cv-00102-MOB-MKM (ECF Doc. No. 521, para. 3).

During the November 16, 2016 hearing on the Auto Dealers' motion for final approval of the Round Two settlements, the Court granted counsel for the Auto Dealers an interim award of 20 percent of the settlement funds (after the deduction of notice and claim processing costs) and allowed the other requested fees to be placed in reserve. (*See* November 2016 transcript, p. 134). The Court's November 29, 2016 order stated:

> As the Court indicated during the hearing on this motion and at the November 16, 2016 status conference, the Court reserves ruling on the Auto Dealers' request for additional fees from these settlements. The Court may, or may not, grant additional fees from these settlements. Interim Co-Lead Counsel for the Auto Dealers are authorized to hold in reserve the difference between the fees requested in this motion and the fees currently awarded by the Court.

(*See* 2:12-cv-00102-MOB-MKM (ECF Doc. No. 523, p. 6). That fee award resulted in a negative multiplier of counsel for the Auto Dealer's lodestar. *Id.*, para. 15.[1]

C. Fee Awards Subsequent to November 2016.

When considering motions seeking awards of attorneys' fees since November 2016, the Court has consistently awarded 30 percent or more of the settlement funds after the deduction of notice and administration expenses. (*See, e.g.*, 2:12-cv-00102-MOB-MKM (ECF Doc. No. 568, para. 9) (30 percent); 2:12-cv-00101-MOB-MKM (ECF Doc. No. 495, para. 22) (30 percent); 2:12-cv00102-MOB-MKM (ECF Doc. No. 401, para. 11) (33 percent)).

[1] When the 20 percent fee award was added to the fees awarded in Round One settlements, the Auto Dealers were awarded $43,446,364.00 when their lodestar totaled $48,406,000.00. (November 2016 transcript, p.132). This results in a negative, or .89, multiplier of the lodestar.

Argument

I. The Court Should Authorize the Award of the Fees Held in Reserve Since 2016 For the Round Two Auto Dealer Settlements.

In 2016, the Court had not determined the amount it would award in fees for settlements reached by the various plaintiff groups. It subsequently awarded 30 percent or more in all settlements presented by the Direct Purchasers, End Payors, and Auto Dealer groups for final approval. Interim Co-Lead Counsel for the Auto Dealers respectfully suggest that the same percentage should apply to the Round Two settlements and, as a result, request an award allowing the reserved 10 percent of the Round Two settlements.

During the November 2016 final approval process, the Court analyzed and weighed the six factors described in *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188 (6th Cir. 1974) and *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). It also considered the briefing, billing records, and other information provided by counsel for the Auto Dealers. (*See* 2:12-cv-00102-MOB-MKM (ECF Doc. No. 523). The Court heard argument and recognized that fee awards of 33.33 percent were within the range of fee awards made by courts in this Circuit. *Id.* (citing *In re Prandin Direct Purchaser Antitrust Litig.*, 2015 WL 1396473 (E.D. Mich. Jan. 20, 2015) (awarding one-third of the fund); *In re Packaged Ice Antitrust Litig.*, 08-MDL-01952, 2011 WL 6209188, at *19 (E.D. Mich. Dec. 13, 2011); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 2014 WL 2946459, *1 (E.D. Tenn. Jun. 30, 2014); *In re Southeastern Milk Antitrust Litig.*, 2013 WL 2155387, at *8 (E.D. Tenn. May 17, 2013); *Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d, 521, 528 (E.D. Ky. 2010); *Bessey v. Packerland Plainwell, Inc.*, No. 4:06-CV-95, 2007 WL 3173972, at *4 (W.D. Mich. 2007); *In re Delphi Corp. Sec., Derivative & ERISA Litig.*, 248 F.R.D. 483, 502-503 (E.D. Mich. 2008); *In re National Century*

Financial Enterprises, Inc. Investment Litig., 2009 WL 1473975 (S.D. Ohio, May 27, 2009); *Kogan v. AIMCO Fox Chase, L.P.*, 193 F.R.D. 496, 503 (E.D. Mich. 2000)).

Awarding to counsel for the Auto Dealers the reserved 10 percent is proper for numerous reasons. First, no class member objected to a request for a 33.33 percent fee: awarding a total of 30 percent conforms to the notice provided to the classes. Second, a 30 percent fee for Round Two settlements would equal the awards allowed in the Round Three and Round Four settlements the Auto Dealers attained. Third, allowing the additional 10 percent is consistent with the awards issued to the other plaintiff groups after November 2016. Finally, allowing the reserved 10 percent would move the Auto Dealers' lodestar multiplier for Round Two settlements from a negative .89 to a slightly positive multiplier of approximately 1.15. *See* 2:12-cv-00102-MOB-MKM (ECF Doc. No. 514); 2:12-cv-00102-MOB-MKM (ECF Doc. No. 514-2); 2:12-cv-00102-MOB-MKM (ECF Doc. No. 514-3).

The Auto Dealers, with the assistance of the claim administrator, have made the initial payments to dealerships who submitted eligible claims in the Round Two settlements. The Auto Dealers have also paid the Round One and Round Three claims and are nearly ready to distribute the settlement funds held in reserve (pursuant to the allocation plans approved by the Court) for each of those three rounds. As reported during prior hearings, there has been a high rate of claim participation from eligible auto dealerships in each round. In fact, claim participation has increased in each round, which counsel for the Auto Dealers attribute to the excellent results achieved in this litigation.

Conclusion

For the foregoing reasons, Interim Co-Lead Counsel for the Auto Dealers respectfully requests that the Court grant their motion to award the Round Two fees held in reserve since 2016.

Dated: June 8, 2020

By: /s/ Gerard V. Mantese
Gerard V. Mantese (P34424)
MANTESE HONIGMAN, P.C.
1361 E. Big Beaver Road
Troy, MI 48083
Telephone: (248) 457-9200 Ext. 203
Facsimile: (248) 457-9201
gmantese@manteselaw.com

Interim Liaison Counsel for the Automobile Dealer Plaintiffs

Jonathan W. Cuneo
CUNEO GILBERT & LADUCA, LLP
4725 Wisconsin Avenue NW, Suite 200
Washington, Dc 20016
Telephone: (202) 789-3960
Facsimile: (202) 789-1813
jonc@cuneolaw.com

Don Barrett
BARRETT LAW GROUP, P.A.
P.O. Box 927
404 Court Square
Lexington, MS 39095
Telephone: (662) 834-2488
Facsimile: (662)834.2628
dbarrett@barrettlawgroup.com

Shawn M. Raiter
LARSON KING, LLP
2800 Wells Fargo Place
30 East Seventh Street
St. Paul, MN 55101
Telephone: (651) 312-6500
Facsimile: (651) 312-6618
sraiter@larsonking.com

Interim Co-Lead Counsel for the Automobile Dealer Plaintiffs

CERTIFICATE OF SERVICE

I, Gerard V. Mantese, hereby certify that I caused a true and correct copy of **AUTO DEALERS' MEMORANDUM IN SUPPORT OF MOTION TO AWARD FEES PLACED IN RESERVE IN 2016 FOR ROUND TWO SETTLEMENTS** to be served via e-mail upon all registered counsel of record via the Court's CM/ECF system on June 8, 2020.

/s/ Gerard V. Mantese
Gerard V. Mantese

TAB 52A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEPHEN SULLIVAN, WHITE OAK FUND LP, CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM, SONTERRA CAPITAL MASTER FUND, LTD., FRONTPOINT PARTNERS TRADING FUND, L.P., AND FRONTPOINT AUSTRALIAN OPPORTUNITIES TRUST on behalf of themselves and all others similarly situated, Plaintiffs, – against – BARCLAYS PLC, BARCLAYS BANK PLC, BARCLAYS CAPITAL INC., BNP PARIBAS S.A., CITIGROUP, INC., CITIBANK, N.A., COÖPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., CRÉDIT AGRICOLE S.A., CRÉDIT AGRICOLE CIB, DEUTSCHE BANK AG, DB GROUP SERVICES UK LIMITED, HSBC HOLDINGS PLC, HSBC BANK PLC, ICAP PLC, ICAP EUROPE LIMITED, J.P. MORGAN CHASE & CO., JPMORGAN CHASE BANK, N.A., THE ROYAL BANK OF SCOTLAND PLC, SOCIÉTÉ GÉNÉRALE SA, UBS AG AND JOHN DOE NOS. 1-50, Defendants	Docket No.: 13-cv-02811 (PKC)

~~[PROPOSED]~~
ORDER GRANTING CLASS COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

This matter came for a duly-noticed hearing on October 31, 2023 (the "Settlement Hearing"), upon Class Counsel's Motion for Award of Attorneys' Fees and Reimbursement of Expenses ("Fee and Expense Application") in the above-captioned action (the "Action"). The Court has considered the Fee and Expense Application and all supporting and other related materials, including the matters presented at the Settlement Hearing. Due and adequate notice of the Settlement Agreement between Plaintiffs and Defendant Société Générale entered into on

March 31, 2023 (the "Settlement Agreement")[1] (ECF No. 562-1) having been given to the Settlement Class Members, the Settlement Hearing having been held, and the Court having considered all papers filed and proceedings held herein, having found the Settlement of the Action to be fair, reasonable and adequate, and otherwise being fully informed in the premises and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. This Court has personal jurisdiction over Plaintiffs and Société Générale and all Settlement Class Members who have not timely and validly requested exclusion, and subject matter jurisdiction over the Action to approve the Settlement Agreement and all exhibits attached thereto.

2. Notice of the Fee and Expense Application was provided to potential Settlement Class Members in a reasonable manner, and such notice complies with Rule 23(h)(1) of the Federal Rules of Civil Procedure and due process requirements.

3. The Court hereby awards Class Counsel attorneys' fees of $16,800,000 (16 % of the total Settlement Fund), and litigation expenses of $98,568.15, together with interest for the same time period and at the same rate as earned by the Settlement Fund until paid, which shall be paid out of the Settlement Fund.

4. Class Counsel is hereby authorized to allocate the attorneys' fees among Plaintiffs' Counsel in a manner in which, in Class Counsel's judgment, reflects the contributions of such counsel to the institution, prosecution and settlement of the Action.

5. In making this award of attorneys' fees and payment of litigation expenses, the Court has considered and found that:

[1] Unless otherwise defined herein, all capitalized terms used have the meanings set forth and defined in the Settlement Agreement.

a. the Settlement Agreement with Société Générale has created a fund of $105,000,000 in cash that Société Générale has paid into escrow pursuant to the terms of the Settlement Agreement;

b. Class Members who or which submit valid Proofs of Claim and Release will benefit from settlement reached because of the efforts of Plaintiffs' Counsel;

c. Class Counsel have prosecuted the Action and achieved the Settlement with skill, perseverance, and diligent advocacy;

d. The Action involves numerous complex factual and legal issues and was actively litigated and, in the absence of a settlement, would have involved lengthy proceedings with uncertain resolution of the numerous complex factual and legal issues;

e. Had Class Counsel not achieved the Settlement with Société Générale, there would remain a significant risk that Plaintiffs and the Settlement Class may have recovered less or nothing from Société Générale;

f. The contingent nature, risks and complexity of the Action favor the fee percentage awarded above;

g. Public policy considerations support the requested fee, as only a small number of firms have the requisite expertise and resources to successfully prosecute cases such as the Action;

h. Notice was disseminated stating that Class Counsel would be moving for attorneys' fees of not more than 16.0% of the Settlement Fund and payment of litigation expenses and costs not to exceed $500,000, plus interest; and

i. The amount of attorneys' fees awarded and expenses to be paid from the Settlement Fund are fair and reasonable in view of the applicable legal principles and the particular facts and circumstances of the Action.

6. Without affecting the finality of this Order in any way, this Court hereby retains continuing jurisdiction over the Parties and the Class Members for all matters relating to this Action, including the administration, interpretation, effectuation, or enforcement of this Order.

7. In the event that the Settlement is terminated, or the Effective Date does not occur in accordance with the terms of the Settlement, this Order shall be null and void, of no further force or effect, and without prejudice to any of the Parties, and may not be introduced as evidence or used in any actions or proceedings by any Person against the Parties.

8. Pursuant to the Settlement Agreement, the attorneys' fees and expense awards are independent of the Court's consideration of the fairness, reasonableness, and adequacy of the Settlement and are also independent of the Court's consideration of the Distribution Plan.

9. The attorneys' fees and payment of expenses awarded herein may be paid to Class Counsel from the Settlement Fund immediately upon entry of this Order, subject to the terms, conditions, and obligations of the Settlement Agreement which terms, conditions, and obligations are incorporated herein.

IT IS SO ORDERED.

Signed this 31st day of October, 2023.

Honorable P. Kevin Castel
United States District Judge

TAB 52B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEPHEN SULLIVAN, WHITE OAK FUND LP, CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM, SONTERRA CAPITAL MASTER FUND, LTD., FRONTPOINT PARTNERS TRADING FUND, L.P., AND FRONTPOINT AUSTRALIAN OPPORTUNITIES TRUST on behalf of themselves and all others similarly situated,

Plaintiffs,

– against –

BARCLAYS PLC, BARCLAYS BANK PLC, BARCLAYS CAPITAL INC., BNP PARIBAS S.A., CITIGROUP, INC., CITIBANK, N.A., COÖPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., CRÉDIT AGRICOLE S.A., CRÉDIT AGRICOLE CIB, DEUTSCHE BANK AG, DB GROUP SERVICES UK LIMITED, HSBC HOLDINGS PLC, HSBC BANK PLC, ICAP PLC, ICAP EUROPE LIMITED, J.P. MORGAN CHASE & CO., JPMORGAN CHASE BANK, N.A., THE ROYAL BANK OF SCOTLAND PLC, SOCIÉTÉ GÉNÉRALE SA, UBS AG AND JOHN DOE NOS. 1-50,

Defendants

Docket No.: 13-cv-02811 (PKC)

MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES AND PLAINTIFF'S REQUEST FOR SERVICE AWARD

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Pursuant to this Court's April 18, 2023 Order,[1] Class Counsel respectfully move pursuant to Rule 23(h) of the Federal Rules of Civil Procedure for an attorneys' fees award of $16.8 million, 16% of the $105,000,000 common fund created by Plaintiffs'[2] settlement with Société Générale ("Settlement"), and reimbursement of $98,568.15 in litigation expenses. In addition, CalSTRS seeks a service award totaling $4,406.11 for reimbursement of its additional out-of-pocket expenses incurred in representing the Class and achieving this substantial additional Settlement.

INTRODUCTION

With the added Société Générale settlement, Class Counsel's relentless efforts on behalf of Plaintiffs and the Settlement Class have increased the total recovery in this Action by $105 million to $651,500,000. Using their substantial knowledge of the facts and law, Class Counsel implemented an effective litigation strategy that continues to provide substantial benefits for the Class, even from claims dismissed with prejudice. Class Counsel, assisted by additional Plaintiffs' Counsel,[3] have presented strong legal arguments, demonstrated their ability to engage in efficient and effective discovery, and developed a persuasive and credible class wide damages model that, Plaintiffs contend, reflects the significant potential liability involved in this case. It is because of the work Class Counsel invested throughout the litigation and their ability to prosecute the Class's claims on appeal and through trial that the Class will reap a substantial recovery from the settling defendants for their alleged manipulation of Euribor and Euribor Products.

[1] Order Preliminarily Approving Proposed Settlement with Defendant Société Générale, Scheduling Hearing for Final Approval Thereof, and Approving the Proposed Form and Program of Notice to the Class (S.D.N.Y. April 18, 2023), ECF No. 564.

[2] "Plaintiffs" are California State Teachers' Retirement System ("CalSTRS"), Stephen Sullivan, White Oak Fund LP, any subsequently named plaintiff(s), and any of their assignees that may exist now or in the future, including but not limited to Fund Liquidation Holdings, LLC ("FLH"). Unless otherwise defined, capitalized terms herein have the same meaning as in the Settlement Agreement. ECF No. 562-1.

[3] "Plaintiffs' Counsel" means Class Counsel and Berman Tabacco, Kirby McInerney LLP, Glancy Prongay & Murray LLP, Cafferty Clobes Meriwether & Sprengel LLP, and Nussbaum Law Group, P.C.

As described below, the risks involved in litigating an action of this complexity and magnitude, combined with the time and labor invested in the prosecution of the case and the quality of that prosecution, amply support awarding the requested 16% fee. *See* Part I.A-C, *infra*. Equally important given the length of this prosecution and the diligence Class Counsel have displayed, the remaining *Goldberger* factors and the lodestar cross-check support awarding the fee request. *See* Part I.D-E, *infra*. In addition, the agreed-upon sliding scale fee percentage CalSTRS negotiated in retaining Class Counsel also fully supports a 16% fee, which is reasonable and commensurate with awards in similarly (and less) complex actions with similar recoveries. *See* Part I.D.1, I.F, *infra*. Plaintiffs' Counsel spent 144,833.34 hours over ten years prosecuting the Action. This work has inured to the benefit of the Class and provides a sufficient foundation to support the fee request.

Plaintiffs' Counsel seek $98,568.15 for out-of-pocket litigation costs incurred from August 2022 through present. *See* Part II, *infra.* These expenses, described in the accompanying declarations of Vincent Briganti ("Briganti Decl."), Benjamin M. Jaccarino ("Jaccarino Decl."), and Todd A. Seaver ("Seaver Decl."), were incurred for the Class's benefit and predominantly related to prosecuting the Appeals and ongoing document production/hosting costs. Such costs are reasonable and should be reimbursed. CalSTRS also seeks a service award for out-of-pocket costs related to the representation of the Class in connection with this Settlement and the final approval of the Crédit Agricole settlement. *See* Part III, *infra*. CalSTRS continued its extensive involvement in this case on behalf of the Class, and its additional expenses and efforts should be compensated.

ARGUMENT

I. CLASS COUNSEL'S FEE REQUEST IS FAIR AND REASONABLE

"[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also In re Credit Default Swaps Antitrust Litig.*

("*CDS Litig.*"), No. 13-md-2476 (DLC), 2016 WL 2731524, at *16 (S.D.N.Y. Apr. 26, 2016). Courts "may award attorneys' fees in common fund cases under either the 'lodestar' method or the 'percentage of the fund' method;" the "trend in this Circuit is toward the percentage method." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005)). Courts assess the reasonableness of the fee request based on six factors: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation [ ]; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000).

Class Counsel request an award of $16.8 million, which is 16% of the $105,000,000 common fund and consistent with the fee schedule CalSTRS negotiated with Plaintiffs' Counsel prior to CalSTRS' involvement in the Action. The fee request is reasonable because: (1) the risks Class Counsel undertook to prosecute this Action were substantial, and Class Counsel's success in obtaining this Settlement (and the previous settlements), in spite of those risks and the complexity and magnitude of the Action, warrants granting a significant fee; (2) Class Counsel have invested considerable time and labor to prosecute the Action; (3) Class Counsel provided excellent representation as evidenced by another massive recovery for the Class, the lack of objections to the Settlement, and Class Counsel's expertise in benchmark litigation and class actions; (4) the remaining *Goldberger* factors—the size of the fee request as compared to fee awards in other similar cases, and the public policy interest in encouraging attorneys to pursue such actions—all support granting the fee request; and (5) the lodestar cross-check confirms that the requested fee is reasonable in relation to Class Counsel's investment in the case.

A. <u>The Risks Faced by Class Counsel in this Complex Action Support the Requested Fee</u>

The risks involved in pursuing a class action are substantial factors in calculating a fair and reasonable fee award. *Goldberger,* 209 F.3d at 54 ("We have historically labeled the risk of success

as 'perhaps the foremost' factor to be considered in determining whether to award an enhancement."); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014) ("*Payment Card*") ("The most important *Goldberger* factor is often the case's risk"); *In re Bristol-Myers Squibb Sec. Litig.*, 361 F. Supp. 2d 229, 233 (S.D.N.Y. 2005) (the risk of the litigation is the "first, and most important, *Goldberger* factor").

When a large, complex action is coupled with significant litigation risks, a greater fee award is warranted. *See In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 379 (S.D.N.Y. 2013) ("the magnitude and complexity of the litigation also weigh in favor of a significant award"). Such cases require a greater level of investment by counsel, in terms of effort, expertise, and resources, to competently litigate the claims and issues at stake on behalf of the class. Class actions involving antitrust and commodities claims stand out as some of the most "complex, protracted, and bitterly fought." *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 670 (S.D.N.Y. 2015); *In re Platinum & Palladium Commodities Litig.*, No. 10-cv-3617, 2014 WL 3500655, at *12 (S.D.N.Y. July 15, 2014) (commodities cases are "complex and expensive" to litigate).

As this Court previously observed, the claims involved in this Action were particularly high risk. *See* May 17, 2019 Settlement Hearing Tr. at 22-23 (ECF No. 504) ("there was substantial risk at the class certification stage, at the liability stage, damage stage, summary judgment stage, so this all weighs in favor of approving the settlement.").

Risk of Personal Jurisdiction Defenses: From the outset of litigation, the assertion of a personal jurisdiction defense by Société Générale and most other defendants posed an immediate existential risk to the prosecution of the claims against them. This risk materialized after Société Générale and the other Foreign Defendants[4] made several arguments that the Fourth Amended

[4] Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. ("Rabobank"), Crédit Agricole S.A., Crédit Agricole CIB (together with Crédit Agricole S.A., "Crédit Agricole"), Deutsche Bank AG, DB Group Services (UK) Ltd.

Complaint should be dismissed for a lack of personal jurisdiction, including that: (i) Foreign Defendants are not subject to general jurisdiction because Foreign Defendants are not at home in the relevant forum and have not consented to jurisdiction; (ii) Foreign Defendants are not subject to specific jurisdiction because the alleged conduct occurred outside the United States and Plaintiffs' specific jurisdiction allegations, including foreseeability of harm, U.S. derivatives transactions, conspiracy with U.S.-based entities, and use of U.S. wires, are insufficient; and (iii) no Federal statute provides for personal jurisdiction. *See* ECF No. 200. Here, the risk Plaintiffs faced from these personal jurisdiction defenses materialized while the state of the law on jurisdiction remained muddy, leading to the dismissal of claims against a number of the defendants, including Société Générale, and the subsequent appeal/cross-appeal of that decision.

Risk of Pleading and Merits Defenses: At the outset of this Action, it was unclear whether a private right of action was available under antitrust laws for the alleged misconduct. The risks of dismissal of private antitrust claims were realized in other cases shortly after filing this Action. *See, e.g.*, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 688 (S.D.N.Y. 2013) ("*LIBOR I*"). Plaintiffs' antitrust claims survived here because the Second Circuit's decision in *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 771-75 (2d Cir. 2016), vacated the prior consensus that private plaintiffs did not have antitrust claims for benchmark rate manipulation. *See Sullivan v. Barclays plc*, No. 13-cv-2811 (PKC), 2017 WL 685570, at *13 (S.D.N.Y. Feb. 21, 2017). When *Gelboim* was decided, Class Counsel had already been prosecuting these claims in high-risk conditions for over three years. *Gelboim* did not, however, mitigate other risks such as merits defenses, personal jurisdiction, and the inherent difficulty of litigating against some of the world's

(together with Deutsche Bank, AG, "Deutsche Bank"), HSBC Holdings plc, HSBC Bank plc (together with HSBC Holdings plc, "HSBC"), ICAP plc, ICAP Europe Ltd. (together with ICAP plc, "ICAP"), The Royal Bank of Scotland plc ("RBS"), and UBS AG ("UBS").

largest financial institutions with the financial resources and ability to prolong this case for years.

Due to these high risks and despite the presence of an ACPERA[5] applicant, no companion or tag along class actions were filed. Accordingly, Class Counsel assumed all of the foregoing risks alone, bearing the costs and potential loss on a contingent basis. *See In re Remeron Direct Purchaser Antitrust Litig.*, No. CIV.03-0085 FSH, 2005 WL 3008808, at *14 (D.N.J. Nov. 9, 2005), *judgment entered,* No. 03-cv-0085 (FSH), 2005 WL 8181042 (D.N.J. Nov. 9, 2005) (identifying "the uncertain nature of the fee, the wholly contingent outlay of large out-of-pocket sums by plaintiffs, and the fact that the risk of failure and nonpayment in an antitrust case are extremely high" as risks in an antitrust class action.).

Risk of Certifying a Class and Establishing Liability: Assuming Plaintiffs prevail on appeal, Plaintiffs would still face enormous challenges in certifying a litigation class and establishing liability. These antitrust claims involving both domestic and foreign misconduct are inherently complex. At class certification, Class Counsel would have to demonstrate, supported by expert testimony, that Defendants' alleged manipulation of the Euribor Products market caused class wide impact, an argument Defendants would vigorously oppose with expert testimony of their own. Class Counsel would need to establish Defendants' liability using evidence that in part uses technical financial language and industry jargon with which a factfinder is likely unfamiliar. Such information would also need to be used to establish common impact and show that class wide damages could be calculated based on common proof. The risks associated with certifying a class and establishing liability independently satisfy this *Goldberger* factor.

Risk of Establishing Damages: Société Générale would have argued that it was not liable for any of the damages that Plaintiffs allege. In addition, there are risks associated with establishing

[5] "ACPERA" means the Antitrust Criminal Penalty Enhancement and Reform Act (Pub. L. No. 108-237, tit. II, June 22, 2004, 118 Stat. 661, 665, extended by Pub. L. No. 111-190, June 9, 2010, 124 Stat. 1275).

a class wide damages model. *See In re Platinum & Palladium Commodities Litig.*, 2014 WL 3500655, at *12 ("[I]n any market manipulation or antitrust case, [p]laintiffs face significant challenges in establishing liability and damages."). For example, Plaintiffs' case depended on showing what Euribor would have been absent manipulation. Euribor is intended to reflect the cost of borrowing Euros in the interbank money market. Class Counsel, with the assistance of its experts, had to show that the Euribor was not reflective of such borrowing costs. Plaintiffs' experts opined on whether there were violations of the customs and standards in the relevant markets, and on how common impact and common proof of damages could be used to calculate class wide damages. *See* July 2023 Joint Decl. ¶ 55. These opinions were thoroughly scrutinized when Citi and JPMorgan deposed Plaintiffs' experts. *Id.* ¶ 60. While Class Counsel is confident in its position that class wide damages could be determined, there is always uncertainty where a battle of experts is involved. *Chatelain v. Prudential-Bache Sec., Inc.,* 805 F. Supp. 209, 214 (S.D.N.Y. 1992) (noting the complexities of calculating damages in class actions); *Maley v. Del Glob. Techs. Corp.,* 186 F. Supp. 2d 358, 372 (S.D.N.Y. 2002) (citing *Chatelain* and stating the complex issue of calculating damages incurred by the Class requires a battle of the experts). Given the risks involved with establishing damages, the requested attorneys' fee is appropriate.

Risks Due to the Size and Complexity of the Claims: A greater fee award is warranted for counsel prosecuting complex class action cases. *See In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d at 379; *see also In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998) ("*NASDAQ III*") ("[C]lass actions have a well-deserved reputation as being most complex"). This case was tremendously complex both in subject matter and scope, requiring a greater level of investment, in terms of effort, expertise, and resources, by counsel to competently litigate the claims and issues at stake on behalf of plaintiffs and the class. *See In re Vitamin C*

Antitrust Litig., No. 06-MD-1738 (BMC)(JO), 2012 WL 5289514, at *4 (E.D.N.Y. Oct. 23, 2012) (holding the first *Grinnell* factor favored finding the settlements were fair where litigation was ongoing for seven years, involved the production of thousands of documents, expert discovery and extensive motion practice); *accord Meredith Corp.*, 87 F. Supp. 3d at 670; *In re Platinum & Palladium Commodities Litig.,* 2014 WL 3500655 at *12. Class Counsel took this case on a fully contingent basis and invested considerable time, money, and resources to advance the Action. *See City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM)(GWG), 2014 WL 1883494, at *14 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015) ("The Second Circuit has recognized that the risk associated with a case undertaken on a contingent basis is an important factor in determining an appropriate fee award."). The likelihood of success would have been low absent Class Counsel's willingness and ability to commit sufficient time and resources to address the complexity and magnitude of the Action.

Complexity: This case involves a conspiracy among multiple banks and interdealer brokers to fix Euribor and Euribor Products prices over a Class Period of almost six years through multiple means, including, *inter alia*: (1) making false Euribor submissions; (2) "pushing cash" with manipulative transactions; (3) "spoofing" the market with false bids and offers; and (4) sharing proprietary information. ECF No. 174 (Fourth Amended Class Action Complaint) ¶ 18. The amount of work required to understand the inner workings of a cartel with this level of sophistication and number of participants was "extraordinary" in both its "complexity and scope" and required Class Counsel to master the properties of complex financial instruments and markets. *See In re GSE Bonds Antitrust Litig*., No. 19 Civ. 1704 (JSR), 2020 WL 3250593, at *4 (S.D.N.Y. June 16, 2020) (finding "complexity [is] present [where] plaintiffs claimed that the defendants colluded in the GSE Bond market over more than seven years, involving thousands of bond

issuances, and implicating sixteen defendants"); *In re Holocaust Victim Assets Litig.*, No. CV 06-0983 (FB)(JO), 2007 WL 805768, at *46 (E.D.N.Y. Mar. 15, 2007), *report and recommendation adopted,* 528 F. Supp. 2d 109 (E.D.N.Y. 2007), *as amended* (Dec. 14, 2007).

Magnitude: Over the course of ten years of litigation involving up to 20 Defendants, the parties produced over 560 docket entries associated with four amended complaints and motions to dismiss, transfer venue, reconsider orders, and issue a request to obtain documents via The Hague Convention. The motion to dismiss briefing involved six memoranda of law, 19 declarations, numerous exhibits, and 14 letter briefs discussing opinions issued after the motion had been fully briefed. There have been hundreds of thousands of documents, spreadsheets and audio files produced, and thousands of hours of work spent on understanding all this information. The appeal and cross-appeal of the Court's decisions further expanded the cost and duration of the Action. The nature, duration, size of the case, complexity of the financial instruments, and sophistication and the depth of the conspiracy weigh heavily in favor of approving the requested fee.

B. <u>The Time and Labor Expended by Class Counsel Support the Requested Fee</u>

This Settlement is the product of the continued investigation, diligence and skill of Class Counsel, who are among the most experienced attorneys litigating interest rate benchmark manipulation cases. They shouldered the risk of the litigating this Action and, through their work, continue to produce outstanding results for Plaintiffs and the Class.

Class Counsel's efforts throughout the Action laid the foundation for this Settlement. In total, Class Counsel spent 133,467.24 hours litigating this Action for over a decade to achieve this massive benefit for the Class. A description of the efforts of Plaintiffs' Counsel can be found in the Joint Declaration accompanying this brief, as well the declarations filed in support of the prior settlements. *See* ECF Nos. 403-04, 411, 472-473, 483, 525. A summary of Class Counsel's and additional Plaintiffs' Counsel's work is described below.

1. *Settlement Negotiations with Société Générale*

Negotiations between Plaintiffs and Société Générale to resolve their dispute initially began in February 2017. July 2023 Joint Decl. ¶ 17. In advance of these discussions, Class Counsel conducted targeted searches through the discovery and cooperation materials it received and reviewed regulatory settlements and findings to compile information on Société Générale's culpability. *Id*. ¶ 18. The information generally informed Class Counsel's negotiation strategy, and certain key findings were integrated into robust settlement presentations. *Id*. ¶ 54. Using this information, Class Counsel engaged in preliminary settlement discussions with Société Générale's counsel that continued over several months. Ultimately, these initial discussions did not progress.

In May 2022, settlement negotiations resumed, with the Parties sharing their updated views on the case, Société Générale's potential exposure, and the measure of damages in the event of liability. *Id*. ¶ 20. After months of preliminary negotiations, on November 8, 2022, the Parties reached an agreement in principle and signed a settlement term sheet ("Term Sheet"). *Id*. ¶ 20. Extensive negotiations continued between the Parties over the next approximately four-and-a-half months to reduce the Term Sheet to a formal settlement agreement, culminating in the execution of the Settlement Agreement on March 31, 2023. *Id*. ¶ 23.

2. *Plaintiffs' Counsel's Substantial Earlier Efforts in the Action*

i. Drafting and Amending the Class Action Complaint.

Class Counsel drafted and filed the initial Class Action Complaint and four amended complaints over a two-and-a-half year period, amending the allegations each time they received or uncovered newly disclosed relevant facts. *Id.* ¶ 27. Using, among other sources, information contained in regulatory agency settlements and findings involving Defendants, as well as settlement cooperation received from Barclays, Deutsche Bank, and HSBC, Class Counsel

augmented the complaints in a strategic effort to address potential pleading defenses and improve the likelihood of defeating Defendants' forthcoming motion to dismiss. *Id.* ¶ 27.

ii. Substantial Discovery Efforts.

Class Counsel devoted substantial resources to obtain and analyze discovery materials while working under significant time pressure due to the discovery schedule. Class Counsel:

- analyzed more than one million pages of documents, tens of thousands of audio files and other data received from Prior Settling Defendants.[6] *Id.* ¶ 28.
- participated in dozens of meet-and-confers concerning documents and data production, including negotiating access to transaction data essential for class certification. *Id.* ¶ 30.
- leveraged in-house technological expertise to locally deploy Relativity, a sophisticated document review platform, to greatly reduce the hours required for review and to prioritize the most relevant files. *Id.* ¶ 32.
- used sophisticated document review software to exploit potential key terms through smart searches, "relational searching" and other analytic tools. These tools identified relevant documents, followed themes and dates of conversations, and cross-referenced and matched them to significant individuals. *Id.* ¶ 33.
- identified over 1,400 potential instances of agreement or manipulation, over 400 instances of potential admissions of manipulation, and over 100,000 relevant documents. *Id.*
- prepared witness lists and correlated witnesses to significant documents. *Id.* ¶ 42.
- prepared and defended Plaintiffs' expert witnesses during two separate all-day depositions (*Id.* ¶¶ 59-60), and prepared to depose Citi and JPMorgan's experts prior to reaching a settlement. *Id.* ¶ 61.

Class Counsel also responded to Citi and JPMorgan's discovery requests, working closely with CalSTRS and FrontPoint/FLH to identify responsive documents. *Id.* ¶ 47. Specifically, Class Counsel:

[6] The "Prior Settling Defendants" are Barclays plc, Barclays Bank plc and Barclays Capital Inc. ("Barclays"), Crédit Agricole S.A. and Crédit Agricole CIB ("Crédit Agricole"), Deutsche Bank AG and DB Group Services (UK) Ltd. ("Deutsche Bank"), HSBC Holdings plc, and HSBC Bank plc. ("HSBC"), Citigroup Inc. and Citibank, N.A. ("Citi"), and JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. ("JPMorgan").

- worked with former FrontPoint personnel to identify and collect relevant documents (*id.* ¶ 48);
- reviewed boxes of documents held in storage for information responsive to document requests and interrogatories (*id.* ¶ 49);
- collected and reviewed over 457,000 documents of potentially relevant documents to Relativity (*id.* ¶ 50);
- produced over 49,000 pages of FrontPoint's and CalSTRS' documents (*id.* ¶¶ 51-52).

iii. Development of the Class Wide Models of Alleged Violative Conduct and Price Impact and Preparation of Class Certification Reports

Even before all the necessary data and documents were available, Class Counsel engaged in comprehensive discussions with industry and economic experts to outline a strategy for class certification. Class Counsel decided to use two experts to develop expert reports relating to (1) JPMorgan's and Citi's alleged violations of customs and standards in the euro-denominated interbank loan market and the Euribor Products market, and (2) common impact and common proof of damages. *Id.* ¶ 55.

To assist the expert preparing the report on the alleged violations of market customs and standards, Class Counsel provided the expert with relevant policy and procedure guides produced by Citi and JPMorgan, as well as related communications. *Id.* ¶ 54. The expert used these documents to support his ultimate opinion. *Id.*

Plaintiffs' second expert employed a benchmark comparison approach to demonstrate how Plaintiffs could show common impact and common proof of damages. *Id.* ¶ 56. Class Counsel obtained nearly a decade's worth of historical Euribor submissions data and benchmark data that could be used to demonstrate the artificiality caused by Euribor manipulation. *Id.* ¶ 57. Plaintiffs' expert recommended applying a regression analysis of the relationship between Euribor and the benchmark data during the alleged manipulated and unmanipulated periods to assess where

artificiality could be objectively observed. *Id.* To ensure that this model was defensible, additional research was performed to understand the use of regression analysis in expert reports and the commonly accepted characteristics of such analysis, as well as the use of control periods in expert analysis and the standards applied to such data. *Id.* This research helped Class Counsel to ensure the expert report properly framed the inquiry and would ultimately be deemed reliable. *Id.*

3. *Appellate Work and Settlement Administration*

Class Counsel also continued to advance Plaintiffs' appeal from certain orders, including the February 21, 2017 Order denying in part and granting in part Defendants' motion to dismiss. In May 2022, Class Counsel worked with appellate counsel to file a 60-page opening brief, arguing that: (i) intervening precedent establishes U.S. Courts' personal jurisdiction over the remaining defendants; (ii) defendants intended to manipulate Euribor; (iii) Plaintiffs are the most efficient enforcers possible for futures-based antitrust claims; and (iv) the Complaint adequately alleges a domestic RICO claim. July 2023 Joint Decl. ¶ 64. Coöperatieve Rabobank U.A., The Royal Bank of Scotland Group plc (n/k/a NatWest Group plc), Société Générale, and UBS AG (collectively, the "Principal Appellees-Cross-Appellants") filed their principal appeal brief, and ICAP plc and ICAP Europe Limited ("ICAP") joined the principal appeal brief and filed an additional brief in August 2022. *Id*. ¶ 65. Class Counsel filed a brief that included its reply in support of Appellants-Cross-Appellees' appeal and its response to the briefs filed by Principal Appellees-Cross-Appellants and ICAP in October 2022, and worked with appellate counsel to finalize a joint appendix in November 2022. *Id*. ¶ 67. On November 4, 2022, the Principal Appellees-Cross-Appellants and ICAP each filed a reply brief. *Id*. ¶ 68.

In addition, Class Counsel continue to supervise the settlement administration process to ensure an accurate and efficient processing of the over 46,000 claims received. *Id.* ¶ 71.

4. *Negotiating Settlements with the Prior Settling Defendants*

Negotiations with the Prior Settling Defendants occurred over a nine-year period, beginning in 2013 and Barclays' production of cooperation materials pursuant to ACPERA through to the completion of the Crédit Agricole settlement agreement in March 2022.

Throughout the process of negotiating the settlements with the Prior Settling Defendants, Class Counsel presented Plaintiffs' views on the factual and legal issues in the case and critically analyzed each Prior Settling Defendant's opposing views in services of identifying opportunities for settlement. While settlement negotiations with each Prior Settling Defendant were ongoing, Class Counsel continued their analysis of the documents and information obtained throughout the course of Class Counsel's extensive investigation, including: (i) ACPERA provided by Barclays, and settlement cooperation gained through earlier settlements; (ii) government settlements, including plea, non-prosecution and deferred prosecution agreements; (iii) publicly available information relating to the conduct alleged in Plaintiffs' complaints; and (iv) expert and industry research regarding Euribor and Euribor Products in futures and over-the-counter markets; and (v) prior decisions of this Court and others deciding similar issues.

The settlements negotiated with the Prior Settling Defendants involved nearly a decade's worth of relentless litigation and advocacy on behalf of Plaintiffs by Class Counsel. As a direct result of Class Counsel's past and present efforts, $651,500,000 has been recovered on behalf of the Class, who without Class Counsel's diligence, would have been left without recompense.

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Plaintiffs' Counsel have spent more than 144,000 hours over ten years prosecuting this Action, with Class Counsel contributing over 133,000 hours and significant resources to the case. The fruits of this labor are evident in the extraordinary recovery thus far for the Settlement Class. Accordingly, this *Goldberger* factor weighs heavily in favor of granting the fee request.

C. Quality of Representation

"[T]he quality of representation is best measured by results," *Goldberger*, 209 F.3d at 55, which are evaluated by "the recovery obtained and the backgrounds of the lawyers" involved in the suit. *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 141 (S.D.N.Y. 2008).

Results Obtained: The settlements reached so far provide significant value to the Class. $546,500,000 has already been obtained from the Prior Settling Defendants, in and of itself an extraordinary result by Class Counsel. The Settlement with Société Générale will add $105,000,000, bringing the total funds available to the Class to $651,500,000. These funds will provide Class members with an immediate recovery.

Moreover, the size of the Settlement Fund may continue to grow as Class Counsel continue to appeal Plaintiffs' claims against the non-settling Defendants. In negotiating the Settlement, Class Counsel secured significant cooperation from Société Générale intended to assist with the prosecution of any claims against any non-settling Defendants remanded to this Court. *See* Settlement Agreement ¶¶ 23-29. This cooperation was an essential component of the Settlement Agreement, requested to enhance Class Counsel's ability to further prosecute the Action. Class Counsel acted in the best interests of the Class and protected Plaintiffs' ability to pursue claims against the non-settling Defendants.

The Settlement Class consists of numerous institutional investors, including Plaintiffs, with the sophistication and resources to object to the Settlement or opt out to pursue claims on their own. While the deadlines to object or opt out have not passed, it is noteworthy that no objections have been lodged and only two potential Class Members have opted out of the Settlement. *See* Declaration of Steven Straub on behalf of A.B. Data, Ltd. Regarding Notice Administration ¶¶ 30, 32. The Class's reaction thus far provides another indication of the incredible results achieved.

Background of Lawyers Involved: Class Counsel have decades of experience prosecuting class action cases, including some of the largest class action recoveries under the commodities and antitrust laws.[7] This includes specific expertise in benchmark manipulation as demonstrated by Class Counsel's current tenure as lead counsel in cases alleging anticompetitive and manipulative conduct for several "IBOR" rates.[8] Additional examples of Class Counsel's more than 70 years of combined experience with complex litigation are detailed in Class Counsel's resumes.

Another consideration for assessing the quality of the representation is "[t]he quality of the opposing counsel" in the case. *See Maley*, 186 F. Supp. 2d at 373. The valuable settlement that Class Counsel secured cannot be understated given the caliber of Société Générale's counsel in this Action. *See Meredith Corp.*, 87 F. Supp. 3d at 670 (noting that counsel's achievement in "obtaining valuable recompense . . . for its clients is particularly noteworthy given the caliber and vigor of its adversaries").[9] The fact that Class Counsel successfully prosecuted this Action for over a decade against other formidable opponents leading to the recovery of more than $650 million dollars further reflects the quality of representation provided. The caliber of work that Class Counsel and defense counsel performed in this Action led this Court to conclude when reviewing prior settlements in this case that the "lawyering was a judge's dream." *See* May 17, 2019 Settlement Hearing Tr. at 31 (ECF No. 504).

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[7] *See* ECF Nos. 562-6 (attaching Lowey's firm resume), 562-7 (attaching Lovell's firm resume).

[8] *See, e.g.*, *Sonterra Capital Master Fund Ltd. et al. v. Credit Suisse Group AG et al.*, No. 15-cv-871 (SHS) (S.D.N.Y.); *Sonterra Capital Master Fund Ltd. et al. v. Barclays Bank plc,* 15-cv-3538 (VSB) (S.D.N.Y) (Sterling Libor); *Fund Liquidation Holdings LLC v. Citibank, N.A.*, 16-cv-5263 (AKH) (S.D.N.Y.) (SIBOR); *Laydon v. Mizuho Bank Ltd., et al.*, No. 12-cv-3419 (GBD) (S.D.N.Y.) and *Fund Liquidation Holdings LLC as assignee and successor-in-interest to Sonterra Capital Master Fund, Ltd., et al. v. UBS AG, et al.*, No. 15-cv-5844 (GBD) (S.D.N.Y.); and *Richard Dennis, et al. v. JPMorgan Chase & Co., et al.*, No. 16-cv-06496 (LAK) (S.D.N.Y.).

[9] *See also NASDAQ III*, 187 F.R.D. at 488 (approving attorneys' fee award where defendants were represented by "several dozen of the nation's biggest and most highly regarded defense law firms."); *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MC-2543 (JMF), 2020 WL 7481292, at *2 (S.D.N.Y. Dec. 18, 2020) (litigating against sophisticated opposing counsel with a well-funded defendant are "the hallmarks of a challenging case.").

D. The Fee Request is Supported by the Remaining *Goldberger* Factors

Goldberger factors one through four, discussed *supra* in Part I.A-B, support granting a substantial fee to Class Counsel. The remaining *Goldberger* factors discussed below further augment the basis for awarding the requested fee.

1. *Class Counsel's Request is Within the Range Used Under the Second Circuit's Preferred Percentage-Based Methodology*

The reasonableness of the requested fee is confirmed by the cases applying the "percentage method" of fee calculation favored in this Circuit. *See Wal-Mart Stores*, 396 F.3d at 121 ("The trend in this Circuit is toward the percentage method"); *see also In re Beacon Assocs. Litig.*, No. 09 CIV. 3907 (CM), 2013 WL 2450960, at *5 (S.D.N.Y. May 9, 2013) (explaining that "percentage of recovery" is "the preferred method of calculating the award for class counsel in common fund cases"). Courts prefer the "percentage method" because it is easy to administer and avoids the "dubious merits of the lodestar approach." *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003); *see also NASDAQ III*, 187 F.R.D. at 485 (noting that the percentage method is easy to administer). It also "aligns the interests of the class and its counsel" while incentivizing "the efficient prosecution and early resolution of litigation." *Hall v. Children's Place Retail Stores Inc.*, 669 F. Supp. 2d 399, 401 (S.D.N.Y. 2009) (citation omitted). Use of the percentage method is particularly appropriate in this instance, as the Settlement simplified the Appeal by eliminating the need for the Second Circuit to review the question of personal jurisdiction over Société Générale.

If the Court considers the total fees awarded in the Action, granting the $16.8 million request will result in Plaintiffs' Counsel receiving, in the aggregate, attorneys' fees of $129.24

million, or 19.84% of the $651.5 million recovered.[10] This percentage is comparable to the total fee awards granted in other similarly sized settlements. *See Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-cv-7126 (JMF), 2018 WL 6250657, at *3 (S.D.N.Y. Nov. 29, 2018) (awarding 26% of the net settlement fund from a $504.5 million settlement); *Payment Card*, 991 F. Supp. 2d at 445 (adopting sliding scale that awarded a 20% attorneys' fee on the first $650 million recovered; total fee award of 9.56% on the $5.7 billion settlement); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding one-third of the net settlement fund arising from a $586 million settlement); *In re Adelphia Commc'ns Corp. Sec. and Derivative Litig.*, No. 03 Civ. 5755, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006), *aff'd*, 272 F. App'x 9 (2d Cir. 2008) (awarding attorneys' fees of 21.4% of $455 million fund in complex securities class action settlement); *Ohio Pub. Employees Ret. Sys. v. Freddie Mac.*, No. 03-CV-4261, 2006 U.S. Dist. LEXIS 98380, at *4 (S.D.N.Y. Oct. 26, 2006) (Sprizzo, J.) (awarding 20% of $410 million settlement, representing a 2.33 multiplier); *In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d at 381 (awarding attorneys' fees of 16.0% of the settlement fund of $730 million); *Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400, 403 (D. Conn. 2009), *aff'd*, 355 F. App'x 523 (2d Cir. 2009) (awarding attorneys' fees equal to 16.0% of a $750 million settlement fund); *see also In re Urethane Antitrust Litig.*, No. 04 Civ. 1616, 2016 WL 4060156, at *6 (D. Kan. July 29, 2016) (awarding 33.33% fee on $835 million settlement); *Dahl v. Bain Capital Partners, LLC*, No. 07-cv-12388, Dkt. No. 1095 (D. Mass. Feb. 2, 2015) (awarding 33% in attorneys' fees from a $590.5 million antitrust

[10] Class Counsel's 16.0% fee request for this Settlement is within, if not below, the range of reasonable attorneys' fees approved in complex class actions in this Circuit, including other "IBOR" cases, and is an equal or smaller percentage than the fees approved in similarly sized settlements. *See, e.g., In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004) (finding 16% of a $205 million settlement fund to be a fair and reasonable fee award); *Bd. of Trustees of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, No. 09 Civ. 686 (SAS), 2012 WL 2064907, at *1 (S.D.N.Y. June 7, 2012) (approving attorneys' fees of 25% of a $150 million settlement fund); *In re J.P. Morgan Stable Value Fund ERISA Litig.*, No. 12-cv-2548 (VSB), 2019 WL 4734396, at *2 (S.D.N.Y. Sept. 23, 2019) (awarding one-third fee from $75 million settlement fund).

settlement); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 2000 WL 204112, at *3 (N.D. Ill. Feb. 10, 2000) ($175,000,000 (25.12%) of $696,667,000 settlement awarded as attorneys' fees). The fee request is also less than Class Counsel requested in from earlier settlements in this Action.

Further, while these similarly sized settlements all involved complex litigation, the majority of these cases did not involve the risks, magnitude, and complexity faced by Class Counsel in litigating this Action for over a decade. *See In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d at 379 (securities litigation lasting 4.5 years, a type of case which the court noted the risk of achieving no recovery has become quite small); *Carlson*, 596 F. Supp. 2d at 403, *aff'd*, 355 F. App'x 523 (2d Cir. 2009) (noting that the litigation risks were at most those presented by a typical case); *Alaska Elec. Pension Fund*, 2018 WL 6250657, at *1 (antitrust litigation spanning four years and involving settlements with 15 defendants totaling $504.5 million).

Empirical studies underscore the reasonableness of the requested fee. A survey of antitrust class settlements found that, between 2009 and 2021, the median attorneys' fees award was 26% for settlements ranging from $500 million to $999 million. *See* Center for Litigation and Courts and The Huntington National Bank, *2021 Antitrust Annual Report: Class Actions in Federal Court* (April 2022) at 27-28;[11] *see also* Theodore Eisenberg et. al., *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 952 (2017) (the median and average percentages awarded for attorneys' fees in antitrust recoveries between 2009-2013 were 30% and 27%, respectively); WILLIAM B. RUBENSTEIN, 5 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 15:78 (6th ed. 2023) (mean percentage for attorneys' fees in Second Circuit class actions from 2009 to 2013 was 28%).

[11] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4117930.

When all of the metrics above are considered, Class Counsel's fee request is demonstrably within the range of reasonable fee awards regularly granted by courts in this District.

2. *Public Policy Supports Approval*

Had Class Counsel not prosecuted this Action, the class of investors in Euribor Products would have been left without recompense for their losses. Despite the government investigations and certain Defendants' admissions of wrongdoing, many investors harmed by the conspiracy would not have received any money at all but for this Action. *See, e.g.*, *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 352 (S.D.N.Y. 2014) ("providing lawyers with sufficient incentive to bring common fund cases . . . serve[s] the public interest") (citations omitted).

Public policy encourages enforcement of the antitrust laws through private civil suits to deter infringing conduct in the future. *See Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983) ("This Court has emphasized the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws."). Awarding a reasonable percentage of the common fund further ensures that Class Counsel retains the ability and incentive to pursue antitrust violations at their own expense even when recovery is uncertain. *See Goldberger*, 209 F.3d at 51 ("There is . . . commendable sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest.").

E. The Lodestar Value of Class Counsel's Time and Labor Confirms the Reasonableness of the Fee Request

The amount of work that Plaintiffs' Counsel have undertaken is further evident in the total lodestar in this Action. Courts in this Circuit use the lodestar calculation "as a sanity check to ensure that an otherwise reasonable percentage fee would not lead to a windfall." *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d at 353. There is no windfall here.

Plaintiffs' Counsel have worked 144,833.34 hours in this Action as of June 30, 2023, for an aggregate lodestar of $72,015,852.45. *See* July 2023 Joint Decl. ¶ 83; Briganti Decl.; Jaccarino Decl.; Seaver Decl. Class Counsel applied rate caps and audited the time for reasonableness and necessity. Current rates have not been applied to the work performed through June 30, 2022 that was included in previous fee applications. The $16.8 million fee requested, when combined with the previously awarded fees totaling $112.44 million, constitutes a 1.8 multiplier. This is less than the negotiated 3.5 risk multiplier cap in the CalSTRS's retainer. *See* Part I.F, *infra*. As a result, the full fee will not result in an "unwarranted windfall." *Goldberger*, 209 F.3d at 49. It is also comparable or less than the range of multipliers approved in this and other circuits.[12]

F. The Negotiated Sliding Fee Scale on which Class Counsel's Request is Based Provides Further Evidence of the Proposed Award's Reasonableness

Court-awarded attorneys' fees should reflect "what a reasonable, paying client would be willing to pay" for counsel's services. *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany & Albany Cty. Bd. of Elections,* 522 F.3d 182, 184 (2d Cir. 2008). Courts give great weight to negotiated fee agreements because they typically reflect actual market rates. *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008) ("In many cases, the agreed-upon fee will offer the best indication of a market rate."). If a "sophisticated benefits fund with fiduciary obligations to its members and [ ] a sizeable stake in the litigation" negotiates an *ex ante* fee agreement, courts recognize that there is a "rebuttable 'presumption of correctness'" that should apply to those terms. *CDS Litig.*, 2016 WL 2731524, at *16.

[12] *See, e.g.*, *CDS Litig.*, 2016 WL 2731524, at *17 (approving a lodestar multiplier of "just over 6" in a complex antitrust class action); *Beckman v. KeyBank N.A.,* 293 F.R.D. 467, 481 (S.D.N.Y. 2013) (approving a multiplier of 6.3 in class action, explaining that "[c]ourts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers."); *Maley*, 186 F. Supp. 2d at 371 (holding that a 4.65 lodestar multiplier is modest, fair, and reasonable); *see also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052 (9th Cir. 2002) (listing nationwide class action settlements where the lodestar multiplier ranged up to 8.5). Under the CalSTRS fee agreement, the risk multiplier is based on the total lodestar since inception.

The attorneys' fee request of 16.0% ($16.8 million) of the $105,000,000 common fund complies with the sliding fee scale included in the retainer that CalSTRS negotiated with Class Counsel and Berman Tabacco. Further, in the aggregate, the fee request is well within the 3.5 multiplier cap for aggregate lodestar for all Plaintiffs' Counsel that is imposed in the retainer agreement. *See* Declaration of Brian Bartow dated July 13, 2023 ("Bartow Decl.") ¶ 7. CalSTRS is the second largest pension fund in the United States, with more than 980,000 members and beneficiaries, and an investment portfolio currently valued at $309.3 billion. *See* Bartow Decl. ¶ 4. Since 2014, CalSTRS has been an active and engaged plaintiff. *Id.* ¶¶ 10-22. CalSTRS' General Counsel has scrutinized every aspect of Class Counsel's work and independently concluded that he supports both the motion for final approval and the requested award of attorneys' fees. *See Id*. ¶¶ 23-26. This Court has approved fee awards based on CalSTRS' retainer with Class Counsel three times previously. *See* ECF Nos. 425, 500, 550. Notably, no Class Member has objected to any of the prior three fee requests that have been based on CalSTRS' retainer. July 2023 Joint Decl. ¶ 80.

CalSTRS' *ex ante* judgment about the attorneys' fees in this case, as well as CalSTRS' *post hoc* support of the fee request in light of its involvement in the Action amply exceed the factors identified in *CDS Litig.* to create a presumption of reasonableness here.

II. CLASS COUNSEL'S EXPENSES ARE REASONABLE

The attorneys whose work leads to the creation of "a common settlement fund for a class are entitled to reimbursement of [reasonable] expenses that they advance to a class." *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 671 (S.D.N.Y. 2015); *see also In re Arakis Energy Corp. Sec. Litig.*, No. 95 CV 3431(ARR), 2001 WL 1590512, at *17 n.12 (E.D.N.Y. Oct. 31, 2001) ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course."). Plaintiffs' Counsel incurred $98,568.15 in expenses from August 2022 to the present.

See July 2023 Joint Decl. ¶¶ 85-86. This amount is well below the $500,000 Class Counsel advised in the Court-approved notice sent to Settlement Class Members. *See* ECF No. 562-3 at 8.

These costs and expenses were "incidental and necessary to the representation of the [C]lass," and should be reimbursed. *See Beckman*, 293 F.R.D. at 482. Since August 2022, $50,000 (or 50.73%) of Plaintiffs' Counsel's reimbursable expenses went towards engaging appellate counsel to assist Plaintiffs in the Appeals, and $34,972.08 (or 35.48%) of Plaintiffs' Counsel's reimbursable expenses were related to ongoing document production and hosting costs.

III. THE COURT SHOULD GRANT CALSTRS' SERVICE AWARD REQUEST

"Service" or "incentive" awards to class representatives are granted at the discretion of the Court to "compensate class representatives for their services to the class and simultaneously serve to incentivize them to perform this function." WILLIAM B. RUBENSTEIN, 5 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 17:1 (6th ed. 2023). In deciding whether to grant such awards, a court considers "'the personal risk (if any) incurred by the plaintiff-applicant in becoming and continuing as a litigant, the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise), any other burdens sustained by that plaintiff . . . and, of course, the ultimate recovery.'" *Dial Corp. v. News Corp.*, 317 F.R.D. 426, 439 (S.D.N.Y. 2016) (quoting *Roberts v. Texaco*, 979 F. Supp. 185, 200 (S.D.N.Y. 1997)); *see also Anwar v. Fairfield Greenwich Ltd.*, No. 09-cv-118 (VM), 2012 WL 1981505, at *3 (S.D.N.Y. June 1, 2012) ("Courts consistently approve awards in class action lawsuits to compensate named plaintiffs for the services they provide and burdens they endure during litigation."); *Beckman*, 293 F.R.D. at 483 ("It is important to compensate plaintiffs for the time they spend and the risks they take."). Courts recognize that out-of-pocket costs incurred by class representatives are reimbursable as part of a service award. *See Warren v.*

Xerox Corp., No. 01-CV-2909(JG), 2008 WL 4371367, at *6 n.3 (E.D.N.Y. Sept. 19, 2008). Based on these factors, a service award for CalSTRS is warranted.

As set forth in its declaration, Plaintiff CalSTRS was vigilant in its representation of the Class. CalSTRS' request for a service award is based upon the substantial amount of time it devoted to and costs it incurred in the Action in connection with this Settlement and the Crédit Agricole settlement. *See generally* Bartow Decl. CalSTRS played an active role in the last year by attending the fairness hearing for the Crédit Agricole settlement and closely supervising and participating in the settlement negotiations with Société Générale.

The efforts by CalSTRS are precisely the types of activities courts have found to support reimbursement to class representatives. *See, e.g.*, *In re Petrobras Sec. Litig.*, 317 F. Supp. 3d 858, 873 (S.D.N.Y. 2018) (Rakoff, J.) (awarding three class representatives a total of $400,000 as compensation for, among other things, responding to discovery, "providing oversight of the mediation and settlement process," and reviewing and authorizing settlement).; *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *21 (S.D.N.Y. Dec. 23, 2009) (awarding $144,657 to the New Jersey Attorney General's Office and $70,000 to certain Ohio pension funds, to compensate them "for their reasonable costs and expenses incurred in managing this litigation and representing the Class" and noting that these efforts were "precisely the types of activities that support awarding reimbursement of expenses to class representatives"); *In re Satyam Computer Servs. Ltd. Sec. Lit*ig., No. 09-MD-2027-BSJ, slip. op. at 3-4 (S.D.N.Y. Sept. 13, 2011), ECF No. 365 (awarding an aggregate amount of $195,111 as reimbursement for the costs and expenses of class representatives directly relating to their services in representing the class). As Judge Sweet observed in *In re Gilat Satellite Networks, Ltd.,* "[s]ince the tasks undertaken by employees of Lead Plaintiffs reduced the amount of time

those employees would have spent on other work and these tasks and rates appear reasonable to the furtherance of the litigation, the motion for . . . expenses for Lead Plaintiffs is granted." No. CV-02-1510 (CPS)(SMG), 2007 WL 2743675, at *19 (E.D.N.Y. Sept. 18, 2007). Similarly, in *In re American International Group, Inc. Securities Litigation*, Judge Batts found that "the request of [lead plaintiffs] OPERS and STRS Ohio for reimbursement of $71,910.00 in lost wages related to their active participation in this action is reasonable," No. 04 Civ. 8141 (DAB), 2012 WL 345509, at *6 (S.D.N.Y. Feb. 2, 2012). Here, the award sought by CalSTRS is reasonable and justified based on its extensive involvement in the Action and should be granted.

The notice to Class Members stated that in the event Plaintiffs sought a service award, such amount would not exceed $150,000. To date, there have been no objections to this request. Class Counsel respectfully request that the Court award $4,406.11 to CalSTRS as compensation for its reasonable costs and expenses incurred in representing the Class. The service award of $4,406.11 represents 0.0042% of the Société Générale Settlement. This percentage is comparable to incentive or service awards granted in other cases. *See In re GSE Bonds Antitrust Litig.,* 19-cv-1704 (JSR) (S.D.N.Y.); *Laydon v. Mizuho Bank, Ltd.*, No. 12-cv-3419 (GBD), ECF No. 724 (S.D.N.Y. Nov. 10, 2016) (awarding $580,000 in incentive awards to plaintiffs, representing 1% of the settlement fund); *Dial Corp.*, 317 F.R.D. at 438-39 (awarding 0.12% of the $244 million settlement fund ($300,000) to six class representatives); *In re Air Cargo Shipping Services Antitrust Litig.*, No. 06-MD-1775 (JG)(VVP), 2015 WL 5918273, at *6 (E.D.N.Y. Oct. 9, 2015) (granting $540,000 in incentive awards, representing 0.06% of the total $900 million in settlements, to six class representatives).

CONCLUSION

For the foregoing reasons, Class Counsel respectfully requests that the court approve their application for attorneys' fees and costs and service award in the amounts set forth above.

Dated: July 13, 2023

Respectfully submitted,

LOWEY DANNENBERG, P.C.

/s/ Vincent Briganti
Vincent Briganti
Geoffrey Horn
44 South Broadway, Suite 1100
White Plains, NY 10601
Tel.: (914) 997-0500
Fax: (914) 997-0035
E-mail: vbriganti@lowey.com
E-mail: ghorn@lowey.com

LOVELL STEWART HALEBIAN JACOBSON LLP

/s/ Christopher Lovell
Christopher Lovell
Benjamin M. Jaccarino
500 Fifth Avenue, Suite 2440
New York, NY 10110
Tel.: (212) 608-1900
Fax: (646) 398-8392
E-mail: clovell@lshllp.com
E-mail: bjaccarino@lshllp.com

Class Counsel

BERMAN TABACCO
Joseph J. Tabacco, Jr.
Todd A. Seaver
425 California Street, Suite 2300
San Francisco, CA 94104
Tel.: 415-433-3200
Fax: 415-433-6282

GLANCY PRONGAY & MURRAY LLP
Brian P. Murray
Lee Albert
230 Park Avenue, Suite 358
New York, NY 10169
Tel.: 212-682-5340
Fax: 212-884-0988

BERMAN TABACCO
Patrick T. Egan
One Liberty Square
Boston, MA 02109
Tel.: 617-542-8300
Fax: 617-542-1194

KIRBY MCINERNEY LLP
David E. Kovel
250 Park Avenue, Suite 820
New York, NY 10177
Tel.: 212-371-6600
Fax: 212-751-2540

Additional Plaintiffs' Counsel

TAB 53A

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

ROBERT A. NITSCH, et al.,

Plaintiffs,

v.

DREAMWORKS ANIMATION SKG INC., et al.,

Defendants.

Case No. 14-CV-04062-LHK

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR ATTORNEY'S FEES

Re: Dkt. No. 385

Before the Court is Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards arising out of a settlement between individual and representative plaintiffs Robert Nitsch, David Wentworth, and Georgia Cano, and the Class they represent (collectively, "Plaintiffs"), and DreamWorks Animation SKG, Inc. ("DreamWorks"), and The Walt Disney Company, Pixar, Lucasfilm, Ltd., LLC, and Two Pic MC LLC (collectively, "Disney").

Having considered the submissions of the parties, the arguments made at the May 18, 2017 hearing, the relevant law, and the record in this case, the Court hereby GRANTS IN PART AND DENIES IN PART Plaintiffs' motion.

I. BACKGROUND

This is a consolidated class action brought by former employees alleging antitrust claims

against their former employers, who are various animation and visual effects studios with principal places of business in California. Second Amended Complaint ("SAC"), ECF No. 121.[1] Plaintiffs contend that Defendants engaged in a conspiracy to fix and suppress employee compensation and to restrict employee mobility.

A. Factual Background

1. The Parties

Defendants include the following animation and visual effects studios: Blue Sky Studios, Inc. ("Blue Sky"), a Delaware corporation with its principal place of business in Greenwich, Connecticut; DreamWorks Animation SKG, Inc. ("DreamWorks"), a Delaware corporation with its principal place of business in Glendale, California; Two Pic MC LLC, formerly known as ImageMovers Digital LLC ("ImageMovers Digital"), a Delaware corporation with its principal place of business in Burbank, California; Lucasfilm Ltd., LLC ("Lucasfilm"), a California corporation with its principal place of business in San Francisco, California;[2] Pixar, a California corporation with its principal place of business in Emeryville, California;[3] Sony Pictures Animation, Inc. and Sony Pictures Imageworks, Inc. (collectively, "the Sony Defendants"), California corporations with their principal places of business in Culver City, California; and The Walt Disney Company ("Disney"), a Delaware corporation with its principal place of business in Burbank, California.[4] SAC ¶¶ 22–29.

Plaintiffs are artists and engineers who were previously employed by four of the named Defendants. *Id.* ¶¶ 19–21. Nitsch worked for Sony Picture Imageworks in 2004 and DreamWorks from 2007 to 2011. *Id.* ¶ 19. Cano worked for Walt Disney Feature Animation from 2004 to 2005,

[1] Defendant Blue Sky Studios, Inc. has its principal place of business in Greenwich, Connecticut, but Plaintiffs allege that it is owned by Twentieth Century Fox Film Corporation, which has its principal place of business in Los Angeles, California. SAC ¶ 22.

[2] The parties' papers also refer at points to Industrial Light & Magic ("ILM"). Plaintiffs aver that ILM is a division of Lucasfilm.

[3] According to Plaintiffs, Defendant The Walt Disney Company acquired Pixar in 2006 and acquired ILM and Lucasfilm in 2012. SAC ¶¶ 25–26.

[4] Disney also "oversees the operations of" Walt Disney Animation Studios, formerly known as Walt Disney Feature Animation. SAC ¶ 29.

ImageMovers Digital in 2010, and at various other visual effects and animation studios. *Id.* ¶ 20. Wentworth worked at ImageMovers Digital from 2007 to 2010. *Id.* ¶ 21. Nitsch is a resident of Massachusetts, and Cano and Wentworth are residents of California. *Id.* ¶¶ 19–21.

2. *In re High-Tech Employee Litigation* and the Department of Justice investigation

There is significant overlap between the instant case and the related action *In re High-Tech Employee Litigation*, No. 11-CV-02509-LHK ("*High-Tech*"), as well as the civil complaints filed by the Department of Justice ("DOJ") against Pixar, Lucasfilm, and several Silicon Valley technology companies. As the background of the related *High-Tech* action and the DOJ actions is relevant to Plaintiffs' Motion, the Court briefly summarizes the background of those prior proceedings below.

From 2009 to 2010, the Antitrust Division of the DOJ investigated the employment and recruitment practices of various Silicon Valley technology companies, including Adobe Systems, Inc., Apple, Inc., Google, Inc., Intel Corp., and Intuit, Inc. *See In re High-Tech Empl. Litig.*, 856 F. Supp. 2d 1103, 1109 (N.D. Cal. 2012). The DOJ filed its complaint against Adobe, Apple, Google, Intel, Intuit, and Pixar in D.C. District Court on September 24, 2010. *Id.* On December 21, 2010, the DOJ filed a separate complaint against Lucasfilm. *Id.* & n.1. The defendants, including Pixar and Lucasfilm, stipulated to proposed final judgments in which the defendants agreed that the DOJ's complaints had stated claims under federal antitrust law and agreed to be "enjoined from attempting to enter into, maintaining or enforcing any agreement with any other person or in any way refrain from . . . soliciting, cold calling, recruiting, or otherwise competing for employees of the other person." *Id.* at 1109–10 (quoting Adobe Proposed Final Judgment at 5). The D.C. District Court entered the stipulated proposed final judgments in March and June 2011. *Id.* at 1110.

The *High-Tech* plaintiffs filed five separate state court actions between May and July 2011. Following removal, transfer to San Jose to the undersigned judge, and consolidation, the *High-Tech* plaintiffs filed a consolidated amended complaint on September 13, 2011. *High-Tech*, 856 F. Supp. 2d at 1112–13. In their complaint, the *High-Tech* plaintiffs alleged antitrust claims against

their employers and alleged that the defendants had conspired "to fix and suppress employee compensation and to restrict employee mobility." *Id.* at 1108. More specifically, the *High-Tech* plaintiffs alleged a conspiracy comprised of "an interconnected web of express bilateral agreements." *Id*. at 1110. One agreement, the "Do Not Cold Call" agreement, involved one company placing the names of the other company's employees on a "Do Not Cold Call" list and instructing its recruiters not to cold call the employees of the other company. *Id.* In addition to the "Do Not Cold Call" agreements, the *High-Tech* plaintiffs also alleged that Pixar and Lucasfilm, defendants in both *High-Tech* and the instant action, entered into express, written agreements (1) to not cold call each other's employees, (2) to notify the other company whenever making an offer to an employee of the other company, and (3) not to engage in "bidding wars." *Id.* at 1111. Second, Defendants allegedly "shared confidential compensation information with each other despite the fact that they considered each other competitors for talent," which would artificially limit compensation offered to Defendants' current and prospective employees. *In re High-Tech Employee Antitrust Litig.*, 2014 WL 1283086, at *3 (N.D. Cal. Mar. 28, 2014).

3. Alleged Conspiracy in the Instant Action

In the instant case, Plaintiffs allege that Defendants conspired to suppress compensation in two ways. First, Defendants allegedly entered into a scheme not to actively solicit each other's employees. SAC ¶ 42. Second, Defendants allegedly engaged in "collusive discussions in which they exchanged competitively sensitive compensation information and agreed upon compensation ranges," which would artificially limit compensation offered to Defendants' current and prospective employees. *Id.*

a. Anti-Solicitation Scheme

According to Plaintiffs, as in *High-Tech*, "Defendants agreed not to contact their coconspirators' employees to inform them of available positions unless that individual employee had applied for a job opening on his or her own initiative." *Id.* ¶ 43. This solicitation, also known as "cold calling," is "a key competitive tool in a properly functioning labor market, especially for skilled labor." *Id.* ¶ 44. Plaintiffs aver that employees of competitor studios represent "one of the

main pools of potential hires," and that employees of competitor studios that are not actively searching for new employment are "more likely to be among the most sought after employees." *Id.* Hiring an employee from a competitor studio "can save costs and avoid risks." *Id.* Absent active solicitation, these employees are also difficult to reach. *Id.* Defendants' anti-solicitation scheme also allegedly included "notifying each other when an employee of one Defendant applied for a position with another Defendant, and agreeing to limit counteroffers in such situations." *Id.* ¶ 45. Moreover, Defendants allegedly "often refrained from hiring other Defendants' employees at all without the permission of the current employer," and would sometimes decline to make offers of employment to an unemployed prospective hire if that individual had an outstanding offer from another Defendant. *Id.* ¶ 46.

Plaintiffs allege that while the conspiracy originated with Pixar and Lucasfilm in the mid-1980s, Pixar President Ed Catmull later brought additional studios into the fold. *Id.* ¶ 52. According to Plaintiffs, Blue Sky, DreamWorks, ImageMovers Digital,[5] the Sony Defendants, and Walt Disney Animation Studios all became part of the anti-solicitation conspiracy during the mid-2000s and agreed not to directly recruit each other's employees. *Id.* ¶¶ 53–79.

b. Compensation Ranges

In addition to the anti-solicitation scheme, Plaintiffs further allege that Defendants "directly communicated and met regularly to discuss and agree upon compensation ranges." *Id.* ¶ 86 (citing March 28, 2007 email from Pixar's Vice President of Human Resources, Lori McAdams). According to Plaintiffs, Defendants met at least once a year in California at meetings organized by the Croner Company, a third party that apparently collects industry-specific salary information.

Plaintiffs allege that at these meetings, Defendants "discussed, agreed upon and set wage and salary ranges during meals, drinks and other social gatherings that they held outside of the

[5] Plaintiffs dismissed a separate Defendant, ImageMovers LLC, without prejudice pursuant to a tolling agreement on January 14, 2015. ECF No. 83. The dismissal of ImageMovers LLC did not affect ImageMovers Digital.

official Croner meetings." *Id.* ¶ 89. Plaintiffs further allege that Defendants regularly emailed each other with specific salary ranges. Plaintiffs contend that Defendants' "collusive compensation setting was not limited to wages and salaries, but extended to other benefits and terms of employment." *Id.* ¶ 97.

Defendants' human resources and recruiting personnel also allegedly regularly communicated via telephone. *Id.* ¶ 113. As Plaintiffs describe it, the Croner survey meetings, side meetings, emails, and telephone calls "provided the means and opportunities for Defendants to collude and to implement and enforce the conspiracy to suppress workers' compensation." *Id.* ¶ 114. According to Plaintiffs, executives such as Pixar's Lori McAdams, "knew that such conversations were inappropriate." *Id.* ¶ 5, 110–11.

Plaintiffs further allege that while press reports in 2009 noted that the DOJ was investigating anti-solicitation agreements among high-tech companies, including Google and Apple, there was no indication that the DOJ was also investigating Pixar, Lucasfilm, or any other animation company. *Id.* ¶ 119. Plaintiffs aver that September 17, 2010 marked the first news story naming Pixar as a company under investigation, but that there was no public disclosure that any other Defendant in the instant action was part of the conspiracy. *Id.* ¶¶ 119, 184. According to Plaintiffs, Lucasfilm was implicated in the Pixar investigation in December 2010, but "until certain filings in the High-Tech docket were unsealed in 2013," there was no public information that the other Defendants in this action had engaged in similar conduct. *Id.* Plaintiffs also cite the absence of news coverage as proof that Plaintiffs had no way of discovering the conspiracy, as even industry journalists were "unable to discover and explore the conspiracy." *Id.* ¶ 186.

c. Fraudulent Concealment

In their SAC, Plaintiffs allege that Defendants fraudulently concealed the conspiracy and therefore prevented the Plaintiffs from filing their claims on time. Plaintiffs allege that Defendants (1) took affirmative steps to keep their conspiracy a secret; (2) affirmatively misled class members by claiming that compensation and recruiting was determined by factors other than the alleged conspiracy; and (3) took affirmative steps to mislead class members about the conspiracy during

the *High-Tech* litigation. The details of these alleged steps to fraudulently conceal the anti-competitive scheme are discussed in prior orders in this case, and therefore the Court does not repeat those details here.

4. Claims

Plaintiffs' SAC asserts three claims for relief under the following statutes: (1) Section 1 of the Sherman Act, 15 U.S.C. § 1; (2) California's Cartwright Act, Cal. Bus. & Prof. Code § 16720; and (3) California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq*. SAC ¶¶ 205–18. Plaintiffs seek treble damages, pre- and post-judgment interest, attorney's fees and expenses, and a permanent injunction. *Id.* ¶ 219.

B. Procedural Background

In light of the relationship between the instant case and the *High-Tech* case, the Court summarizes the relevant procedural history of the *High-Tech* case in addition to the procedural history of the instant case.

1. *High-Tech* Procedural Background

The *High-Tech* defendants removed the first state court action on May 23, 2011. No. 11-2509, ECF No. 1. The last state-court action in the *High-Tech* litigation was removed on July 19, 2011. No. 11-2509, ECF No. 41. After reassignment of the cases to the undersigned judge, a First Consolidated Amended Complaint was filed on September 13, 2011. No. 11-2509, ECF No. 65. On April 18, 2012, the Court granted in part and denied in part the *High-Tech* defendants' motions to dismiss. No. 11-2509, ECF No. 119. On April 5, 2013, the Court granted in part and denied in part the *High-Tech* plaintiffs' motion for class certification with leave to amend and denied two motions to exclude expert testimony under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). No. 11-2509, ECF No. 382. The *High-Tech* plaintiffs filed a supplemental motion for class certification on May 10, 2013, which the Court granted on October 24, 2013. No. 11-2509, ECF No. 531. On November 7, 2013, the *High-Tech* defendants filed a Rule 23(f) petition before the Ninth Circuit, requesting permission to appeal this Court's October 24, 2013 class certification order. *In re High-Tech Empl. Antitrust Litig.*, No. 13-80223, ECF No. 1 (9th Cir. Nov. 7, 2013).

The Ninth Circuit denied the defendants' petition on January 14, 2014. *Id.*, ECF No. 18.

In the interim, three of the *High-Tech* defendants—Intuit, Lucasfilm, and Pixar—reached a settlement with the *High-Tech* plaintiffs. On October 30, 2013, the Court granted preliminary approval of that settlement. No. 11-2509, ECF No. 540. The Court granted final approval on May 16, 2014. No. 11-2509, ECF No. 915. The Court entered a final judgment with regard to Lucasfilm, Pixar, and Intuit on June 9, 2014 and an amended final judgment on June 20, 2014. No. 11-2509, ECF Nos. 936, 947.

The remaining *High-Tech* defendants—Adobe, Apple, Google, and Intel—filed individual motions for summary judgment, a joint motion for summary judgment, and a joint motion to strike certain expert testimony on January 9, 2014. No. 11-2509, ECF Nos. 554 (Intel), 556 and 557 (joint motions), 560 (Adobe), 561 (Apple), 564 (Google). The Court denied the *High-Tech* defendants' four individual motions for summary judgment on March 28, 2014. No. 11-2509, ECF No. 771. On April 4, 2014, the Court granted in part and denied in part the *High-Tech* defendants' joint motion to strike, and denied the defendants' joint motion for summary judgment. No. 11-2509, ECF No. 788.

On May 22, 2014, the *High-Tech* plaintiffs filed a motion for preliminary approval of class action settlement as to the remaining defendants. No. 11-2509, ECF No. 920. On August 8, 2014, the Court denied the *High-Tech* plaintiffs' motion for preliminary approval and concluded that the proposed settlement, which included a settlement fund of $324.5 million, did not fall "within the range of reasonableness." No. 11-2509, ECF No. 974 at 30. On September 4, 2014, the *High-Tech* defendants filed a petition for a writ of mandamus with the Ninth Circuit. *In re Adobe Sys., Inc., et al.*, No. 14-72745, ECF No. 1 (9th Cir. Sept. 4, 2014). On September 22, 2014, the Ninth Circuit found that the petition "raises issues that warrant a response," and ordered briefing. *Id.*, ECF No. 2. On January 13, 2015, the *High-Tech* defendants filed correspondence with the Ninth Circuit referring to a new proposed settlement agreement. *Id.*, ECF No. 21. On January 30, 2015, the defendants filed an unopposed motion to dismiss the petition, which the Ninth Circuit granted on February 2, 2015. *Id.*, ECF Nos. 23, 24.

On January 15, 2015, the *High-Tech* plaintiffs filed a motion for preliminary approval of class action settlement as to the remaining defendants. No. 11-2509, ECF No. 1032. In this second proposed class action settlement, the parties had reached a settlement amount exceeding the previously rejected settlement by approximately $90.5 million. *Id.* at 1. Following a fairness hearing on March 2, 2015, the Court granted preliminary approval to the January 2015 settlement agreement on March 3, 2015. No. 11-2509, ECF Nos. 1051, 1054. The Court held a final approval hearing on July 9, 2015. No. 11-2509, ECF No. 1096. On September 2, 2015, the Court granted final approval of the class action settlement and entered final judgment with regard to Adobe, Apple, Google, and Intuit. No. 11-2509, ECF Nos. 1111, 1113.

2. Procedural Background in the Instant Action

Plaintiff Nitsch filed the first complaint against all Defendants except Blue Sky on September 8, 2014. ECF No. 1. The Court related Nitsch's action to *In re High-Tech Employee Antitrust Litigation*, No. 11-2509, on September 23, 2014. ECF No. 12. Plaintiff Cano filed the second complaint against all Defendants on September 17, 2014, which the Court related to *High-Tech* on October 7, 2014. *See* Case No. 14-4203, ECF Nos. 1, 9. Plaintiff Wentworth filed the third complaint against all Defendants except Blue Sky on October 2, 2014, which the Court related to *High-Tech* on October 28, 2014. *See* Case No. 14-4422, ECF Nos. 1, 26. On November 5, 2014, the Court granted Plaintiffs' motion to consolidate the above-mentioned three cases into a single action, *In re Animation Workers Antitrust Litigation*. *See* Case No. 14-4062, ECF No. 38.

Pursuant to the Court's November 6, 2014 case management order, ECF No. 39, Plaintiffs filed their first consolidated amended complaint on December 2, 2014. ECF No. 63. On January 9, 2015, Defendants filed a joint motion to dismiss. ECF Nos. 75. Plaintiffs filed a timely opposition, ECF No. 97, and Defendants replied, ECF No. 100. On April 3, 2015, the Court granted Defendants' motion to dismiss. *In re Animation Workers Antitrust Litig.*, 87 F. Supp. 3d 1195 (N.D. Cal. Apr. 3, 2015). The Court found that Plaintiffs' claims were time barred under the statute of limitations, and that Plaintiffs had failed to adequately plead a "continuing violations" theory or a "fraudulent concealment" theory to toll the statute of limitations. *See id.* at 1212,

1217–18. The dismissal was without prejudice, as the Court determined that Plaintiffs might be able to allege sufficient facts to support their continuing violations or fraudulent concealment theories. *Id.*at 1218.

On May 15, 2015, Plaintiffs filed their Second Amended Complaint. ECF No. 121. Six days later, Defendants filed a joint motion to dismiss the SAC. ECF No. 126. Plaintiffs filed a timely opposition, ECF No. 132, and Defendants replied, ECF No. 137. On August 20, 2015, the Court denied Defendants' motion to dismiss the SAC. *In re Animation Workers Antitrust Litig.*, 123 F. Supp. 3d 1175, 1207 (N.D. Cal. 2015). In its order denying Defendants' motion to dismiss, the Court found that the SAC was not barred by the statute of limitations because the SAC sufficiently alleged that Defendants had fraudulently concealed the alleged conspiracy. *Id.*

Plaintiffs filed a motion for class certification on February 1, 2016. ECF No. 203. Defendant Blue Sky did not join Defendants' opposition to class certification. Instead, Plaintiffs filed a joint motion for preliminary approval of class action settlement with Blue Sky on March 31, 2016, ECF No. 249, and an amended motion for preliminary approval of class action settlement on May 11, 2016, ECF No. 282. The Blue Sky settlement provided for a payment of $5,950,000 to the class. ECF No. 336, at 1.

Defendants DreamWorks, Disney, Lucasfilm, Pixar, Two Pic (ImageMovers Digital), Sony Pictures Animation, and Sony Pictures Imageworks filed an opposition to the motion for class certification on March 24, 2016. ECF No. 239-1. After Defendants' opposition to class certification was filed, Plaintiffs filed a motion for preliminary approval of class action settlement with the Sony Defendants on May 3, 2016. ECF No. 273 at 4. The Sony settlement provided for a payment of $13,000,000 to the class. ECF No. 336, at 1. As part of the settlement agreement, the Sony Defendants agreed not to cooperate with the remaining Defendants in opposing Plaintiffs' motion for class certification. *See id.*

On May 6, 2016, the Court held a hearing on Plaintiffs' class certification motion. ECF No. 276. On May 25, 2016, the Court granted in part and denied in part the motion. *See Nitsch v.*

DreamWorks Animation SKG Inc., 315 F.R.D. 270 (N.D. Cal. 2016). The Court certified the following class (*id.* at 317):

> All animation and visual effects employees employed by defendants in the United States who held any of the jobs listed in Ashenfelter Reply Report Amended Appendix C during the following time periods: Pixar (2004-2010), Lucasfilm Ltd., LLC (2004-2010), DreamWorks Animation SKG, Inc. (2004-2010), The Walt Disney Company (2004-2010), Sony Pictures Animation, Inc. and Sony Pictures Imageworks, Inc. (2004-2010), Blue Sky Studios, Inc. (2005-2010) and Two Pic MC LLC f/k/a ImageMovers Digital LLC (2007-2010). Excluded from the Class are senior executives, members of the board of directors, and persons employed to perform office operations or administrative tasks.

The Court denied the motion without prejudice as to class members who worked at Pixar and Lucasfilm from 2001-2003, and who worked at DreamWorks in 2003. *See id.* The Court ruled that the SAC did not sufficiently allege acts of fraudulent concealment during those years. *See id.*

On June 8, 2016, defendants filed a Rule 23(f) petition with the Ninth Circuit. *See* Petition for Permission to Appeal from the United States District Court for the Northern District of California, *Nitsch v. DreamWorks Animation SKG, Inc.*, No. 16-80077 (9th Cir. June 8, 2016) ("*Nitsch I*" or "Appeal"). On August 29, 2016, the Ninth Circuit granted defendants' motion for leave to file a reply, but denied their Rule 23(f) Petition in a summary order. ECF No. 7 at 1.

On July 6, 2016, the Court granted Plaintiffs' motion for preliminary approval of the class action settlements with Sony and Blue Sky. ECF No. 305. On November 11, 2016, the Court granted Plaintiffs' motion for final approval of the class action settlements with Sony and Blue Sky. EF No. 346. On November 11, 2016, the Court also awarded class counsel $4,737,500 in attorney's fees in connection with the Sony and Blue Sky settlements.

Plaintiffs and DreamWorks signed a settlement agreement on October 4, 2016 in which DreamWorks agreed to pay $50,000,000 to a common fund to resolve the litigation. On January 19, 2017, the Court granted preliminary approval of the Dreamworks Settlement. ECF No. 353.

Plaintiffs and Disney signed a settlement agreement on January 30, 2017 in which Disney agreed to pay $100,000,000 to a common fund to resolve the litigation. On March 2, 2017, the

Court granted preliminary approval of the Disney Settlement. ECF No. 382. In the preliminary approval order, the Court set a single final approval hearing for the Dreamworks and Disney Settlements for May 18, 2017. The Court held the final approval hearing for the Dreamworks and Disney Settlements on May 18, 2017.

II. DISCUSSION

The instant motions contain specific requests for attorney's fees, reimbursement of expenses, and service awards. The Court addresses each in turn.

A. Attorney's Fees

1. The Appropriate Method: Lodestar v. Percentage-of-Recovery

Under Ninth Circuit law, "the choice between lodestar and percentage calculation depends on the circumstances, but . . . 'either method may . . . have its place in determining what would be reasonable compensation for creating a common fund.'" *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (second ellipsis in original) (quoting *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989)). "Where," as here, "a settlement produces a common fund for the benefit of the entire class, courts have discretion to employ either the lodestar method or the percentage-of-recovery method." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011). To guard against an unreasonable result, the Ninth Circuit encourages district courts to "cross-check[] their calculations against a second method." *Id.* at 944; *see also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050-51 (9th Cir. 2002) (applying a lodestar cross-check to ensure the percentage-of-recovery method yielded a reasonable result).

Where the percentage-of-recovery method is employed, it is well established that 25% of a common fund is a presumptively reasonable amount of attorney's fees. *See, e.g.*, *In re Bluetooth*, 654 F.3d at 942 ("[C]ourts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying a departure."); *Six Mexican Workers*, 904 F.2d at 1311 ("[W]e established 25 percent of the fund as the 'benchmark' award that should be given in common fund cases."). Nevertheless, "[t]he 25% benchmark rate, although a starting point for analysis, may be inappropriate in some cases."

Vizcaino, 290 F.3d at 1048. For instance, "where awarding 25% of a 'megafund' would yield windfall profits for class counsel in light of the hours spent on the case, courts should adjust the benchmark percentage or employ the lodestar method instead." *In re Bluetooth*, 654 F.3d at 942. Whatever decision a court reaches, that decision "must be supported by findings that take into account all of the circumstances of the case." *Vizcaino*, 290 F.3d at 1048.

Here, class counsel advocate applying the percentage-of-recovery method. Class counsel request 21 percent of the $150,000,000 total Dreamworks and Disney Settlements, or $31,500,000. Class counsel argue that the Court should apply the percentage-of-the-recovery method of calculating attorney's fees. Class counsel point out that the requested 21% recovery is "well under the 25 percent benchmark" that the Ninth Circuit has established for common fund cases. ECF No. 385, at 4; *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) ("This circuit has established 25% of the common fund as a benchmark award for attorney fees."). However, as will be discussed further below, in making such a request, class counsel ignores the $4,737,500 in attorney's fees that the Court has already awarded for the same work.

The Ninth Circuit has made clear that in "megafund" cases, such as this one, courts may "employ the lodestar method instead" of the percentage-of-recovery method if rote application of the 25% benchmark "would yield windfall profits for class counsel in light of the hours spent on the case." *In re Bluetooth*, 654 F.3d at 942. For example, in *In re Washington Public Power Supply System Securities Litigation* ("*WPPSS*"), 19 F.3d 1291, 1297-98 (9th Cir. 1994), the Ninth Circuit held that the district court "acted well within the bounds of its discretion" in applying the lodestar method, rather than the percentage-of-recovery method, to an attorney's fees request arising out of a $687 million settlement fund. Class counsel in *WPPSS* had asked the district court for 13.6% of the fund, well below the "circuit's 25 percent benchmark figure," but the district court found that request to be "arbitrary" because class counsel "could just as easily have requested 3.6 percent or 36.1 percent." *Id.* (internal quotation marks omitted). In upholding the district court's decision, the Ninth Circuit explained: "With a fund this large, picking a percentage without reference to all the circumstances of the case, including the size of the fund, would be like

picking a number out of the air." *Id.* "Because a court must consider the fund's size in light of the circumstances of the particular case," the Ninth Circuit continued, "we agree with the district court that the 25 percent 'benchmark' is of little assistance in a case such as this." *Id.*

Just as there was "nothing inherently reasonable about an award of 13.6 percent of a [$687 million] fund" in *WPPSS*, *id.* at 1298, the Court finds nothing inherently reasonable in Plaintiffs' counsel's total request here for 21% of the $150,000,000 settlement (or 21.4% of $168,950,000 if the settlements with Sony and Blue Sky are included). *See also Gutierrez v. Wells Fargo Bank, N.A.*, No. C 07-05923 WHA, 2015 WL 2438274, at *4 (N.D. Cal. May 21, 2015) (rejecting class counsel's request to apply the percentage-of-recovery method to a $203 million restitution award and opting for the lodestar method instead because "blindly adopting the 25-percent benchmark . . . would result in a windfall to class counsel").

Having overseen the litigation in the instant case and the related case of *In re High-Tech Employee Antitrust Litigation*, No. 11-2509, the Court finds that justice would be best served by applying the lodestar method—i.e., tying the fee awards for class counsel to the actual hours they reasonably expended on this litigation and then selecting a multiplier. The Court concludes that the lodestar method is superior to the percentage-of-the-recovery method for two reasons.

First, class counsel's proposed percentage would result in a multiplier that is unreasonably high. The multiplier for class counsel's proposed percentage is 3.40 for the Disney and Dreamworks settlements and 3.91 if the prior attorney's fees awards for the Sony and Blue Sky settlements are included. Although class counsel argues extensively about the reasonableness of "[a]n overall multiplier of 3.40," ECF No. 385, at 6, ignoring previous awards of attorney's fees for the same work renders class counsel's multiplier inaccurate. In calculating its lodestar in the instant motion for attorney's fees, class counsel includes billed hours for which class counsel already received compensation in connection with the Sony and Blue Sky settlements. Thus, if the Court did not take into account the fee awards for the Sony and Blue Sky settlements, class counsel would receive a double recovery for these hours. Thus, the Court determines that the 3.91 multiplier is the relevant multiplier for class counsel's requested award.

Class counsel argues that courts often approve multipliers as high or higher than 3.91. However, such awards are far from the norm. In *Vizcaino*, 290 F.3d at 1051 n.6, the Ninth Circuit surveyed class actions settlements nationwide and found that 54 percent of lodestar multipliers fell within the 1.5 to 3.0 range, and that 83 percent of multipliers fell within the 1.0 to 4.0 range. Thus, the requested 3.91 multiplier would be higher than the significant majority of cases. Additionally, although class counsel have cited several cases awarding multipliers higher than 3.91, most of these cases involved settlement funds that were much smaller than the $168,950,000 settlement fund in the instant case. *See, e.g.*, *Buccellato v. AT & T Operations, Inc.*, 2011 WL 3348055, at *2 (N.D. Cal. June 30, 2011) (approving multiplier of 4.3 in case involving $12,500,000 settlement fund); *Rabin v. Concord Assets Grp., Inc.*, 1991 WL 275757, at *1 (S.D.N.Y. Dec. 19, 1991) ("The requested attorneys' fees of $2,544,122.78 represents a multiplier of 4.4 . . . . Plaintiffs' counsel asserts that 'when one considers the potential additional time plaintiffs' counsel will be required to work in this matter, the multiplier is reduced to a range of 3.7 to 3.2.'"); *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 360 (S.D.N.Y. 2002) (approving multiplier of 4.65 in case involving $28,000,000 settlement fund).

In the instant case, in the Court's judgment, a multiplier of 3.91 would result in "windfall profits for class counsel in light of the hours spent on the case." *In re Bluetooth*, 654 F.3d at 942; *see also Allen v. Bedolla*, 787 F.3d 1218, 1224 n.4 (9th Cir. 2015) (cautioning that district courts "should not calculate fees using a mechanical or formulaic approach that results in an unreasonable reward" (internal quotation marks omitted)). The potential for a significant windfall counsels against rigid application of the percentage-of-the-recovery method for calculating an attorney's fees award.

The second reason that the lodestar method is superior to the percentage-of-the-recovery method in the instant case is that using the lodestar method would allow the Court to examine class counsel's "presumptively reasonable" lodestar figures, and if suitable, adjust them "by an appropriate . . . multiplier reflecting a host of reasonableness factors, including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues

presented, and the risk of nonpayment." *In re Bluetooth*, 654 F.3d at 941-42 (citations and internal quotation marks omitted). This case has a very large settlement fund, and the size of the settlement fund can be attributed in large part to the success of *High-Tech*. *High-Tech* provided much of the evidence, legal theories, arguments, and prior rulings necessary to litigate this case. Moreover, by litigating two motions to dismiss, multiple *Daubert* motions, two class certification motions, and five summary judgment motions, the plaintiffs in *High-Tech* eliminated much of the risk in litigating the instant case and established the benchmarks for the sizes of the settlement funds. Therefore, considering the posture of this case and the large settlement fund, the Court finds that the lodestar method is superior to accepting somewhat arbitrary percentages. *See WPPSS*, 19 F.3d at 1297–98.

2. Lodestar Method

Under the lodestar method, a "lodestar figure is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer." *In re Bluetooth*, 654 F.3d at 941 (citing *Staton v. Boeing Co.*, 327 F.3d 938, 965 (9th Cir. 2003)). Although "the lodestar figure is 'presumptively reasonable,' the court may adjust it upward or downward by an appropriate positive or negative multiplier reflecting a host of reasonableness factors." *Id.* at 941-42 (citations and internal quotation marks omitted).

a. Billing Rates

Having reviewed the billing rates for the attorneys, paralegals, and litigation support staff at each of the firms representing Plaintiffs in this case, the Court finds that these rates are reasonable in light of prevailing market rates in this district and that counsel for Plaintiffs have submitted adequate documentation justifying those rates.

Class counsel have filed several declarations describing the billing rates and hours worked on the instant case. *See* Declaration of Jeff D. Friedman in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards ("Friedman Decl."), ECF No. 385-2; Declaration of Daniel A. Small in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service

Awards ("Small Decl."), ECF No. 385-7; Declaration of Steven G. Sklaver in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards ("Sklaver Decl."), ECF No. 385-5; *see also* Supplemental Brief Regarding Motion for Attorney's Fees, ECF No. 345. These declarations establish that the hourly rates are fair, reasonable, and market-based, particularly for the "relevant community" in which counsel work. *See* Friedman Decl. ¶ 12; Small Decl., ¶ 29; Sklaver Decl., ¶ 11. Class counsel are highly-respected members of the bar with extensive experience in prosecuting high-stakes complex litigation, including consumer class actions. *See* Friedman Decl., ¶¶ 6-11; Small Decl., ¶¶ 2-13; Sklaver Decl., ¶¶ 3-10. With three exceptions, counsel's hourly rates in this action range from $275 to $750, with rates varying based on experience. *See* Friedman Decl., ¶ 13; Small Decl., ¶ 30; Sklaver Decl., ¶ 12. The three most senior attorneys on the case, who serve as the lead attorney for each respective law firm, charge between $870 and $1,200 per hour. *See* Friedman Decl., ¶ 13; Small Decl., ¶ 30; Sklaver Decl., ¶ 12. Mr. Seltzer's $1,200 hourly rate is the same rate that he charges clients, including corporations that are billed hourly, which provides a market-based cross-check. *See* Sklaver Decl., ¶ 11. Hourly rates for paralegals are $290 or lower. *See* Friedman Decl., ¶ 13; Small Decl., ¶ 30; Sklaver Decl., ¶ 12. Overall, the rates charged by counsel here are comparable to the fees approved by the Court, over a year ago, in the *High-Tech* case and more recently in conjunction with the Sony and Blue Sky settlements.[6] *See* ECF No. 347 (approving almost identical rates in connection with the Sony and Blue Sky settlements). Thus, the Court finds that the reported hourly rates are fair and reasonable.

a. Hours

Having reviewed the billing records for the attorneys, paralegals, and litigation support staff at each of the firms representing Plaintiffs in this case, the Court finds that these records

[6] In *High-Tech*, this Court found class counsel's rates "reasonable in light of prevailing market rates in this district," including partner rates that ranged from $490 to $975 per hour; non-partner rates that ranged from $310 to $800 per hour; and paralegals, law clerks, and support staff rates that ranged from $190 to $430, "with most in the $300 range." *High-Tech Fees Order*, 2015 WL 5158730, at *9; *In re Animators*, Order Granting Request for Attorney's Fees, Dkt. # 347.

adequately reflect the amount of time reasonably spent on this litigation.

As set forth in the supporting declarations, class counsel have collectively spent more than 18,448 hours of attorney and litigation support time on this action. *See* Friedman Decl. ¶ 13 (4,704.30 hours); Small Decl. ¶ 30 (7,446.75 hours); Sklaver Decl., ¶ 12 (6,297.90 hours). The number of hours that class counsel has devoted to pursuing this litigation is appropriate and reasonable, given class counsel's work in the following areas: (1) pre-complaint investigation; (2) production and review of documents in discovery; (3) filing an amended complaint, an opposition to a motion to dismiss, a second amended complaint, and a second opposition to a motion to dismiss, as well as an opposition to a motion to compel arbitration; (4) briefing at the class certification stage; (5) expert reports; (6) taking the depositions of twenty-five witnesses and defending an additional five depositions; and (7) opposing defendants' Rule 23(f) petition. Class counsel's reported hours include hours billed through February 2017. ECF No. 385, at 5 n.6. Thus, these hours do not include hours billed in preparing the motion for final approval, responding to objections, arguing at the final approval hearing, working with the settlement administrator to distribute the settlement fund, and litigating any appeals.

Class counsel reports a lodestar of $2,165,448.50 for Hagens Berman, $2,859,177 for Susman Godfrey, and $4,244,453.75 for Cohen Milstein. Thus, in total, class counsel reports a lodestar of $9,269,079.25.

a. Multipliers

As indicated above, the Court may "adjust" the lodestar figures "upward or downward by an appropriate positive or negative multiplier reflecting a host of 'reasonableness' factors, 'including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment.'" *In re Bluetooth*, 654 F.3d at 941-42 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998)). "Foremost among these considerations, however, is the benefit obtained for the class." *Id.* at 942. For the reasons stated below, the Court concludes that a positive multiplier of 2.0 is appropriate for class counsel.

The Court recognizes that class counsel has achieved significant benefits for the class and

that class counsel assumed a risk of nonpayment while litigating this case for over two years. In the end, class counsel achieved a significant result for the class. The Disney and Dreamworks settlements total $150,000,000, which represents 33.5% of the damages attributable to Disney and 39% of the damages attributable to Dreamworks. Together, all the settlements in the instant case total $168,950,000, which represents 30.5% of Plaintiffs' valuation.

Considering all the facts and circumstances of this case, the Court finds that a multiplier of 2.0 is appropriate for class counsel. As stated above, the Ninth Circuit in *Vizcaino* conducted a survey of attorney's fees awards in megafund cases. *See* 290 F.3d at 1052-54. This survey involved common fund cases ranging from $50–200 million between 1996 and 2001. *See id.* In 83% of the settlements (20 of 24), the multiplier ranged from 1.0–4.0, and in 54% of the settlements (13 of 24), the multiplier was in the 1.5–3.0 range. *Id.* at 1051 n.6. A multiplier of 2.0 would therefore be in line with the vast majority of megafund settlements such as this one and would adequately reward class counsel for the work performed in this litigation. A multiplier of 2.0 is also reasonable in light of the 2.2 multiplier that the Court granted in *High-Tech*, a case that involved significantly more risk than the instant case. As a result, the Court multiplies class counsel's lodestar of $9,269,079.25, which includes all work in the instant case related to claims against all Defendants, by 2.0 and finds that a total attorney's fee award of $18,538,158.50 is appropriate. Because class counsel has already received $4,737,500 in attorney's fees as part of the Sony and Blue Sky settlements, the Court grants an attorney's fee award of $13,800,658.50 in the instant Dreamworks and Disney settlements.

1. Percentage-of-Recovery Cross-Check

The reasonableness of the Court's fee awards under the lodestar method is supported by cross-checking the award with the percentage-of-recovery method. *See In re Bluetooth*, 654 F.3d at 944 (encouraging courts to "cross-check[] their calculations against a second method"). The $13,800,658.50 attorney's fee award is about 9.2% of the $150 million Disney and Dreamworks

settlements.[7] Adding the $4,737,500 million in attorney's fees the Court already awarded for the settlements with Sony and Blue Sky, the percentage increases to roughly 11%.[8] Although the benchmark in the Ninth Circuit for common fund cases is 25%, a percentage recovery of 9.2% or 11% is not unreasonable for a settlement of this size.

The most accurate comparison for the attorney's fees in the instant case is the attorney's fees award that the Court granted in *High-Tech*, which is related to and gave rise to the instant case. *See* ECF No. 385 at 2 (In the instant case, "[c]lass counsel were not even aware of the possibility of bringing this case until one of its lawyers read an article in July 2014 discussing some of the documents unsealed in *High-Tech*."). In *High-Tech*, after evaluating several empirical studies, the Court granted a $40,000,000 attorney's fee award based on a lodestar multiplier of 2.2. The Court performed a percentage-of-the-recovery crosscheck and determined that a total percentage of 10.5% was reasonable. Thus, the total percentage of the recovery in the instant case, 11%, is higher than the percentage of the recovery in *High-Tech*, despite the greater risk, greater overall recovery, and longer litigation in *High-Tech*.

A comparison of the work done in this case and the work done in *High-Tech* confirms that class counsel should not receive a significantly higher percentage-of-the-recovery fee than the percentage awarded in *High Tech*. The instant case lasted less than three years, from the filing of the complaint on September 8, 2014, to the date of this order, June 5, 2017. As discussed above, in the instant case class counsel (1) conducted pre-complaint investigation; (2) produced and reviewed documents in discovery; (3) filed an amended complaint, an opposition to a motion to dismiss, a second amended complaint, and a second opposition to a motion to dismiss, as well as an opposition to a motion to compel arbitration; (4) filed briefing at the class certification stage; (5) served expert reports; (6) took the depositions of twenty-five witnesses and defended an additional five depositions; and (7) opposed defendants' Rule 23(f) petition.

[7] (13,800,658.50 ÷ 150,000,000) × 100 = 9.2%

[8] ((13,800,658.50 + 4,737,500) ÷ 168,950,000) × 100 = 10.97%

High-Tech, in contrast, lasted over four years, from the filing of the initial complaint on May 4, 2011 to the date the case closed on September 2, 2015. In *High-Tech*, class counsel had taken the following actions up to the time of settlement: (1) identified the alleged conspiracy to fix and suppress employee compensation in the tech industry; (2) prepared and filed multiple complaints against Defendants; (3) survived two motions to dismiss; (4) undertook considerable discovery, including taking 93 depositions and defending 14 others, serving 75 document requests, reviewing the resulting 325,000 documents (over 3.2 million pages), serving 28 subpoenas on third parties, reviewing 8,809 pages of documents from those third parties, producing over 31,000 pages of documents in response to Defendants' document requests, and responding to and reviewing 34 subpoenas served by Defendants on third parties; (6) retained four experts to assist in analyzing over 15 gigabytes of employment-related compensation and recruiting data; (7) worked with the experts to produce multiple expert reports; (8) litigated multiple *Daubert* motions; (9) filed a consolidated class action complaint; (10) litigated two rounds of class certification; (11) opposed a Rule 23(f) appeal to the Ninth Circuit; (12) survived five summary judgment motions; (13) prepared for trial; (14) negotiated three settlements; and (15) opposed mandamus in the Ninth Circuit.

Thus, a comparison of work between the instant case and *High Tech* makes clear that class counsel should not receive a significantly higher percentage of the recovery than class counsel received in *High Tech.* Indeed, if the Court granted the overall 21.4% percentage of the recovery that class counsel requests in the instant case, the total attorney's fee award would be $36,237,500. This is over 90% of the $40,000,000 award granted in *High-Tech*, despite the fact that the lodestar in *High-Tech* was almost double the reported lodestar in the instant case. *See In re High-Tech Employee Antitrust Litig.*, 2015 WL 5158730, at *5 (N.D. Cal. Sept. 2, 2015) ("Class Counsel's final revised lodestar, which is the sum of the lodestars for each of the four firms, is $18,201,787.50."). This would also be unreasonable in light of the fact that the settlements in *High-Tech* totaled $415,000,000, which far exceeds the $168,950,000 total settlement amount in the instant case.

An 11% percentage of the recovery is also consistent with the principle that "fees as a percentage of the recovery tend to decrease as the size of the recovery increases," which is discussed in the empirical study cited in class counsel's motion for attorney's fees, Theodore Eisenberg, *Geoffrey P. Miller & Roy Germano, Attorneys' Fees in Class Actions: 2009-2013*, NYU Law and Economics Research Paper No. 17-02 (December 1, 2016) ("EMG Study"). As the EMG Study points out, this effect is "due to the economies of scale that can sometimes be achieved in very large cases." *Id.* This "economies of scale" effect is especially relevant in the instant case, in which not only has class counsel achieved economies of scale from their work in this case, but class counsel was also able to rely on documents, legal theories, rulings, and settlements in *High Tech* to successfully litigate and resolve this case. Thus, although the recovery in the instant case is a significant benefit for the class, a substantial portion of the size of the recovery in the instant case can be attributed to the success of the plaintiffs in *High-Tech*. In this context, it would be unfair and unreasonable to grant class counsel in the instant case a greater percentage of the recovery than the percentage awarded to class counsel in *High Tech.*

In short, in the instant case, even more than in *High Tech*, rote application of the 25% benchmark "would yield windfall profits for class counsel in light of the hours spent on the case." *In re Bluetooth*, 654 F.3d at 942. Therefore, the Court finds that the percentage-of-the-recovery crosscheck confirms that a total award from all settlements of $18,538,158.50, and a $13,800,658.50 from the Dreamworks and Disney settlements, are reasonable.

This reduced attorney's fees award will provide a significant benefit to the class because the attorney's fees are deducted from the fund for class members. Specifically, as discussed below, the Court's decision to reduce the attorney's fees award to class counsel increases the average class member recovery from all the settlements from roughly $11,984 per person to roughly $13,612 per person. *See infra* Part III.C.

2. Objections

The Court received three objections to class counsel's requested attorney's fees. The first two objections were from Charles Williams and Alice Goldstone, who filed a joint objection form.

ECF No. 386. Mr. Williams and Ms. Goldstone are not members of the class and thus lack standing to object. Additionally, on June 2, 2017, Mr. Williams and Ms. Goldstone withdrew their objections. Nevertheless, the Court considers the objections for the sake of completeness. Mr. Williams and Ms. Goldstone objected to the attorney's fee award on two grounds. First, Mr. Williams and Mr. Goldstone objected that "none of the specifics for the requested fee are not [sic] included in the notice" and that "the costs of notice and administration of the class fund were not disclosed." *Id.* at 8. However, the notice sent to class members disclosed that class counsel would seek a fee of up to 25%, and there is no requirement that details regarding the plaintiffs' fee request be separately disseminated to the Class. Indeed, Plaintiff's requested fees of 21% of the settlement fund are below the 25% disclosed in the notice, and the Court's final award of $13,800,658.50 in attorney's fees in connection with the DreamWorks and Disney settlements is substantially below the 25% disclosed in the notice. In addition, the notice disclosed that "court-approved costs, and attorney's fees and expenses" would be deducted from the settlement. ECF No. 359-2, at 9. Furthermore, the instant motion for attorney's fees in connection with the DreamWorks and Disney settlements does not seek any additional funds for the settlement administrator because the Court granted the settlement administrator $95,495.09 in costs in connection with the Sony and Blue Sky settlements for all of the settlement administrator's actual and projected costs. ECF No. 347, at 14. There were no objections to the Sony and Blue Sky settlements.

Second, Mr. Williams and Ms. Goldstone objected to the size of the multiplier that class counsel requests. ECF No. 386, at 9 ("3.91 is a very large multiplier"). For the reasons discussed above, the Court agrees. As discussed above, the Court exercises its discretion to award attorney's fees in the instant case based on the lodestar method and grants class counsel a lodestar multiplier of 2.0. The Court finds that a multiplier of 2.0 is fair and reasonable in light of all the facts and circumstances of the case and is in line with multipliers granted in similar cases. *See, e.g.*, *High-Tech*, 2015 WL 5158730, at *10 (granting a multiplier of 2.2).

The third objection to the attorney's fee award is from Christian Haley. ECF No. 387. Mr. Haley objects to the requested attorney's fees on the grounds that "it is established that in mega fund' settlements, such as the case at bar, the preferable method [for calculating attorney's fees] is the lodestar method." *Id.* at 3–4. Mr. Haley also states that class counsel's requested percentage "of about 20%" would "lead to a windfall" for class counsel in the instant case. *Id.* at 4.

Although the Court does not decide whether the lodestar method is in general preferable in mega-fund settlements, the Court agrees with Mr. Haley that under the facts and circumstances of the instant case, the percentage-of-the-recovery method "is arbitrary and may provide a windfall to counsel." *Id.* at 4. Thus, as discussed above, the Court applies the lodestar method to calculate class counsel's attorney's fees.

In short, none of the above objections requires the Court to modify its attorney's fees awards to class counsel.

3. Conclusion: Attorney's Fees Award

In sum, the Court awards $13,800,658.50 in attorney's fees to class counsel for the Dreamworks and Disney settlements. Taking into account the $4,737,500 million in attorney's fees already awarded to class counsel in the settlements with Sony and Blue Sky, class counsel will receive a total of $18,538,158.50 out of the $168,950,000 combined settlements.

B. Expenses

In common fund cases, the Ninth Circuit has stated that the reasonable expenses of acquiring the fund can be reimbursed to counsel who has incurred the expense. *See Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *accord Wininger v. SI Mgmt. L.P.*, 301 F.3d 1115, 1121 (9th Cir. 2002). All expenses that are typically billed by attorneys to paying clients in the marketplace are compensable. *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994).

The Court previously awarded $1,561,700.47 in expenses in connection with the Sony and Blue Sky settlements. ECF No. 347, at 13–14. In the instant motion, Plaintiffs seek a total award of $490,040.13 in expenses that were not reimbursed in the Sony and Blue Sky settlement and that were necessarily incurred in connection with the prosecution of this action. With their motion,

plaintiffs provide an accounting of the expenses incurred by Plaintiffs' counsel. *See* Friedman Decl. ¶ 15; Small Decl. ¶ 33; Sklaver Decl. ¶ 14. Several categories account for the bulk of these expenses: fees paid to experts, filing fees, travel expenses, costs of court and deposition transcripts, and computer research expenses. All of these costs were necessarily and reasonably incurred to bring this case to a successful conclusion, and they reflect market rates for the various categories of expenses incurred. Further, Plaintiffs' counsel advanced these necessary expenses without assurance that they would be recouped. For these reasons, Plaintiffs' request for fees is reasonable. The Court therefore GRANTS an award of $490,040.13 in expenses.

C. Service Awards

In evaluating whether class representatives are entitled to reasonable service awards, district courts "must evaluate their awards individually, using 'relevant factors including the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, . . . the amount of time and effort the plaintiff expended in pursuing the litigation . . . and reasonabl[e] fear[s of] workplace retaliation.'" *Staton*, 327 F.3d at 977.

In the instant case, Plaintiffs request $80,000 for each named Plaintiff for service awards in connection with the Disney settlement and $10,000 for each named Plaintiff for service awards in connection with the Dreamworks settlement. Combined with service awards from the Sony and Blue Sky settlements, this will result in a total of $100,000 in service awards for each of the three named Plaintiffs.

"Service awards for class representatives are routinely provided to encourage individuals to undertake the responsibilities and risks of representing the class and recognize the time and effort spent in the case." ECF No. 347 at 14. In the Ninth Circuit, service awards "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009). "Courts have discretion to approve service awards based on, *inter alia*, the amount of time and effort spent, the duration of the litigation, and the personal benefit (or lack thereof) as a result of

the litigation." ECF No. 347 at 14.

Here, the three named plaintiffs, Robert Nitsch, David Wentworth, and Georgia Cano have spent a significant amount of time assisting the litigation of this case.[9] Each plaintiff responded to written discovery and produced documents relating to their claims; they were each deposed by defense counsel for a full day regarding their claims; they reviewed the SAC and other substantive pleadings; and they reviewed and approved the settlements.[10] Perhaps most importantly, despite the tight-knit and fluid nature of the animation and visual effects industry, each of the named plaintiffs was willing to put his or her name on this employment lawsuit for the benefit of all absent class members despite a very real fear of workplace retaliation, *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998), or being viewed as "troublemakers" within the industry, *In re High-Tech Emp. Antitrust Litig.*, 2015 WL 5158730, at *17 (N.D. Cal. Sept. 2, 2015); *see also* Nitsch Decl. ¶ 12; Wentworth Decl. ¶ 10; Cano Decl. ¶ 12. In fact, defendants subpoenaed their employment records from current and former employers. Additionally, the named plaintiffs each state in their declarations that the animation industry is particularly sensitive to the reputation of employees because it is a small industry and employees tend to switch projects and employers often. S*ee* Nitsch Decl. ¶ 12; Wentworth Decl. ¶ 12; Cano Decl. ¶ 12. Thus, the risk of workplace retaliation in the instant case is particularly acute.

Furthermore, the service awards of $90,000 ($100,000 total for the litigation) are in line with awards in other megafund cases. *See, e.g.*, *Marchbanks Truck Serv. v. Comdata Network*,

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[9] Mr. Williams and Ms. Goldstone also object to the incentive awards for named Plaintiffs on the ground that the proposed incentive awards are disproportionate to the average recovery for class members and because"[t]he proposed incentive award has not been supported by any substantial evidence that the class representatives have exerted any labor . . . , suffered any risk of retaliation, or otherwise put the sweat of their collective brow to work on behalf of the class." ECF No. 386, at 10. However, as discussed above, Mr. Williams and Ms. Goldstone are not members of the class in this case, have no standing to object, and have withdrawn their objections. Additionally, as described below, the named Plaintiffs performed significant work on behalf of the class and the requested incentive awards are not disproportionate to the average recovery for class members.

[10] *See* Declaration of Robert Nitsch in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards ("Nitsch Decl."), ¶¶ 6-11; Declaration of David Wentworth in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards ("Wentworth Decl."), ¶¶ 6-9; Declaration of Georgia Cano in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards ("Cano Decl."), ¶¶ 6-11.

Inc., Case No. 07-CV-1078, Dkt. 713 at 2, 8 (E.D. Pa. July 14, 2014) (approving $130 million class action settlement, including service award of $150,000 to one class representative and service awards of $75,000 to two other class representatives); *In re Titanium Dioxide*, 2013 WL 6577029, at *1 (awarding $125,000 to lead class representative out of $163.5 million settlement); *Velez v. Novartis Pharm. Corp.*, No. 04 CIV 09194 CM, 2010 WL 4877852, at *4, *8, *28 (S.D.N.Y. Nov. 30, 2010) (awarding $125,000 to named plaintiffs from $175 million settlement). The service awards of $90,000 are also consistent with service awards granted in *High-Tech*. *See High-Tech Fees Order*, 2015 WL 5158730, at *17 (granting each of four named plaintiffs a total of $100,000 in service awards, and awarding a fifth plaintiff, who successfully objected to the final settlement, a total of $140,000).

Finally, the ratio between the service awards and the average class member recovery is not unreasonable. The Ninth Circuit has cautioned that where there is a "very large differential in the amount of damage awards between the named and unnamed class members," that differential must be justified by the record. *Staton*, 327 F.3d at 978. Taking into account the Court's reductions of the amounts requested for attorney's fees, the average class member recovery from all the settlements in the instant case should increase from roughly $11,984 per person to roughly $13,612 per person.[11] The resulting ratio between service awards and class member recovery is about 7.3. This ratio is justified by the record detailed above, including the numerous hours each class representative spent on this high-profile litigation and their reasonable fears of workplace retaliation. *Compare Staton*, 327 F.3d at 948, 975-78 (rejecting settlement where 29 class representatives could receive up to $50,000 compared to $1,000 for unnamed class members); *Wallace v. Countrywide Home Loans, Inc.*, No. 8:08-1463-JLS MLGX, 2014 WL 5819870, at *4 (C.D. Cal. Apr. 14, 2014) (rejecting settlement where service awards were "33 times greater than

[11] The Court calculated this figure by comparing the net settlement fund (from all settlements) with the requested fees, costs, and incentive awards divided by the approximate number of class members (($168,950,000 – $36,237,500 – 2,051,740.60 – 95,495.09 – 300,000) ÷ 10,870 = $11,983.9) with the net settlement fund with the final fees, costs, and incentive awards divided by the approximate number of class members ((($168,950,000 – $18,538,158.50 – 2,051,740.60 – 95,495.09 – 300,000) ÷ 10,870 = $13,612.20).

the maximum possible recovery of other individual class members" (emphasis added)); *Kaufman v. Am. Exp. Travel Related Servs. Co.*, 264 F.R.D. 438, 448 (N.D. Ill. 2009) (disapproving $2,500 service awards because they were "125 times greater than the $20 maximum that any similar Class member could recover"), *with In re Capital One Tel. Consumer Prot. Act Litig.*, 2015 WL 605203, at *19 (N.D. Ill. Feb. 12, 2015) (approving $5,000 service awards where class members who made timely claims were entitled to "at least $39.66"); *Lemus v. H&R Block Enters. LLC*, No. C 09-3179 SI, 2012 WL 3638550, at *5-6 (N.D. Cal. Aug. 22, 2012) (approving $15,000 service awards where the average class recovery was about $1,200).

This ratio is also significantly lower than the ratios approved in *High Tech, High-Tech Fees Order*, 2015 WL 5158730, at *17. In *High-Tech*, the Court approved an award of $140,000 for a successfully objecting plaintiff and $100,000 each for four other named plaintiffs. *Id.* In *High-Tech*, the average recovery per class member was "roughly $5,770 per person," and thus the ratio between recovery and service awards was 21 for the plaintiff receiving $140,000 and 14 for the plaintiffs receiving $100,000. These ratios are significantly higher than the 7.3 ratio in the instant case.

Even though the litigation in the instant case was shorter than the litigation in *High-Tech*, the service awards are the same as the service awards in *High-Tech* because the individual recovery is significantly higher, because the plaintiffs in the instant case are often employed for a single project and thus need to switch jobs often, and because the plaintiffs in the instant case are employed in a much smaller industry with a smaller number of employers (most of whom are Defendants in this case). *Compare Nitsch v. Dreamworks Animation SKG Inc.*, 315 F.R.D. 270, 317 (N.D. Cal. 2016) (certifying class of "animation and visual effects employees") with *In re High-Tech Employee Antitrust Litig.*, 985 F. Supp. 2d 1167, 1177 (N.D. Cal. 2013) (certifying class of "[a]ll natural persons who work in the technical, creative, and/or research and development fields").

Based on the foregoing, the Court accordingly concludes that the request for a $90,000 service award for each named plaintiff is reasonable. The Court therefore GRANTS the requested $90,000 service award for each of the three named Plaintiffs.

III. CONCLUSION

For the foregoing reasons, the Court hereby GRANTS in part and DENIES in part the motions for attorney's fees, reimbursement of expenses, and service awards. The Court awards as follows:

- $13,800,658.50 in attorney's fees to class counsel in connection with the Dreamworks and Disney settlements, for a total attorney's fee award of $18,538,158.50 in the entire case;
- $490,040.13 in unreimbursed expenses to class counsel in connection with the Dreamworks and Disney settlements;
- $90,000 service awards each to Plaintiff Nitsch, Plaintiff Wentworth, and Plaintiff Cano in connection with the Dreamworks and Disney settlements.

IT IS SO ORDERED.

Dated: June 5, 2017

Lucy H. Koh

LUCY H. KOH
United States District Judge

United States District Court
Northern District of California

TAB 53B

Daniel A. Small (*pro hac vice*)
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave. NW, Suite 500
Washington, DC 20005
Telephone: (202) 408-4600
Facsimile: (202) 408-4699
dsmall@cohenmilstein.com

Steve W. Berman (*pro hac vice*)
HAGENS BERMAN SOBOL SHAPIRO LLP
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslaw.com

Marc M. Seltzer (54534)
SUSMAN GODFREY L.L.P.
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067-6029
Telephone: (310) 789-3100
Facsimile: (310) 789-3150
mseltzer@susmangodfrey.com

[Additional Counsel on Sig. Page]

Co-Lead Class Counsel

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE ANIMATION WORKERS ANTITRUST LITIGATION	Master Docket No. 14-CV-4062-LHK
	NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS
	Date: May 18, 2017 Time: 1:30 p.m. Courtroom: 8, 4th Floor Judge: The Honorable Lucy H. Koh
THIS DOCUMENT RELATES TO: ALL ACTIONS	

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on May 18, 2017 at 1:30 pm or as soon thereafter as the matter may be heard by the Honorable Lucy H. Koh of the United States District Court of the Northern District of California, San Jose Division, located at 280 South 1st Street, San Jose, CA 95113, plaintiffs and class counsel will, and hereby do, move for an award of attorneys' fees, expenses, and service awards to the named plaintiffs. This motion is based on this Notice of Motion and Motion, the following memorandum of points and authorities, the pleadings and papers on file in this action, and such other matters as the Court may consider.

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I. INTRODUCTION

The $168,950,000 recovery achieved through class counsel's efforts and risk-taking translates into an average gross recovery for each of the approximately 10,043 class members of $16,823. Net of the attorneys' fees requested herein, class members would each receive on average $13,214, *more than double* the per-class-member net result in *High-Tech*. Class counsel's fee request, for 21% of the $150,000,000 in settlements before the Court, is not only well below the Ninth Circuit's benchmark of 25% (approximately 20% below the benchmark), it would leave class members far better off than their counterparts in *High-Tech*.

The requested fees, combined with the fees previously awarded in this case, would provide class counsel with a multiplier of their lodestar of 3.91. (The requested fees alone would be a 3.40 multiplier.) As this Court has stated, the "foremost" consideration in determining a reasonable multiplier is the benefit obtained for the class,[1] and here the benefit was excellent. The requested multiplier also falls within the range of the majority of multipliers surveyed by the Ninth Circuit in *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052-54 (9th Cir. 2002) (*Vizcaino II*). While it is at the high end of the range, that is warranted not only by the results obtained, but also by class counsel's efficiency and risk-taking. At the outset of the case, this Court requested that class counsel be efficient,[2] and we were, aggressively litigating this case for nearly three years for about $9 million in lodestar.

And there can be no doubt that many in the legal market assessing risk in deciding whether to even bring this case judged it to be too risky to try to pursue. Both the United States Department of Justice and the plaintiffs' attorneys in *High-Tech* did not pursue claims against most of the defendants here. And as to Pixar and Lucasfilm, there was little value placed in those claims (based on the settlement amounts there).

In addition to the legal market participants viewing these claims as being too risky or small in value to pursue, the claims presented other challenges at the outset, and in fact the original

[1] Order Granting in Part and Denying in Part Motions for Attorney's Fees, Reimbursement of Expenses, and Service Awards ("*High-Tech*. Order") at 19, *In re High-Tech Employee Antitrust Litig.*, No. 11-cv-2509, N.D. Cal. Sept. 2, 2015), ECF No. 1112.

[2] *See* Case Management Conference Hearing Tr. ("CMC Tr."), at 10, Nov. 5, 2014.

Complaint was dismissed as time barred. Class counsel were not even aware of the possibility of bringing this case until one of its lawyers read an article in July 2014 discussing some of the documents unsealed in *High-Tech*. They filed this case less than two months later, after interviewing dozens of witnesses, being retained, and drafting a complaint.[3] While plaintiffs were able to amend the complaint to survive a second motion to dismiss (while other plaintiffs in cases against Microsoft and Oracle were dismissed), the statute of limitations remained an over-hanging threat throughout and would have been a central issue at trial and on appeal, delaying payment to class members (at the least) and potentially jeopardizing meaningful payment completely.

To be sure, *High-Tech* provided a roadmap for class certification, mitigating some of the risk on *that* issue. But of course, certification was far from the only issue in the case. Plaintiffs faced a panoply of hurdles, including proving the amount of damages (compared to some far lower amount presented to the jury at trial by defendants), proving that Sony and Blue Sky were co-conspirators, and convincing a jury that restraining cold calls to a limited number of class members would suppress the pay of all (or nearly all) 10,000+ class members. And even as to class certification, *High Tech* did not help plaintiffs obtain the necessary data, analyze it, and respond to defendants' numerous and unique attacks on Prof. Ashenfelter's work, mounted by talented and aggressive defense counsel and their expert witness. Nor did *High Tech* help plaintiffs establish Rule 23(b)(3) predominance despite alleged individual issues raised by the statute of limitations defense.

Given the excellent result achieved for the class, the real risks class counsel faced, and the efficiency with which they litigated the case, there is a reasonable argument to be made for the Ninth

[3] To be clear, no plaintiffs' counsel in this case had any involvement in the *High-Tech* litigation, and no plaintiffs' counsel was aware at the time that the Court unsealed various documents in that case in 2013. *See* Declaration of Jeff D. Friedman in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards (Apr. 7, 2017) ("Friedman Decl."), ¶ 2; Declaration of Steven G. Sklaver in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards (Apr. 7, 2017) ("Sklaver Decl."), ¶ 16; Declaration of Daniel A. Small in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards (Apr. 7, 2017) ("Small Decl.'), ¶ 36, In July 2014, an online publication, *Pando Daily*, published an article discussing evidence of conspiratorial activity among animation studios revealed by the unsealed documents. An attorney at class counsel, Cohen Milstein Sellers & Toll, read the article that month, and the firm promptly began an investigation that involved interviewing dozens of witnesses. Plaintiff Robert Nitsch, represented by Cohen Milstein, filed the first complaint in this case on September 8, 2014, less than two months after Cohen Milstein read the *Pando Daily* article. *See* Small Decl., ¶¶ 36-37.

Circuit's 25% benchmark. Notwithstanding, class counsel surveyed the vast and variable terrain of fee awards, including the updated fee study this Court relied on in *High-Tech*, and respectfully submit that a 21% attorney fee award is reasonable and supported by the lodestar cross-check.

II. ARGUMENT

A. Plaintiffs Request a Reasonable Amount of Attorneys' Fees

When awarding attorneys' fees under Federal Rule of Civil Procedure 23(h), "courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). Considering all of the circumstances of this case, a fee of 21 percent of the settlement funds before the Court, or $31.5 million, is reasonable.[4]

Under the "common fund" doctrine, "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). "The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." *Id.* (internal citations omitted).

"The procedures used to determine the amount of reasonable attorneys' fees differ concomitantly in cases involving a common fund from those in which attorneys' fees are sought under a fee-shifting statute." *Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003). Unlike the calculation of fees under a fee-shifting statute, where "a reasonable fee . . . reflects the amount of attorney time reasonably expended on the litigation," "under the 'common fund doctrine,'" "a reasonable fee is based on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). "Indeed, every Supreme Court case addressing the computation of a

[4] This Court previously awarded class counsel 25 percent of the $18.95 million settlement fund created by the Blue Sky and Sony settlements. *See* Order Granting Plaintiffs' Motion for Attorneys' Fees, Expenses and Service Awards for Settlements with Sony Pictures Imageworks Inc., Sony Pictures animation Inc., and Blue Sky Studios Inc. ("Order"), Nov. 11, 2016, ECF No. 347.

common fund fee award has determined such fees on a percentage of the fund basis." *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 773 (11th Cir. 1991).

"This circuit has established 25% of the common fund as a benchmark award for attorney fees." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998). "That percentage amount can then be adjusted upward or downward depending on the circumstances of the case." *de Mira v. Heartland Emp't Serv., LLC*, No. 12-CV-04092 LHK, 2014 WL 1026282, at *1 (N.D. Cal. Mar. 13, 2014). As this Court and others have recognized, "'in most common fund cases, the award exceeds the benchmark.'" *Id.* (alteration omitted) (quoting *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008)).

But the hallmark remains the reasonableness of the fee: "[w]hether the Court awards the benchmark amount or some other rate, the award must be supported by findings that take into account all of the circumstances of the case," (*id.*) – which may include "[c]alculation of the lodestar, which measures the lawyer's investment of time in the litigation." *Vizcaino II*, 290 F.3d at 1050. "[W]hile the primary basis of the fee award remains the percentage method, the lodestar may provide a useful perspective on the reasonableness of a given percentage award." *Id*. Here, consideration of all circumstances demonstrates that a 21 percent fee is reasonable.

1. The 25 Percent Benchmark Award Is Presumptively Reasonable – Reflecting a Market Based Fee Amount

Notably, class counsel are asking for fees well under the 25 percent benchmark – $6 million under, to be precise. And "[w]hile the benchmark is not per se valid," the Ninth Circuit has recognized that requesting "the 25% benchmark award only" demonstrates the reasonableness of a fee request. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 955 (9th Cir. 2015). This Court has held similarly. *See Buccellato v. AT & T Operations, Inc.*, No. C10-00463-LHK, 2011 WL 3348055, at *1 (N.D. Cal. June 30, 2011) (holding that fee request was "reasonable under the percentage of the common fund method, as it is equal to this Circuit's benchmark of 25 percent.").

To help arrive at class counsel's fee request, we canvassed fee awards, particularly focusing on large dollar settlements. In doing so, our 21 percent fee request is supported by an updated attorneys' fees study relied upon by this Court in *High-Tech*, conducted by three law professors,

analyzing awards in 458 class actions during 2009-2013.[5] The study looked at fee award percentages and found that they decreased as the recovery increased. *See* EMG Study at 1. For the highest decile of recoveries in the study, above $67.5 million, the average percentage awarded was 22.3%. *See id.* at 9-10. The largest recoveries in the study, above $100 million, had mean and median fee percentages that ranged from 16.6% to 25.5%, depending on the year. *See id.* at 8. The midpoint of the study period for recoveries exceeding $100 million is 21% - our request here.

Moreover, a lodestar cross-check confirms the reasonableness of class counsel's request: "[i]f the multiplier is within an acceptable range, this adds further support to the conclusion that the fees sought are reasonable." *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-LHK, 2013 WL 496358, at *4 (N.D. Cal. Feb. 6, 2013). Multiplying class counsel's reasonable hours by their prevailing market rates yields a lodestar of $9.27 million.[6] The resulting multiplier of 3.40 (3.91 including the prior fee award) is in line with multipliers that this Court and others have deemed "reasonable":

> The resulting multiplier of 4.3 is reasonable in light of the time and labor required, the difficulty of the issues involved, the requisite legal skill and experience necessary, the excellent and quick results obtained for the Class, the contingent nature of the fee and risk of no payment, and the range of fees that are customary. *Vizcaino*, 290 F.3d at 1052-54; *Steiner v. Am. Broad. Co.*, 248 Fed. Appx. 780, 783 (9th Cir. 2007) (affirming award with multiplier of 6.85); *see also* Newberg, *Attorney Fee Awards*, § 14.03 at 14–5 (1987) ("multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied."); *Rabin v. Concord Assets Group, Inc.*, No. No. 89 Civ. 6130(LBS), 1991 WL 275757 (S.D.N.Y. 1991) (4.4 multiplier) ("In recent years multipliers of between 3 and 4.5 have become

[5] *See* Friedman Decl., Ex. B (Theodore Eisenberg, Geoffrey P. Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, NYU Law and Economics Research Paper no. 17-02; Cornell Legal Studies Research paper No. 17-05 at 8 (December 1, 2016) ("EMG Study")). This as-yet unpublished working paper is available at https://ssrn.com/abstract=2904194. In *High-Tech*, the Court relied on an earlier study by Eisenberg and Miller covering 68 class action settlements during 1993-2008. *See In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730, at *13 (N.D. Cal. Sept. 2, 2015).

[6] *See* Friedman Decl., ¶ 13; Sklaver Decl., ¶ 12; Small Decl., ¶ 30. While class counsel have provided their detailed billing,"[i]t is well established that the lodestar cross-check calculation need entail neither mathematical precision nor bean counting . . . courts may rely on summaries submitted by the attorneys and need not review actual billing records." *Perkins v. LinkedIn Corp.*, No. 13-CV-04303-LHK, 2016 WL 613255, at *17 (N.D. Cal. Feb. 16, 2016) (alterations, quotation marks, and internal citations omitted). Class counsel are reporting their lodestar through February 2017. The reported lodestar thus omits work class counsel have done and will do since, including drafting a motion for final approval of the pending settlements, arguing at the fairness hearing, and if the settlements are approved, administering distribution of the settlement fund. At the end of the day, the requested fee award would generate a multiplier well under 4.

> common.") (internal quotations and citations omitted); *In re Xcel Energy, Inc., Securities, Derivative & " 'ERISA" Litig.*, 364 F.Supp.2d 980, 998-99 (D. Minn. 2005) (approving 25% fee, resulting in 4.7 multiplier); *In re Aremissoft Corp. Sec. Litig.*, 210 F.R.D. 109, 134-35 (D.N.J. 2002) (approving 28% fee, resulting in 4.3 multiplier); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 371 (S.D.N.Y. 2002) (approving 33.3% fee, resulting in "modest multiplier of 4.65"); *Di Giacomo v. Plains All Am. Pipeline*, Nos. 99-4137 & 99-4212, 2001 WL 34633373, at *10-11 (S.D. Fla. Dec. 19, 2001) (approving 30% fee, resulting in 5.3 multiplier); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 198 (S.D.N.Y. 1997) (5.5 multiplier); *Roberts v. Texaco*, 979 F.Supp. 185 (S.D.N.Y. 1997) (approving multiplier of 5.5); *Weiss v. Mercedez-Benz*, 899 F.Supp. 1297 (D.N.J. 1995) (approving multiplier of 9.3); *Weiss v. Mercedes-Benz of N. Am., Inc.*, 899 F. Supp. 1297, 1304 (D.N.J. 1995) (9.3 multiplier), *aff'd*, 66 F.3d 314 (3d Cir. 1995).

Buccellato, 2011 WL 3348055 at *2. Indeed, "Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers." *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) (collecting cases); *accord, e.g.*, *In re Aremissoft Corp. Secs. Litig.*, 210 F.R.D. 109, 134–35 (D.N.J. 2002) (awarding 28% of a $194 million settlement, resulting in a lodestar multiplier of 4.3). The Ninth Circuit, for example, has explicitly affirmed a multiplier of 6.85, holding that it "falls well within the range of multipliers that courts have allowed." *Steiner v. Am. Broad. Co.*, 248 F. App'x 780, 783 (9th Cir. 2007).

An overall multiplier of 3.40 is within the range of multipliers surveyed by the Ninth Circuit in *Vizcaino*. *See High-Tech*. Order (relying on *Vizcano* survey). *Vizcano* found that in 20 of the 24 cases it surveyed, the multiplier was between 1.0 and 4.0. *See Vizcano II*, 290 F.3d at 1051 n.6. Significantly, the cases *Vizcano* surveyed involved common funds of $50-200 million. *Id.* at 1052-54. The settlements in this case total in the high end of this range. Given that the EMG Study shows that ***multipliers increase as the size of the recovery increases*** (*see* EMG Study at 1), a multiplier in this case at the high end of the *Vizcano* range is appropriate for this reason alone, even putting aside the excellent results achieved and significant risks borne by class counsel.

Having been shown to be presumptively reasonable under a percentage-of-the-fund calculation, a lodestar cross-check, and a large study of class action fee awards, the question becomes whether there are "any 'special circumstances' justifying a departure" (*Bluetooth*, 654 F.3d at 942) from the requested 21 percent. For the reasons that follow, the answer is "no."

2. All Relevant Circumstances Confirm a 21 Percent Award Is Reasonable

Though no exhaustive list of relevant factors exists, the Ninth Circuit has endorsed a number of factors which may be relevant to determining the reasonableness of a fee, including the results achieved, the risks faced, the non-monetary benefits conferred, the contingent nature of the representation, the market rates for similar cases, and the risk of any windfall profits. *See, e.g.*, *In re Online DVD-Rental*, 779 F.3d at 954 (listing factors).

a. A 21 percent fee is justified by the exceptional results achieved

"The most important factor is the results achieved for the class." *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, No. 1917, 2016 WL 4126533, at *4 (N.D. Cal. Aug. 3, 2016). Here, those results are exceptional. Taking all approved and preliminarily-approved settlements into account, counsel's efforts created a $168.95 million fund for the class. Notably, the class will recover 30.5 percent of an antitrust injury estimated to be $553 million before trebling.[7] Lesser results have justified ***upward departures*** from the 25% benchmark. *See, e.g.*, *CRT*, 2016 WL 4126533, at *4-*5 (holding that 20 percent antitrust recovery in a megafund case warranted "a modest increase over the Ninth Circuit benchmark"); *Omnivision*, 559 F. Supp. 2d at 1046 (holding that "a total award of approximately 9% of the possible damages" "weighs in favor of granting the requested 28% fee").[8]

The results achieved are even more substantial when considered as a function of the average ***cash*** recovery to each class member, which is $16,823 before accounting for fees and expenses. *Cf. In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2013 WL 1365900, at *7 (N.D. Cal. Apr. 3, 2013) (awarding 28.5% fee because "the amount that individual claimants will receive is

[7] *See* Friedman Decl., ¶ 17.

[8] *See also In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at *19 (C.D. Cal. June 10, 2005) ("When the requested fee and expense award is deducted, the net amount of the settlement represented approximately 23% of the class' claimed loss. As Lead Counsel maintains, such a recovery percentage is considerable, and is greater than those obtained in cases where class counsel was awarded one-third of a common fund. *See Med. X–Ray* 1998 WL 661515, at *7-*8 (increasing 25% benchmark to 33.3% where counsel recovered 17% of damages); *Crazy Eddie*, 824 F. Supp. at 326 (increasing 25% benchmark to 33.8% where counsel recovered 10% of damages); *In re Gen. Instruments Sec. Litig.*, 209 F. Supp. 2d 423, 431, 434 (E.D. Pa. 2001) (awarding one-third fee from $48 million settlement fund that was approximately 11% of the plaintiffs' estimated damages); *Corel*, 293 F. Supp. 2d at 489-90, 498 (permitting one-third fee award from $48 million settlement fund which represented approximately 15% of class' total net damages); *Cullen*, 197 F.R.D. at 148 (awarding one-third in fees from settlement of class consisting of defrauded vocational students that was 17% of the tuition that class members paid)).")

excellent" and "in the range of $64 per monitor or laptop, or $128 per TV."). Importantly, class counsel also negotiated an allocation and payment method whereby, at the time of disbursement, each non-opt out class member will receive his or her substantial cash payment directly in the mail, without needing to make any showing, or do anything further.

And if one were to use the *High-Tech* recovery per class member to help assess counsel's achievement for the class, the results appear even more impressive.Whereas the settlements in *High-Tech* totaled only 14% of the proposed single damages estimate, the settlements here totaled 30.5%. More importantly, whereas the settlements in *High-Tech* amounted to approximately $6,753 per class member, the settlements here amounted to approximately $16,823. In fact, were this Court to award all fees, expenses, and service awards requested herein, the average class member recovery after accounting for all fees and expenses will still be $13,637.36 – which is 2.4 times more than the equivalent *High-Tech* recovery of approximately $5,770 per person. Indeed, the assumed average recovery in this case after accounting for all requested fees and expenses, would be two times greater than the average recovery in *High-Tech* ***had High-Tech counsel worked for free and paid their own expenses,*** $6,753.61.[9]

As noted at the outset, moreover, these exceptional results were achieved "in absence of supporting precedents" (*Vizcaino II*, 290 F.3d at 1048) – really, in the face of superficially *contrary* precedents –"and against [defendants'] vigorous opposition throughout the litigation." *Id.* At the first hearing in this matter, DreamWorks told this Court that plaintiffs had asserted "slim to not existent" allegations against defendants "that, frankly, they do not appear to have any basis to have filed lawsuits against."[10] Of course, DreamWorks ended up settling for $50,000,000 and cooperation. And the Disney defendants agreed to pay $100,000,000 even though "the House of Mouse is

[9] The favorable comparisons to the results achieved in *High-Tech* hold on a more granular level too: whereas Pixar and Lucasfilm settled for just $9 million in *High-Tech*, they and the other Disney defendants settled for $100 million here, despite being represented by the same counsel, and despite the fact that the *High-Tech* settlement likely released many of the claims at issue in this case. *See Vizcaino II*, 290 F.3d at 1048 (noting exceptional results achieved "in the face of agreements signed by the class members forsaking benefits").

[10] *See* CMC Tr. at 19.

infamous for almost never settling lawsuits."[11] Finally, class counsel achieved these exceptional raw-dollar, percentage, and per capita results despite facing off against some of the best, and most well-resourced, defense lawyers, from Covington & Burling; Gibson, Dunn & Crutcher; Jones Day; Keker & Van Nest; Orrick Herrington & Sutcliffe; and Williams & Connolly. *See de Mira*, 2014 WL 1026282 at *2 (justifying 28% fee award in part because "Defendant was represented by an experienced and well-resourced defense firm. Had Class Counsel failed to vigorously prosecute this case, it is unlikely that this settlement could have been achieved").

b. A 21 percent fee is justified by the significant risk borne by counsel

"The risk that further litigation might result in Plaintiffs not recovering at all, particularly a case involving complicated legal issues, is a significant factor in the award of fees." *In re Omnivision*, 559 F. Supp. 2d at 1046-47; *accord In re Pac. Enter. Secs. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (holding fees justified "because of the complexity of the issues and the risks").

Here, class counsel faced real risks in pursuing this case, not the least of which was being initially dismissed on the pleadings as a matter of law. *See Vizcaino II*, 290 F.3d at 1048 (finding case "extremely risky" where "[t]wice plaintiffs lost in the district court"). Indeed, defendants' statute of limitations defense reared its head over this case every step of the way. Although class counsel were able to survive a second motion to dismiss, two related cases were not so fortunate – and ended in ***zero*** recovery. *See Garrison v. Oracle Corp.*, 159 F. Supp. 3d 1044 (N.D. Cal. 2016) (distinguishing this case, and granting motion to dismiss plaintiffs' time-barred claims with prejudice); *Ryan v. Microsoft Corp.*, 147 F. Supp. 3d 868 (N.D. Cal. 2015) (same).

Stating a timely claim was only the first step on the road to recovery, as failing to obtain class certification would have all but eliminated the chances of any recovery, much less the meaningful recovery obtained here. While class counsel was able to obtain class certification, it did so without the support of "any case in which the Ninth Circuit ha[d] considered . . . whether certification is permissible when the plaintiff class must prove fraudulent concealment to overcome the statute of

[11] Dominic Patten, *It's Over! Disney Ends Animation Anti-Poaching Suit with $100M Deal*, Deadline Hollywood, Feb. 1, 2017, http://deadline. com/2017/02/disney-pixar-dreamworks-animation-settlement-lawsuit-class-action-dreamworks-1201899625.

limitations," and notwithstanding a Fourth Circuit decision reversing a $390 million class-action judgment on the theory that tolling analyses implicated individual questions. *See* ECF No. 289 at 64-65.

Although class counsel and this Court got those decisions right, surviving a motion to dismiss and certifying the class by no means eliminated the risks posed by defendants' statute of limitations defense. Because fraudulent concealment presents classic jury questions, there remained a significant chance of the class not recovering at trial, if counsel failed to convince the jury that defendants had fraudulently concealed their conduct, or if defendants were able to convince the jury that some or all of the class members had actual or constructive knowledge of their claims. And even if plaintiffs' fraudulent concealment allegations, and all others, carried the day at trial, defendants would have undoubtedly appealed any jury verdict to the Ninth Circuit, and possibly even the Supreme Court. And here again, because the statute of limitations question was one of law, a Ninth Circuit reversal as to the pleadings or class certification could have resulted in zero recovery.

The significant risks borne by counsel extended beyond the statute of limitations issue too. As other courts have recognized, "[a]n antitrust class action is arguably the most complex action to prosecute. The legal and factual issues involved are always numerous and uncertain in outcome." *In re Optical Disk Drive Prod. Antitrust Litig.*, No. 3:10-MD-2143 RS, 2016 WL 7364803, at *4 (N.D. Cal. Dec. 19, 2016) (quotation marks and ellipses omitted).

Although the DOJ investigation certainly paved some ground here – as to the alleged illegality of the restraint for example – the scope of the DOJ investigation and consent decree also cut against pursuing this suit. Here's how Blue Sky's counsel framed those risks at the first hearing in this case, a sentiment which was echoed by DreamWorks and Sony alike:

> DOJ filed no action against us. We were not part of the consent decree. We were never added to the *High-Tech Employees Litigation* and the like. Given that, there is really the, frankly, flimsiest bases to have included Blue Sky in this lawsuit.[12]

High-Tech more directly piggy-backed onto the DOJ investigation. While similar, in the end, most of the overlap between the two cases boils down to both involving no-poach agreements and Steve Jobs

[12] *See* CMC Tr. at 28.

being at the epicenter of both conspiracies, as CEO of Apple and President of Pixar. Indeed, were the legal and factual issues – and attendant risks – one and the same, *High-Tech* counsel never would have carved out and left behind the *Animation Workers* conspiracy.

To be sure, this class has benefitted from the Court's unsealing of the facts in *High-Tech*, and class counsel was guided by this Court's class certification analyses in *High-Tech*. But those realities did not eliminate the risks or complexities class counsel faced in achieving this recovery in a case that neither the DOJ nor *High-Tech* counsel decided to pursue. One significant difference was the statute of limitations defense (which engendered different risks and required different analyses and strategies at the pleadings and class certification stages, and at trial), but others existed as well. Indeed, a second important legal issue in this case was also still open from *High-Tech*: namely, whether a "no poach" restraint is *per se* illegal, or whether it requires a rule of reason analysis. Furthermore, the conspiracy here included a compensation coordination component that was not present in *High-Tech*.

And putting aside the legal classification of the restraint, *High-Tech* never tested any theory of that restraint to a jury, or any theory of impact or damages resulting from that restraint to a jury. *Cf. Omnivision*, 559 F. Supp. 2d at 1047 (risks faced by plaintiffs supported 28 percent fee, where "[t]he parties' estimates of possible damages varied dramatically, such that if Plaintiffs prevailed on liability but Defendants prevailed on damages, the reward could have been even smaller"). In particular, the basic theory of causation in both cases – that suppression of cold calls to a fraction of the class would suppress the pay of every one of thousands of class members – was untested in *High-Tech*. Factual differences between the two cases affecting complexity and risk were also abound, including that: many of the defendants here were not pursued by the DOJ; the conspiracy evidence against Sony and Blue Sky was weaker than it was for the other defendants; and a *High-Tech* settlement released a large number of claims in this case.

Finally, it is also worth noting that the EMG Study looked at average fee awards based on risk, according to the type of litigation. The average fee award for ***low-medium risk*** antitrust cases between 2009-2013 was ***24.91%***. This data looking at the risk dimension in antitrust cases reinforces the reasonableness of counsel's 21% fee request.

c. A 21 percent fee is justified by the incidental benefits flowing to the public

"Incidental or non-monetary benefits conferred by the litigation are a relevant circumstance." *Vizcaino II*, 290 F.3d at 1049; *accord Bebchick v. Washington Metro. Area Transit Comm'n*, 805 F.2d 396, 408 (D.C. Cir. 1986) ("we think that an upward adjustment to the lodestar is appropriate to reflect the benefits to the public flowing from this litigation."). Here, class counsel's efforts as private attorneys general conferred at least two types of non-monetary benefits on the public.

First, their high-profile and successful pursuit of this powerful cartel put other employers on notice of the illegality of "no poach" agreements, benefiting workers nationwide. *Accord Vizcaino v. Microsoft Corp.*, 142 F. Supp. 2d 1299, 1304 (W.D. Wash. 2001) ("As a result of this case and the large amount of publicity surrounding it, many employers have been advised to carefully ensure their workers are properly classified so that they will not get into the same trouble as Microsoft."); *In re Linerboard Antitrust Litig.*, MDL No. 1261, 2004 WL 1221350, at *17 (E.D. Pa. June 2, 2004) ("As the Second Circuit has explained, the incentive for 'the private attorney general' is particularly important in the area of antitrust enforcement because public policy relies so heavily on such private action for enforcement of the antitrust laws." (Internal citation omitted.)

Second, class counsel's efforts further benefited the public, and future classes, by clarifying the law in the Ninth Circuit in many important respects, including by clarifying what is required to adequately plead fraudulent concealment (ECF No. 147); that pleading fraudulent concealment is not a *per se* bar to class certification (ECF No. 289); and in a case of first impression in the Ninth Circuit, that a civil antitrust violation can fall within the "crime-fraud" exception to the attorney-client privilege (ECF No. 236 at 3). *See Vizcaino II*, 290 F.3d at 1049 (upholding 28 percent fee where "the litigation also benefitted employers and workers nationwide by clarifying the law of temporary worker classification"). These incidental benefits provide further support for a 21 percent fee.

d. A 21 percent fee is justified by the contingent nature of the representation

Class counsel's 21 percent fee request is also reasonable in light of the contingent nature of class counsel's representation—that is, that they would only get paid if the class recovered, and only out of the class's recovery at that. "Courts have long recognized that the public interest is served by

rewarding attorneys who assume representation on a contingent basis with an ***enhanced fee*** to compensate them for the risk that they might be paid nothing at all for their work." *Ching v. Siemens Indus., Inc.*, No. 11-CV-04838-MEJ, 2014 WL 2926210, at *8 (N.D. Cal. June 27, 2014) (emphasis added). "This mirrors the established practice in the private legal market of rewarding attorneys for taking the risk of nonpayment by paying them ***a premium*** over their normal hourly rates for winning contingency cases." *Vizcaino II*, 290 F.3d at 1051 (emphasis added). "Contingent fees that may ***far exceed*** the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose." *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994) (emphasis added).

Contingent fees, in short, are good for clients and the public alike. In exchange for increased predictability, decreased bean counting, and unlimited protection against downside risks—including the risk of a zero dollar recovery—a client agrees to pay its attorneys an enhanced fee ***if and only if*** the client recovers. And because contingent fees are almost always determined as a percentage of the client's recovery, such fees are necessarily aligned with and proportional to the results achieved for that client—in short, you only pay for what you get. *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 887 (1987) ("[E]ven uninformed clients can align their attorney's interests with their own by compensating them through a percentage-of-recovery fee formula."). Lest contingent fees disappear altogether, however, the law must continue to recognize both sides of the bargain – namely, a significant upside fee for successful contingent representations. If it instead becomes that lawyers must not only bear all of the downside risk, but must also do so only for the prospect of being paid what they would have been paid by the hour, win or lose, had they not taken the case on a contingency, the law will at the very least discourage sophisticated counsel from pursuing risky representations on behalf of non-wealthy clients. *See Vizcaino II*, 290 F.3d at 1051 ("In common fund cases, 'attorneys whose compensation depends on their winning the case must make up in compensation in the cases they win for the lack of compensation in the cases they lose.'").

Here, class counsel have spent nearly three years and nearly 18,500 hours investigating and

litigating this case, while foregoing other paid work, without receiving any compensation to do so. Such burdens are significant, even for law firms of class counsel's stature. For instance, the fact that no money was coming in did not relieve class counsel from having to pay the salaries of the associates and staff working on this case, or from having to cover non-reimbursable overhead expenses like rent. Class counsel not only floated these financial burdens, but they did so while assuming the class's risk that there might never be ***any*** repayment. *See Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376–77 (9th Cir. 1993) ("Class counsel, however, have the case on a contingency. Moreover, it is a double contingency; first, they must prevail on the class claims, and then they must find some way to collect what they win."). They also advanced over $2,067,288.06 in expenses, interest-free, prosecuting this action, including all expert fees and expenses, which are a substantial but necessary burden in any antitrust action. "This substantial outlay, when there is a risk that none of it will be recovered, further supports the award of the requested fees." *In re Omnivision*, 559 F. Supp. 2d at 1047.

A 21 percent benchmark award reasonably compensates class counsel for carrying the financial burdens of this risky case. *See Torrisi*, 8 F.3d at 1377 ("The 25% contingent fee rewarded class counsel not only for the hours they had in the case to the date of the settlement, but for carrying the financial burden of the case, effectively prosecuting it and, by reason of their expert handling of the case, achieving a just settlement for the class."); *accord*, *e.g.*, *Hopkins*, 2013 WL 496358, at *3 (awarding 30 percent fee in part because "case was conducted on an entirely contingent fee basis against a well-represented Defendant."). The 21 percent rate is actually below the standard market contingency rate of 33 percent,[13] which further demonstrates the reasonableness of class counsel's request. *See In re Online DVD*, 779 F.3d at 955 (reasonableness factors include "the market rate for

[13] *See, e.g.*, Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 Fordham L. Rev. 247, 248 (1996) (noting that "standard contingency fees" are "usually thirty-three percent to forty percent of gross recoveries" (emphasis omitted)); F. Patrick Hubbard, *Substantive Due Process Limits on Punitive Damages Awards: "Morals Without Technique"?*, 60 Fla. L. Rev. 349, 383 (2008) (mentioning "the usual 33-40 percent contingent fee" (quoting *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003))); Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DePaul L. Rev. 267, 286 (1998) (reporting the results of a survey of Wisconsin lawyers, which found that "[o]f the cases with a [fee calculated as a] fixed percentage [of the recovery], a contingency fee of 33% was by far the most common, accounting for 92% of those cases").

the particular field of law in some circumstances"); *Vizcaino II*, 290 F.3d at 1049-50 (evidence of market rate may be probative of the fee award's reasonableness).

e. A 21 percent fee accords with fee awards in analogous cases

An award of 21 percent of the common fund is consistent with, and within the range of, fee awards out of common funds of comparable size – which is not surprising since the "benchmark for an attorneys' fee award in a successful class action is twenty-five percent of the entire common fund." *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997). Of course, because "the percentage may be adjusted to account for any unusual circumstances" (*id.*), it is possible to cite many examples of percentage-of-the-fund awards falling on either side of that benchmark. But this Court has correctly recognized that "[p]ercentage awards of between 20% and 30% are common," and that, "'in most common fund cases, the award exceeds the benchmark'" *de Mira*, 2014 WL 1026282, at *1.

In fact, of the three common funds of equivalent or greater size cited by the Ninth Circuit in *Vizcaino II*, ***all three cases awarded fees at or above the 25 percent benchmark***, and ***two of the three awards*** resulted in multipliers exceeding the 3.91 multiplier requested here:

Case	Fund	Fee (%)	Fee ($)	Multiplier
In re Rite Aid Corp. Sec. Litig., 146 F. Supp. 2d 706 (E.D. Pa. 2001)	$193M	25.0%	$48M	4.5-8.5
In re Lease Oil Antitrust Litig., 186 F.R.D. 403 (S.D. Tex. 1999)	$190M	25.0%	$47M	1.4
In re Merry–Go–Round Enter., Inc., 244 B.R. 327 (Bankr. D. Md. 2000)	$185M	40.0%	$71M	19.6

Vizcaino II, 290 F.3d at 1052 (upholding 28% fee on $97 million settlement fund, resulting in a 3.65 multiplier). Indeed, ***"federal district courts across the country have, in the class action settlement context, routinely awarded class counsel fees in excess of the 25% 'benchmark,' even in so-called 'mega-fund' cases.***" *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1210 (S.D. Fla. 2006) (emphasis added) (awarding 31.33% fee on $1.075 billion settlement fund); *accord In re Urethane Antitrust Litig.*, No. 04-1616-JWL (D. Kan. July 29, 2016), ECF No. 2373 (awarding 33.33% fee on $835 million settlement; "Counsel's expert has identified 34 megafund cases with

settlements of at least $100 million in which the court awarded fees of 30 percent or higher").[14]

While *Vizcaino II* alone demonstrates that both the requested fee and resultant multiplier is well within the reasonable range, additional market information further bolsters that a 21 percent award is reasonable and within the range of fee awards from analogous cases. For example, as discussed above, the EMG Study reports that the highest decile of recoveries in the study, above $67.5 million, averaged a 22.3 percent fee award. *See* EMG Study at 9-10. The largest recoveries in the study, above $100 million, had mean and median fee percentages that ranged from 16.6% to 25.5%, depending on the year. *See id.* at 8. Across all settlements in the study, the report finds that "[o]n average, fees were 27% of gross recovery during the 2009-2013 period, which is higher than the average fee percentage of 23% that we reported in our analyses of the 1993-2008 period." *Id.* The study further reports that, of the 53 settlements in the Northern District of California, the mean and median percentages awarded were 26% and 25% respectively (*id.* at 11), and that, of the 144 settlements in the Ninth Circuit, the mean and median percentages awarded were also 26% and 25% respectively (*id.* at 12). Looking at case subject matter, the study further reports that of the 19 antitrust settlements between 2009-2013, with a mean recovery of $501.09 million and a median recovery of $37.3 million, the mean and median percentages awarded were 27% and 30%

[14] *See also, e.g.*, *In re Optical Disk Drive*, 2016 WL 7364803 at *6 (awarding 25% fee on $124.5 million settlement fund); *CRT.*, 2016 WL 4126533 at *1 (awarding 27.5% fee on $576.75 million settlement fund); *In re Polyurethane Foam Antitrust Litig.*, No. 1:10 MD 2196, 2015 WL 1639269, at *7 (N.D. Ohio Feb. 26, 2015) (awarding 30% fee on $147.8 million settlement fund); *In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167, 170 (D. Mass. 2014) (awarding 28% fee on $325 million settlement fund); *TFT-LCD*, 2013 WL 1365900, at *3 (awarding 28.6% fee on $571 million settlement fund); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1366 (S.D. Fla. 2011) (awarding 33.3% fee on $510 million settlement fund); *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-CV-1825 (NGG), 2010 WL 2653354, at *6 (E.D.N.Y. June 24, 2010) (awarding 25% fee on $225 million settlement fund); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (awarding 25% fee on $126 million settlement fund, resulting in multiplier of 6.96); *Linerboard*, 2004 WL 1221350, at *1(awarding 30% fee on $202.5 million settlement fund); *In re Buspirone Antitrust Litig.*, No. 01-MD-1410 (S.D.N.Y. Apr. 11, 2003), at 4, 42-45 (awarding 33.3% of a $220 million dollar fund, which produced a multiplier of 8.46); *In re Cardizem CD Antitrust Litig.*, No. 99-MD-1278 (E.D.Mich. Nov. 26, 2002), at 18-20 (awarding 30% of a $110 million dollar fund, which produced a multiplier of 3.7); *In re Vitamins Antitrust Litig.*, No. MDL 1285, 2001 WL 34312839, at *9 (D.D.C. July 16, 2001) (awarding 34.6% fee on $365 million settlement fund); *In re Ikon Office Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 170 (E.D. Pa. 2000) (awarding 30% fee on $111 million settlement fund); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 2000 WL 204112, at *2 (N.D. Ill. Feb. 10, 2000) (awarding 25.4% fee on $696 million settlement fund); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 395 (S.D.N.Y. 1999) (awarding 27.5% fee on $116 million settlement fund).

respectively. *Id.* at 13; s*ee also, e.g.*, *In re Auto. Refinishing Paint Antitrust Litig.*, MDL No.1426, 2008 WL 63269, at *5 (E.D. Pa. Jan. 3, 2008) ("We have previously noted that is not unusual in antitrust class actions for the attorneys to receive awards for fees in the 30% range."). In addition, the study reports that "the fee-to-recovery ratio tends to be lower in cases with very large recoveries." EMG Study at 8. Conversely, the study at the same time reports that "higher multipliers are associated with higher recoveries." *Id.* at 27.

Here again, that the average award in megafund cases across all subject matters and all locales in 2011 was ***greater than*** the 21 percent fee requested here confirms, like *Vizcaino II* does, that a 21 percent fee on a recovery of this size is reasonable and well inside the range of fee awards in comparable common fund cases.

f. A 21 percent fee does not award windfall profits to counsel

In reiterating in *In re Bluetooth Headset Prod. Liab. Litig.* that any fee award must be reasonable, the Ninth Circuit remarked, in dicta, "for example, where awarding 25% of a 'megafund' would yield windfall profits for class counsel in light of the hours spent on the case, courts should adjust the benchmark percentage or employ the lodestar method instead." 654 F.3d at 942; *but see, e.g.*, *Linerboard*, 2004 WL 1221350, at *17 ("the sliding scale approach is economically unsound.") As an initial matter, counsel are not seeking the benchmark 25% fee here, notwithstanding the representative cases and studies cited in the previous section that could support such a request. Again, courts in this district and across the country have routinely awarded above the 25% benchmark in megafund cases.

As the successive, increasing settlements obtained in this action underscore, the size of the common fund is directly related to the efforts of counsel. After class counsel defeated defendants' motion to dismiss and filed a motion for class certification, Blue Sky settled for $5.95 million; after class counsel replied to defendants' opposition to class certification, Sony settled for $13 million; after the Court certified the class and class counsel defeated defendants' Rule 23(f) petition, DreamWorks settled for $50 million; after class counsel staved off absent class member discovery, served their merits expert reports, and presented their case to an impartial mediator, the Disney defendants settled for $100 million.

Simply put, this is not a mass tort or fraud case where the mere disclosure of a government investigation all but guarantees the creation of a megafund, notwithstanding what counsel does or does not do; instead, this case went from ***zero*** recovery to megafund precisely because of counsel's efforts. *Accord, e.g.*, *Linerboard*, 2004 WL 1221350, at *17 (rejecting application of the increase-decrease principle "because the highly favorable settlement was attributable to the petitioners' skill and it is inappropriate to penalize them for their success."); *Vitamins*, 2001 WL 34312839, at *12 ("This Court agrees that it is not fair to penalize counsel for obtaining fine results for their clients.").

Relatedly, the size of the common fund obtained in this case is not "merely a factor of the size of the class." *Bluetooth*, 654 F.3d at 943. In truth, a megafund was created in this case despite the size of the class, not because of it. An analysis of the megafund cases cited at *supra* note 8 reveals that, with one exception, the number of class members sharing in the megafund in this case (approximately 10,043 class members) is ***one-fourth*** the number of class members sharing in the next smallest by-member megafund case; in fact, above-benchmark fees are often awarded where megafunds must be shared by hundreds of thousands, if not millions, of class members.[15] Here again, a comparison to *High-Tech* is also instructive. There, counsel's efforts were on behalf of approximately 64,410 non-opt-out class members, or nearly ***6.5 times*** as many class members as have claims here. And yet, despite representing class members who number less than 16 percent of the *High-Tech* class, class counsel created a common fund that is nearly 39 percent of the *High-Tech* common fund. Class counsel were able to do so, moreover, even though average class member salaries were lower than in *High-Tech*, and even though *High-Tech* released many overlapping

[15] *See, e.g.*, *Optical Disk Drive*, 2016 WL 7364803, at *6 ($124.5 million settlement fund for "millions of class members"); *CRT*, 2016 WL 4126533, at *1 ($576.75 million settlement fund for "millions" of class members, *Polyurethane Foam*, 2015 WL 1639269, at *7 ($147.8 million settlement fund for more than "48,000" class members); *Neurontin*, 58 F. Supp. 3d at 170 ($325 million settlement fund for "more than 40,000 class members"); *TFT-LCD*, 2013 WL 1365900, at *3 ($571 million settlement fund for more than "235,808" class members); *In re Checking*, 830 F. Supp. 2d 1330 at 1366 ($510 million settlement fund for "approximately 13 million" class members); *Comverse Tech*, 2010 WL 2653354, at *6 ($225 million settlement fund for "more than 204,000 potential class members"); *Linerboard*, 2004 WL 1221350, at *1 ($202.5 million settlement fund for "approximately 80,000 companies"); *Ikon*, 194 F.R.D. at 170 ($111 million settlement fund for more than 200,000 class members); *Brand Name Prescription Drugs*, 2000 WL 204112, at *2 ($696 million settlement fund for "approximately 40,000 retail pharmacies"); *but see Vitamins*, 2001 WL 34312839, at *9 ($365 million settlement fund for 4,000 class members).

claims.

Thus, while application of the so-called increase-decrease principle may be appropriate in certain cases,[16] it is tenuous here, where the size of the fund is not merely a factor of the size of the class but is instead directly related to the efforts of class counsel. In the end, the facts are these: class counsel achieved exceptional, megafund results for a relatively small class of plaintiffs who had been left behind by the government and *High-Tech* alike. In doing so, they overcame adverse decisions, obtained incidental benefits for the public, expended huge amounts of their own time and money, and faced considerable risks of non-recovery (and thus non-payment) in pursuing this complex antitrust class action against well-financed corporate defendants, with top-notch counsel. Their 21 percent fee request is below the market contingency rate, below the Ninth Circuit benchmark rate, below the rates awarded in other megafund cases, and results in a lodestar cross-check multiplier within the range of multipliers that both this Court and the Ninth Circuit have previously deemed "reasonable." Class counsel's fee request, in short, is eminently reasonable, fair, and justified based on all the circumstances of this case. To nonetheless apply the increase-decrease principle and reduce

[16] Many courts are not so sure. As Judge Katz put it in oft-quoted language:

> The court will not reduce the requested award simply for the sake of doing so when every other factor ordinarily considered weighs in favor of approving class counsel's request of thirty percent. In so ruling, the court is well aware that most decisions addressing similar settlement amounts have adopted some variant of a sliding fee scale, by which counsel is awarded ever diminishing percentages of ever increasing common funds. This court respectfully concludes that such an approach tends to penalize attorneys who recover large settlements. More importantly, it casts doubt on the whole process by which courts award fees by creating a separate, largely unarticulated set of rules for cases in which the recovery is particularly sizable. It is difficult to discern any consistent principle in reducing large awards other than an inchoate feeling that it is simply inappropriate to award attorneys' fees above some unspecified dollar amount, even if all of the other factors ordinarily considered relevant in determining the percentage would support a higher percentage. Such an approach also fails to appreciate the immense risks undertaken by attorneys in prosecuting complex cases in which there is a great risk of no recovery. Nor does it give sufficient weight to the fact that large attorneys' fees serve to motivate capable counsel to undertake these actions.

Ikon, 194 F.R.D. at 196-97 (quotations marks and citations omitted). Others, like Judge Easterbrook, have criticized the principle as economically unsound, highlighting its perverse outcomes and incentives. *See In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) (where megafunds were defined as greater than $75 million: "This means that counsel for the consumer class could have received $22 million in fees had they settled for $74 million but were limited to $8.2 million in fees because they obtained an extra $14 million for their clients.").

an otherwise reasonable fee simply because this is a "megafund" case, would be to ignore the foregoing *Vizcaino II* factors and sanction an arbitrary, formulaic, and unreasonable result.

3. Class Counsel's Efficiencies Should Be Rewarded and Incentivized

Although class counsel's fee request is reasonable, and checks out as so under a lodestar cross-check (*see supra* § II.A.1), the efficiency with which class counsel achieved such exceptional results is laudable because it benefits the class. Had class counsel's lodestar been significantly higher, a stronger case would exist for a benchmark award of 25 percent (or more). Thus, class counsel's efficiency should be considered favorably in evaluating the reasonableness of our fee request. *See Vizcaino II*, 290 F.3d at 1043 & n.5 ("The lodestar method is merely a cross-check on the reasonableness of a percentage figure, and it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee").

Class counsel spent many hours investigating and litigating this case over the last three years, but keeping good on a promise they made at the outset,[17] they litigated strategically and efficiently throughout – placing their utmost focus on the most efficient path to results, not devoting resources to "nice to have" belt and suspender litigation. Rather than boiling the ocean, class counsel took a number of actions to circumscribe their lodestar:

- Class counsel divided categories of tasks (e.g., briefing, expert work) among the three firms, eliminating overlap and catch-up work as much as possible;
- Class counsel also worked to divide discovery tasks among the firms by defendant: for example, rather than having one lawyer from each firm on a meet and confer call, one firm would handle the call for their respective defendant and report back to all others; for maximum efficiency, the same lawyer would generally handle any follow up;
- In a time when this Court and others have been forced to issue orders encouraging law firms to give their junior lawyers standup time in court, class counsel did so willingly (with accompanying lower hourly rates). Associate-level attorneys were often the sole or primary representatives at hearings in this case. For example, at the Case Management Conference held on December 9, 2015, plaintiffs sent a mid-level Associate as the sole representative; defendants sent seven partners, with two attorneys representing each defendant (except for Williams & Connolly, an East Coast firm);[18]

[17] *See* Plaintiffs' Statement in Further Support of Plaintiffs' Unopposed Motion for Appointment of Plaintiffs' Interim Co-Lead Class Counsel at 1-2, Nov. 12, 2014, ECF No. 44.

[18] *See* ECF No. 172.

- While courts often place a two-attorney limit on depositions, with one exception, class counsel, in sharp contrast to defendants, sent only one attorney to each deposition they took in this case. As a practice, deposition preparation was also so limited: the attorney who prepared for the deposition generally took the deposition;
- Speaking of depositions: class counsel only took 25 of them, strategically focusing solely on depositions that were necessary with which to go to trial. Counsel also noticed some depositions – including of at least one top executive – but cancelled them based on the evidence developed during discovery. By way of comparison, *High-Tech* counsel took 93 depositions.[19] This saved the class significant expenses, in addition to fees; and
- Class counsel submitted monthly billings records and exchanged those records with one of the other co-lead firms, allowing the three firms to cross-check each other's time records and write off any duplicative or inefficient time.[20]

Again, each one of these actions reduced class counsel's lodestar, resulting in a higher multiplier when cross-checking counsel's percentage-of-the-fund award. But that's a good thing. *See In re Xcel Energy, Inc., Secs., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 996 (D. Minn. 2005) ("But for the cooperation and efficiency of counsel, the lodestar of plaintiffs' counsel would have been substantially more and would have required this court to devote significant judicial resources to its management of the case. Instead, counsel moved the case along expeditiously, and the court determines that the time and labor spent to be reasonable and fully supportive of the 25% attorney fee."). Strategic and efficient lawyering not only encourages "the just, speedy, and inexpensive determination of every action and proceeding" (Fed. R. Civ. P. 1), it is also directly correlated with obtaining superb results. One-on-one meet and confers tend to be more productive; oral arguments tend to go better when the person who wrote the motion also argues the motion; and depositions are more effective when the person taking the deposition drafted the questions for the deposition.

Thus, as a matter of policy, the law should reward results achieved through efficiency and incentivize similar future litigation conduct:

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[19] *See High-Tech*, 2015 WL 5158730, at *10.

[20] Friedman Decl., ¶ 5; *accord* Sandra R. McCandless et al., Tort Trial & Ins. Practice Section of the Am. Bar Ass'n, *Report on Contingent Fees in Class Action Litigation*, 25 Rev. Litig. 459, 468 (2006) ("the lodestar method encourages lawyers to ensure that the number of hours in the case is high": "They might do duplicative or otherwise unnecessary work. They might send two lawyers rather than one to a deposition, or three rather than two to a discovery hearing. Work that could be done by an associate or a paralegal might be done by a partner and billed at the partner's higher rate.").

> There are strong policy reasons behind the judicial and legislative preference for the percentage of recovery method of determining attorney fees in these cases. Under the percentage method, the more the attorney succeeds in recovering money for the client, and the fewer legal hours expended to reach that result, the higher dollar amount of fees the lawyer earns. Thus, one of the primary advantages of the percentage of recovery method is that it is thought to equate the interests of class counsel with those of the class members and encourage class counsel to prosecute the case in an efficient manner.

In re Xcel Energy, 364 F. Supp. 2d at 991 (footnotes, alterations, quotations, and citations omitted).

In recommending that courts employ a percentage-of-the-fund method, a Third Circuit Task Force added that lodestar methods "increase[] the workload of an already overtaxed judicial system;" are "insufficiently objective and produce results that are far from homogenous;" "create[] a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law;" are "subject to manipulation;" "encourage[] lawyers to expend excessive hours, and, in the case of attorneys presenting fee petitions, engage in duplicative and unjustified work, inflate their 'normal' billing rate, and include fictitious hours or hours already billed on other matters;" "create[] a disincentive for the early settlement of cases;" "do[] not provide the district court with enough flexibility to reward or deter lawyers;" "work[] to the particular disadvantage of the public interest bar;" and "despite the apparent simplicity . . . considerable confusion and lack of predictability remain in its administration." Court Awarded Attorney Fees, 108 F.R.D. 237, 248 (1986); *accord*, *e.g.*, Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 139-46 (2006) ("[T]he major villain here is the lodestar cross-check, which undermines deterrence by driving attorneys to settle cases at settlement-incentive breakpoints that fall short of true settlement values.").

Although modification of fee award based on a lodestar cross-check may serve some utility in cases at the fringes (such as cases far outside the main), routine recourse to it threatens to swallow the benefits that the percentage-of-the-fund method provides, for "if a court sometimes employs a lodestar cross-check, then self-interested entrepreneurial lawyers will conduct their affairs accordingly." Gilles & Friedman at 145-146; *see also* McCandless, et al. at 471 ("The lodestar cross-check re-introduces the problems of the lodestar method. If the attorneys in the previous example know that their fee, when calculated as a percentage, will be 'crosschecked' by the lodestar, they

have every financial incentive to put as many hours into the file as possible. They may do unnecessary work or delay settlement to make sure that the multiplier needed to get to their percentage fee does not appear to be out of line."). In sum, in order to maximize recoveries, promote optimal deterrence, incentivize efficient, speedy, and inexpensive dispute resolution, and conserve judicial resources, this Court should exercise its discretion here and award attorneys' fees at 21 percent of the fund recovered for the class.

B. Plaintiffs' Expenses Are Reasonable and Were Necessarily Incurred

In addition to the $31,500,000 in fees sought, plaintiffs seek reimbursement of $490,040.13 in expenses necessarily incurred in connection with the prosecution of this action.[21] All expenses that are typically billed by attorneys to paying clients in the marketplace are compensable. *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994). With this motion, plaintiffs provide an accounting of the expenses incurred by class counsel.[22] The primary expense in this case is for experts, which accounts for nearly $1.6 million, or about 77 percent, of the total. Several additional categories account for the remainder, including filing fees, travel expenses, costs of court and deposition transcripts, and computer research expenses. All of these costs were necessarily and reasonably incurred to achieve the megafund recovery, and they reflect market rates for the various categories of expenses incurred. Further, class counsel advanced these necessary expenses, interest-free, without assurance that they would even be recouped. Plaintiffs' request for expenses is reasonable.

C. Plaintiffs Request Service Awards in the Amount of $90,000

Finally, plaintiffs also request that the Court approve service awards in the amount of $90,000 for each of the three named plaintiffs, to be deducted from the settlement fund.[23] "Service awards for class representatives are routinely provided to encourage individuals to undertake the

[21] This Court previously reimbursed counsel $1,561,700.47 in expenses necessarily incurred, in connection with the Blue Sky and Sony settlements. *See* Order at 13-14.

[22] *See* Friedman Decl., ¶ 15; Sklaver Decl., ¶ 14; Small Decl., ¶ 33. As reflected in the Sklaver Declaration, there is a positive balance of $15,547.55 in the joint expense account. That amount was subtracted from the total expenses paid ($505,587.68) to calculate the net unreimbursed expenses. *See* Sklaver Decl., ¶ 15.

[23] This Court previously awarded each of the named plaintiffs $10,000, in connection with the Blue Sky and Sony settlements. *See* Order at 14-15.

responsibilities and risks of representing the class and recognize the time and effort spent in the case." Order at 14. In the Ninth Circuit, service awards "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009). "Courts have discretion to approve service awards based on, *inter alia*, the amount of time and effort spent, the duration of the litigation, and the personal benefit (or lack thereof) as a result of the litigation." Order at 14.

Here, the three named plaintiffs, Robert Nitsch, David Wentworth, and Georgia Cano have spent a significant amount of time assisting the litigation of this case. Each plaintiff responded to written discovery and produced documents relating to their claims; they were each deposed by defense counsel for a full day regarding their claims; they reviewed the SAC and other substantive pleadings; and they reviewed and approved the settlements.[24] Maybe most importantly, despite the tight-knit and fluid nature of the animation and visual effects industry, each of the named plaintiffs was willing to put his or her name on this employment lawsuit for the benefit of all absent class members despite a very real fear of "workplace retaliation" (*Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)), or being viewed as "troublemakers" within the industry (*High-Tech*, 2015 WL 5158730, at *17).[25] In fact, defendants subpoenaed their employment records from current and former employers. Finally, the service awards of a total of $100,000 for the case are in line with awards in other megafund cases, and the ratio between the services awards and the average class member recovery is not unreasonable. *High-Tech*, 2015 WL 5158730, at *18.

III. CONCLUSION

For the foregoing reasons, plaintiffs respectfully submit that plaintiffs' requests for fees, expenses, and service awards are reasonable and should be granted.

[24] *See* Declaration of Robert Nitsch in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards ("Nitsch Decl."), ¶¶ 6-11; Declaration of David Wentworth in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards ("Wentworth Decl."), ¶¶ 6-9; Declaration of Georgia Cano in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards ("Cano Decl."), ¶¶ 6-11.

[25] *See* Nitsch Decl., ¶ 12; Wentworth Decl., ¶ 10; Cano Decl., ¶ 12.

DATED: April 10, 2017

SUSMAN GODFREY L.L.P.

By *s/ Steven G. Sklaver*
STEVEN G. SKLAVER

Marc M. Seltzer (54534)
Steven G. Sklaver (237612)
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067-6029
Telephone: (310) 789-3100
Facsimile: (310) 789-3150
mseltzer@susmangodfrey.com
ssklaver@susmangodfrey.com

Matthew R. Berry (*pro hac vice*)
John E. Schiltz (*pro hac vice*)
SUSMAN GODFREY LLP
1201 Third Avenue, Suite 3800
Seattle, WA, 98101-3000
Telephone: (206) 516-3880
Facsimile: (206) 516-3883
mberry@susmangodfrey.com
jschiltz@susmangodfrey.com

Elisha Barron (*pro hac vice*)
SUSMAN GODFREY L.L.P.
1301 Avenue of the Americas, 32nd Floor
New York, NY 10019-6023
Telephone: (212) 336-8330
Facsimile: (212) 336-8340
ebarron@susmangodfrey.com

DATED: April 10, 2017

HAGENS BERMAN SOBOL SHAPIRO LLP

By *s/ Jeff D. Friedman*
JEFF D. FRIEDMAN

Shana E. Scarlett (217895)
715 Hearst Avenue, Suite 202
Berkeley, CA 94710
Telephone: (510) 725-3000
Facsimile: (510) 725-3001
jefff@hbsslaw.com
shanas@hbsslaw.com

Steve W. Berman *(Pro Hac Vice)*
Jerrod C. Patterson *(Pro Hac Vice)*
HAGENS BERMAN SOBOL SHAPIRO LLP
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslaw.com
jerrodp@hbsslaw.com

DATED: April 10, 2017

COHEN MILSTEIN SELLERS & TOLL PLLC

By *s/ Daniel A. Small*
DANIEL A. SMALL

Brent W. Johnson
Jeffrey B. Dubner
Daniel H. Silverman
1100 New York Ave. NW, Suite 500
Washington, DC 20005
Telephone: (202) 408-4600
Facsimile: (202) 408-4699
dsmall@cohenmilstein.com
bjohnson@cohenmilstein.com
dsilverman@cohenmilstein.com

Co-Lead Class Counsel

E-FILING ATTESTATION

I, Jeff D. Friedman, am the ECF User whose ID and password are being used to file this document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that each of the signatories identified above has concurred in this filing.

s/ Jeff D. Friedman
JEFF D. FRIEDMAN

TAB 54A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PRECISION ASSOCIATES, INC.; ANYTHING GOES LLC d/b/a MAIL BOXES ETC., and JCK INDUSTRIES, INC., on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

PANALPINA WORLD TRANSPORT (HOLDING) LTD., et al.,

Defendants.

Case No.: 08-CV-00042 (JG) (VVP)

ORDER

UPON Plaintiffs' Motion For Interim Payment Of Attorneys' Fees And Reimbursement Of Expenses (ECF No. 835) in respect of the $112,356,911.58 in settlement proceeds recovered by Class Counsel for the Class herein;

UPON the absence of any objections by any Class member to Class Counsel's fee application;

UPON this Court's August 27, 2013 Memorandum and Order (ECF No. 866) directing Class Counsel to resubmit and limit their fee application;

UPON Class Counsel's Supplemental Fee Application And Expense Request (ECF No.874);

UPON this Court's order awarding fees and costs dated October 3, 2013 ("Order");

UPON Class Counsel's Memorandum Of Law In Support Of Their Motion For Reconsideration Of The Court's October 3, 2013 Order ("Motion for Reconsideration"), dated October 17, 2013 (ECF No. 898), which sought reconsideration of and only of the amount of attorneys' fees awarded by the Order;

UPON this Court's ruling dated October 18, 2013 which stated that such Motion For Reconsideration "appears to have merit", and directed that Class Counsel post specified papers on the class action settlement website affording Class members a further opportunity through November 8, 2013 to object;

UPON Class Counsel's posting of such papers on such website, and the resulting absence of any objections to Class Counsel's Motion For Reconsideration (see ECF No. 939, reporting the timely posting and the absence of objections); and

UPON all prior proceedings herein;

It is hereby ORDERED that Class Counsel's Motion For Reconsideration is granted and, upon reconsideration, Class Counsel are awarded attorney fees of fifteen percent of the $112,356,911.58 in settlement proceeds that were the subject of Class Counsel's fee application.

So ordered.

John Gleeson, U.S.D.J.

Dated: December 27, 2013
Brooklyn, New York

TAB 54B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

PRECISION ASSOCIATES, INC., *et al.*, Plaintiffs, v. PANALPINA WORLD TRANSPORT (HOLDING) LTD., *et al.* Defendants.	CASE NO. 08-CV-00042 (JG)(VVP)

MEMORANDUM IN SUPPORT OF CO-LEAD COUNSEL'S PETITION FOR INTERIM PAYMENT OF ATTORNEYS' FEES` AND REIMBURSEMENT OF EXPENSES

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I. INTRODUCTION

After five and a half years of hard work in this litigation, Plaintiffs have secured settlements from ten of the twenty-eight Defendant groups[1] in this antitrust class action alleging complex international conspiracies. The resulting combined Settlement Fund provides a guaranteed fund of $112,356,911.58 in settlements for the benefit of the Class and additional future settlement payments from Settling Defendants based upon a percentage of most Settling Defendants' future recovery in *In re Air Cargo Shipping Services Antitrust Litig.*, 06-MD-1775 (JG) (VVP) (E.D.N.Y.) ("*Air Cargo*").[2] Co-Lead Counsel separately will seek final approval of these settlements and implementation of a plan of distribution to provide the benefits of the settlements to Class Members.

Co-Lead Counsel and other Class Counsel (collectively "Class Counsel") zealously litigated these complex international claims on an entirely contingent basis for years before any government indictments or guilty pleas or any assistance from the Amnesty Applicant.

When Class Counsel filed this case, there were no government complaints and all the risks of dismissal pursuant to *Bell Atl. Corp. v. Twombly*, 550 U.S. 5 44 (2007), complex foreign discovery, summary judgment, class certification, trial and collecting on judgments against foreign defendants were fully present. Most of those risks continue today to be fully present even after the subsequent government complaints. While they are favorable to the merits of the liability portion of Plaintiffs' Claims, the government actions still leave substantial risks

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[1] Plaintiffs have reached settlements with Deutsche Bahn AG, Schenker AG, Schenker, Inc., Bax Global Inc. and DB Schenker (collectively, "**Schenker**"); EGL, Inc. and EGL Eagle Global Logistics, LP, Inc. (collectively, "**EGL**"); Vantec Corporation and Vantec World Transport (USA), Inc. (collectively, "**Vantec**"); **Expeditors**; **Nishi-Nippon**; **United Aircargo Consolidators, Inc.**; **Kuehne + Nagel**; **Morrison Express**; **UTi Worldwide, Inc.**; and **ABX Logistics Worldwide NV/SA** (collectively, "Settling Defendants"). The Court has preliminarily approved each of those settlements. ECF Nos. 530, 587, 604, 643, 649, 673, 692, 715.

[2] In the *Air Cargo* Litigation, which is also before this Court, plaintiffs claim that various airlines conspired to fix prices for air cargo services. Many if not all of the Defendants in this case are class members in *Air Cargo*. Most of the Settling Defendants have agreed to turn over some or all of the proceeds they receive from the *Air Cargo* case.

(including class certification, proof of damages and collection against foreign Defendants) even when those risks are considered long after the required measuring point *i.e.*, the start of the case. In these conditions of substantial risk and without any of the comforts of hindsight bias, Class Counsel invested significant time and incurred out-of-pocket expenses on behalf of the class. In doing so, they have faced constant opposition for five and a half years from Defendants who have been represented by highly skilled and experienced antitrust counsel who have made every argument in their clients' interests.

Notwithstanding the absence of any formal factual discovery (because of the Court's stay) and Defendants' significant and ongoing opposition, Class Counsel have obtained significant settlements that, unlike in most cases, far exceed the amounts of the fines the United States Department of Justice ("DOJ") obtained based on its information and plea agreements, all of which followed long after Plaintiffs filed this action.[3] The exceptional value provided by these settlements reflects the skill, expertise and hard work of Class Counsel in the face of the significant litigation risks associated with the case.[4]

Based on the greater risks, the greater percentage recovery, the greater recovery compared to criminal fines (see footnote 3), and the much longer delays in any prospective payment of fees and reimbursement of litigation expenses in this case as compared to *Air Cargo*, Co-Lead Counsel now respectfully request that this Court:

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[3] For example, in *Air Cargo*, the settlements in the civil action represented 26.94% of the corresponding DOJ fines. In contrast, in this civil case the settlements of the Defendants who have paid DOJ fines constitute more than 200% of the amount of the government fines. In *Air Cargo*, unlike in this case, the plaintiffs were aided from the outset by cooperation from the amnesty applicant. This significantly reduced the risks faced by counsel in *Air Cargo*. By contrast, in this case Plaintiffs proceeded for approximately 26 months without any such cooperation from the Amnesty Applicant which necessarily increased the litigation risks.

[4] As described in the Declaration of W. Joseph Bruckner in Support of Co-Lead Counsel's Petition for Interim Payment of Attorneys' Fees and Reimbursement of Expenses, in addition to the four firms this Court appointed as Co-Lead Counsel, four other firms have contributed their time and resources to the successful prosecution of this case, and their time and expenses are included in this motion. In this memorandum, the term "Class Counsel" refers not only to Co-Lead Counsel but to those other firms as well.

(1) Award 33% of the Settlement Fund as interim attorneys' fees in the amount of $32,596,320.32 from settlement proceeds ($98,776,728.25) currently paid into the Settlement Fund;[5]

(2) Award 33% of the Settlement Fund as interim attorneys' fees in the amount of $4,459,980.25 from the settlement proceeds ($13,515,091.67) scheduled to be paid by EGL, Schenker and United Aircargo upon Final Approval of their respective Settlements;[6]

(3) Award 33% of the Settlement Fund as interim attorneys' fees in the amount of $21,480.25 from the settlement proceeds ($65,091.66) scheduled to be paid by United Aircargo one year after the Fairness Hearing or Final Approval of the United Aircargo settlement; and

(4) Reimburse Class Counsel for reasonable interim litigation expenses totaling $811,095.84.

II. FACTUAL BACKGROUND

A. Plaintiffs Have Litigated For Five And One-Half Years To Achieve The Settlements In This Case.

On January 3, 2008, after many months of counsels' investigation, research and preparation, Plaintiffs filed their initial complaint alleging that Defendants and others conspired to fix prices and surcharges relating to U.S. Freight Forwarding Services, in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. ECF No. 1. Bruckner Decl. ¶¶ 4 and 5.[7] On

[5] This amount includes all Settlement Fund payments and interest accrued through April 30, 2013.

[6] United Aircargo will make a payment of $65,091.67 ten Japanese business days after the Fairness Hearing, or if no Fairness Hearing is held, after the Final Approval of the Settlements.

[7] References to the Bruckner Decl. are to the Declaration of W. Joseph Bruckner in Support of Co-Lead Counsel's Petition for Interim Payment of Attorneys' Fees and Reimbursement of Expenses, dated June 12, 2013 and filed herewith.

June 3, 2009, the Court appointed the undersigned as Interim Co-Lead Counsel, and ordered them to file an amended complaint within 42 days. ECF No. 115. The Court also stayed discovery pending resolution of any motions filed by Defendants in response to the Amended Complaint. ECF No. 115. Although Co-Lead Counsel's motion to partially lift the stay of discovery is *sub judice*, the stay remains in place.

Co-Lead Counsel also sought to learn whether the DOJ had granted conditional amnesty under its Corporate Leniency Program to one of the Defendants. To that end, Co-Lead Counsel wrote to all Defendants shortly after their appointment as Co-Lead Counsel and exhorted any such Amnesty Applicant to come forward immediately and begin cooperating with Plaintiffs prior to Plaintiffs' July 2009 deadline to file the FACAC. If the Amnesty Applicant did not do so, Co-Lead Counsel stated, it would prejudice – not benefit – the Class, and as a result Plaintiffs would ultimately oppose any petition to the Court by the Amnesty Applicant for the damages limitations available upon satisfactory cooperation under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, P.L. 108-237 ("ACPERA"). But the Amnesty Applicant refused to come forward (and did not do so until after the FACAC was filed).

Faced with the refusal of the Amnesty Applicant to cooperate with the Plaintiffs at that time, Co-Lead Counsel sought an early settlement and cooperation from another Defendant, which resulted in the initial "ice-breaker" settlement with the Schenker Defendants. Meanwhile, the Amnesty Applicant joined other Defendants in moving to dismiss Plaintiffs' FACAC (and continues to bring motions to dismiss today), all the while possessing information that it should have to help bolster Plaintiffs' allegations.

Although the Schenker Settlement is a good result for the Class in and of itself, the fact that the Amnesty Applicant refused to come forward and cooperate at that material stage in the

litigation changed the tenor of settlement talks with Schenker, forced Co-Lead Counsel to enter into an "ice-breaker" settlement and then to expend additional time and resources investigating and compiling facts that they would not have been required to do, had the Amnesty Applicant come forward in a timely fashion. Bruckner Decl. ¶ 6.

On July 21, 2009, Plaintiffs filed their First Amended Class Action Complaint ("FACAC") using information obtained from Settling Defendant Schenker (and its counsel) to add new claims, new Defendants, and more detailed allegations. ECF No. 117. The FACAC alleged dozens of dates, times, places of, and participants in conspiratorial meetings, phone calls, and e-mails, and described the unlawful agreements the conspirators reached at those meetings.[8] In response, most Defendants moved to dismiss Plaintiffs' Complaint. ECF Nos. 120, 220, 233-35, 239, 240, 242, 247, 297, 383, 386, 387, 390, 391, 392, 396, 397. Plaintiffs' Co-Lead Counsel filed seventeen briefs in opposition to those motions (ECF Nos. 322, 323, 324, 325, 326, 327, 328, 329, 330, 405, 406, 407, 408, 409, 410, 413, 414), and on September 15, 2010, Magistrate Judge Pohorelsky heard argument for a full afternoon. On January 4, 2011, Magistrate Judge Pohorelsky issued a Report and Recommendation (ECF No. 468) granting in part and denying in part Defendants' motions to dismiss Plaintiffs' Complaint, and recommended that Plaintiffs be allowed to replead any dismissed claims. Both sides objected to aspects of the Report and Recommendation (ECF Nos. 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 482, 483), and Co-Lead Counsel filed twelve separate responses to Defendants' objections (ECF Nos. 488, 489, 490, 492, 493, 494, 495, 496, 497, 498, 499, 500). On August 13, 2012, this Court adopted Magistrate Judge Pohorelsky's Report and Recommendation in its

[8] On October 7, 2010, Plaintiffs filed the Second Amended Class Action Complaint ("SACAC") (ECF No. 460), which made only ministerial changes to the First Amended Class Action Complaint necessary to allow Co-Lead Counsel to serve certain foreign Defendants, in conformity with requirements of certain foreign government authorities.

entirety. As a result, the joint motion to dismiss the Complaint was granted in part and denied in part, and Plaintiffs were granted leave to replead. ECF No. 628.

But Co-Lead Counsel did not stop their work while the motions to dismiss were pending. Instead, Co-Lead Counsel continued investigating and further developed their case. As part of their investigation, Co-Lead Counsel obtained over 1.3 million documents from the Settling Defendants and the Amnesty Applicant (who finally provided documents in March 2010), long after the FACAC was drafted and filed. Of the over 1.3 million total documents produced thus far a significant percentage have been reviewed and further review is ongoing.[9]

In addition to reviewing the documents, Co-Lead Counsel also conducted many extensive fact interviews to bolster the case. To date, they have interviewed 32 current and former employees of the Settling Defendants and the Amnesty Applicant here and abroad, and have obtained evidence proffers from counsel for many of the Settling Defendants. Co-Lead Counsel thoroughly investigated and researched the freight forwarding industry, including examining company practices, the Defendants' corporate structures, their roles in the industry, and their market shares. These investigations were further informed by consultations with an economist and industry experts regarding industry practices and surcharges, and by careful review and analysis of relevant documents in the possession of Class Counsel and Settling Defendants.

With this ongoing investigation, limited to their own efforts and no formal discovery, Co-Lead Counsel were able to initiate settlement discussion with multiple Defendants, seeking the best deals, rejecting others, and seeking to navigate the best course in this litigation for the Class.

Also based on their investigation, Plaintiffs filed their Motion to Add Proposed Plaintiffs

[9] Given the large number of documents produced in this case, Co-Lead Counsel have continually worked to ensure that the document review is efficiently and effectively run by using technology to reduce duplicative work. Further, document review has been capped at $400 per hour. Bruckner Decl. ¶ 16.

to Third Amended Class Action Complaint ("TACAC") (ECF No. 676) and TACAC under seal (ECF No. 677) on November 15, 2012.[10] The TACAC alleges eleven separate violations of Section 1 of the Sherman Act against named groups of Defendants and adds significant details regarding the dates, times, places, and participants of conspiratorial meetings, phone calls, and e-mails, and the unlawful agreements reached at those meetings. Defendants served fourteen separate motions to dismiss on February 27, 2013. These motions have been briefed, are currently pending before this Court, and are scheduled for argument before Magistrate Judge Pohorelsky on June 13, 2013.[11]

Co-Lead Counsel also have sought to lift the continuing stay of discovery to obtain production of documents Defendants have produced to government entities. Defendants opposed this request, and the motion is pending before the Court.[12] Before completion of the interviews of Settling Defendants' witnesses (another benefit to the Class produced by these settlements), Co-Lead Counsel are waiting to see if they may obtain the documents produced to the government by non-settling Defendants in order to assist in such interviews.

All of Class Counsel's work to date has been beneficial to Co-Lead Counsel's opposition to non-settling Defendants' subsequent motions to dismiss each successive iteration of Plaintiffs' Complaint, as well as reaching settlements with other Defendants, developing the TACAC, and otherwise assuring the continued successful litigation of the case for the benefit of the Class.

B. Plaintiffs' Case Preceded Government Complaints.

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[10] Plaintiffs filed a Corrected TACAC on March 27, 2013. ECF No. 746. The Corrected TACAC corrected references to certain Defendant entities and added certain Hellman entities to the complaint. ECF No. 717. A Corrected Redacted TACAC was publicly filed on May 9, 2013. ECF No. 772.

[11] These motions were subsequently filed with the Court on May 24, 28, and 29, 2013. *See* ECF Nos. 779, 781, 782, 783, 786, 787, 789, 792, 793, 799, 804, 806, 809, 810, 816, 817, 818, 819, 821, 822, 823, 824, 825, 826, 827, 828.

[12] ECF Nos. 733, 739, 740, 741, 742, 769.

Co-Lead Counsel developed the case long before filing of any government complaints. Plaintiffs' first complaint was filed in January 2008, and Co-Lead Counsel spent many months prior to that date investigating, researching and preparing the case. Bruckner Decl. ¶ 4.

In 2009 the Japan Fair Trade Commission ("JFTC") imposed $94.7 million in fines on ten freight forwarding companies for their anticompetitive conduct. Since September 2010, fifteen Defendant groups have agreed to plead guilty to the DOJ's charges against them under 15 U.S.C. § 1 and to pay a total of $101 million in criminal fines for some of the same conduct underlying this civil case: (1) Schenker AG; (2) BAX Global, Inc. (a Schenker affiliate); (3) Kuehne + Nagel International AG; (4) EGL, Inc.; (5) Geo-Logistics (acquired by Agility Logistics); (6) Nippon Express; (7) Kintetsu World Express, Inc.; (8) Nishi-Nippon Railroad Co., Ltd.; (9) Hankyu-Hanshin Express; (10) Vantec Corporation; (11) Nissin Corporation; (12) Yamato; (13) MOL Logistics (Japan) Co. Ltd.; (14) Yamato Global Logistics; and (15) Panalpina Worldwide Transport (Holding) Ltd.

In March 2012, the European Commission ("EC") also found that fourteen groups of companies engaged in anticompetitive conduct and issued substantial fines totaling €169 million for their participation in four different price-fixing cartels.[13]

C. Plaintiffs' Co-Lead Counsel Have Recovered Very Substantial Settlements Compared To The Government Fines.[14]

To date, Co-Lead Counsel have obtained a minimum of $112,356,911.58 in settlements from ten different Defendant groups. *See* Bruckner Decl. Exhibit O. Co-Lead Counsel settled with Schenker in July 2009. ECF No. 527 at 2. Using information from Schenker and through

[13] *See* March 28, 2012 European Commission Press Release, attached to the Bruckner Decl. as Exhibit N.

[14] Following in this Subsection II.C is simply a summary of the settlements achieved to date. Those settlements have been described in detail in each motion for preliminary approval filed so far with the Court, *see* ECF Nos. 526, 527, 574, 576, 588, 590, 637-640, 644-47, 667-70, 686-89, 711-14, and will be analyzed in more detail in Plaintiffs' motionsfor final approval of each settlement.

the continuing investigation of Co-Lead Counsel, Co-Lead Counsel settled with several more Defendants, starting with Vantec in April 2011 and ending most recently with ABX in January 2013. *See* ECF Nos. 516, 526, 574, 588, 637-640, 644-47, 667-70, 686-89, 711-14. Co-Lead Counsel used the information obtained in each settlement to inform their negotiations with other Defendants, including those with whom Co-Lead Counsel decided to enter subsequent settlements. Bruckner Decl. ¶¶ 7-8. Each settlement has been preliminarily approved by the Court. ECF Nos. 530, 587, 604, 643, 649, 673, 692, 715.

The Schenker and ABX Settlements provide an immediate cash payment into the Settlement Fund and cooperation in the continuing lawsuit. The Expeditor Settlement provides for a payment into the Settlement Fund of a specified percentage of all of its cash benefits from *Air Cargo*, $10,872,222.08 of which has already been paid. The remaining settlements provide an immediate cash payment into the Settlement Fund followed by payment of all or in some instances a portion of the Settling Defendants' recovery from *Air Cargo* and their cooperation in the continuing lawsuit.[15] *See* Bruckner Decl. Exhibit O.

These settlements were obtained after extensive arm's length negotiations with Defendants, including multiple mediation sessions. As part of Co-Lead Counsel's assessment of the strength of the settlements, Co-Lead Counsel researched and verified Defendants' sales data, consulted with experts to determine the extent of financial harm, and otherwise reviewed evidence and other sources to ensure the best possible settlement for the Class. Notably, in

[15] In addition to the immediate cash payments received as part of the settlement agreements with the following Settling Defendants, each has an *Air Cargo* component. EGL has agreed to pay up to $10 million in proceeds from any cash benefits it receives from *Air Cargo.* Nishi-Nippon has agreed to pay up to $500,000 in cash benefits it receives from *Air Cargo.* Vantec has agreed to pay all of the cash benefits it receives from *Air Cargo* to the Class with a guaranteed minimum of $300,000 (which has been surpassed). United Aircargo Consolidators has agreed to pay 75% of all cash benefits it receives from *Air Cargo* subject to an adjustment specified in the Settlement Agreement. Kuehne + Nagel has agreed to pay 99.7% of cash benefits it receives from *Air Cargo*. Morrison Express has agreed to pay 72.5% of cash benefits it receives from *Air Cargo* after October 5, 2012 and UTi Worldwide, Inc. has agreed to pay 80.5% cash benefits it receives from *Air Cargo* after December 5, 2012.

virtually every applicable instance (except Schenker), the settlements negotiated by Co-Lead Counsel are significantly larger (in some instances triple or quadruple) the fines paid to the DOJ by those Defendants who were criminally charged.[16]

Once the settlements were preliminarily approved by the Court, Co-Lead Counsel established escrow accounts for the settlement funds; obtained customer data from Settling Defendants, and successfully moved the Court to obtain customer data from non-settling Defendants. Based on the foregoing, Counsel proposed a program to provide class notice directly to class members where possible (ECF Nos. 536, 546, 561); coordinated with the Claims Administrator and experts to design a Class Notice Program that ensured that Class Members received appropriate information regarding their rights under the Settlements (ECF No. 596, 666); and drafted settlement notices and a claim form for the Court's approval (ECF Nos. 654, 656).

In addition to providing notice to the Class, Co-Lead Counsel researched and responded to motions filed by intervening Class Members who challenged the opt out provisions of the Schenker Settlement. ECF Nos. 566, 580, 605, 618.

The Court overruled the intervenors' objections to preliminary approval and also, with limited modifications, approved the notice plan. Pursuant to such approval, notice has been sent

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[16] The Settling Defendants who paid DOJ fines have agreed to make, in aggregate, fixed cash payments totaling $76,732,896 [Nishi Nippon ($20,082,896); Vantec ($9,900,000); EGL ($10,000,000); KN ($28,000,000); Schenker ($8,750,000)] and all but Schenker have agreed to make further cash payments based upon proceeds from *Air Cargo*. *Air Cargo* proceeds received from these Settling Defendants to date already exceed $16,000,000 [Nishi Nippon ($500,000); Vantec ($714,263.21); EGL ($8,574,850.25); KN ($6,244,829.80)]. The $92,766,839.26 in payments from Settling Defendants who also paid fines to the DOJ is more than twice the amount that such Settling Defendants paid to the DOJ in aggregate: $45,645,367. [Nishi Nippon ($4,673,114) + Vantec ($3,339,648) + EGL ($4,486,120) + KN ($9,865,044) + Schenker ($3,535,514) + Bax ($19,745,927)]. In contrast, according to the DOJ, the fines paid in the *Air Cargo* case have reached $1.8 billion. U.S. Department of Justice, *Division Update Spring 2011*, http://www.justice.gov/atr/public/division-update/2011/criminal-program.html (last visited June 11, 2013). In the civil *Air Cargo* litigation, the total settlements to date are significantly less: $485 million. *In re Air Cargo Shipping Services Antitrust Litigation*, http://aircargosettlement3.com/main (last visited June 11, 2013).

and Co-Lead Counsel has continued to work with the Claims Administrator to address Class Member questions about the litigation, the claims filing process and the settlements. Bruckner Decl. ¶ 12.

III. ARGUMENT

A. Courts In This Circuit Award A Percentage Of The Common Fund As Attorneys' Fees, And May Also Utilize A Lodestar Crosscheck.

The equitable fund doctrine provides that plaintiffs' attorneys in a class action lawsuit may petition the court for compensation from any benefits to the class that resulted from counsel's efforts. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The Second Circuit applies both the "percentage of the fund" and lodestar approach when calculating fees in a common fund case. *See, e.g.*, *McDaniel v. Cnty. of Schenectady*, 595 F.3d 411, 419 (2d Cir. 2010) (holding that a district court may in its discretion chose either approach). But the "trend in this Circuit is toward the percentage method, which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (citation omitted); *accord In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 128 (S.D.N.Y. 2009).

The use of the percentage method dispenses with the "cumbersome, enervating, and often surrealistic process of lodestar computation." *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) (quotation marks and citations omitted). However, the Court of Appeals recommends considering the hours submitted by counsel as a "cross-check" on the reasonableness of the requested percentage. *Id.* Accordingly, Class Counsel's lodestar in this case and the cross-check it provides are discussed in Section III.E below.

Regardless of which method of calculation a court uses, the key consideration in

awarding fees is what is reasonable under the circumstances. *Id.* at 47; *see also* Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees . . . ."). In addition, the fee award should be based on the entire settlement fund, not a portion of the fund. *See Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007) ("The entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class. An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not.").

B. Co-Lead Counsel Seeks A Reasonable Percentage Of The Common Fund.

Co-Lead Counsel's request for payment of 33% of the Settlement Fund is reasonable. Co-Lead Counsel has secured a guaranteed fund of $112,356,911.58 for the benefit of the Class. Of this amount, $98,776,728.25 has already been paid by Settling Defendants. Another $13,580,183.33 in amounts certain will be paid pursuant to the terms of the various settlement agreements. Beyond these payments, all Settling Defendants, with the exception of Schenker and ABX,[17] will make additional future payments of all or a substantial portion of the cash benefits they receive from *Air Cargo*. Co-Lead Counsel requests an initial disbursement of $32,596,320.32 — which represents 33% of the cash settlement already obtained. Co-Lead Counsel also requests a future award of $4,481,460.50 — which represents 33% of remaining cash payments that will be made by Settling Defendants EGL, Schenker and United Aircargo upon final approval of their respective settlements.[18] Because settlement payments in this case from future *Air Cargo* proceeds necessarily are indeterminate at this time, they are not included

[17] Nishi-Nippon Railroad Co., Ltd., has paid its *Air Cargo* proceeds up to the $500,000 cap in its settlement agreement.

[18] Pursuant to the terms of its settlement agreement, United Aircargo will make two separate payments of $65,091.76 within 10 Japanese business days after the Court's Fairness Hearing, or if no such hearing, after Final Approval of the settlement, and an additional payment of $65,091.66 within one year after the Fairness Hearing, or if no such hearing, Final Approval of the settlement.

in the calculation of the guaranteed fund referred to above of $112,356,911.58, and Co-Lead Counsel are not currently seeking a fee award from such future *Air Cargo* proceeds.[19]

"Generally, the factor given the greatest emphasis [when awarding a percentage of a fund] is the size of the fund created, because 'a common fund is itself the measure of success. . . [and] represents the benchmark from which a reasonable fee will be awarded.'" *Manual for Complex Litigation (Fourth)* § 14.121 (2004) (quoting Alba Conte & Herbert B. Newberg, 4 *Newberg on Class Actions* § 14.6, at 547, 550 (4th ed. 2002)). Courts in this Circuit have repeatedly held that "a fee award should be assessed based on scrutiny of the unique circumstances of each case . . . [with] a jealous regard to the rights of those who are interested in the fund." *Goldberger*, 209 F.3d at 53; *see McDaniel*, 595 F.3d at 426. Here, after five and a half years of diligent work in developing this case without the benefit of formal discovery, Co-Lead Counsel have obtained very substantial relief for the Class. Moreover, in the Class's ongoing claims the non-settling Defendants remain jointly and severally liable. Unlike many cases, the amounts of the settlements paid by Defendants who have agreed to plead guilty to criminal charges is much more than the DOJ fines. *See* footnote 16. But the risks involved and the delays in payment have been greater than, for example, in *Air Cargo*. For these reasons, an award of 33% of the common fund is reasonable. *See, e.g., In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding lead counsel 33.3% of $586 million settlement) ("*IPO*").

While courts, including this Court, have found in other circumstances that fee percentages in "megafund" cases should be smaller than percentages awarded in other cases, the

[19] After proceeds are paid into the Settlement Fund, Class Counsel will seek an award of 33% of those proceeds, likely in conjunction with future settlements with or judgments against the remaining Defendants.

megafund analysis is not appropriate here.

First, the settlements here are one-fourth of the $485 million in settlements obtained in *Air Cargo*, but this Court has not applied a megafund reduction to fee requests involving multiple settlements with defendants in that case. *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 (JG) 2012 WL 3138596, at *5 (E.D.N.Y. Aug. 2, 2012) (granting class counsel's requested interim fee of 25% of the gross amount of the settlement fund when such a request represented a modest 1.11 multiplier).[20] Here, the five and a half year labor involved to bring in the first round of settlements is much greater than the settlements in *Air Cargo*, and, as noted, the settlements here are much larger relative to the government fines than those in *Air Cargo*. These factors militate strongly against a megafund discount and strongly in favor of a fee of 33% of the common fund, which would constitute a reasonable fee for Class Counsel.

Second, as this Court well knows, the Second Circuit has never required the application of the megafund doctrine. The Seventh Circuit has explicitly rejected the megafund doctrine as being contrary to market economics. *See In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("We have held repeatedly that, when deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time. . . . We

[20] While this Court did rely on the megafund theory in awarding attorneys' fees following the Lufthansa Settlement in *In re Air Cargo Shipping Serv. Antitrust Litig.*, 06-MD-1775 (JG) (VVP), 2009 WL 3077396, at *13-14 (E.D.N.Y. Sept. 25, 2009), those circumstances are plainly distinguishable. The fee request in this case is based upon many settlements and five years of hard work by Class Counsel, during which time they have received no payment for their considerable investment of time, and no reimbursement of their out-of-pocket expenditures. By contrast, the Lufthansa fee request was based on a single large settlement obtained in a brief period of time at a very early point in the case, before Lead Counsel had been appointed, before a consolidated complaint was filed, before any documents or other formal discovery had been produced, and before any other settlements had been reached (in a case with several defendants). Co-Lead Counsel here also recognize that while this Court has not yet applied the megafund doctrine to subsequent fee requests in *Air Cargo*, it indicated that it may do so should the circumstances suggest such an analysis is proper. As discussed above, given the modest multiplier in this case, Co-Lead Counsel submit that the megafund doctrine should not apply here.

have never suggested that a 'megafund rule' trumps these market rates, or that as a matter of law no recovery can exceed 10% of a 'megafund' even if counsel considering the representation in a hypothetical arms' length bargain at the outset of the case would decline the representation if offered only that prospective return. . . . Markets would not tolerate that effect. . . .").

Third, the nature of this litigation — a case with relatively small government fines for many Defendants and no fines for others, and sixty-eight individual defendants, twenty-eight Defendant families, and eleven conspiracies — make it the opposite of and distinguishable from a typical monolithic two-defendant mega conspiracy. Unlike *In re Visa Check/Mastermoney Antitrust Litig.*, a megafund case, where class counsel obtained a $3,383,400,000 settlement (a large fund by any measure) against two defendants for domestic conduct, in this case there are sixty-eight defendants which engaged in widespread international conduct and ten settlements so far. The large number of Settling Defendants magnifies the total amount of the settlements, even though each of the ten individual settlements is well below megafund amounts. Moreover, counsel's requested fee award in *Visa Check/Mastermoney* would have resulted in a 9.68 multiplier of counsel's lodestar (again large by any measure, and especially compared to the 1.33 multiplier requested here). 297 F. Supp. 2d. 503, 521-25 (E.D.N.Y. 2003) (Gleeson, J.). Because of the large multiplier, this Court reduced the attorneys' fee request to an award of 6.511% of the common fund (a 3.5 lodestar multiplier). *Id.* In this case, as discussed in more detail in Subsection III.E below, the lodestar crosscheck shows that Co-Lead Counsel's request for 33% of the common fund — which results in a modest lodestar multiplier of 1.33 — is very reasonable given the risks, complexities and work involved to prosecute these international conspiracies.

C. Class Counsel's Request Is Consistent With The *Goldberger* Factors.

In any common fund case, reasonableness of a fee request is determined by applying the

six factors outlined in *Goldberger*, 209 F.3d at 50. *See In re Nortel Networks Corp. Secs. Litig.*, 539 F.3d 129, 134 (2d Cir. 2008). The *Goldberger* factors include:

(1) the time and labor expended by counsel;

(2) the magnitude and complexities of the litigation;

(3) the risk of the litigation;

(4) the quality of representation;

(5) the requested fee in relation to the settlement; and

(6) public policy considerations.

Goldberger, 209 F.3d at 50 (citation omitted).

1. The Time And Labor Expended By Counsel Supports The Requested Fee.

The extensive efforts undertaken by Co-Lead Counsel in prosecuting this case are detailed in the Bruckner Declaration. The total lodestar of $27,898,925.45 from inception of the case through March 31, 2013, reflects the dedication Class Counsel has shown in litigating this case. As discussed above, the fee request reflects over five and a half years of careful case development — all of which has been done without formal discovery and much of which was conducted without the benefit of a completed government investigation. Class Counsel reviewed hundreds of thousands of documents, interviewed over thirty witnesses, and have opposed numerous and serial motions to dismiss. Co-Lead Counsel also negotiated many settlements, including mediations, held evidence proffers, prepared notice for the Class and counseled Class Members, including intervenors, regarding the settlements and claims administration.

Co-Lead Counsel requested that all Class Counsel provide all of their time[21] from inception of the case through March 31, 2013, including complete and accurate categorizations

[21] And expenses, which are addressed in Subsection F below.

of work performed, the name and title of the person who performed the work, and that individual's hourly rate. Bruckner Decl. ¶ 15. In an effort to eliminate unnecessary time, Class Counsel were instructed that time for work not performed at the request or direction of Co-Lead Counsel, duplicative work, read and review time, time spent in the preparation of time and expense reports, routine clerical tasks, and time associated with work related to any client not retained should not be included in any submitted time. Bruckner Decl. ¶ 16.

2. The Magnitude And Complexities Of The Litigation Support The Requested Fee.

Antitrust class actions "are notoriously complex, protracted, and bitterly fought." *Wesely v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989); *see In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. at 129 ("antitrust cases are typically complex"). Indeed, this litigation is tremendously complicated. It involves international conspiratorial conduct across the globe with sixty-eight different Defendants, twenty-eight Defendant families, and eleven conspiracies. Even without the benefit of formal discovery, Plaintiffs nonetheless successfully navigated a number of complex issues that justify the current fee request. First, Co-Lead Counsel effectuated service on multiple foreign defendants involved in this suit. Second, even though there was an Amnesty Applicant who could have — and under ACPERA should have — provided substantial cooperation to the Class, the Amnesty Applicant did not identify itself and begin cooperating until the litigation had progressed substantially. As a result, Co-Lead Counsel spent significant time developing the litigation and negotiating settlements with other Defendants. Further, because of the Amnesty Applicant's refusal to identify itself until later in the case, Co-Lead Counsel spent time researching ACPERA's requirements and negotiating cooperation with other Defendants. Third, in addition to opposing Defendants' serial and myriad motions to dismiss Plaintiffs' allegations as implausible under. *Twombly*, 550 U.S.

544 (2007), and other grounds, Co-Lead Counsel researched and opposed Defendants' claims that because much of the conduct at issue took place overseas, dismissal was warranted under the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a. Fourth, because of the nature of the freight forwarding industry, the conspiracies alleged often required the involvement of both the Defendant parent company and its subsidiaries. Co-Lead Counsel also spent time researching and investigating each Defendant's corporate structure in order to establish the integration and involvement of corporate parents and subsidiaries in conduct alleged in the complaints. Finally, because Defendants' unlawful actions occurred across the globe and have been the subject of governmental investigations on several continents, Co-Lead Counsel have researched their ability to obtain discovery from foreign subsidiaries and foreign enforcement agencies, and to verify the Court's personal jurisdiction of these foreign subsidiaries.

3. The Risk Of Litigation Supports The Requested Fee.

The risk of litigation is "perhaps the foremost factor to be considered in determining whether to award an enhancement." *Goldberger*, 209 F.3d at 54 (quotation omitted); *accord In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. at 129. The litigation risk "must be measured as of when the case is filed." *Goldberger*, 209 F.3d at 55 (citing *DiFilippo v. Morizio*, 759 F.2d 231, 234 (2d Cir. 1985)). Most of these risks continue to be fully present even after the subsequent government complaints which, while favorable to the merits of the Class' claims, still leave substantial risks. Courts in this Circuit have repeatedly recognized that the risk associated with a case undertaken on a contingent basis is an important factor in determining an appropriate fee award. *In re NASDAQ Mkt. Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998).

In this instance, the risks Class Counsel undertook in advancing this litigation justify the requested fee. In the five and a half years Class Counsel has spent litigating this case, they have committed 65,720.84 hours of their time — amounting to over $27,898,925.45 in lodestar — and

incurred $811,095.84 in expenses, all of which were and are at risk of never being recovered. Class Counsel faced considerable risk from the outset of this case; it was filed prior to the commencement of any government complaints, it implicates vast international discovery and (if it is not otherwise dismissed) culminates in the further risks of collecting on judgments against foreign Defendants. The first fines related to government investigations did not occur until the JFTC issued fines in March 2009, over a year after the inception of the case. And the DOJ did not announce any guilty pleas until 2010 — more than two years after Plaintiffs' case began. The EC did not impose fines until 2012. As such, the case has had significant risks from inception. Class Counsel did not have the benefit of any government criminal charges, investigations, or theories of liability on which to rely when making allegations or calculating damages. Instead, Class Counsel invested significant amounts of their own time and resources investigating the freight forwarding industry and Defendants, researching the allegations alleged in the Complaint, consulting with experts, and developing theories of liability and damages. Throughout these efforts, Co-Lead Counsel have had no guarantee of recovery. *See also In re Priceline.com, Inc. Sec. Litig.*, No. 3:00-CV-1884 (AVC), 2007 WL 2115592, at *5 (D. Conn. July 20, 2007) (acknowledging that risk is high when plaintiffs developed their own theory of liability and damages absent a government prosecution).

Indeed, despite over five and a half years of litigation, non-settling Defendants, including the Amnesty Applicant and numerous guilty pleaders, continue to vigorously deny liability to Plaintiffs and the Class, and still aggressively seek to have Plaintiffs' claims dismissed. While Co-Lead Counsel believe they will defeat Defendants' motions to dismiss their TACAC, success

is far from certain.[22]

4. The Quality Of Counsel's Representation Supports The Requested Fee Award.

Notwithstanding Defendants' ongoing efforts to defeat this case and a five and a half year delay in the commencement of discovery, Co-Lead Counsel has managed to obtain ten substantial settlements for the Class, which in nearly every applicable instance exceeded the fines paid by Settling Defendants in the related criminal investigations. Such a recovery is consistent with Co-Lead Counsel's extensive experience successfully litigating antitrust class actions, and supports the fee request. *See* ECF No. 101 (outlining Co-Lead Counsel's extensive experience and success in the class action field).

Similarly, in addition to the collective wealth represented by Defendants themselves, they are represented by top antitrust legal practitioners; the law firms representing Defendants are some of the largest and most skilled law firms in the world. Throughout this litigation, Defendants' counsel have worked tirelessly to protect their client's interests, and Co-Lead Counsel's ability to obtain these significant settlements at this stage of the litigation further underscores the adequacy of the requested fee award. *See In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156, 174 (S.D.N.Y. 2007) ("The quality of opposing counsel is also important in evaluating the quality of Class Counsels' work."); *In re NASDAQ Market Makers Antitrust Litig.*, 187 F.R.D. 465, 488 (S.D.N.Y. 1998).

5. The Requested Fee Is Supported By The Size And The Scope Of The Settlement.

While Co-Lead Counsel believe that at the end of the day this case will be even more

[22] With respect to the SACAC, this Court sustained the plausibility of almost all of Plaintiffs' claims, but dismissed all of the claims in the SACAC on various grounds, except those asserted in Claim 1 as against ABX Logistics Group, Exel Global Logistics Inc., DHL Danzas, and Geo-Logistics. The Court granted Plaintiffs leave to replead the remaining claims, which Plaintiffs have done.

successful for the Class, the settlements obtained so far ensure that the Class will receive a significant recovery regardless of what the future holds. Counsel respectfully submit that they are not overreaching in their fee request, but rather request a fee that fully compensates them for their work on this case and provides a modest multiplier for handling this case on a contingent basis.

The fee requested is consistent with fee requests in other class action litigations with settlements of this size. *See, e.g., IPO*, 671 F. Supp. 2d at 516 (Scheindlin, J.) (awarding one-third fee in a securities fraud case)*; In re Priceline.com, Inc. Sec. Litig.*, 2007 WL 2115592, at *4 (awarding 30% of $80 million settlement); *see also In re Prudential Sec., Inc. Ltd. P'ships Litig.*, 912 F. Supp. 97, 103 (S.D.N.Y. 1996) ("Many courts have approved and awarded fees in class actions of one-third of the settlement fund in recognition of the substantial services performed by counsel and the risks undertaken.").

6. Public Policy Considerations Support the Award of the Requested Fee.

The award of the percentage of fee requested by Co-Lead Counsel will encourage the private enforcement of antitrust laws and support attorneys who decide to take such cases on a contingent fee basis. The Supreme Court has held repeatedly that private enforcement of U.S. antitrust laws is essential to effective antitrust enforcement, *e.g., Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969), and a market-rate fee award such as is requested here incentivizes competent, experienced counsel to undertake such high-risk, complex class action litigation. This Circuit has noted that "[i]n the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation." *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2d Cir. 1973). In determining whether public policy supports the requested fee

request, the court should balance providing lawyers with a "sufficient incentive to bring common fund cases" against preventing an "unwarranted windfall" to counsel. *In re Air Cargo Shipping Services Antitrust Litig.*, No. 06-MD-1775 (JG)(VVP), 2011 WL 2909162, at *6 (E.D.N.Y. July 15, 2011). In light of the time and effort Co-Lead Counsel have dedicated to this litigation, the requested fee of 33% fairly compensates Co-Lead Counsel, helps to perpetuate the availability of skilled counsel in future antitrust class actions, and does not result in a windfall to counsel.

D. Reported Statistical Data Support A Market Rate In Antitrust Class Actions Of 30% to 40%.

Academic and government reports are often relied upon by courts as a factor in determining the "market price" for class action contingent fees. *In re Cabletron Systems, Inc. Securities Litigation*, 239 F.R.D. 30, 42-44 (D.N.H. 2006), (relying on "comprehensive studies evaluating fee awards in class action cases" and collecting those studies).

Relevant here is a study of forty antitrust class actions. *See* Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F.L. Rev. 879 (July 2008).[23] Courts in the majority of antitrust class actions resulting in recoveries of more than $100 million awarded a contingent fee of 30% or more. Lande & Davis, *supra*, at 911, Table 7B.

E. Co-Lead Counsel's Request For Attorneys' Fees Is Reasonable Under A Lodestar Crosscheck.

The use of the lodestar crosscheck on the reasonableness of a percentage of fee award is encouraged. *Farinella v. Paypal, Inc.*, 611 F. Supp. 2d 250, 269 (E.D.N.Y. 2009). Courts may award fees higher than the lodestar by applying a multiplier based on factors such as the riskiness of litigation. *See In re Nortel Networks Corp. Secs. Litig.*, 539 F.3d at 132 n.4. Courts

[23] Attached as Exhibit M to the Bruckner Decl.

commonly award multipliers from two to six times the lodestar. *See Monserrate v. Tequipment, Inc.*, No. 11 CV 6090, 2012 WL 5830557, at *3 (E.D.N.Y. Nov. 16, 2012) (collecting cases).

The lodestar in this case is $27,898,925.45. Bruckner Decl. ¶ 19. A lodestar cross-check against the award Class Counsel seeks in this petition yields a multiplier of 1.33, which has been deemed reasonable under analogous circumstances. *See In re Cendant Corp. PRIDES Litig.*, 243 F.3d. 722, 742 (3d Cir. 2001) (finding lodestar multipliers of 1.35 to 2.99 common in megafunds over $100 million); *NASDAQ Market Makers*, 187 F.R.D. at 489 ("'In recent years multipliers of between 3 to 4.5 have become common.'") (citation omitted); *see also In re Air Cargo Shipping Servs. Antitrust Litig.*, 2012 WL 3138596, at *5 (granting an interim attorneys' fee request where class counsel had "a reasonably modest 1.11 multiplier of the lodestar").

The lodestar in this case is based on rates currently charged by counsel, Bruckner Decl. ¶¶ 19 and 23, which courts have considered reasonable. *Velez v. Novartis Pharm. Corp.*, 04 CIV 09194 CM, 2010 WL 4877852, at *23 (S.D.N.Y. Nov. 30, 2010) ("The use of current rates to calculate the lodestar figure has been repeatedly endorsed by courts as a means of accounting for the delay in payment inherent in class actions and for inflation. . . .") (citation omitted). These rates are well within the normal range for counsel litigating similar antitrust class actions.

F. Class Counsels' Request For An Award Of Expenses Incurred Is Reasonable.

Co-Lead Counsel's request for an award of $811,095.84 for payment of expenses is reasonable. "Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients." *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993). Within the Second Circuit, courts "normally grant expense requests in common fund cases as a matter of course." *In re Vitamin C Antitrust Litigation*, 2012 WL 5289514, at *11 (E.D.N.Y. Oct. 23, 2012); *In re Arakis Energy Corp. Sec. Litig.*, No. 95CV3421, 2001 WL 1590512, at *17 n.12 (E.D.N.Y. Oct. 31, 2001). Co-Lead Counsel seek reimbursement

for the costs of economic and industry experts, class notice and claims administration, online legal research, travel expenses, document imaging and copying, and an online document repository. *See* Bruckner Decl. ¶ 26. The expenses incurred by Class Counsel were reasonably necessary to advance the interests of the Class and to obtain an excellent result on their behalf. Due to the risk that they might never be recovered, Class Counsel endeavored to keep expenses to a minimum. Accordingly, Class Counsel respectfully request reimbursement of expenses in the amount of $811,095.84.[24]

G. Co-Lead Counsel Will Make Subsequent Applications For Claims Settlement And Administration And Processing.

The processing and administration of Class Members' claims will begin in earnest following the November 22, 2013 deadline to submit claims. The Claims Administrator has mailed direct notice to 2,323,671 potential Class Members. Class Members have been submitting claims and will continue to do so through the November 22, 2013 deadline. Before payment of such claims can be recommended to the Court for its approval, each claim will have to be verified and in some cases audited, to ensure that the Class Member is qualified and that its claimed purchases are allowable.

Accordingly, as appropriate Co-Lead Counsel will apply to the Court for approval to pay expenses related to claims and administration and processing before any such expense payments

[24] In addition to the expenses described here and in greater detail in the Declaration of W. Joseph Bruckner, payments totaling $2,806,172.89 have been made from the settlement escrow accounts for class notice as directed by the Court, related expenses regarding preliminary or final approval, and related bank fees. In addition, invoices related to notice totaling $597,741.07 are outstanding and in the process of review. To the extent appropriate, they will be paid from the settlement escrow accounts within 30 days. These payments were made and will be made pursuant to language in each of the Settling Defendant's Settlement Agreements reserving a specific amount of such Settling Defendant's payment that may be used for payment of notice and related costs (and which would be non-refundable to the Settling Defendant in the event the settlement was not finally approved). While these payments are not included in the requested reimbursement in this petition, and have already been paid or may be paid from those escrow accounts, we describe those expenditures here to fully describe all litigation-related expenses incurred in this case.

are made.

IV. CONCLUSION

For all of the reasons set forth above, Co-Lead Counsel respectfully requests that the Court:

(1) Award 33% of the Settlement Fund as interim attorneys' fees in the amount of $32,596,320.32 from settlement proceeds ($98,776,728.25) currently paid into in the Settlement Fund;

(2) Award 33% of the Settlement Fund as interim attorneys' fees in the amount of $4,459,980.25 to be paid fifteen business days after the Final Approval of the EGL, Schenker and United Aircargo settlements from the settlement proceeds ($13,515,091.67) scheduled to be paid into the Settlement Fund upon Final Approval of the Settlements;

(3) Award 33% of the Settlement Fund as interim attorneys' fees in the amount of $21,480.25 to be paid from the United Aircargo settlement proceeds ($65,091.66) one year after the Fairness Hearing of the United Aircargo settlement, or if no hearing is held, one year after Final Approval of the United Aircargo settlement; and

(4) Reimburse Class Counsel for interim litigation expenses totaling $811,095.04.

Dated: June 12, 2013

Respectfully submitted,

s/ W. Joseph Bruckner

W. Joseph Bruckner
Heidi M. Silton
Craig S. Davis
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401
T: (612) 339-6900
F: (612) 339-0981
E-mail: wjbruckner@locklaw.com
hsilton@locklaw.com
csdavis@locklaw.com

Christopher Lovell
Benjamin M. Jaccarino
LOVELL STEWART HALEBIAN JACOBSON LLP
61 Broadway, Suite 501
New York, NY 10006
T: (212) 608-1900
F: (212) 719-4775
E-mail: clovell@lshllp.com
bjaccarino@lshllp.com

Daniel E. Gustafson
Daniel C. Hedlund
Michelle J. Looby
Joshua J. Rissman
GUSTAFSON GLUEK PLLC
Canadian Pacific Plaza
120 South 6th Street, Suite 2600
Minneapolis, MN 55402
T: (612) 333-8844
F: (612) 339-6622
E-mail: dgustafson@gustafsongluek.com
dhedlund@gustafsongluek.com
mlooby@gustafsongluek.com
jrissman@gustafsongluek.com

Steven N. Williams
Adam J. Zapala
COTCHETT, PITRE & MCCARTHY, LLP
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
Burlingame, CA 94010
T: (650) 697-6000
F: (650) 697-0577
E-mail: swilliams@cpmlegal.com
azapala@cpmlegal.com

Imtiaz A. Siddiqui
COTCHETT, PITRE & MCCARTHY, LLP
One Liberty Plaza, 23rd Floor
New York, NY 10006
T: (212) 682-3198
F: (646) 219-6678
E-mail: isiddiqui@cpmlegal.com

Interim Co-Lead Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PRECISION ASSOCIATES, INC., *et al.*, Plaintiffs, v. PANALPINA WORLD TRANSPORT (HOLDING) LTD., *et al.* Defendants.	CASE NO. 08-CV-00042 (JG)(VVP)

PLAINTIFFS' SUPPLEMENTAL FEE APPLICATION AND EXPENSE REQUEST

Pursuant to the Court's order of August 27, 2013, Plaintiffs submit this supplemental fee application and expense request "limited to work performed with respect to the ten settlements." August 27, 2013 Memorandum and Order [ECF No. 866]. As set forth below, the lodestar for all Class Counsel through August 27, 2013 for work related to the ten settlements is $13,796,633.27, and the expenses spent or incurred with respect to the ten settlements is $613,385.84.

1. The August 27, 2013 Order

On August 27, 2013 this Court entered an Order (the "August 27, 2013 Order") granting final approval of ten settlements secured by Plaintiffs in their litigation of this action over the last five years. These settlements provide for a guaranteed settlement fund of $112 million, which will increase by virtue of assignments of proceeds to be received by settling defendants from the *In re Air Cargo Shipping Services Antitrust Litigation*, No. 06-MD-1775 (JG) (VVP) ("*Air Cargo MDL*") and paid to the Class in this case. In its Order the Court overruled all objections, granted final approval of these ten settlements and approved the proposed plan of allocation. In approving the ten settlements, the Court found:

1. Each settlement was the product of hard fought negotiations;

2. Complex factual and legal issues "abound" in the action.

3. The reaction of the class to the settlements was favorable.

4. The nine settlements which followed the first settlement with Schenker were the product of "robust information" and work by counsel including:

> (a) the . . . cooperation that had been received from Schenker; (b) the . . . documents that had been obtained during the litigation from other Defendants; (c) assertions by each Settling Defendant of their defenses as well as previews of their cooperation; (d) Class Counsel's continuing investigation until the time of each respective settlement; (e) estimates of the amount of charges by each Settling Defendant; (f) as to the KN and Expeditors settlements, full-day mediation sessions with an experienced mediator; and (g) such other information that became available (including regarding risks of foreign collection).[1]

5. There are significant risks in the action, damage issues will be hotly contested, and the settlements both eliminate these risks as to settling defendants and may assist plaintiffs in resolving the action against non-settling defendants.[2]

The August 27 Order recognized that the trend in the Second Circuit is to use the "percentage of the fund" method of computing attorneys' fees, and to use lodestar as a "cross check" on the reasonableness of the requested percentage.[3] The Court then directed Class

[1] August 27 Order at 17.

[2] *Id.* at 18.

[3] *Id.* at 26-27.

Counsel to "submit a supplemental fee application and expenses request limited to work performed with respect to the ten settlements."[4] The Court specifically stated that certain categories of time "preparing the Complaint (and subsequently amending the Complaint), effectuating service, investigating and researching the freight forwarding industry, and briefing opposition to defendants' motions to dismiss . . . should not be considered as part of the present fee application. . . . "[5]

The Court noted that the litigation is "irrefutably complex," and that Class Counsel spent "significant resources gaining an understanding of the freight forwarding industry as it operates globally [and] [w]ith respect to the cases against the settling defendants, counsel invested resources researching, analyzing, and evaluating contested legal and factual issues, in order to negotiate favorable settlements."[6] These efforts were comprised in large part of review and analysis of information and documents provided by settling defendants and by DHL, the amnesty applicant. As set forth in the motion for final approval of the ten settlements, and in particular in regard to the Schenker settlement, Class Counsel does not believe that DHL's cooperation has been timely or sufficient for purposes of any future limitations on the Class' ability to seek damages against DHL. *See, e.g., In re Aftermarket Automotive Lighting Products Antitrust Litigation*, Order that TCY Forfeited Any Claim to the Benefits of Limited Civil Liability under the Antitrust Criminal Penalty Enhancement and Reform Act, Case No. 09-MDL 2007-GW/(PJW)-PJW, Doc. 702 (C.D. Cal. August 27, 2013). While that determination will be made at a later time, the belated and inadequate cooperation of DHL required greater work by Class

[4] *Id.* at 33.

[5] *Id.* at 30.

[6] *Id.*

Counsel in securing the ten settlements (as distinguished from the early cooperation by Lufthansa, the ACPERA applicant, in the *Air Cargo MDL*).

2. Counsel's Response to the August 27, 2013 Order

Following the August 27, 2013 Order, Co-Lead Counsel established guidelines for all Class Counsel to prepare their supplemental fee application and expense request, specifically to include work related to the ten settlements, and to exclude unrelated work. This task was different from that performed in the *Air Cargo MDL* supplemental fee application and expense request related to the Lufthansa settlement (No. 1:06-MD-(1775)(JG)(VVP) ECF No. 895) because in this case substantial work in reviewing and analyzing documents, proffers, and other information flowing from initial settlements and limited cooperation from the amnesty applicant led to the ten settlements. By contrast, the Lufthansa settlement in the *Air Cargo MDL* was reached prior to the production of documents by Lufthansa or any other party, and thus there was no work analogous to the work done by Class Counsel here which led to the ten settlements.

Pursuant to the Court's directive, Class Counsel followed these guidelines in making this supplemental fee application and expense request:

I. Categories Which May Be Included:

- Meetings and communications regarding the ten settlements.
- Pre-settlement attorney proffers and meetings relating to the ten settlements.
- Drafting settlement agreements.
- Claims Administration.
- Class Notice work.
- Plan of Allocation work.
- Discovery of Class Member information for purposes of class notice.
- Work pertaining to preliminary and final approval of settlements, including meetings and discussions with Class Members about the settlements and responding to objections to the settlements.

- Meetings and negotiations with intervenors and objectors pertaining to any settlement.
- Review and culling of documents related to pending settlement discussions.
- Drafting Complaint *only if the work identifies and pertains to a settled defendant*.
- Responding to motions to dismiss *only if the work identifies and pertains to a settled defendant*.
- Investigating Freight Forwarding industry *only if the work identifies and pertains to a settled defendant*.
- Review of documents and other information provided by a settling defendant prior to January 28, 2013 and relating to the ten settlements.
- Attorney proffers prior to January 28, 2013 and relating to the ten settlements.
- Witness interviews provided by a settling defendant prior to January 28, 2013 and relating to the ten settlements.
- Review of documents and other information provided by DHL prior to January 28, 2013 and relating to the ten settlements.
- Attorney proffers by DHL prior to January 28, 2013 and relating to the ten settlements.
- Witness interviews provided by DHL prior to January 28, 2013 and relating to the ten settlements.

II. Categories Which May Not Be Included:

- Drafting/Amending Complaint, except for work relating to a settled defendant.
- Responding to motions to dismiss, except for work relating to a settled defendant.
- Investigating Freight Forwarding industry, except for work relating to a settled defendant.
- Retaining Clients.
- Any information collection and preservation from Plaintiffs, including reviewing their documents and ESI to prepare them for production.
- Service of complaint.
- General strategizing.
- Work related to any fee petition.
- Time and expense reporting.

Co-lead Counsel then reviewed all submissions prior to filing them with the Court to insure their compliance with the categories described above.

3. Plaintiffs' Counsel's Time and Expenses Related to the Ten Settlements

Other than time related to (1) responding to objections to the ten settlements, (2) briefing and appearing at the hearing on final approval of the ten settlements and the plan of allocation, (3) working with Class Members to respond to inquiries about the settlements and claims filing process, and (4) working with the Claims Administrator in relation to Class Member questions and other matters relating to administration of the settlement funds and claims process, no time was submitted for work performed after January 28, 2013 (the date of the last of the ten settlements). A similar adjustment was made and approved by the Court in the supplemental fee and expense application relating to the Lufthansa settlement in the *Air Cargo MDL*. Thus, the total lodestar for all Class Counsel for work relating to the ten settlements is $13,796,633.27 and the total expenses are $517,110.54.

Time unrelated to the ten settlements has been excluded. After careful review, some time that was originally categorized under categories other than settlement has been included because it was performed in furtherance of pursuing and securing settlements. Examples include review and analysis of documents, information, and proffers made by settling defendants and/or the amnesty applicant that helped achieve the settlements. A similar adjustment was made by counsel, and approved by the Court, in the supplemental fee and expense application relating to the Lufthansa settlement in the *Air Cargo MDL*.

Concerning expenses, the firms attempted to identify those expenses that could be specifically related to the ten settlements. This included expenses related to the work described in Section 2(I) above. Where items in certain categories – such as computer research, internal reproduction/copies, telephone/fax and postage/express delivery/messenger – could not be specifically identified as relating to the ten settlements, or otherwise disaggregated, the firms

discounted the amount of such expenses by the percentage of their settlement-related time to their total time in the case.

The firms also included in their contributions to the common litigation fund that Co-Lead Counsel established to prosecute this action. Those assessment payments to the litigation fund have been similarly discounted. The supplemental declaration of W. Joseph Bruckner describes the amounts that have been contributed to, and the expenditures related to the ten settlements, from the litigation fund.

In addition to Class Counsel's settlement-related out-of-pocket expenses of $517,110.54, Class Counsel also incurred $96,275.30 in outstanding expenses to the Claims Administrator, Epiq Systems. These expenses were incurred in providing notice to the class of the ten settlements, and answering Class Member questions about the settlements and about the submission of Class Members' claims against the settlement fund.

Thus, the total expenses of all counsel spent or incurred in relation to the ten settlements is $613,385.84.

4. Conclusion

Co-Lead Counsel will provide any additional information upon the Court's request.

Dated: September 10, 2013

Respectfully submitted,

s/ W. Joseph Bruckner

W. Joseph Bruckner
Heidi M. Silton
Craig S. Davis
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401
T: (612) 339-6900
F: (612) 339-0981
E-mail: wjbruckner@locklaw.com
hsilton@locklaw.com
csdavis@locklaw.com

Christopher Lovell
Benjamin M. Jaccarino
LOVELL STEWART HALEBIAN JACOBSON LLP
61 Broadway, Suite 501
New York, NY 10006
T: (212) 608-1900
F: (212) 719-4775
E-mail: clovell@lshllp.com
bjaccarino@lshllp.com

Daniel E. Gustafson
Daniel C. Hedlund
Michelle J. Looby
Joshua J. Rissman
GUSTAFSON GLUEK PLLC
Canadian Pacific Plaza
120 South 6th Street, Suite 2600
Minneapolis, MN 55402
T: (612) 333-8844
F: (612) 339-6622
E-mail: dgustafson@gustafsongluek.com
dhedlund@gustafsongluek.com
mlooby@gustafsongluek.com
jrissman@gustafsongluek.com

Steven N. Williams
Adam J. Zapala
COTCHETT, PITRE & MCCARTHY, LLP
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
Burlingame, CA 94010
T: (650) 697-6000
F: (650) 697-0577
E-mail: swilliams@cpmlegal.com
azapala@cpmlegal.com

Interim Co-Lead Counsel for Plaintiffs

TAB 55A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In Re: **DISPOSABLE CONTACT LENS ANTITRUST LITIGATION**	**Case No. 3:15-md-2626-HES-JRK** **Judge Harvey E. Schlesinger** **Magistrate Judge James R. Klindt**
THIS DOCUMENT RELATES TO: **All Class Actions**	

ORDER GRANTING LEAD COUNSEL'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES FROM THE ABB SETTLEMENT FUND

THIS CAUSE is before the Court upon Lead Counsel's Application for an Award of Attorneys' Fees and Reimbursement of Expenses (Doc. 1242). Upon consideration, the motion is granted. Thus, it is **ORDERED**:

WHEREAS, the Action[1] is pending before this Court;

WHEREAS, Plaintiffs[2] have entered into and executed a Stipulation and Agreement of Settlement ("Settlement Agreement") with ABB Optical Group,

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[1] As defined in the Settlement Agreement, the "Action" means the above-captioned litigation pending in the United States District Court for the Middle District of Florida, Jacksonville Division, and any other actions that may be transferred or consolidated into this litigation.

[2] As defined in the Settlement Agreement, "Plaintiffs" are Rachel Berg, Miriam Pardoll, Jennifer Sineni, Elyse Ulino, Susan Gordon, Cora Beth Smith,

LLC ("ABB" together with Plaintiffs, the "Settling Parties"), which, if finally approved by the Court, will result in the settlement of all claims against ABB;

WHEREAS, the Court previously certified litigation classes pursuant to Fed. R. Civ. P. 23 (Doc. 940);

WHEREAS, the Court previously granted final approval of settlements releasing all claims against Bausch & Lomb, Inc. and CooperVision, Inc. (Doc. 1164);

WHEREAS, the Court has appointed Scott+Scott Attorneys at Law LLP, Hausfeld LLP, and Robins Kaplan, LLP ("Lead Counsel") as class counsel (Doc. 940);

WHEREAS, the Court has appointed Rachel Berg, Miriam Pardoll, Jennifer Sineni, Elyse Ulino, Susan Gordon, Cora Beth Smith, Brett Watson, Tamara O'Brien, Sheryl Marean, Catherine Dingle, Amanda Cunha, Alexis Ito, Kathleen Schirf, John Machikawa, and Joseph Felson as class representatives (Doc. 940), and each of these Class Representatives searched for and produced documents, and sat for a full deposition;

Brett Watson, Tamara O'Brien, Sheryl Marean, Catherine Dingle, Amanda Cunha, Alexis Ito, Kathleen Schirf, John Machikawa, and Joseph Felson. Pamela Mazzarella was a plaintiff in the CVI settlement, but not the B&L or ABB settlements because she withdrew as a named class representative; however, she continues to be a member of the Settlement Classes.

WHEREAS, by Order dated November 13, 2020 (the "Preliminary Approval Order") this Court: (a) preliminarily approved the Settlement Agreement; (b) preliminarily certified the Settlement Class; (c) ordered that notice of the Settlement Agreement be provided to potential members of the Settlement Class; (d) provided members of the Settlement Class with the opportunity either to exclude themselves from the Settlement Class or to object to the proposed Settlement Agreement; (e) provided members of the Settlement Class with the opportunity to object to the Application for Attorneys' Fees and Reimbursement of Costs, and (f) designated Scott+Scott Attorneys at Law LLP, Hausfeld LLP, and Robins Kaplan, LLP as settlement class counsel for the Settlement Classes ("Class Counsel") and Plaintiffs as class representatives of the Settlement Classes;

WHEREAS, consistent with the Court's order, notice has been disseminated to potential members of the Settlement Class;

WHEREAS, in full and final settlement of the claims asserted against ABB in this Action, ABB agreed to pay the amount of $30,200,000 and to provide limited cooperation as set forth in the Settlement Agreement;

WHEREAS, pursuant to the Preliminary Approval Order, an Escrow Account was established;

WHEREAS, pursuant to the Settlement Agreement and the Preliminary Approval Order, ABB timely deposited $500,000 of the Settlement Amount into

the settlement Escrow Account on December 16, 2020 and timely deposited 50% of the remainder of the Settlement Amount ($14,850,000) on April 15, 2021;

WHEREAS, pursuant to the Settlement Agreement, ABB will deposit the remainder of the Settlement Amount ($14,850,000) into the Escrow Account by January 14, 2022;

WHEREAS, in the Preliminary Approval Order, the Court ordered that all settlement funds held in the escrow account shall remain subject to the jurisdiction of the Court, until such time as such funds shall be distributed pursuant to the Settlement Agreement and further order(s) of the Court;

WHEREAS, in the Preliminary Approval Order, the Court ordered that all reasonable expenses incurred in identifying and notifying potential Class Members as well as in administering the ABB Settlement ("Settlement Administration Expenses") should be paid as set forth in the Settlement Agreement up to $500,000;

WHEREAS, the Court appointed Epiq Class Action & Claims Solutions, Inc. ("Epiq") as the notice provider and approved the proposed plan of notice, which provided for notice to members of the ABB Settlement Class using funds from the ABB Settlement;

WHEREAS, on February 26, 2021, Class Counsel filed an Application for an Award of Attorneys' Fees and Reimbursement of Expenses (Doc. 1242);

WHEREAS, the March 10, 2021 deadline to object to the Application for Attorneys' Fees and Reimbursement of Expenses has now passed;

WHEREAS, by Notice dated April 15, 2021 this Court scheduled a hearing regarding final approval of the ABB Settlement and Application for Attorneys' Fees and Costs on May 19, 2021;

WHEREAS, due and adequate notice has been given to potential members of the Settlement Class;

WHEREAS, the 90-day period provided by the Class Action Fairness Act, 28 U.S.C. §1715(d), has expired;

WHEREAS, the Court conducted a hearing on May 19, 2021 (the "Fairness Hearing") to consider, among other things, (a) whether the terms and conditions of the Settlement Agreement are fair, reasonable, and adequate to the Settlement Class, and should therefore be approved; (b) whether a judgment should be entered dismissing the Action with prejudice as against ABB; and (c) whether Plaintiffs' Attorneys' Fees and Costs should be granted;

WHEREAS, Class Counsel have requested as attorneys' fees one-third (33.3%) of the $30,200,000 ABB Settlement Fund ($9,315,960.97), after payment of the Court-approved notice costs ($500,000), anticipated claims administration costs ($1,000,000), and expenses ($752,117.10);

WHEREAS, Class Counsel notified the Settlement Class that they would seek up to one-third (33.3%) of the ABB Settlement Fund as reimbursement

for attorneys' fees, and notified members of the Settlement Class of the specific requested fee amount in advance of the deadline for objections and exclusion requests;

WHEREAS, as described in the Plaintiffs' Application for Attorneys' Fees and Costs filed February 26, 2021, the Court has read and considered the reasonableness and necessity of the fees and costs;

WHEREAS, the Court has considered the applicable case law and finds that awarding common costs as well as funds for anticipated common costs necessary for Class Counsel to continue litigating Plaintiffs' claims against the non-settling defendants benefits Class Members; and

WHEREAS, the Court has considered the applicable case law and finds that awarding the requested attorneys' fees is fair and reasonable and just compensation for the work done and risks taken in this litigation and is well within the range of reasonableness under the factors established by the Eleventh Circuit in *Camden I Condo Ass'n v. Dunkle*, 946 F.2d 768 (11th Cir. 1991);

Thus, it is **ORDERED**:

1. The Court authorizes Class Counsel to withdraw the following from the ABB Settlement Fund Escrow Account:

   a. $9,315,960.97 in attorneys' fees;

   b. up to $1,000,000 in anticipated claims administration costs

without further order of the Court; and

c. $752,117.10 in general incurred and anticipated litigation costs.

DONE AND ENTERED at Jacksonville, Florida, this 31st day of May, 2021.

HARVEY E. SCHLESINGER
United States District Judge

Copies to:
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In Re: **DISPOSABLE CONTACT LENS ANTITRUST LITIGATION**	**Case No. 3:15-md-2626-HES-LLL** **Judge Harvey E. Schlesinger** **Magistrate Judge Laura Lothman Lambert**
THIS DOCUMENT RELATES TO: **All Class Actions**	

ORDER GRANTING LEAD COUNSEL'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES FROM THE COOPERVISION, INC., BAUSCH & LOMB, INC., ALCON VISION, LLC, AND JOHNSON & JOHNSON VISION CARE, INC. SETTLEMENT FUNDS

This Action[1] is pending before this Court:

Plaintiffs[2] have entered into and executed Stipulations and Agreements of Settlement ("Settlement Agreements") with Alcon Vision, LLC ("Alcon"), and Johnson & Johnson Vision Care, Inc. ("JJVCI") ("Defendants" together with Plaintiffs, the "Settling Parties"), which, if finally approved by the Court, will result in the settlement of all claims against Defendants and bring the Action to an end;[3]

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[1] As defined in the Settlement Agreements, the "Action" means the above-captioned litigation pending in the United States District Court for the Middle District of Florida, Jacksonville Division, and any other actions that may be transferred or consolidated into this litigation.

[2] As defined in the Settlement Agreements, "Plaintiffs" are Rachel Berg, Miriam Pardoll, Jennifer Sineni, Elyse Ulino, Susan Gordon, Cora Beth Smith, Brett Watson, Tamara O'Brien, Sheryl Marean, Catherine Dingle, Amanda Cunha, Alexis Ito, Kathleen Schirf, John Machikawa, and Joseph Felson. Pamela Mazzarella was a plaintiff in the CooperVision, Inc. ("CVI") settlement, but not the Bausch & Lomb Inc. ("B&L") or ABB Optical Group, LLC ("ABB") settlements because she withdrew as a named class representative; however, she continues to be a member of the Settlement Classes.

[3] Alcon Vision, LLC vs. Lens.com, C.A. No. 1:18-407, was filed in the Eastern District of New York. The case is a trademark infringement action against discount retailer Lens.com, a "gray market" purchaser, which allegedly bought certain Alcon products overseas and sold them in the United States. Defendant Lens.com brought several counterclaims that generally (1) refute Alcon's accusation of trademark infringement and suggest instead that changes Alcon made to products exclusively sold in the U.S. were pretextual changes aimed at eliminating gray market competitors, (2) challenge Alcon's proposed exclusive-dealing arrangements and its alleged attempts to tie the sale of products it exclusively sells in the U.S. to an agreement that Lens.com purchase all Alcon products at its U.S. prices, and (3) connect Alcon's filing of the trademark action against Lens.com to its alleged prior efforts to prevent resellers from distributing Alcon products to the detriment of eye care professionals. Two of Lens.com's claims relate to the universal pricing policies (UPPs) at issue in MDL No. 2626. These two UPP-related counterclaims were transferred to this Court. The two counterclaims, Alcon Vision, LLC v. Lens.com,

The Court previously certified litigation classes pursuant to Federal Rule of Civil Procedure 23 (Doc. 940);

The Court has appointed Scott+Scott Attorneys at Law LLP, Hausfeld LLP, and Robins Kaplan, LLP ("Lead Counsel") as class counsel (*id.*);

The Court has appointed Rachel Berg, Miriam Pardoll, Jennifer Sineni, Elyse Ulino, Susan Gordon, Cora Beth Smith, Brett Watson, Tamara O'Brien, Sheryl Marean, Catherine Dingle, Amanda Cunha, Alexis Ito, Kathleen Schirf, John Machikawa, and Joseph Felson as class representatives (*id.*);

By Order dated May 9, 2022 (Doc. 1343) (the "Preliminary Approval Order") this Court: (a) preliminarily approved the Settlement Agreements with Alcon and JJVCI; (b) preliminarily certified those Settlement Classes; (c) ordered that notice of the Settlement Agreements be provided to potential members of the Settlement Classes; (d) provided members of the Settlement Classes with the opportunity either to exclude themselves from the Settlement Classes or to object to the proposed Settlement Agreements; (e) provided members of the Settlement Classes with the opportunity to object to the Application for Attorneys' Fees and Reimbursement of Costs, and (f) designated Scott+Scott Attorneys at Law LLP, Hausfeld LLP, and

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case number 19-cv-706, remain pending before this Court and the claims are not dismissed by this Order. Final briefing on dispositive motions is due September 13, 2023 (Doc. 1345). The Parties have stipulated that ten days after this Court's ruling on all dispositive motions, this matter shall be remanded to the United States District Court for the Eastern District of New York for any trial (Doc. 1344).

Robins Kaplan, LLP as settlement class counsel for the Settlement Classes ("Class Counsel") and Plaintiffs as class representatives of the Settlement Classes;

Consistent with the Court's Order, notice has been disseminated to potential members of the Alcon and JJVCI Settlement Classes;

In full and final settlement of the claims asserted against Alcon in this Action, Alcon agreed to pay the amount of $20,000,000 (twenty million dollars) as set forth in the Alcon Settlement Agreement;

In full and final settlement of the claims asserted against JJVCI in this Action, JJVCI agreed to pay the amount of $55,000,000 (fifty-five million dollars) as set forth in the JJVCI Settlement Agreement;

Pursuant to the Preliminary Approval Order, Escrow Accounts were established for the Settlement Agreements;

Pursuant to the Alcon Settlement Agreement, Alcon deposited $20,000,000 (twenty million dollars) into an Escrow Account;

Pursuant to the JJVCI Settlement Agreement, JJVCI deposited $55,000,000 (fifty-five million dollars) into an Escrow Account;

In the Preliminary Approval Order, the Court ordered that all settlement funds held in the escrow account shall remain subject to the jurisdiction of the Court, until such time as such funds shall be distributed pursuant to the Settlement Agreements and further order(s) of the Court;

In the Preliminary Approval Order, the Court ordered that all reasonable expenses incurred in identifying and notifying potential Class Members as well as in

administering the Alcon and JJVCI Settlements ("Settlement Administration Expenses") should be paid as set forth in the Settlement Agreements up to $1,500,000;

The Court appointed Epiq Class Action & Claims Solutions, Inc. ("Epiq") as the notice provider and approved the proposed plan of notice, which provided for notice to members of the Settlement Classes using funds from the Settlements;

On July 22, 2022, Class Counsel filed an Application for an Award of Attorneys' Fees and Reimbursement of Expenses (Doc. 1349);

The August 22, 2022 deadline to object to the Application for Attorneys' Fees and Reimbursement of Expenses has now passed and no objections were filed and neither Class Counsel nor Epiq is otherwise aware of any objections;

By Notice dated July 26, 2022, this Court scheduled a hearing regarding final approval of the Alcon and JJVCI Settlements and Application for Attorneys' Fees and Costs on October 12, 2022 at 9:30 AM at Bryan Simpson United States Courthouse, 300 North Hogan Street, Jacksonville, Florida, Courtroom 10C (Doc. 1353);

Due and adequate notice has been given to potential members of the Settlement Classes;

The 90-day period provided by the Class Action Fairness Act, 28 U.S.C. §1715(d), has expired;

The Court conducted the hearing on October 12, 2022 (the "Fairness Hearing") to consider, among other things, (a) whether the terms and conditions of the Settlement Agreements are fair, reasonable, and adequate to the Settlement Classes, and should therefore be approved; (b) whether a judgment should be entered

dismissing the Action with prejudice against Alcon and JJVCI; and (c) whether Plaintiffs' Attorneys' Fees and Costs should be granted;

The Court previously granted final approval of settlements releasing all claims against B&L ($10,000,000) and CVI ($3,000,000) (Doc. 1164) and both Funds were fully funded by CVI and B&L;

Notice for the CVI and B&L Settlements informed the Settlement Class Members that Lead Counsel may request up to one-third of the Settlement Funds as attorneys' fees;

Lead Counsel never requested compensation for their time spent litigating this Action from the CVI and B&L Settlement Funds;

No CVI or B&L Settlement Class Member objected to Lead Counsel's ability to request up to one-third of the Settlement Funds as attorneys' fees;

Class Counsel have requested as attorneys' fees one-third of the combined $88,000,000 CVI, B&L, Alcon, and JJVCI Settlement Funds ($29,333,333.33), as well as payment of costs and expenses reasonably incurred in litigating this Action ($1,649,702.38);

Class Counsel also notified the Alcon and JJVCI Settlement Classes that they would seek up to one-third of the those Settlement Funds as reimbursement for attorneys' fees, and notified members of the Settlement Classes of the specific percentage of the Settlement Funds to be requested in advance of the respective deadlines for each settlement for objections and exclusion requests;

As described in the Plaintiffs' Application for Attorneys' Fees and Costs filed February 26, 2021, the Court has read and considered the reasonableness and necessity of the fees and costs; and

The Court has considered the applicable case law and finds that awarding the requested attorneys' fees is fair and reasonable and just compensation for the work done and risks taken in this litigation and is well within the range of reasonableness under the factors established by the Eleventh Circuit in Camden I Condo. Ass'n, Inc. v. Dunkle, 946 F.2d 768 (11th Cir. 1991).

NOW, THEREFORE, IT IS HEREBY ORDERED:

The Court authorizes Class Counsel to withdraw the following from the Settlement Fund Escrow Accounts:

a. $29,333,333.33 in attorneys' fees, with one-third to be withdrawn from each of the CVI ($1,000,000), B&L ($3,333,333.33), Alcon ($6,666,666.67), and JJVCI ($18,333,333.33) Settlement Funds; and

b. $1,649,702.38 in general incurred and litigation costs to be withdrawn from Alcon ($439,920.63) and JJVCI ($1,209,781.75) Settlement Funds.

DONE AND ENTERED in Jacksonville, Florida this 12th day of October 2022.

HARVEY E. SCHLESINGER
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record

TAB 55B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In Re: **DISPOSABLE CONTACT LENS ANTITRUST LITIGATION**	**Case No. 3:15-md-2626-HES-JRK** **Judge Harvey E. Schlesinger** **Magistrate Judge James R. Klindt**
THIS DOCUMENT RELATES TO: **All Class Actions**	

LEAD COUNSEL'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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For the reasons set forth below, Lead Counsel request that the Court enter an order: (1) promptly setting a date and time for the Fairness Hearing regarding this Motion and the concurrently filed Motion for Final Approval of Settlement Agreement with Defendant ABB Optical Group LLC ("Motion for Final Approval"); and (2) awarding Lead Counsel the requested $9,315,960.97 in attorneys' fees and $752,117.10 in newly incurred expenses.[1]

I. PRELIMINARY STATEMENT

Over the course of nearly six years of hard-fought litigation that has progressed through motions to dismiss, sharply contested discovery, class certification, several motions for interlocutory appeal, and multiple motions for summary judgment, Lead Counsel have reached settlements with three of the original five defendants totaling $43,200,000.[2] They have not until now, however, requested any award of attorneys' fees for the work they performed litigating the case. Lead Counsel therefore respectfully request that the Court award attorneys' fees equal to one-third (33.3%) of the $30,200,000 ABB Settlement Fund ($9,315,960.97), after payment of the Court-approved notice costs ($500,000), anticipated claims administration costs ($1,000,000),[3]

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[1] Lead Counsel will submit a Proposed Order with their reply brief on April 9, 2021, once the opt-out and objection deadline has passed and Lead Counsel have had an opportunity to consider and respond to any objections, should they arise.

[2] On March 4, 2020, the Court granted final approval to settlements of $10,000,000 and $3,000,000 with Bausch & Lomb Incorporated ("B&L" and "B&L Settlement Fund") and CooperVision, Inc. ("CVI" and "CVI Settlement Fund"), respectively. ECF No. 1164. A motion for Final Approval of the ABB Optical Group LLC ("ABB") Settlement of $30,200,000 ("ABB Settlement Fund") was submitted concurrently with this motion. Each settlement is held in a separate fund. Together, they will be referred to herein as the "Settlement Funds."

[3] As noted in the motions to approve the B&L and CVI Settlements (ECF Nos. 1011, 1037, 1145), payment of additional notice and claims administration costs will be necessary. Lead Counsel calculated the $1,000,000 figure based on estimates provided by the Court-approved claims administrator and their decades of experience with class action settlements. All claims administration costs will be subject to court approval and any amount under the estimate will remain in the Settlement Fund for distribution to Class Members. Lead Counsel presently

and expenses ($752,117.10) also requested in this Motion.[4] The requested award of attorneys' fees and expense is well within the range approved by courts in this District and Circuit. Counsel for ABB take no position on Lead Counsel's application for fees and costs. Declaration of Joseph P. Guglielmo, Christopher Lebsock, and Eamon O'Kelly, filed herewith ("Jt. Decl."), ¶70.

In addition, because the Court has not yet set a date for the Fairness Hearing, Lead Counsel respectfully requests that the Court do so.[5]

II. STATEMENT OF FACTS

A. Lead Counsel's Initial Investigation

Lead Counsel devoted substantial time to investigating the potential claims against Defendants before filing Plaintiffs' complaints. Lead Counsel interviewed customers and potential plaintiffs to gather information about Defendants' conduct and the impact on customers. *Id.*, ¶¶6-8. This information was essential to Lead Counsel's ability to understand the nature of Defendants' conduct, the nature of the UPPs, and potential remedies. Lead Counsel consulted with experts to develop and refine their legal and damages theories and amassed evidence from various state and federal government hearings related to disposable contact lenses.

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anticipates that they will file a motion for payment of additional notice and claims costs when they file their motion to distribute the settlement funds. Application for additional notice and claims administration costs after payment of fees and expenses is routine in cases such as this. *See, e.g.*, *In re Foreign Exchange Benchmark Rates Antitrust Litig.*, Case No. 1:13-cv-07789-LGS (S.D.N.Y.) (ECF Nos. 1178, 1181).

[4] Lead counsel's fee request of $9,315,960.97 is equal to one-third of the ABB Settlement Amount ($30,200,000), less the expenses requested in this motion of $752,117.10 and the anticipated notice and administration costs of $1,500,000 ($500,000 previously approved by the Court, and $1,000,000 for anticipated future notice and claims administration expenses). The fees and expenses requested in this motion equal 33.34% to the ABB Settlement Amount. Inclusive of the anticipated notice and claims costs, the total is 36.65% of the ABB Settlement Amount.

[5] Lead Counsel will submit a Proposed Order with their reply brief on April 9, 2021, once the opt-out and objection deadline has passed and Lead Counsel have had an opportunity to consider and respond to any objections, should they arise.

B. Procedural History

This case has presented a complex set of legal questions and novel defenses throughout. For nearly six years, Lead Counsel have successfully advanced Plaintiffs' antirust claims against five sophisticated multinational defendants, represented by counsel from some of the largest law firms in the world. After thousands of pages of motion practice, millions of pages of documents exchanged and reviewed in discovery, and hours of depositions and hearings, Lead Counsel have negotiated and obtained class settlements totaling $43,200,000 and prepared the case for trial. Below, Lead Counsel detail their efforts to achieve these results.

This litigation began on March 3, 2015, when Plaintiff John Machikawa, among others, filed the first complaint against the four dominant manufacturers of disposable contact lenses, B&L, Johnson & Johnson Vision Care, Inc. ("JJVC"), Alcon Laboratories, Inc. ("Alcon"), CVI, and their primary distributor, ABB (collectively, "Defendants"), in the U.S. District Court for the Northern District of California ("*Machikawa*"). The complaints alleged that the Defendants' so-called "Unilateral Pricing Policies" ("UPPs") were illegal restraints on competition under Section One of the Sherman Act, 15 U.S.C. §1, and various state unfair competition laws and sought, *inter alia*, monetary damages, interest, attorneys' fees, restitution, and equitable relief. Jt. Decl., ¶9.

On June 10, 2015, the Judicial Panel on Multidistrict Litigation consolidated and centralized *Machikawa*, along with other lawsuits alleging similar wrongdoing, in this Court. *Id.* The cases were re-captioned *In Re: Disposable Contact Lens Antitrust Litigation*, No. 3:15-md-02626-J-HES-JRK.

On October 7, 2015, the Court granted Lead Counsel's motion appointing Hausfeld LLP ("Hausfeld"), Scott+Scott Attorneys at Law LLP ("Scott+Scott"), and Robins Kaplan LLP ("Robins Kaplan") as interim co-lead counsel. ECF No. 116. On November 23, 2015, Lead Counsel, on behalf of Plaintiffs, filed the Consolidated Class Action Complaint ("Consolidated

Complaint"), asserting six causes of action: (1) Violation of 15 U.S.C. §§1 and 3 (*Per Se* Violation of the Sherman Act); (2) Violation of 15 U.S.C. §§1 and 3 (Rule of Reason Violations of the Sherman Act); (3) Violation of the California Cartwright Act; (4) Violation of the Maryland Antitrust Act; (5) Violation of the California Unfair Competition Law; and (6) Violation of the Maryland Consumer Protection Act. ECF No. 133.

On December 23, 2015, Defendants filed their Motion to Dismiss the Consolidated Complaint. ECF No. 146. Following briefing and oral argument, the Court denied Defendants' motion. ECF Nos. 185, 190. Discovery commenced on April 1, 2016. ECF No. 204. On July 27, 2016, Defendants filed their Answers and Affirmative Defenses. ECF Nos. 266-70.

The Parties engaged in significant motion practice and extensive formal discovery, including approximately 79 depositions of Plaintiffs, Defendants' employees, experts, and third parties, and the production of more than 4.3 million pages of documents and voluminous electronically stored information by Defendants and third parties. Jt. Decl., ¶¶20-22.

On March 1, 2017, Plaintiffs filed the operative complaint in this matter. ECF No. 395. On March 3, 2017, Plaintiffs filed a Motion for Class Certification with accompanying expert reports. ECF Nos. 396-98. On June 15, 2017, Defendants filed their Motion to Strike certain portions of Plaintiffs' Expert Reports and their Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification, accompanying expert reports, and other declarations. ECF Nos. 500-10, 693. Plaintiffs filed their Reply in support of their Motion for Class Certification on September 8, 2017, as well as their oppositions to Defendants' Motion to Strike portions of Plaintiffs' Expert Reports. ECF Nos. 611-18, 715. On October 20, 2017, Defendants filed their Sur-Reply Memorandum of Law in Further Opposition to Plaintiffs' Motion for Class Certification. ECF Nos. 674-78. On August 1 and 2, 2018, the Court held a hearing on Plaintiffs'

Class Certification motion, which involved examination and cross-examination of Plaintiffs' and Defendants' experts, presentation of more than 50 exhibits; the hearing spanned more than ten hours. ECF Nos. 865-1, 865-2, 866.

On December 4, 2018, the Court granted Plaintiffs' Motion for Class Certification ("Class Certification Order") and certified four litigation Classes, including the following Horizontal Class:

> All persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by Alcon, JJVC, or B&L for their own use and not for resale, where the prices for such contact lenses were subject to a "Unilateral Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Class are any purchases from 1-800[-]Contacts of disposable contact lenses subject to B&L's Unilateral Pricing Policy, where the purchase occurred on or after July 1, 2015. Also excluded from the Class are Defendants, their parent companies, subsidiaries and affiliates, any coconspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

ECF No. 940 at 162. The Court appointed Hausfeld, Scott+Scott, and Robins Kaplan as counsel for the certified Classes and appointed the Plaintiffs as class representatives.

On December 18, 2018, Defendants filed petitions to appeal the Class Certification Order, pursuant to Rule 23(f) of the Federal Rules of Civil Procedure. The Parties briefed Defendants' petitions. On April 5, 2019, the Eleventh Circuit denied Defendants ABB's and JJVC's petition to appeal the Class Certification Order, and on June 20, 2019, denied Alcon and B&L's virtually identical petition. Jt. Decl., ¶¶31-32.

On August 20, 2018, Defendants filed four motions for summary judgment regarding all of Plaintiffs' claims. ECF Nos. 872-74, 877. Briefing on the motions was completed on December 17, 2018 (ECF No. 942), and a two-day hearing was held on August 21 and 22, 2019. ECF Nos. 1015, 1017. On November 27, 2019, the Court denied Defendants' Motions for Summary Judgement, concluding as follows:

> The Court finds Plaintiffs have produced satisfactory evidence supporting their position that Defendants had a conscious commitment to a common scheme designed to achieve an unlawful objective. There is evidence that the UPPs were instituted pursuant to coordinated pressure exerted by certain ECPs and ABB, the manufacturers sought agreement regarding the UPPs and the Defendants jointly policed the pricing policies. Plaintiffs have also proffered ample evidence of potential or actual anticompetitive market effects, demonstrated the alleged conspiracy was economically reasonable and substantiated their allegation that the UPPs imposed an unreasonable restraint on competition with no pro-competitive benefit.
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> Finally, the Court finds that Plaintiffs have done more than show conduct that is as consistent with lawful competition as it is with an illicit conspiracy; weighing the competing inferences, it is reasonable for a jury to find Defendants were engaged in an illicit price fixing.

ECF No. 1091 at 23.

For the next few months, the Parties worked to prepare their respective cases for trial, which was then schedule for February of 2020. Jt. Decl., ¶41. This included drafting, exchanging, and meeting and conferring regarding proposed jury instructions, witnesses, deposition designations, and exhibit lists. *Id*. The Parties also filed competing motions *in limine* (ECF Nos. 1055, 1056, 1058-61, 1064, 1092, 1103, 1160), which this Court ultimately ruled on, granting some in favor of Defendants and some in favor of Plaintiffs. ECF Nos. 1142, 1150, 1174.

At a January 8, 2020 hearing, the Court set a trial date of June 22, 2020 and a final pre-trial hearing for May 13, 2020. ECF No. 1131. On March 30, 2020, Plaintiffs and Defendants filed a Joint Notice in which they requested the Court's guidance on pre-trial and trial scheduling issues regarding the impact of the COVID-19 pandemic. ECF No. 1178. On April 3, 2020, the Court issued its Order in response, delaying the start of trial indefinitely on account of the many difficulties and dangers of attempting to hold a trial during the pandemic. ECF No. 1180. The Court also urged the parties to use this time to discuss and seriously consider a potential resolution of the litigation. *Id*.

Defendants have repeatedly denied all of Plaintiffs' allegations of wrongdoing. They have consistently defended their conduct by arguing, *inter alia*, that the UPPs were lawful and that they never entered into an agreement with anyone to adopt, implement, or enforce the UPPs. Defendants have advanced additional defenses.

C. The Settlements

On August 30, 2017, Plaintiffs reached an "ice-breaker" settlement with Defendant CVI. Joint Decl., ¶48. The settlement included a monetary payment of $3,000,000 and was reached on behalf of the following settlement class:

> All persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by Alcon Laboratories, Inc., Johnson & Johnson Vision Care, Inc., Bausch & Lomb, Inc., or CVI (or distributed by ABB Concise Optical Group) during the Settlement Class Period for their own use and not for resale, which were sold at any time subject to a Unilateral Pricing Policy. Excluded from the Settlement Class are Defendants, their parent companies, subsidiaries and affiliates, any coconspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

ECF No. 781-1, ¶1.37 (the "CVI Settlement Class"). On July 10, 2018, the Court preliminarily approved the settlement with CVI, but delayed dissemination of notice. ECF No. 841.

On August 19, 2019, Plaintiffs reached a settlement agreement with Defendant B&L. Jt. Decl., ¶50. The settlement included a monetary payment of $10,000,000 and was reached on behalf of the following settlement class:

> [A]ll persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by Alcon Laboratories, Inc., Johnson & Johnson Vision Care, Inc., or B&L during the Settlement Class Period for their own use and not for resale, where the prices for such contact lenses were subject to a Unilateral Pricing Policy and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Settlement Class are any purchases from 1-800-Contacts of disposable contact lenses subject to B&L's Unilateral Pricing Policy, where the purchase occurred on or after July 1, 2015. Also excluded from the Settlement Class are Defendants, their parent companies, subsidiaries and affiliates, any coconspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

ECF No. 781-1, ¶1.37 (the "B&L Settlement Class"). On October 8, 2019, the Court granted preliminary approval of the B&L settlement and approved a plan to disseminate notice to members of the litigation classes, the CVI Settlement Class, and the B&L Settlement Class. ECF No. 1046.

On January 16, 2020, Plaintiffs filed their Motion for Final Approval of Settlement Agreements with Defendants B&L and CV, as well as a Motion for Payment of Common Expenses and Class Representatives' Service Awards. ECF Nos. 1136, 1137. On February 25, 2020, the Court held a Fairness Hearing regarding the settlements with B&L and CVI. *See* ECF No. 1154 and February 25, 2020 Hearing Transcript. On March 4, 2020, the Court granted Plaintiffs' Motion for Final Approval and issued its Final Approval Order and Final Judgment and Order of Dismissal with Prejudice as to B&L and CVI. ECF No. 1164. The Court also granted Plaintiffs' Motion for Payment of Common Expenses and Class Representatives' Service Awards. ECF No. 1165.

As permitted by the Court, Lead Counsel withdrew 33.3% ($4,329,000) from the collective $13,000,000 in the B&L and CVI Settlement Funds to cover incurred and anticipated common litigation expenses. Jt. Decl., ¶56.[6] These costs included $664,206.86 for some, but not all, of the future costs Lead Counsel anticipated they would incur to litigate the case through trial. ECF No. 1165. Lead Counsel did not seek any award of attorneys' fees from the settlements with B&L or CVI.

On April 3, 2020, the Court issued an Order regarding the impact of COVID-19 on the case schedule. ECF No. 1180. In the Order's final paragraph, the Court stated that it "sincerely urges the Parties to earnestly confer with each other in a deliberate attempt to reach an agreement that

[6] $3,330,800 was paid from the B&L Settlement Fund and $999,000 was paid from the CVI Settlement Fund. *Id.*

completely resolves this litigation. Specifically, the Court implore[d] the remaining Defendants to have their corporate executives seriously consider this request and the basis for it." *Id*. at 5.

Plaintiffs and ABB took the Court's words to heart. On Sunday, August 30, 2020, they engaged in a day-long mediation session with former U.S. District Judge, Layn Phillips, via video conference. Jt. Decl., ¶64. Prior to the August 30, 2020 mediation session, the Parties engaged in a series of pre-mediation discussions with Judge Phillips regarding a potential settlement. *Id.* With Judge Phillips' guidance and assistance, the Parties were able to reach an agreement to resolve the case against ABB. *Id*. ABB will pay $30,200,000 into a settlement fund in exchange for dismissal and release of all claims against it.[7] *Id*. The Parties fully executed the Settlement Agreement on September 22, 2020. *Id*.

On October 22, 2020, Plaintiffs filed their Motion for Preliminary Approval and Notice Plan regarding the ABB Settlement. ECF No. 1215. Because ABB was a distributor of contact lenses made by all of the manufacturer Defendants including Alcon, JJVC, CVI, and B&L, the ABB Settlement Class define the ABB Settlement Class as follows:

> [A]ll persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by Alcon, JJVC, CVI, or B&L during the Settlement Class Period for their own use and not for resale, where the prices for such contact lenses were subject to a "Unilateral Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Settlement Class are any purchases from l-800 Contacts of disposable contact lenses subject to B&L's Unilateral Pricing Policy, where the purchase occurred on or after July 1, 2015. Also excluded from the Settlement Class are Defendants, their parent companies, subsidiaries and affiliates, any alleged co-conspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

[7] ABB already paid $500,000 of the Settlement Amount in cash into the Escrow Account controlled by the Escrow Agent for purposes of disseminating notice. ABB will pay the remainder of the Settlement Amount ($29,700,000) into the Escrow Account as follows: 50% of the remainder ($14,850,000) by April 15, 2021, and the remaining balance ($14,850,000) by January 14, 2022. Agreement, ¶3.1.

Agreement, ¶1.35. The ABB Settlement Class tracks the CVI Settlement Class for which the Court has already granted final approval. ECF No. 1164.

On November 4, 2020, the Court held a hearing on the Motion for Preliminary Approval of the ABB Settlement. ECF No. 1219. On November 12, 2020, the Court preliminarily approved the ABB Settlement and approved the Notice Plan. ECF No. 1224.

The Court-approved Notice Plan for the ABB Settlement informed potential Class Members that Lead Counsel would ask the Court for attorneys' fees "up to one-third (33.3%)" of the Settlement Fund, "after payment of Court-approved costs and expenses." ECF No. 1216.

III. ARGUMENT

A. Lead Counsel's Request for 33.3% of the ABB Net Settlement Funds Is Fair and Reasonable

As stated in the ABB Settlement Agreement and Notice Plan, and consistent with standard class action practice and procedure, Lead Counsel respectfully request $9,315,960.97 in attorneys' fees, which equals one-third of the $30,200,000 Settlement Fund, after payment of the already-approved $500,000 in notice costs, $1,000,000 in anticipated claims administration costs, and $752,117.10 in expenses also requested in this Motion. Agreement, ¶9.1; ECF No. 1216; Jt. Decl., ¶84. Lead Counsel's 33.3% fee request is appropriate, fair, and well within the range of reasonableness under the factors established by the Eleventh Circuit in *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768 (11th Cir. 1991). For the reasons detailed herein, Lead Counsel's application for attorneys' fees should be approved.

1. The Law Awards Lead Counsel Fees from the Common Fund

It is well established that when a representative party has conferred a substantial benefit upon a class, counsel is entitled to attorneys' fees based upon the benefit obtained. *Camden I*, 946 F.2d at 771; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The common benefit doctrine

serves the "twin goals of removing a potential financial obstacle to a plaintiff's pursuit of a claim on behalf of a class and of equitably distributing the fees and costs of successful litigation among all who gained from the named plaintiff's efforts." *In re Gould Secs. Litig.*, 727 F. Supp. 1201, 1203 (N.D. Ill. 1989).[8] The common benefit doctrine stems from the premise that those who receive the benefit of a lawsuit without contributing to its costs are "unjustly enriched" at the expense of the successful litigant. *Boeing*, 444 U.S. at 478. As a result, the Supreme Court, the Eleventh Circuit, and courts in this District have all recognized that "'[a] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as whole.'" *In re Sunbeam Secs. Litig.*, 176 F. Supp. 2d 1323, 1333 (quoting *Boeing*, 444 U.S. at 478); *see also Camden I*, 946 F.2d at 771 ("Attorneys in a class action in which a common fund is created are entitled to compensation for their services from the common fund, but the amount is subject to court approval."). Courts have also recognized that appropriate fee awards in cases such as this encourage redress for wrongs caused to entire classes of persons and deter future misconduct of a similar nature. *See, e.g.*, *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 660, 687 (M.D. Ala. 1988); *see also Deposit Guar. Nat'l Bank v. Rope*, 445 U.S. 326, 338-39 (1980). Adequate compensation promotes the availability of counsel for aggrieved persons:

> If the plaintiffs' bar is not adequately compensated for its risk, responsibility, and effort when it is successful, then effective representation for plaintiffs in these cases will disappear. . . . We as members of the judiciary must be ever watchful to avoid being isolated from the experience of those who are actively engaged in the practice of law. It is difficult to evaluate the effort it takes to successfully and ethically prosecute a large plaintiffs' class action suit. It is an experience in which few of us have participated. The dimensions of the undertaking are awesome.

Muehler v. Land O'Lakes, Inc., 617 F. Supp. 1370, 1376 (D. Minn. 1985).

[8] Unless otherwise noted, citations are omitted.

In the Eleventh Circuit, class counsel receives a percentage of the funds obtained through a settlement. In *Camden I*, the Eleventh Circuit held that "the percentage of the fund approach [as opposed to the lodestar approach] is the better reasoned in a common fund case. Henceforth in this [C]ircuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." 946 F.2d at 774. Courts in this Circuit have applied the percentage of the fund approach since, holding as follows:

> The Eleventh Circuit made clear in *Camden I* that percentage of the fund is the exclusive method for awarding fees in common fund class actions. *Camden I*, 946 F.2d at 774. Even before *Camden I*, courts in this Circuit recognized that "a percentage of the gross recovery is the only sensible method of awarding fees in common fund cases." [*Mashburn*, 684 F. Supp. at 670.] More importantly, the Court observed first hand the monumental effort exerted by Class Counsel in this case, and does not need to see timesheets to know how much work Class Counsel have put in to reach this point.

In re Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1362 (S.D. Fla. 2011).

The Court has discretion in determining an appropriate fee. "'There is no hard and fast rule mandating a certain percentage of a common fund which may be awarded as a fee because the amount of any fee must be determined upon the facts of each case.'" *Sunbeam*, 176 F. Supp. 2d at 1333 (quoting *Camden I*, 946 F.2d at 774). Nonetheless, "'[t]he majority of common fund fee awards fall between 20% to 30% of the fund'" – though "'an upper limit of 50% of the fund may be stated as a general rule.'" *Id.* (quoting *Camden I*, 946 F.2d at 774-75); *see also Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999) (approving fee award where the district court determined that the benchmark should be 30% and then adjusted the fee award higher in view of the circumstances of the case); *Wolff v. Cash 4 Titles*, No. 03-2278-CIV, 2012 WL 5290155, at *5-6 (S.D. Fla. Sept. 26, 2012) ("The average percentage award in the Eleventh Circuit mirrors that of awards nationwide – roughly one-third"); Theodore Eisenberg, *et al.*, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. REV. 937, 951 (2017) (showing, through an

empirical study, that the median fee award in Eleventh Circuit is 33% and the mean is 30%). Lead Counsel's fee request falls within this accepted range. *See, e.g.*, *In re CNL Hotels & Resorts, Inc. Secs. Litig.*, No. 04-cv-01231 (M.D. Fla. Aug. 1, 2006) (granting 34% in fees, over $12 million, of a $35 million class settlement); *Johns Manville v. Tennessee Valley Auth.*, No. 99-2294 (N.D. Ala. Aug. 20, 2007) (awarding 35% as fees for a $18 million class settlement); *Neal v. Chase Manhattan Bank, U.S.A., N.A.*, No. 06-00049 (S.D. Ala. May 30, 2006) (awarding 37% in fees of $2.7 million class settlement).

2. Application of the *Camden I* Factors Supports the Requested Fee

In the Eleventh Circuit, courts use the below factors to determine a reasonable percentage to award as an attorneys' fee to class counsel in class actions:

(1) the time and labor required;

(2) the novelty and difficulty of the relevant questions;

(3) the skill required to properly carry out the legal services;

(4) the preclusion of other employment by the attorney as a result of his acceptance of the case;

(5) the customary fee;

(6) whether the fee is fixed or contingent;

(7) time limitations imposed by the clients or the circumstances;

(8) the results obtained, including the amount recovered for the clients;

(9) the experience, reputation, and ability of the attorneys;

(10) the "undesirability" of the case;

(11) the nature and the length of the professional relationship with the clients; and

(12) fee awards in similar cases.

Camden I, 946 F.2d at 772 n.3 (citing factors originally set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)).

These factors are guidelines; they are neither exhaustive nor mandatory in every case. *See Sunbeam*, 176 F. Supp. 2d at 1333 (quoting *Camden I*, 946 F.2d at 775) ("'Other pertinent factors are the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel, any non-monetary benefits conferred upon the class by the settlement, and the economics involved in prosecuting a class action.'"); *id.* at 1333-34 (encouraging "'the lower courts to consider additional factors unique to the particular case'") (quoting *Walco Investments, Inc. v. Thenen*, 975 F. Supp. 1468, 1472 (S.D. Fla.1997)). As applied here, the *Camden I* factors demonstrate that the Court should approve the requested fee.

a) Litigating This Complex and Novel Case Required Substantial Time and Labor

Litigating and settling these claims demanded considerable time and labor, making this fee request reasonable. Jt. Decl., ¶¶71-75. Since the inception of this case, Lead Counsel ensured their efforts were efficient and coordinated to minimize duplication of effort. *Id.*, ¶72. Lead Counsel's efforts have been considerable; it is a massive undertaking to advance such a complex multi-defendant antitrust class action such as this to the precipice of trial. *Id.*, ¶¶71-75.

Consideration of the novelty and difficulty of the questions involved in the case further support the fee request here. Lead Counsel acquired and analyzed, along with experts, a substantial amount of factual and legal information. *Id.*, ¶73. Litigation of this action required counsel who were highly trained in class action law and procedure, as well as the specialized antitrust issues, presented here. Lead Counsel possess these attributes, and their participation added value to the representation of the Classes. *Id.*, ¶74. The record demonstrates that the action

involved a broad range of complex challenges by Defendants, which Lead Counsel met at every juncture. *Id.*, ¶¶74-75. For example, Defendants have repeatedly argued to this Court, and the Eleventh Circuit, that Plaintiffs lack standing to bring this lawsuit because they are not direct purchasers under the antitrust laws (ECF Nos. 505, 674, 906-908, 912, 930, 931, 934, 935, 967, 1015, 1016, 1023), an issue on which Lead Counsel prevailed at every turn. ECF Nos. 940, 993, 1091. The ability and knowledge to successfully navigate the nuanced issues regarding purchaser standing in antitrust matters is rare, even among class action attorneys. Thankfully, Lead Counsel were able to draw on their decades of combined experience representing plaintiffs in large antitrust class actions to successfully counter Defendants' arguments. Jt. Decl., ¶76.

In evaluating the quality of representation by Lead Counsel, the Court should also consider the quality of opposing counsel. *See Camden I*, 946 F.2d at 772 n.3; *Ressler v. Jacobson*, 149 F.R.D. 561, 654 (M.D. Fla. 1992). Litigating against capable opposing attorneys regarding an array of complex legal issues, Lead Counsel maintained a superlative quality of novel legal work, which conferred a substantial benefit on the Settlement Class. Jt. Decl., ¶¶71-77. Throughout the litigation, Plaintiffs, represented by Lead Counsel, have repeatedly prevailed against Defendants represented by experienced counsel from some of the world's largest law firms. *Id.*, ¶77; *see also Checking Account Overdraft*, 830 F. Supp. 2d at 1348 ("Class Counsel confronted not merely a single large bank, but 'the combined forces of a substantial portion of the entire American banking industry, and with them a large contingent of some of the largest and most sophisticated law firms in the country.'"); *Walco Invs., Inc. v. Thenen*, 975 F. Supp. 1468, 1472 (S.D. Fla. 1997) ("Given the quality of defense counsel from prominent national law firms, the Court is not confident that attorneys of lesser aptitude could have achieved similar results.").

b) Lead Counsel Achieved a Successful Result Considering the Litigation Risks

Rather than face uncertainty at trial, the Settlement Class Members who file valid and timely claims will receive a meaningful cash benefit. Jt. Decl., ¶64. The ABB Settlement is particularly noteworthy given the combined litigation risks over the more than five years of litigation. *Id.*, ¶¶60, 63. Defendants raised numerous defenses. Success under these circumstances was far from certain, and this Settlement represents a fantastic result.

Prosecuting this action was risky from the outset. *Id.* If Defendants had been successful in even one of their potentially dispositive motions, members of the Classes would have obtained limited to no recovery for their losses. Given these risks, as well as the complexity of the litigation and the significant risks and barriers that loomed in the absence of Settlement, the $30,200,000 cash recovery obtained through the ABB Settlement is outstanding.

The recovery achieved by this Settlement must be measured against the fact that any recovery by Plaintiffs and Settlement Class Members, through continued litigation, could only have been achieved if Plaintiffs and the certified litigation Classes established liability and recovered damages at trial; and the final judgment was affirmed on appeal. The Settlement is, therefore, an extraordinary recovery for the Settlement Class in light of all of the risks that Lead Counsel faced and continue to face. *Id.*

c) Lead Counsel Assumed Considerable Risk to Pursue This Action on a Pure Contingency Basis

In undertaking to litigate this complex case on a contingent-fee basis, Lead Counsel assumed a significant risk of nonpayment or underpayment. *Id.*, ¶78. That risk warrants approval of the requested fee. Indeed, "'[a] contingency fee arrangement often justifies an increase in the award of attorney's fees.'" *Sunbeam*, 176 F. Supp. 2d at 1335 (quoting *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990); *see also*

In re Continental Ill. Sec. Litig., 962 F.2d 566 (7th Cir. 1992) (holding that when a common fund case has been prosecuted on a contingent-fee basis, plaintiffs' counsel must be adequately compensated for the risk of non-payment); *Ressler*, 149 F.R.D. at 656 ("Numerous cases recognize that the attorney's contingent fee risk is an important factor in determining the fee award.").

Public policy concerns – in particular, ensuring the continued availability of experienced and capable counsel to represent classes of injured plaintiffs holding small individual claims – support the requested fee. As courts in this Circuit have held:

> Generally, the contingency retainment must be promoted to assure representation when a person could not otherwise afford the services of a lawyer. . . . A contingency fee arrangement often justifies an increase in the award of attorney's fees. This rule helps assure that the contingency fee arrangement endures. If this "bonus" methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing.

Behrens, 118 F.R.D. at 548.

The progress of the action shows the inherent risk faced by Lead Counsel in accepting and prosecuting the action on a contingency-fee basis. Despite Lead Counsel's tireless work in litigating this action for almost six years, Lead Counsel have, until now, neither requested nor received compensation for the considerable time they have invested in this case. Jt. Decl., ¶79. Under Eleventh Circuit precedent, this fact supports an award of the requested fee.

d) The Requested Fee Comports with Fees Awarded in Similar Cases

The fee sought here is within the range of fees typically awarded in similar cases. Numerous decisions within and outside of the Eleventh Circuit have found that a 33.3% fee is within the range of reasonableness under the factors listed by *Camden I*. *See, e.g.*, *Waters*, 190 F.3d 1291 (11th Cir. 1999) (affirming fee award of $33^{1}/_{3}$% on settlement of $40 million); *Morgan*

v. Pub. Storage, 301 F. Supp. 3d 1237, 1257-58 (S.D. Fla. 2016) ("[A] fee award of 33% . . . is consistent with attorneys' fees awards in federal class actions in this Circuit . . . .").[9]

Lead Counsel's fee request also falls within the range of what is customary in the private legal marketplace, where contingency fee arrangements often approach or equal 40% of any recovery. *See Acad. Mortg. Corp.*, 369 F. Supp. 3d at 1382 ("Plaintiffs request for approval of Class Counsel's 33% fee falls within the range of the private marketplace, where contingency-fee arrangements are often between 30 and 40 percent of any recovery."); *Continental*, 962 F.2d at 572 ("The object in awarding a reasonable attorneys' fee . . . is to simulate the market.").[10] This, too, supports an award of the requested fee.

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[9] *See also In re Checking Account Overdraft Litig.*, 2020 WL 4586398, at *22 (S.D. Fla. Aug. 10, 2020) (35%); *George v. Acad. Mortg. Corp. (UT)*, 369 F. Supp. 3d 1356, 1375 (N.D. Ga. 2019) (33.3%); *Pierre-Val v. Buccaneers Ltd. P'ship*, 2015 WL 12843849, at *2 (M.D. Fla. Dec. 7, 2015) (32%). *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1210 (S.D. Fla. 2006) (31.3%); *Gutter v. E.I. Dupont De Nemours & Co.*, 95-2152-CIV-Gold (S.D. Fla. May 30, 2003) (33.3%); *Sands Point Partners, LP v. Pediatrix Med. Group, Inc.*, 2002 U.S. Dist. LEXIS 25721 (S.D. Fla. 2002) (30%); *In re CHS Elecs., Inc. Sec. Litig.*, 99-8186-CIV-Gold (S.D. Fla. 2002) (30%); *Ehrenreich v. Sensormatic Elecs. Corp.*, 95-6637-CIV-Zloch (S.D. Fla. 1998) (30%); *Tapken v. Brown*, 90-0691-CIV-Marcus (S.D. Fla. 1995) (33%); *In re Friedman's, Inc. Sec. Litig.*, 2009 WL 1456698 (N.D. Ga. May 22, 2009) (30%); *Francisco v. Numismatic Guar. Corp. of Am.*, 2008 WL 649124 (S.D. Fla. 2008) (30%); *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334 (S.D. Fla. 2007) (30%); *In re BellSouth Corp. Sec. Litig.*, Civil Action No. 1:02-cv-2142-WSD (N.D. Ga. Apr. 9, 2007) (30%); *In re Cryolife, Inc. Sec. Litig.*, Civil Action No. 1:02-cv-1868-BBM (N.D. Ga. Nov. 9, 2005) (30%); *In re Profit Recovery Group Int'l, Inc. Sec. Litig.*, Civil Action No. 1:00-cv-1416-CC (N.D. Ga. May 26, 2005) (33.25%); *In re Clarus Corp. Sec. Litig.*, Civil Action No. 1:00-CV-2841-CAP (N.D. Ga. Jan. 6, 2005) (33.25%); *In re Pediatric Servs. of Am., Inc. Sec. Litig.*, Civil Action No. 1:99-CV-0670-RLV (N.D. Ga. Mar. 15, 2002) (33.25%); *Ressler v. Jacobson*, 149 F.R.D. 651 (M.D. Fla. 1992) (30%).

[10] *See also RJR Nabisco, Inc. Sec. Litig.*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶94, 268 (S.D.N.Y. 1992) ("[W]hat should govern [fee] awards is . . . what the market pays in similar cases."); *In re Public Serv. Co. of N.M.*, 1992 WL 278452, at *7 (S.D. Cal. July 28, 1992) ("If this were a non-representative litigation, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 40% of the recovery."); 1 COURT AWARDED ATTORNEY FEES, ¶2.06[3], at 2-88 (Matthew Bender 2010) (noting that, "when appropriate circumstances have been identified, a court may award a percentage significantly higher" than 25%); 4 NEWBERG ON CLASS ACTIONS, §14:6, at 551 (4th ed. 2002) ("Empirical studies show that,

e) The Remaining *Camden I* Factors Also Favor Approving the Requested Fee

The remaining *Camden I* factors further support granting the fee request. As demonstrated by the experience and acumen of Lead Counsel throughout this litigation, Lead Counsel are among the most highly regarded attorneys in their field. Jt. Decl., ¶74. Indeed, Lead Counsel have been recognized by their peers for their superlative work in litigating this case specifically. *Id.*, ¶80. Had Lead Counsel not been so skilled in these matters, the Classes might not have received a similar result. Without adequate compensation and financial reward, cases such as this simply would not be pursued despite the widespread aggregate harm to consumers. As courts have held, "given the positive societal benefits to be gained from lawyers' willingness to undertake difficult and risky, yet important, work like this, such decisions must be properly incentivized." *Checking Account Overdraft*, 830 F. Supp. 2d at 1364.

In sum, the record here justifies Lead Counsel's fee request.

3. The Expense Request Is Appropriate

Lead Counsel also request reimbursement $752,117.10 in expenses. Jt. Decl., ¶83; *see Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970). This sum reflects the common litigation expenses that have been invoiced or paid from the litigation since final approval of the B&L and CVI Settlements. These expenses are comprised of: (1) $500,208.37 in fees and expenses incurred for experts and their support staff; (2) $172,316.30 in data hosting fees; (3) $45,790.00 in mediator's fees and expenses incurred for the services rendered by Hon. Layn Phillips and the staff at Phillips ADR; (4) $31,711.50 in trial consultant fees; (5) $553.20 in process

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regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.").

server fees; and (6) $1,537.73 in printing fees.[11] *Id.* These out-of-pocket expenses were reasonably and necessarily incurred and paid in furtherance of the prosecution of this Action and are outside of those contemplated in Lead Counsel's previous request for costs. *Id.*; ECF No. 1137. "There is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of . . . reasonable litigation expenses from that fund." *Ontiveros v. Zamora*, 303 F.R.D. 356, 375 (E.D. Cal. 2014); *see also Behrens*, 118 F.R.D. at 549 ("[P]laintiff's counsel is entitled to be reimbursed from the class fund for the reasonable expenses incurred in this action."). Courts in this Circuit have thus routinely approved payment of expenses from the common fund where they were reasonable and necessary for the litigation. *See Columbus Drywall & Insulation, Inc. v. Masco Corp.*, No. 1:04-cv-3066, 2008 WL 11234103, at *6 (N.D. Ga. Mar. 4, 2008) (approving $2.4 million for reimbursement of litigation expenses); *Swift v. BancorpSouth Bank*, No. 1:10-cv-00090, 2016 WL 11529613, at *20 (N.D. Fla. July 15, 2016) (approving application for reimbursement of costs that "were necessarily incurred in furtherance of the litigation of the Action and the Settlement"); *Ressler*, 149 F.R.D. at 657 (approving requested expenses as reasonable and necessary); *see also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970); *In re Ikon Office Sols., Inc. Secs. Litig.*, 194 F.R.D. 166, 192 (E.D. Pa. 2000).

IV. FAIRNESS HEARING

Lead Counsel request that the Court set a date and time for a Fairness Hearing regarding this Motion and the concurrently filed Motion for Final Approval. Lead Counsel and ABB's counsel have conferred and are happy to make themselves available for a hearing, remote or in person, should state and federal COVID protocols allow, at the Court's convenience any time

[11] Lead Counsel are prepared to submit detailed invoices for *in camera* review should the Court believe it prudent.

during the week of May 10, 2021, consistent with the Court's Preliminary Approval Order. ECF No. 1224. This will give any interested parties and/or objectors thirty (30) days to review Plaintiffs' and Lead Counsel's reply briefs in further support of this Motion and the Motion for Final Approval, to be filed on April 9, 2021.

V. CONCLUSION

The Settlement with ABB, which secures $30,200,000 in cash compensation for the benefit of the Settlement Class, represents an excellent result, particularly given the obstacles confronted in this case. Lead Counsel's application for attorneys' fees and expenses is reasonable and consistent with governing law. The request more than satisfies the guidelines of *Camden I* in light of the results achieved, the significant litigation risks, the complexity of the factual and legal issues, and the time, effort, and skill required to litigate claims of this nature to a satisfactory conclusion.

Accordingly, Plaintiffs and Lead Counsel respectfully request that the Court: (1) promptly set a date and time for the Fairness Hearing during the week of May 10, 2021 regarding this Motion and the concurrently filed Motion for Final Approval; and (2) award Lead Counsel the requested $9,315,960.97 in attorneys' fees and $752,117.10 in incurred and anticipated expenses.

Dated: February 26, 2021

Respectfully submitted,

s/ Joseph P. Guglielmo
Joseph P. Guglielmo
Thomas K. Boardman
SCOTT+SCOTT
ATTORNEYS AT LAW LLP
The Helmsley Building
230 Park Avenue, 17th Floor
New York, NY 10169
Telephone: (212) 223-6444
Facsimile: (212) 223-6334
jguglielmo@scott-scott.com
tboardman@scott-scott.com

John A. DeVault, III
Florida Bar No. 103979
BEDELL, DITTMAR, DEVAULT,
PILLANS & COXE, P.A.
101 East Adams Street
Jacksonville, FL 32202
Telephone: (904) 353-0211
Facsimile: (904) 353-9307
jad@bedellfirm.com

Plaintiffs' Local Counsel

Christopher M. Burke
SCOTT+SCOTT
ATTORNEYS AT LAW LLP
600 W. Broadway, Suite 3300
San Diego, CA 92101
Telephone: (619) 233-4565
Facsimile: (619) 233-0508
cburke@scott-scott.com

Co-Lead Class Counsel

Michael E. Lockamy
Florida Bar No. 69626
BEDELL, DITTMAR, DEVAULT,
PILLANS & COXE, P.A.
101 East Adams Street
Jacksonville, FL 32202
Telephone: (904) 353-0211
Facsimile: (904) 353-9307
mel@bedellfirm.com

Robert C. Gilbert
Florida Bar No. 561861
KOPELOWITZ OSTROW FERGUSON
WEISELBERG GILBERT
2800 Ponce de Leon Boulevard, Suite 1100
Coral Gables, FL 33134
Telephone: (305) 384-7270
gilbert@kolawyers.com

Plaintiffs' Liaison Counsel

Eamon O'Kelly
Benjamin Steinberg
ROBINS KAPLAN LLP
399 Park Avenue, Suite 3600
New York, NY 10022
Telephone: (212) 980-7400
Facsimile: (212) 980-7499
hsalzman@robinskaplan.com
eokelly@robinskaplan.com
bsteinberg@robinskaplan.com

Co-Lead Class Counsel

Michael D. Hausfeld
James J. Pizzirusso
Nathaniel C. Giddings
HAUSFELD LLP
888 16th Street NW, Suite 300
Washington, DC 20006
Telephone: (202) 540-7200
Facsimile: (202) 540-7201
mhausfeld@hausfeld.com
jpizzirusso@hausfeld.com
ngiddings@hausfeld.com

Michael P. Lehmann
Bonny E. Sweeney
Christopher L. Lebsock
HAUSFELD LLP
600 Montgomery Street, Suite 3200
San Francisco, CA 94111
Telephone: (415) 633-1908
Facsimile: (415) 217-6813
mlehmann@hausfeld.com
bsweeney@hausfeld.com
clebsock@hausfeld.com

Co-Lead Class Counsel

George W. Sampson
SAMPSON DUNLAP LLP
1001 4th Ave., Suite 3200
Seattle, WA 98154
Telephone: (206) 414-8340
george@sampsondunlap.com

Plaintiffs' Trial Counsel

Dennis Stewart
HULETT HARPER STEWART LLP
225 Broadway, Suite 1350
San Diego, CA 92101
Telephone: (619) 338-1133
Facsimile: (619) 338-1139
dennis@hulettharper.com

Plaintiffs' Trial Counsel

Steven C. Marks
PODHURST ORSECK, P.A.
One S.E. 3rd Avenue
Miami, FL 33131
Telephone: (305) 358-2800
Facsimile: (305) 358-2382
smarks@podhurst.com

Plaintiffs' Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2021, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

Dated: February 26, 2021

s/ Joseph P. Guglielmo
Joseph P. Guglielmo

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In Re: **DISPOSABLE CONTACT LENS ANTITRUST LITIGATION**	**Case No. 3:15-md-2626-HES-JRK** **Judge Harvey E. Schlesinger** **Magistrate Judge James R. Klindt**
THIS DOCUMENT RELATES TO: **All Class Actions**	

LEAD COUNSEL'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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For the reasons set forth below, Lead Counsel request that the Court enter an order: (1) setting a date and time for the Fairness Hearing regarding this Motion and the concurrently filed Motion for Final Approval of Settlement Agreements with Defendants Alcon Vision, LLC ("Alcon") and Johnson & Johnson Vision Care, Inc. ("JJVCI") ("Motion for Final Approval"); and (2) awarding Lead Counsel the requested $29,333,333 in attorneys' fees from the CooperVision ("CVI"), Bausch & Lomb ("B&L"), Alcon, and JJVCI Settlements and $1,640,110.77 in unreimbursed costs and expenses, plus interest.[1]

I. PRELIMINARY STATEMENT

After over seven years of hard-fought litigation spanning motions to dismiss, sharply contested discovery, class certification, petitions for interlocutory appeal, multiple motions for summary judgment, and months of extensive trial preparations, Lead Counsel reached settlements with the two last remaining Defendants, Alcon and JJVCI, just days before trial was scheduled to begin in March of 2022. The Settlements provide tremendous relief to Class Members, and, along with the previous Settlements with Defendants CVI, B&L, and ABB, will fully resolve this litigation upon the Court's Approval. In light of their work securing this excellent result, Lead Counsel respectfully request that the Court award attorneys' fees of $29,333,333, equal to one-third of the combined $75,000,000 Alcon and JJVCI Settlement Funds ($25,000,000),

[1] Lead Counsel will submit a Proposed Order with their reply brief after they have the final information regarding settlement participation and the Class's reaction to the Settlements following the opt-out and objection deadline and with sufficient time for review by Class Members in advance of the Fairness Hearing.

plus one-third of the combined $13,000,000 B&L and CVI Settlement Funds ($4,333,333) from which Lead Counsel has not yet requested attorney's fees.[2] Lead Counsel also request reimbursement of $1,640,110.77 in unreimbursed litigation expenses. The requested award of attorneys' fees and expenses is well within the range approved by courts in this District and this Circuit, as well as in antitrust class actions nationwide. As per the Settlement Agreements, Counsel for Defendants take no position on Lead Counsel's application for fees and costs. *See* CVI, B&L, Alcon, and JJVCI Agreements, Section 9.

In addition, because the Court has not yet set a date for the Fairness Hearing, Lead Counsel respectfully requests that the Court do so.

II. STATEMENT OF FACTS

This case has presented a complex and novel set of legal questions, requiring a sustained investment of time and resources from Lead Counsel. Throughout this seven-year litigation, Defendants vigorously denied Plaintiffs' allegations at each

[2] As noted herein, Lead Counsel have not yet received any award of attorneys' fee from any of these four settlements, including the previously approved CVI and B&L Settlements. Lead Counsel requested and received $4,369,000 in spent and forward-looking litigation costs and incentive awards for the Class Representatives from the CVI and B&L Settlements, but merely reserved the right to later ask for attorney fees from those Settlements. ECF No. 1134, p.6 n7. The notice for the CVI and B&L Settlements informed potential class members that "Lead Counsel will ask the Court for attorneys' fees up to one-third (33.3%) of the [CVI/B&L] Settlement[s] and/or reimbursement for costs and expenses for their work in the Litigation." ECF No. 1037-4, p.83. No Class Members objected to the CVI or B&L Settlements or Lead Counsel's request for costs on any grounds. Jt. Decl. ¶ 61. If any Class Members wish to object to Lead Counsel's request for fees from the CVI and B&L Settlements, they should be allowed to be heard at the to be scheduled Fairness Hearing regarding the Alcon and JJVCI Settlements.

stage, challenged Plaintiffs' standing, and defended their conduct by arguing, *inter alia*, that the UPPs were lawful and did not give rise to any agreement or damages. Nonetheless, Lead Counsel successfully advanced Plaintiffs' antirust claims against five sophisticated multinational defendants represented by some of the largest law firms in the world. After thousands of pages of motion practice, millions of pages of documents exchanged and reviewed in discovery, and months of depositions, hearings, and trial preparations, Lead Counsel negotiated and obtained class settlements totaling $75,000,000 for the final two remaining Defendants, approval of which would bring this long-running litigation to a close. The additional $75,000,000 brings the total value of all settlements reached in this litigation to $118,500,000. Below, Lead Counsel detail their efforts to achieve these results.

A. Recent Procedural History

Lead Counsel incorporates by reference all procedural history predating the Court's order granting of Plaintiffs' Motion for Final Approval of the ABB Settlement (ECF No. 1257) and order granting of Lead Counsel's Application for an Award of Attorneys' Fees and Reimbursement of Expenses from the ABB Settlement Fund (ECF No. 1258), as detailed in the previously filed motions and supporting documents regarding approval of settlements and requests for attorneys' fees and reimbursement of costs. ECF Nos. 781, 1037, 1136, 1137, 1138, 1215, 1241, 1243, 1337.

On July 27, 2021, the Court rescheduled the trial for March 28, 2022. ECF No. 1266. On December 20, 2021, the United States Judicial Panel on Multidistrict Litigation issued an order assigning Judge Virginia M. Hernandez Covington as an

additional judge to oversee the trial, which was later moved to Tampa, Florida. ECF No. 1290. Judge Covington held virtual pretrial conferences with the remaining parties on January 21, 2022 (ECF No. 1297) and March 9, 2022 (ECF No. 1316).

Lead Counsel dedicated substantial resources to preparing the case for trial in advance of the new March 28, 2022 trial date. Most of Lead Counsels' trial team, including key support staff and witnesses, relocated to Tampa, Florida in mid-March to oversee final trial preparations. Jt. Decl. ¶ 47. This work included finalizing the presentation and cross-examination of fact and expert witnesses, deposition designations, trial exhibits and graphics, and opening statements. *Id.*

On March 15, 2022, Alcon and JJVCI filed a motion requesting that the Court give certain jury instructions regarding antitrust injury and proximate causation (ECF No. 1317), which Plaintiffs opposed on March 24, 2022 (ECF No. 1332). On Friday, March 25, 2022, after multiple rounds of meet and confers, JJVCI and Plaintiffs submitted their final proposed jury instructions. ECF No. 1333. Had the case not fully settled, as detailed below, trial proceeding would have commenced on Monday, March 28, 2022.

B. The Settlements

On August 30, 2017, Plaintiffs reached an "ice-breaker" settlement with Defendant CVI. Jt. Decl. ¶ 52. The settlement included a monetary payment of $3,000,000 and was reached on behalf of the following settlement class:

> All persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by Alcon Laboratories, Inc., Johnson & Johnson Vision Care, Inc., Bausch &

> Lomb, Inc., or CVI (or distributed by ABB Concise Optical Group) during the Settlement Class Period for their own use and not for resale, which were sold at any time subject to a Unilateral Pricing Policy. Excluded from the Settlement Class are Defendants, their parent companies, subsidiaries and affiliates, any coconspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

ECF No. 781-1, ¶ 1.37 (the "CVI Settlement Class").

On July 10, 2018, the Court preliminarily approved the settlement with CVI, but delayed dissemination of notice. ECF No. 841.

On August 19, 2019, Plaintiffs reached a settlement agreement with Defendant B&L. Jt. Decl. ¶ 54. The settlement included a monetary payment of $10,000,000 and was reached on behalf of the following settlement class:

> [A]ll persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by Alcon Laboratories, Inc., Johnson & Johnson Vision Care, Inc., or B&L during the Settlement Class Period for their own use and not for resale, where the prices for such contact lenses were subject to a Unilateral Pricing Policy and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Settlement Class are any purchases from 1-800-Contacts of disposable contact lenses subject to B&L's Unilateral Pricing Policy, where the purchase occurred on or after July 1, 2015. Also excluded from the Settlement Class are Defendants, their parent companies, subsidiaries and affiliates, any coconspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

ECF No. 1037-1, ¶ 1.35 (the "B&L Settlement Class").

On October 8, 2019, the Court granted preliminary approval of the B&L settlement and approved a plan to disseminate notice to members of the litigation classes, the CVI Settlement Class, and the B&L Settlement Class. ECF No. 1046. The notice for the CVI and B&L Settlements informed potential class members that "Lead

Counsel will ask the Court for attorneys' fees up to one-third (33.3%) of the [CVI/B&L] Settlement[s] and/or reimbursement for costs and expenses for their work in the Litigation." ECF No. 1037-4, p.83.

On January 16, 2020, Plaintiffs filed their Motion for Final Approval of Settlement Agreements with Defendants B&L and CVI, as well as a Motion for Payment of Common Expenses and Class Representatives' Service Awards. ECF Nos. 1136, 1137. The Motion for Payment of Common Expenses informed the potential Class Members that while Lead Counsel were not seeking attorneys' fees at the time, "Lead Counsel reserve their right to seek an award of attorneys' fees and unreimbursed costs at an appropriate point in the future." ECF No. 1137, p. 6 n.7. On February 25, 2020, the Court held a Fairness Hearing regarding the settlements with B&L and CVI. *See* ECF No. 1154 and February 25, 2020 Hearing Transcript. On March 4, 2020, the Court granted Plaintiffs' Motion for Final Approval and issued its Final Approval Order and Final Judgment and Order of Dismissal with Prejudice as to B&L and CVI. ECF No. 1164. The Court also granted Plaintiffs' Motion for Payment of Common Expenses and Class Representatives' Service Awards. ECF No. 1165.

As permitted by the Court, Lead Counsel withdrew $4,329,000 from the collective $13,000,000 in the B&L and CVI Settlement Funds to cover incurred and anticipated common litigation expenses. Jt. Decl. ¶ 60.[3] These costs included

[3] $3,330,800 was paid from the B&L Settlement Fund and $999,000 was paid from the CVI Settlement Fund. *Id.*

$664,206.86 for some, but not all, of the future costs Lead Counsel anticipated they would incur to litigate the case through trial. ECF No. 1165. Until now, Lead Counsel have not sought any award of attorneys' fees from the settlements with B&L or CVI.

On April 3, 2020, the Court issued an Order regarding the impact of COVID-19 on the case schedule. ECF No. 1180. In the Order's final paragraph, the Court "sincerely urge[d] the Parties to earnestly confer with each other in a deliberate attempt to reach an agreement that completely resolves this litigation. Specifically, the Court implores the remaining Defendants to have their corporate executives seriously consider this request and the basis for it." *Id*. at 5.

On Sunday, August 30, 2020, the Plaintiffs and ABB engaged in a day-long mediation session with former U.S. District Judge, Layn Phillips, via video conference. Jt. Decl. ¶ 62. The parties then reached and executed the ABB Settlement Agreement on September 22, 2020, under which ABB agreed to pay $30,200,000 into a settlement fund in exchange for dismissal and release of all claims against it. *Id*.

On October 22, 2020, Plaintiffs filed their Motion for Preliminary Approval and Notice Plan regarding the ABB Settlement. ECF No. 1215. On November 4, 2020, the Court held a hearing on the Motion for Preliminary Approval of the ABB Settlement. ECF No. 1219. On November 12, 2020, the Court preliminarily approved the ABB Settlement and approved the Notice Plan. ECF No. 1224. On February 26, 2021, Plaintiffs filed motions for Final Approval of the ABB Settlement and for an Award of Attorneys' Fees and Costs. ECF Nos. 1241, 1242. On May 19, 2021, the Court held a Fairness Hearing regarding the Motion for Final Approval and Award of Attorneys'

Fees and Costs. ECF No. 1254. On June 1, 2021, the Court granted Final Approval and Final Judgment as to the ABB Settlement and granted Lead Counsel's request for attorneys' fees ($9,315,960.97), notice costs ($1,000,000) and incurred and anticipated litigation costs ($752,117.10). ECF Nos. 1257, 1258. In doing so, the Court certified the following ABB Settlement Class:

> All persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by Alcon, JJVC, CVI, or B&L during the Settlement Class Period for their own use and not for resale, where the prices for such contact lenses were subject to a "Unilateral Pricing Policy" and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Settlement Class are any purchases from 1-800 Contacts of disposable contact lenses subject to B&L's Unilateral Pricing Policy, where the purchase occurred on or after July 1, 2015. Also excluded from the Settlement Class are Defendants, their parent companies, subsidiaries and affiliates, any alleged co-conspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

ECF No. 1257, p.6.

The ABB Settlement Class is identical to the proposed Alcon and JJVCI Settlement Classes. Jt. Decl. ¶ 97.

JJVCI and Plaintiffs participated in an all-day mediation on September 1, 2020 overseen by Hon. Layn Phillips (Ret.). *Id.* ¶ 74. The initial mediation did not result in an agreement, and JJVCI and Plaintiffs continued preparing their respective cases for trial. *Id.* Plaintiffs engaged in further settlement negotiations with both Alcon and JJVCI in the weeks preceding trial.

On Friday, February 25, 2022, Plaintiffs and Alcon engaged in a day-long mediation with Robert Meyer of JAMS in Los Angeles, California. *Id.* ¶ 73. Although

the initial mediation did not result in a settlement, Plaintiffs and Alcon continued their settlement negotiations through Mr. Meyer as they prepared for trial. *Id*. On March 23, 2022, just five days before trial, Plaintiffs and Alcon agreed to settle the action for $20,000,000 and executed the Alcon Settlement. *Id*.

Plaintiffs also continued their negotiations with JJVC with the assistance of Judge Phillips and his staff. *Id*. ¶ 74. These negotiations culminated on March 26, 2022 in an agreement in principle to settle the action as to JJVCI for $55,000,000. *Id*. JJVCI and Plaintiffs executed the JJVCI Settlement the next day on March 27, 2022, just one day before the start of trial proceedings. ECF No. 1334. On March 28, 2022, the day trial was to begin, the Court entered an order canceling the trial. ECF No. 1335. On April 20, 2022, Lead Counsel filed a Motion for Preliminary Approval of Settlements with Defendants Alcon and JJVCI. ECF No. 1337. The Court granted the Preliminary Approval Motion on May 9, 2022. ECF No. 1343. The Notice Plan proposed in the Preliminary Approval Motion was thereafter implemented. The Court-approved Notice Plan informed potential Settlement Class Members that "Lead Counsel will ask the Court for attorneys' fees of up to one-third (33.3%) of the Alcon and JJVCI Settlement Funds, as well as reimbursement of costs and expenses incurred by Lead Counsel during the litigation." *Id*.; ECF No. 1337-4. Lead Counsel now bring this Motion and the concurrently-filed Motion for Final Approval.

III. ARGUMENT

A. Lead Counsel's Request for a Third of the Gross Settlement Fund Is Fair, Reasonable, and Commonly Granted in this Circuit

As set forth in the Settlement Agreements and Notice Plan, and consistent with standard class action practice and procedure, Lead Counsel respectfully request $29,333,333 in attorneys' fees, which equals one-third of the total $75,000,000 from the JJVCI and Alcon Settlement Funds ($25 million), plus one-third of the total $13,000,000 from the CVI and B&L Settlement Funds ($4.333 million). Agreements, ¶ 9.1; ECF No. 1337. Lead Counsel's fee request of a third is appropriate, fair, and well within the range of reasonableness under the factors established by the Eleventh Circuit in *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991). For the reasons detailed herein, Lead Counsel's application for attorneys' fees should be approved.

B. Lead Counsel Is Entitled to Fees from the Common Fund

It is well established that when a representative party has conferred a substantial benefit upon a class, counsel is entitled to attorneys' fees based upon the benefit obtained. *Camden I*, 946 F.2d at 771; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The common benefit doctrine permits "the creation of a common fund in order to pay reasonable attorneys' fees for legal services beneficial to persons other than a particular client, thus spreading the cost of the litigation to all beneficiaries." *In re Abilify (Aripiprazole) Prods. Liab. Litig.*, No. 3:16-md-2734, 2019 WL 7859557, at *5 (N.D. Fla. Dec. 6, 2019), *report and recommendation adopted,* 2019 WL 7019219 (N.D.

Fla. Dec. 21, 2019).[4] The common benefit doctrine stems from the premise that those who receive the benefit of a lawsuit without contributing to its costs are "unjustly enriched" at the expense of the successful litigant. *Boeing*, 444 U.S. at 478.

As a result, the Supreme Court, the Eleventh Circuit, and courts in this District have all recognized that "'[a] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.'" *In re Sunbeam Secs. Litig.*, 176 F. Supp. 2d 1323, 1333 (quoting *Boeing*, 444 U.S. at 478); *see also Camden I*, 946 F.2d at 771 ("Attorneys in a class action in which a common fund is created are entitled to compensation for their services from the common fund, but the amount is subject to court approval."). Courts have also recognized that appropriate fee awards in cases such as this encourage redress for wrongs caused to entire classes of persons and deter future misconduct of a similar nature. *See, e.g.*, *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 660, 687 (M.D. Ala. 1988); *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980). This is because adequate attorney compensation promotes the availability of counsel for aggrieved persons:

> If the plaintiffs' bar is not adequately compensated for its risk, responsibility, and effort when it is successful, then effective representation for plaintiffs in these cases will disappear. . . . We as members of the judiciary must be ever watchful to avoid being isolated from the experience of those who are actively engaged in the practice of law. It is difficult to evaluate the effort it takes to successfully and ethically prosecute a large plaintiffs' class action suit. It is an experience

[4] Unless otherwise noted, citations, and quotations are omitted.

> in which few of us have participated. The dimensions of the undertaking are awesome.

Muehler v. Land O'Lakes, Inc., 617 F. Supp. 1370, 1376 (D. Minn. 1985).

In the Eleventh Circuit, class counsel receive a percentage of the funds obtained through a settlement. In *Camden I*, the Eleventh Circuit held that "the percentage of the fund approach [as opposed to the lodestar approach] is the better reasoned in a common fund case. Henceforth in this [C]ircuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." 946 F.2d at 774. Courts in this Circuit have applied the percentage of the fund approach since, holding as follows:

> The Eleventh Circuit made clear in *Camden I* that percentage of the fund is the exclusive method for awarding fees in common fund class actions. *Camden I*, 946 F.2d at 774. Even before *Camden I*, courts in this Circuit recognized that "a percentage of the gross recovery is the only sensible method of awarding fees in common fund cases." [*Mashburn*, 684 F. Supp. at 670.] More importantly, the Court observed first hand the monumental effort exerted by Class Counsel in this case, and does not need to see timesheets to know how much work Class Counsel have put in to reach this point.

In re Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1362 (S.D. Fla. 2011).

The Court has discretion in determining an appropriate fee. "'There is no hard and fast rule mandating a certain percentage of a common fund which may be awarded as a fee because the amount of any fee must be determined upon the facts of each case.'" *Sunbeam*, 176 F. Supp. 2d at 1333 (quoting *Camden I*, 946 F.2d at 774). Nonetheless, "'[t]he majority of common fund fee awards fall between 20% to 30% of the fund'" – though "'an upper limit of 50% of the fund may be stated as a general

rule.'" *Id*. (quoting *Camden I*, 946 F.2d at 774-75); *see also Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999) (approving fee award where the district court determined that the benchmark should be 30% and then adjusted the fee award higher in view of the circumstances of the case); *Wolff v. Cash 4 Titles*, No. 03-22778-CIV, 2012 WL 5290155, at *5-6 (S.D. Fla. Sept. 26, 2012) ("The average percentage award in the Eleventh Circuit mirrors that of awards nationwide – roughly one-third"); Theodore Eisenberg, et al., *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. REV. 937, 951 (2017) (showing, through an empirical study, that the median fee award in Eleventh Circuit is 33% and the mean is 30%). Lead Counsel's fee request falls within this accepted range and the practice within the Eleventh Circuit.

C. The *Camden I* Factors Support the Requested Fee

In the Eleventh Circuit, courts use the below factors to determine a reasonable percentage to award as an attorneys' fee to class counsel in class actions:

(1) the time and labor required;

(2) the novelty and difficulty of the questions involved;

(3) the skill requisite to perform the legal service properly;

(4) the preclusion of other employment by the attorney due to acceptance of the case;

(5) the customary fee;

(6) whether the fee is fixed or contingent;

(7) time limitations imposed by the client or the circumstances;

(8) the amount involved and the results obtained;

(9) the experience, reputation, and ability of the attorneys;

(10) the "undesirability" of the case;

(11) the nature and the length of the professional relationship with the clients; and

(12) [fee] awards in similar cases.

Camden I, 946 F.2d at 772 n.3 (citing factors originally set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)).

These factors are guidelines; they are neither exhaustive nor mandatory in every case. *See Sunbeam*, 176 F. Supp. 2d at 1333 (quoting *Camden I*, 946 F.2d at 775) ("'Other pertinent factors are the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel, any non-monetary benefits conferred upon the class by the settlement, and the economics involved in prosecuting a class action.'"); *id.* at 1333-34 (encouraging "'the lower courts to consider additional factors unique to the particular case'") (quoting *Walco Investments, Inc. v. Thenen,* 975 F. Supp. 1468, 1472 (S.D. Fla.1997)). Here, the *Camden I* factors demonstrate that the Court should approve the requested fee.

1. Litigating This Complex and Novel Case Required Substantial Time, Labor, and Expertise

The enormous amount of time, labor, and expertise that Lead Counsel invested over the course of this seven-year litigation demonstrates that their fee request is reasonable. Lead Counsel and supporting attorneys and staff invested well over $50 million worth of their time prosecuting Plaintiffs' claims all the way until the literal eve of trial. Jt. Decl. ¶ 81. The value of that time exceeds, by a significant margin, the

$29,333,333 in fees that Lead Counsel now seek, plus the $9,315,960.97 in attorney's fees the Court approved as part of the ABB Settlement. There is thus no possibility that Lead Counsel will receive anything close to a windfall if their fee request is granted.[5]

The novelty and difficulty of this case also supports Lead Counsels' fee request. Lead Counsel navigated, along with their experts, millions of pages of documents, novel questions of antitrust standing and damages, complex econometric analyses, and intersecting issues of horizontal, vertical, and hub-and-spoke conspiracy law. *Id.* ¶ 84. Litigation of this type required counsel who were highly trained in class action law and procedure, as well as the specialized antitrust issues presented here. Lead Counsel possess these attributes and met these challenges at every juncture. *Id.*

For example, Defendants repeatedly argued to this Court and the Eleventh Circuit that Plaintiffs lacked standing because they were not direct purchasers of contact lenses under the antitrust laws. *See* ECF Nos. 505, 674, 906-908, 912, 930, 931, 934, 935, 967, 1015, 1016, 1023. Yet Lead Counsel prevailed on this question at every turn, drawing on decades of combined antitrust class action experience to successfully counter Defendants' standing arguments. Jt. Decl. ¶ 85; ECF Nos. 940, 993, 1091.

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[5] Should the Court grant this motion in full, it would bring the total of attorneys' fees awarded to Lead Counsel to $38,649,294 when added to the $9,315,960.97 in fees granted from the ABB Settlement. ECF No. 1258. That total award of attorneys' fees would represent 32.6% of the total $118,500,000 in settlement funds in all of the litigation. As discussed at length herein, such a percentage is well within the range of attorneys' fees granted from settlement funds in the Eleventh Circuit and slightly less than the full third that each settlement notice set as a cap.

The Court should also consider the quality of opposing counsel when evaluating Lead Counsel's contributions. *See Camden I*, 946 F.2d at 772 n.3; *Ressler v. Jacobson*, 149 F.R.D. 561, 654 (M.D. Fla. 1992). Here, Lead Counsel repeatedly prevailed against Defendants represented by experienced counsel from some of the world's largest law firms. Jt. Decl. ¶ 87; *see also Checking Account Overdraft*, 830 F. Supp. 2d at 1348 ("Class Counsel confronted not merely a single large bank, but 'the combined forces of a substantial portion of the entire American banking industry, and with them a large contingent of some of the largest and most sophisticated law firms in the country.'"); *Walco Invs., Inc. v. Thenen*, 975 F. Supp. 1468, 1472 (S.D. Fla. 1997) ("Given the quality of defense counsel from prominent national law firms, the Court is not confident that attorneys of lesser aptitude could have achieved similar results."). The fact that Lead Counsel secured such successful settlements despite facing top notch opposition weighs in favor of their fee request.

2. Lead Counsel Achieved a Successful Result Considering the Litigation Risks

Rather than face uncertainty at trial, Lead Counsel secured settlements that will provide excellent cash compensation to the Settlement Class. The total $88,000,000 cash recovery obtained through the CVI, B&L, Alcon, and JJVCI Settlements is an outstanding result, particularly when compared to the risks that Plaintiffs faced over the course of the case, including the many trial risks that remained at the time of settlement. Jt. Decl. ¶¶ 70, 72.

Prosecuting this action was risky from the outset. *Id*. If Defendants had been successful in even one of their dispositive motions, or on any of their standing or class certification arguments, members of the Classes might have recovered little-to-nothing at all. Indeed, even after overcoming those challenges, Plaintiffs still faced meaningful risks in establishing liability and damages at trial, and then litigating those issues on appeal. These risks underscore the successful nature of the Settlements secured by Lead Counsel. *Id*.

3. Lead Counsel Assumed Considerable Risk Litigating This Case on a Pure Contingency Basis

In undertaking this complex case on a contingent-fee basis, Lead Counsel assumed a significant risk of nonpayment or underpayment. *Id*. ¶ 88. That risk warrants approval of the requested fee. Indeed, "'[a] contingency fee arrangement often justifies an increase in the award of attorneys' fees.'" *Sunbeam*, 176 F. Supp. 2d at 1335 (quoting *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990); *see also In re Continental Ill. Sec. Litig.*, 962 F.2d 566 (7th Cir. 1992) (holding that when a common fund case has been prosecuted on a contingent-fee basis, plaintiffs' counsel must be adequately compensated for the risk of non-payment); *Ressler*, 149 F.R.D. at 656 ("Numerous cases recognize that the attorney's contingent fee risk is an important factor in determining the fee award.").

Public policy concerns – namely, ensuring that experienced and capable counsel are available to represent classes of plaintiffs holding small individual claims – support the requested fee. As courts in this Circuit have held:

> Generally, the contingency retainment must be promoted to assure representation when a person could not otherwise afford the services of a lawyer. . . . A contingency fee arrangement often justifies an increase in the award of attorneys' fees. This rule helps assure that the contingency fee arrangement endures. If this "bonus" methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing.

Behrens, 118 F.R.D. at 548.

The progress of the case shows the inherent risk faced by Lead Counsel in prosecuting this case on a contingency-fee basis. Despite Lead Counsel's work in litigating this action for more than seven years, Lead Counsel have only once been compensated with attorneys' fees (as part of the ABB Settlement) for the considerable time they have invested in this case . Jt. Decl. ¶ 65. Eleventh Circuit precedent dictates that Lead Counsel should also be entitled to fees from the CVI, B&L, Alcon, and JJVCI Settlement given the work they performed on a contingent-fee basis to secure those settlements.

4. The Requested Fee Comports with Fees Awarded in Similar Cases

The fee sought here is consistent with the fees typically awarded in similar cases and with Eleventh Circuit guidelines. "The average percentage award in the Eleventh Circuit mirrors that of awards nationwide – roughly one-third." *Wolff*, 2012 WL 5290155, at *5-6; *see also* Theodore Eisenberg, et al., *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. REV. 937, 951 (2017) (showing, through an empirical study, that the median fee award in Eleventh Circuit is 33% and the mean is 30%).

Fees of one-third of the gross settlement fund are thus commonplace and reasonable under the *Camden I* factors. *See*, *e.g.*, *Waters*, 190 F.3d 1291 (affirming fee award of a third of $40 million settlement); *Morgan v. Pub. Storage,* 301 F. Supp. 3d 1237, 1257-58 (S.D. Fla. 2016) ("[A] fee award of 33% . . . is consistent with attorneys' fees awards in federal class actions in this Circuit . . . ."). "Courts within this Circuit have routinely awarded attorneys' fees of 33 percent or more of the gross settlement fund." *Fernandez v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. 15-22782, 2017 WL 7798110, at *4 (S.D. Fla. Dec. 18, 2017); *see also, e.g., In re Checking Account Overdraft Litig.*, No. 1:09-MD-02036, 2020 WL 4586398, at *22 (S.D. Fla. Aug. 10, 2020) (35% of gross common fund); *George v. Acad. Mortg. Corp. (UT)*, 369 F. Supp. 3d 1356, 1382 (N.D. Ga. 2019) ("one-third of a common fund"); *Pierre-Val v. Buccaneers Ltd. P'ship*, No.: 8:14–cv–01182, 2015 WL 12843849, at *2 (M.D. Fla. Dec. 7, 2015) (32% of gross common fund); *Barba v. Shire U.S., Inc.,* No. 13-cv-21158, ECF No. 441 at 11 (S.D. Fla. Dec. 2, 2016) (awarding attorneys' fees of 35% of the settlement fund where the litigation was "very hard fought," complex, and required a considerable amount of effort); *Reyes, et al. v. AT&T Mobility Servs., LLC,* Case No. 10-20837, ECF No. 196 at 6 (S.D. Fla. Jun. 21, 2013) (Cooke, J.) (awarding a third of the total maximum settlement fund, noting that the award was consistent with the trend in this Circuit); *Waters v. Cook's Pest Control, Inc.,* No. 2:07–cv–00394, 2012 WL 2923542, at *16-19 (N.D. Ala. July 17, 2012) (awarding fees of 35% based on the complexities of the case, including complex discovery issues, where "defense counsel presented a vigorous defense at every stage of the case, requiring multiple hearings on motions to

quash and motions for protective orders"); *In re: Terazosin Hydrochloride Antitrust Litigation,* No. 99-1317 (S.D. Fla. Apr. 19, 2005) (awarding fees of one-third of settlement of over $30 million); *Gutter v. E.I. Dupont De Nemours & Co.,* No. 95-2152 (S.D. Fla. May 30, 2003) (awarding fees of one-third of the gross settlement fund of $77.5 million).

Lead Counsel's fee request of a third also falls within the range of what is customary in the private legal marketplace, where contingency fee arrangements often approach or equal 40% of any recovery. *See Acad. Mortg. Corp.,* 369 F. Supp. 3d at 1382 ("Plaintiffs request for approval of Class Counsel's 33% fee falls within the range of the private marketplace, where contingency-fee arrangements are often between 30 and 40 percent of any recovery."); *Continental*, 962 F.2d at 572 ("The object in awarding a reasonable attorney's fee . . . is to simulate the market.").[6] This, too, supports granting Lead Counsel's fee request.

[6] *See also RJR Nabisco, Inc. Sec. Litig.*, MDL No. 818, No. 88 Civ. 7905, 1992 WL 210138, at *7 (S.D.N.Y. Aug. 24, 1992) ("[W]hat should govern [fee] awards is . . . what the market pays in similar cases."); *In re Public Serv. Co. of N.M.*, No. 91–0536M, 1992 WL 278452, at *7 (S.D. Cal. July 28, 1992) ("If this were a non-representative litigation, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 40% of the recovery."); 1 COURT AWARDED ATTORNEY FEES, ¶ 2.06[3], at 2-88 (Matthew Bender 2010) (noting that, "when appropriate circumstances have been identified, a court may award a percentage significantly higher" than 25%); 4 NEWBERG ON CLASS ACTIONS, §14:6, at 551 (4th ed. 2002) ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.").

5. The Remaining Camden I Factors Also Favor Approving the Requested Fee

The remaining *Camden I* factors further support Lead Counsel's fee request. As demonstrated by the experience and acumen of Lead Counsel throughout this litigation, Lead Counsel are among the most highly regarded attorneys in their field. Jt. Decl. ¶¶ 4, 5, 70, 72. Indeed, Lead Counsel have been recognized by their peers for their achievements in this case specifically. *Id.* ¶ 70. Without reasonable attorney compensation, important cases like this might not be pursued private counsel despite the widespread harm to consumers. "[G]iven the positive societal benefits to be gained from lawyers' willingness to undertake difficult and risky, yet important, work like this, such decisions must be properly incentivized." *Checking Account Overdraft*, 830 F. Supp. 2d at 1364. Fees should be granted to Lead Counsel on this basis, as well.

D. The Expense Request Is Appropriate

Lead Counsel also request reimbursement of $1,640,110.77 in unreimbursed expenses incurred by Plaintiffs' Counsel in this action, plus interest. Jt. Decl. ¶¶ 92, 93; *see Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970). This sum reflects the litigation expenses incurred by Lead Counsel and supporting firms throughout the litigation that have yet to be reimbursed. These expenses are comprised of: (1) $12,192.88 in expenses incurred for experts, trial consultants, and their support staff; (2) $156,069.16 in electronic legal research fees; (3) $34,147.00 in court fees and expenses; (4) $23,644.05 in telephone fees; (5) $582.15 in process server fees; (6) $72,908.53 in printing fees; (7) $644,307.72 in travel, housing, and office fees,

including those paid by Lead and Trial Counsel during final preparation for trial in Tampa, FL; (8) $4,095.70 in fees regarding depositions and court reporters; (9) $28,490.44 in postage and courier fees; (10) $5,331.25 for investigator costs; (11) $1,022.71 in staff overtime costs; (12) $36,990.67 for other miscellaneous costs, including supplies; (13) $790,000.00 in unreimbursed litigation fund assessments; and less the $169,671.49 currently remaining in the litigation fund.[7] Jt. Decl. ¶ 93. These out-of-pocket expenses were reasonably and necessarily incurred and paid in furtherance of the prosecution of this Action and exclude the expenses that were previously reimbursed. *Id.*; ECF No. 1137. All costs submitted by supporting firms have been attested to as reasonable and necessary expenses incurred in prosecuting this action in sworn declarations by knowledgeable attorneys from those firms. Jt. Decl. ¶ 93. "There is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of reasonable litigation expenses from that fund." *Ontiveros v. Zamora*, 303 F.R.D. 356, 375 (E.D. Cal. 2014); *see also Behrens*, 118 F.R.D. at 549 ("[P]laintiff's counsel is entitled to be reimbursed from the class fund for the reasonable expenses incurred in this action."). Courts in this Circuit thus routinely approve payment of expenses from the common fund where they were reasonable and necessary for the litigation. *See Columbus Drywall & Insulation, Inc. v. Masco Corp.*, No. 1:04-cv-3066, 2008 WL 11234103, at *6 (N.D. Ga. Mar. 4, 2008)

[7] Lead Counsel are prepared to submit detailed records and sworn declarations from supporting counsel for review should the Court believe it prudent.

(approving $2.4 million for reimbursement of litigation expenses); *Swift v. BancorpSouth Bank*, No. 1:10-cv-00090, 2016 WL 11529613, at *20 (N.D. Fla. July 15, 2016) (approving application for reimbursement of costs that "were necessarily incurred in furtherance of the litigation of the Action and the Settlement"); *see also Ressler*, 149 F.R.D. at 657; *Mills*, 396 U.S. at 391-92; *In re Ikon Office Sols., Inc. Secs. Litig.*, 194 F.R.D. 166, 192 (E.D. Pa. 2000).

IV. FAIRNESS HEARING

Lead Counsel request that the Court set a date and time for a Fairness Hearing regarding this Motion and the concurrently filed Motion for Final Approval. Lead Counsel and counsel for Alcon and JJVCI have conferred and are happy to make themselves available for a hearing at the Court's convenience any time on Wednesday, September 21, 2022, or any date thereafter, consistent with the Court's Preliminary Approval Order. ECF No. 1343. This will give any interested parties and/or objectors fifteen (15) days to review Plaintiffs' and Lead Counsel's reply brief in further support of this Motion and the Motion for Final Approval, to be filed on September 6, 2022.

V. CONCLUSION

Lead Counsel have achieved settlements totaling $118,500,000 throughout the seven years it took to resolve this litigation, including $88,000,000 from which they have not been paid for their efforts. Lead Counsel's application for attorneys' fees and expenses is reasonable and consistent with governing law and common practice. It should be granted given the excellent results Lead Counsel achieved; the significant

risks and complex legal issues Lead Counsel faced; and the time, effort, and skill Lead Counsel invested to prosecute this case up to the eve of trial.

Accordingly, Plaintiffs and Lead Counsel respectfully request that the Court: (1) promptly set a date and time for the Fairness Hearing regarding this Motion and the concurrently filed Motion for Final Approval, as described above; and (2) award Lead Counsel the requested $29,333,333 in attorneys' fees and $1,640,110.77 in incurred and anticipated expenses, plus interest.

Dated: July 22, 2022

Respectfully submitted,

s/ Thomas K. Boardman
Thomas K. Boardman
Joseph P. Guglielmo
SCOTT+SCOTT
ATTORNEYS AT LAW LLP
The Helmsley Building
230 Park Avenue, 17th Floor
New York, NY 10169
Telephone: (212) 223-6444
Facsimile: (212) 223-6334
tboardman@scott-scott.com
jguglielmo@scott-scott.com

Christopher M. Burke
SCOTT+SCOTT
ATTORNEYS AT LAW LLP
600 W. Broadway, Suite 3300
San Diego, CA 92101
Telephone: (619) 233-4565
Facsimile: (619) 233-0508
cburke@scott-scott.com

Benjamin Steinberg
ROBINS KAPLAN LLP

John A. DeVault, III
Florida Bar No. 103979
Michael E. Lockamy
Florida Bar No. 69626
BEDELL, DITTMAR, DEVAULT, PILLANS & COXE, P.A.
101 East Adams Street
Jacksonville, FL 32202
Telephone: (904) 353-0211
Facsimile: (904) 353-9307
jad@bedellfirm.com
mel@bedellfirm.com

Plaintiffs' Local Counsel

George W. Sampson
SAMPSON DUNLAP LLP
1001 4th Ave., Suite 3200
Seattle, WA 98154
Telephone: (206) 414-8340
george@sampsondunlap.com

1325 Avenue of the Americas
Suite 2601
New York, NY 10019
Telephone: (212) 980-7400
Facsimile: (212) 980-7499
bsteinberg@robinskaplan.com

Michael D. Hausfeld
Nathaniel C. Giddings
HAUSFELD LLP
888 16th Street NW, Suite 300
Washington, DC 20006
Telephone: (202) 540-7200
Facsimile: (202) 540-7201
mhausfeld@hausfeld.com
ngiddings@hausfeld.com

Michael P. Lehmann
Christopher L. Lebsock
HAUSFELD LLP
600 Montgomery Street, Suite 3200
San Francisco, CA 94111
Telephone: (415) 633-1908
Facsimile: (415) 217-6813
mlehmann@hausfeld.com
clebsock@hausfeld.com

Co-Lead Class Counsel

Dennis Stewart
GUSTAFSON GLUEK PLLC
600 W. Broadway, Suite 3300
San Diego, CA, 92101
Telephone: (612) 333-8844
Facsimile: (612) 339-6622
dstewart@gustafsongluek.com

Plaintiffs' Trial Counsel

Robert C. Gilbert
Florida Bar No. 561861
KOPELOWITZ OSTROW
FERGUSON WEISELBERG
GILBERT
2800 Ponce de Leon Boulevard
Suite 1100
Coral Gables, FL 33134
Telephone: (305) 384-7270
gilbert@kolawyers.com

Plaintiffs' Liaison Counsel

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2022, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

s/ Thomas K. Boardman
Thomas K. Boardman

TAB 56A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

IN RE: DEALER MANAGEMENT SYSTEMS ANTITRUST LITIGATION **This Document Relates To:** **THE DEALERSHIP CLASS ACTION**	MDL No. 2817 Case No. 18-cv-00864 Honorable Rebecca R. Pallmeyer

FINAL ORDER AND JUDGMENT FOR SETTLEMENT BETWEEN THE CDK SETTLEMENT CLASS AND CDK GLOBAL, LLC AND APPLICATION FOR ATTORNEYS' FEES, COSTS AND CLASS REPRESENTATIVE SERVICE AWARDS

WHEREAS, the Dealership Class Plaintiffs and CDK Global, LLC ("CDK") have entered into a Settlement Agreement Between the Dealership Class and CDK (the "Settlement" or "Agreement"), dated August 15, 2024, to settle the Dealership Class Action as against CDK; and

WHEREAS, on August 23, 2024, by Preliminary Approval Order for Settlement Between the CDK Settlement Class and CDK ("Preliminary Approval Order") (ECF No. 1531), this Court (a) preliminarily approved the Settlement; (b) ordered that notice of the proposed Settlement be provided to the CDK Settlement Class; (c) provided CDK Settlement Class Members with the opportunity either to exclude themselves from or to object to the proposed Settlement; and (d) scheduled a hearing regarding final approval of the Settlement (the "Settlement Hearing"); and

WHEREAS, due and adequate notice has been provided to the CDK Settlement Class in accordance with the Preliminary Approval Order; and

WHEREAS, this Court previously granted final approval of a class action settlement on behalf of a Class of Dealerships with The Reynolds and Reynolds Company ("Reynolds Settlement Class") (ECF No. 502); and

WHEREAS due and adequate notice has been provided to members of the CDK Settlement

Class and Reynolds Settlement Class regarding (i) the proposed allocation of funds from the Reynolds Settlement and CDK Settlement in accordance with the Allocation Plan, and (ii) Dealership Class Counsel's application for attorneys' fees, expenses, and Class Representative Service Awards ("Fee and Expense Application"); and

WHEREAS, the Court conducted the Settlement Hearing on February 25, 2025 to consider, among other things, (i) whether the terms and conditions of the Settlement are fair, reasonable and adequate and the Settlement should therefore be approved; and (ii) whether a judgment should be entered dismissing the Dealership Class Action with prejudice as against CDK; and (iii) whether the Fee and Expense Application should be granted;

WHEREAS, there have been no objections to the Settlement, and no persons and entities timely and validly excluded themselves from the CDK Settlement Class ("Opt-Outs");

WHEREAS, there have been no objections to the Fee and Expense Application and the Allocation Plan; and

WHEREAS, the Court having reviewed and considered the Agreement, the Fee and Expense Application and the Allocation Plan, all papers filed and proceedings held herein in connection with the Agreement, the Fee and Expense Application and the Allocation Plan, and the record in the Dealership Class Action, and good cause appearing therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, as follows:

1. This Final Approval Order and Judgment incorporates by reference the definitions set forth in the Agreement, and all terms used herein shall have the same meanings as set forth in the Agreement unless otherwise specified herein. The terms of the Agreement are incorporated in this Final Approval Order and Judgment as if fully set forth herein.

2. **Jurisdiction.** The Court has jurisdiction over the subject matter of the MDL Action (including this Dealership Class Action), and all matters relating to the Settlement, as well as personal jurisdiction over the Dealership Class Plaintiffs, all CDK Settlement Class Members, and the

Defendant.

3. **Class Certification.** Pursuant to Rule 23(c) and (e) of the Federal Rules of Civil Procedure, the Court finally certifies for purposes of the Settlement only, a class ("CDK Settlement Class") as follows:

> All persons and entities located in the United States engaged in the business of the retail sale of automobiles who purchased DMS from CDK and/or Reynolds ("Defendants"), or any predecessor, successor, subsidiary, joint venture or affiliate, during the period from September 1, 2013 through the date of the executed Agreement ("CDK Settlement Class Period"). Excluded from the CDK Settlement Class are Defendants, including any entity or division in which any Defendant has a controlling interest, as well as Defendants' joint ventures, subsidiaries, affiliates, assigns, and successors

4. The Court finds and concludes, for purposes of the Settlement only, that the prerequisites to a class action under Federal Rule of Civil Procedure 23(a) have been satisfied, in that, with respect to the Dealership Class:

a. numerosity is satisfied;

b. the claims of the Dealership Class Plaintiffs are typical of those of the other Dealership Class Members;

c. there are questions of fact and law that are common to all members of the Dealership Class; and

d. the Dealership Class Plaintiffs will fairly and adequately protect the interests of the CDK Settlement Class and have retained counsel experienced in antitrust and class action litigation who have and will continue to adequately represent the CDK Settlement Class.

5. The Court further finds and concludes, for purposes of the Settlement only, that the Dealership Class Action may be maintained as a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure because (i) a class action is superior to other available methods for the fair and efficient adjudication of this controversy, and (ii) questions of fact and law common to the members of the CDK Settlement Class predominate over any questions affecting only individual members.

6. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, for purposes of the Settlement, this Court finally certifies as Dealership Class Representatives the twenty-three (23) dealerships listed in the Appendix to the Unopposed Motion for Preliminary Approval of Settlement with Defendant CDK Global, LLC and for Conditional Certification of the Proposed Settlement Class ("Motion") (ECF No. 1528 at 15-16).

7. The Court finds, for settlement purposes only, that these Dealership Class Representatives' claims are typical of the claims of the Dealership Class. The claims of the Dealership Class Representatives and absent class members rely on the same legal theories and arise from the same alleged conspiratorial conduct by Defendants.

8. The Court approves and appoints Peggy J. Wedgworth and Milberg Coleman Bryson Phillips Grossman, PLLC as Dealership Class Lead Counsel pursuant to Rule 23(g) and finds Dealership Class Lead Counsel has and will fairly and adequately protect the interests of the CDK Settlement Class.

9. The Court approves and appoints Leonard A. Bellavia and Bellavia Blatt, PC; Daniel Hedlund and Michelle Looby and Gustafson Gluek PLLC; James Barz and Frank Richter and Robbins Geller Rudman & Dowd LLP; and Robert A. Clifford and Clifford Law Offices, P.C. as Settlement Class Counsel.

10. **Class Members Bound by this Final Approval Order and Judgment.** Pursuant to Rule 23(c)(3) of the Federal Rules of Civil Procedure, all persons and entities who fall within the foregoing description of the CDK Settlement Class who have not timely and validly requested exclusion from the CDK Settlement Class are CDK Settlement Class Members and are fully bound by this Final Approval Order and Judgment and the terms of the Agreement.

11. **Notice.** As established by the Settlement Administrator's Declarations, filed on November 27, 2024 (ECF No. 1539-2) and January 23, 2025 (ECF No. 1540), the Settlement Administrator caused the Notice Plan to be implemented. The Court finds that the Settlement

Administrator fully complied with the Preliminary Approval Order and that the form and manner of providing notice to the CDK Settlement Class of the proposed Settlement with CDK, the proposed allocation of funds from the CDK Settlement, and the Fee and Expense Application was the best notice practicable under the circumstances, including individual notice to all members of the CDK Settlement Class who could be identified through the exercise of reasonable effort. The Court further finds that the form and manner of providing notice to the Reynolds Settlement Class of the proposed allocation of funds from the Reynolds Settlement, and the Fee and Expense Application was the best notice practicable under the circumstances, including individual notice to all members of the Reynolds Settlement Class who could be identified through the exercise of reasonable effort. The Court further finds that the notice program provided due and adequate notice of these proceedings and of the matters set forth therein, including the terms of the Agreement, to all parties entitled to such notice and fully satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure, 28 U.S.C. § 1715(b), and constitutional due process.

12. **Objections and Exclusions.** The Court finds there were no objections to the Settlement, no Opt-Outs from the CDK Settlement Class, and no objections to the Fee and Expense Application and the Allocation Plan.

13. **Final Approval of the Settlement.** Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the Court fully and finally approves the Settlement with CDK set forth in the Agreement and finds that the Settlement is, in all respects, fair, reasonable and adequate to the CDK Dealership Class. The Court orders the Settling Parties to consummate the Settlement set forth in the Agreement in accordance with its terms. The Court further finds that the Allocation Plan provides a fair, reasonable and adequate method to allocate settlement funds to members of the CDK Settlement Class and the Reynolds Settlement Class.

14. **Release of Claims Against CDK Releasees.** As set forth in the Agreement, upon the Effective Date, and in consideration of payment of the Settlement Amount, CDK Releasees shall be

completely released, acquitted, and forever discharged from any and all Dealership Released Claims by the Dealership Class Releasors as set forth in the Agreement.

15. **Release of Claims Against Dealership Class Releasees.** Upon the Effective Date, the Dealership Class Releasees shall be completely released, acquitted, and forever discharged from any and all CDK Released Claims by the CDK Releasors as set forth in the Agreement.

16. **No Future Actions Following Releases.** CDK Settlement Class Releasors and CDK Releasors covenant and agree that they will not, after the Effective Date, seek to recover from any releasee on account of the claims released by such releasors.

17. **Covenant Not to Sue.** Dealership Class Releasors and CDK Releasors hereby covenant not to sue CDK Releasees and Dealership Class Releasees, respectively, with respect to any Released Claims. Dealership Class Releasors and CDK Releasors shall be permanently barred and enjoined from instituting, commencing, or prosecuting against the CDK Releasees and Dealership Class Releasees, respectively, any claims based in whole or in part on the Released Claims.

18. **Waiver of California Civil Code § 1542 and Similar Laws.** Dealership Class Releasers and CDK Releasers acknowledge that, by virtue of this Agreement, and for the consideration received hereunder, it is their intention to release, and they are releasing, all Released Claims, including any Released Claim that any Dealership Class Releaser or CDK Releaser does not know or suspect to exist in his, her or its favor at the time of the release that if known by him, her or it, might have affected his, her or its settlement with and release, or might have affected his, her or its decision not to object to this Settlement ("Unknown Claims"). Such Unknown Claims include claims that are the subject of California Civil Code § 1542 and equivalent, similar, or comparable laws or principles of law. California Civil Code § 1542 provides:

> CERTAIN CLAIMS NOT AFFECTED BY GENERAL RELEASE. A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE

DEBTOR;

Each Dealership Class Releasor and CDK Releasor may hereafter discover facts other than or different from those which he, she, or it knows or believes to be true with respect to the Released Claims, but each such Dealership Class Releasor and CDK Releasor hereby expressly waives and fully, finally, and forever settles and releases, upon this Agreement becoming final, any known or unknown, suspected or unsuspected, contingent or non-contingent claim with respect to the Released Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts. The Dealership Class Plaintiffs and CDK acknowledge, and all Dealership Class Releasors, Dealership Class Releasees, CDK Releasors, and CDK Releasees by operation of law shall be deemed to have acknowledged, that the inclusion of "Unknown Claims" in the Released Claims was separately bargained for and was a key element of the Settlement.

19. **Dismissal.** The Court hereby dismisses with prejudice the Dealership Class Action as to CDK, without costs to any of the parties as against the others, except as otherwise provided in the Agreement.

20. **Use of Order.** This Final Approval Order and Judgment, the Agreement, and any negotiations, documents, and discussions associated with them, shall not be deemed or construed to be an admission by CDK or the Dealership Class Plaintiffs (or the other CDK Releasees or Dealership Class Releasees) or evidence of any violation of any statute or law or of any liability or wrongdoing by CDK or the Dealership Class Plaintiffs (or the other CDK Releasees or Dealership Class Releasees), or of the truth of the claims or allegations in any complaint or any other pleading filed in the Dealership Class Action, and evidence thereof shall not be discoverable or used directly or indirectly in the Dealership Class Action or in any other action or proceeding.

21. Neither this Final Approval Order and Judgment, nor the Agreement, nor any of its terms and provisions, nor the negotiations or proceedings connected with it, nor any other action taken to carry out the Agreement by either of the Settling Parties shall be referred to, offered as

evidence or received in evidence in any pending or future civil, criminal, or administrative action or proceedings, except in a proceeding to enforce the Agreement, or to defend against the assertion of Released Claims, or as otherwise required by law.

22. **Effect of Termination, Rescission, or Failure to Become Final.** If the Settlement is terminated, rescinded, or otherwise does not become Final, then the Agreement, including any amendment(s) thereof, then this Final Approval Order and Judgment (and any other orders of the Court relating to the Settlement) shall be null and void, of no further force or effect, and without prejudice to any party, and may not be introduced as evidence or referred to in any actions or proceedings by any person or entity, and each party shall be restored to his, her or its respective position as of July 21, 2024.

23. **Retention of Jurisdiction.** Without affecting the finality of this Order, the Court reserves and retains exclusive and continuing jurisdiction over all parties to the MDL Action, all Dealership Class Members, and the Settlement Fund to consider all further matters arising out of or connected with the Agreement. CDK retains any contractual rights it may have to arbitrate any dispute relating to any Released Claim with any Dealership Class Member who timely and validly elects to be excluded from the Dealership Class in accordance with the procedure established by the Court.

24. **Fee and Expense Application.** The Court hereby grants the Fee and Expense Application and awards attorneys' fees equal to 33 % of the combined $100 million CDK Settlement Fund and $29.5 million Reynolds Settlement Fund, together with a proportional share of interest earned on such funds for the same time period until dispersed to Dealership Class Lead Counsel. This award is reasonable under Rule 23 for the award of attorneys' fees based, inter alia, on the amount of work performed in this case, the recoveries obtained and the risks involved. Dealership Class Lead Counsel shall allocate the awarded attorneys' fees amongst plaintiffs' counsel that worked on this case in a manner in which Dealership Class Lead Counsel in good faith believe reflects the

contributions of such counsel to the prosecution and settlement of the Action. The Court also grants Dealership Class Counsel's request for reimbursement of $7,192,133.86 for expenses incurred in prosecuting this action. The Court further grants Class Representative service awards of $10,000.00 for each of the twenty-three (23) dealerships listed in the Appendix to the Motion for Preliminary Approval. Of the foregoing total awarded attorneys' fees, expenses, and class representative service awards, 95% shall be paid from the CDK Settlement Fund, and 5% shall be paid from the Reynolds Settlement Fund. Such attorneys' fees, expenses, and Class Representative service awards shall be paid forthwith.

25. **Attorneys' Fees and Expenses Not a Delay.** The award of any attorneys' fees, expenses, and Class Representative service awards, including any appeals therefrom, shall not affect the finality of this Final Approval Order and Judgment with respect to the Settlement.

26. **Entry of this Final Order and Judgment.** The Court finds there is no just reason for delay and directs the Clerk to enter this Final Approval Order and Judgment forthwith pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Dated February 25, 2025

Hon. Rebecca R. Pallmeyer
United States District Court Judge

TAB 56B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: DEALER MANAGEMENT SYSTEMS ANTITTRUST LITIGATION	MDL No. 2817 Case No. 18-cv-00864
This Document Relates to: THE DEALERSHIP CLASS ACTION	Hon. Rebecca R. Pallmeyer

DEALERSHIP CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND CLASS REPRESENTATIVE SERVICE AWARDS

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I. INTRODUCTION

Dealership Counsel[1] respectfully submit this memorandum in support of their motion, pursuant to Fed. R. Civ. P. 23(h)(1) and 54(d)(2), for (i) an award of $42.735 million in attorneys' fees; (ii) expenses approved in the amount of $7,192,133.86;[2] and (iii) service awards of $10,000 for each of the 23 class representatives.

After more than seven years of hard-fought litigation, and virtually on the eve of trial, Dealership Counsel obtained a $100 million cash settlement with Defendant CDK Global, LLC ("CDK"). That settlement, when added to the previously-approved $29.5 million settlement with Defendant The Reynolds and Reynolds Company ("Reynolds") in 2019 (*see* ECF No. 427-2 at 10, 15; ECF No. 502), has resulted in a $129.5 million recovery for a nationwide class of automobile dealers.[3] Dealership Counsel have litigated this case on a contingency basis and, to date, have been paid nothing for their efforts. Dealership Counsel have also incurred more than $7.192 million in total expenses, which includes the previously awarded $3 million amount authorized for litigation expenses under the Reynolds settlement. *See* ECF No. 501.

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[1] "Dealership Counsel" refers to Lead Counsel Peggy J. Wedgworth and Milberg Coleman Bryson Phillips Grossman, PLLC and Plaintiffs' Steering Committee members Leonard A. Bellavia and Bellavia Blatt, PC; Daniel Hedlund and Michelle Looby and Gustafson Gluek PLLC; James Barz and Frank Richter and Robbins Geller Rudman & Dowd LLP; and Liaison Counsel Robert A. Clifford and Clifford Law Offices. *See* ECF No. 123; *see also* ECF No. 1531 ¶¶ 9-10.

[2] *See* accompanying Declaration of Peggy J. Wedgworth in Support of Dealership Class Counsel's Motion for Attorneys' Fees, Reimbursement of Expenses, and Class Representative Service Awards ("Wedgworth Fee Decl."), Appendices C & D. In connection with the Reynolds settlement, the Court approved Dealership Counsel's withdrawal of up to $3 million from that settlement fund for litigation expenses. *See* ECF No. 501 at 2-3. By this motion, Dealership Counsel seek reimbursement of $4,192,133.86 in expenses. This amount, when added to the previously awarded $3 million amount, totals $7,192,133.86; which is less than the $7.5 million maximum expense amount referenced in the CDK Settlement Class notice.

[3] CDK also agreed to fund up to $250,000 in notice and claims administration costs. *See* ECF No. 1528-2 ¶ A.1(y). Reynolds agreed to fund up to $250,000 for notice costs related to the Reynolds settlement. *See* ECF No. 427-2 ¶ E.13.

In accordance with the Court's August 23, 2024 order (ECF No. 1531), notice of the requests for attorneys' fees, expense reimbursement, and class representative service awards has been distributed.[4]

II. PRINCIPLES OF FEE AWARDS

"The United States Supreme Court long ago recognized that 'a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.'" *McDaniel v. Qwest Commc'ns Corp.*, 2011 WL 13257336, at *3 (N.D. Ill. Aug. 29, 2011) (Pallmeyer, J.) (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). "The common-fund doctrine is based on the notion that all 'those who have benefited from litigation should share its costs.'" *McDaniel*, 2011 WL 13257336, at *3 (quoting *Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 252 (7th Cir. 1988)); *see also In re Synthroid Mktg. Litig.*, 325 F.3d 974, 977 (7th Cir. 2003) ("*Synthroid II*"). Having secured settlements totaling $129.5 million, Dealership Counsel now seek a fee award of 33% of the funds.[5]

In the Seventh Circuit, class action fee awards are based on a "market" rate for legal services, *i.e.*, the rate agreed to (or that hypothetically would have been agreed to) by the parties. *See In re Broiler Chicken Antitrust Litig.*, 80 F.4th 797, 801 (7th Cir. 2023) (citing *In re Synthroid Mktg. Litig.*, 264 F.3d

[4] The Notice Plan reached approximately 98.4% of the identified potential settlement class members via email and/or mail. Notice reach was further enhanced by publication notice, digital media, an informational release, as well as additional efforts undertaken by Dealership Lead Class Counsel. *See* the accompanying Declaration of Cameon R. Azari, Esq. Regarding Implementation and Adequacy of Settlement Notice Plan and Notices ("Azari Decl."), ¶¶ 8, 10-32; *see also* Declaration of Peggy J. Wedgworth in Support of Dealership Class Plaintiffs' Motion for Final Approval of Settlement with Defendant CDK Global, LLC ("Wedgworth Final Approval Decl."), ¶ 10, filed contemporaneously herewith.

[5] *See* Azari Decl. Att. 4 (long form class notice) at 1; *see also id.* at 9: "Dealership Class Counsel will seek (1) an award of attorneys' fees not to exceed 33.3% of the Settlement Funds plus (2) payment of unreimbursed litigation expenses (including expert fees and deposition costs) ('Litigation Expenses') not to exceed $7.5 million; and (3) service awards of up to $10,000 for each of the twenty-three (23) Class Representatives in this case ('Fee and Expense Application')." In accordance with the Court's scheduling order, the deadline for Reynolds and CDK Settlement Class members to object to this motion is December 12, 2024 and Dealership Counsel will respond to any objections by February 18, 2025. *See* ECF No. 1531 at 10.

712, 718 (7th Cir. 2001) ("*Synthroid I*")); *Allen v. JP Morgan Chase Bank, N.A.*, 2015 WL 14074780, at *3 (N.D. Ill. Nov. 3, 2015) (Pallmeyer, J.). Fee awards should reflect market rates even in large, "megafund" settlements. *See Synthroid I*, 264 F.3d at 718; *In re TikTok, Inc., Consumer Priv. Litig.*, 617 F. Supp. 3d 904, 942 (N.D. Ill. 2022).

Two different methodologies are used to determine fee awards. One method is the "percentage-of-the-recovery" method, under which fees are based on a percentage of the recovery obtained. That method "directly aligns the interests of the class and its counsel in achieving the maximum recovery possible in the most efficient manner." *Hash v. First Fin. Bancorp*, 2021 WL 12269064, at *2 (S.D. Ind. Nov. 22, 2021). It also "makes sense because 'it is essentially unheard of for sophisticated lawyers to take on a case of this magnitude and type on any basis other than a contingency fee, expressed as a percentage of the relief obtained.'" *Hale v. State Farm Mut. Auto. Ins. Co.*, 2018 WL 6606079, at *7 (S.D. Ill. Dec. 16, 2018) (citation omitted). The second method – the "lodestar-multiplier" method – calculates fees based on counsel's hours expended and hourly rates, as enhanced by a risk multiplier. *See McDaniel*, 2011 WL 13257336, at *3.

While the choice of method is in the court's discretion (*see Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991)), "the percentage method is employed by the vast majority of courts in the Seventh Circuit (like other Circuits)." *Chambers v. Together Credit Union*, 2021 WL 1948452, at *1 (S.D. Ill. May 21, 2021) (quoting *Hale*, 2018 WL 6606079, at *2); *see also Allen*, 2015 WL 14074780, at *3.

III. THE COURT SHOULD AWARD DEALERSHIP COUNSEL A 33% FEE

The Court should award Dealership Counsel 33% of the total $129.5 million settlement funds, for a fee of $42.735 million. As shown below, that percentage is the market rate for legal services in this case, and the requested fee is reasonable.

A. Prevailing Rates Support the Request

The requested 33% award is fully supported by fee awards routinely granted by the courts. Judge Kennelly's recent decision in *Corzo v. Brown University* is instructive. There, the court awarded attorneys' fees of 33.33% of a $284 million antitrust settlement, plus expenses, explaining:

> The requested attorneys' fees are at a reasonable market rate for Settlement Class Counsel's services had they been negotiated *ex ante*. The sought fee of one-third of the Settlement Fund is within the ordinary range of contingency fee arrangements actually negotiated *ex ante* between parties and awarded, in complex antitrust actions.

2024 WL 3506498, at *7 (N.D. Ill. July 20, 2024). *See also Linnear v. Illinicare Health Plan, Inc.*, 2019 WL 13072750, at *3 (N.D. Ill. Dec. 17, 2019) (Pallmeyer, J.) (awarding fees of "thirty-five of the Gross Settlement Fund": the request "is consistent with the market in the Northern District of Illinois"); *CS Wang & Associate v. Wells Fargo Bank, N.A.*, Case No. 1:16-cv-11223, ECF No. 654 at 7 (N.D. Ill. Dec. 2, 2021) (Pallmeyer, C.J.) (Exh. 1) ("[A] typical contingency agreement in this circuit might range from 33% to 40% of the recovery.") (citation omitted);[6] *McDaniel*, 2011 WL 13257336, at *4 (Pallmeyer, J.) ("the real-world market range for contingent fee cases is 33% to 40%) (citing cases); *Roberson v. Maestro Consulting Services, LLC*, 2024 WL 4785359 (S.D. Ill. Nov. 14, 2024) (awarding fees of "40% of the Gross Settlement Amount" plus expenses); *In re Pork Antitrust Litig.*, 2022 WL 4238416, at *9 (D. Minn. Sept. 14, 2022) (awarding 33%, plus expenses); *White v. Kroger Ltd. P'ship I*, 2024 WL 3343021, at *3 (S.D. Ill. July 9, 2024) (awarding 35% of settlement fund plus costs); *Macovski v. Groupon, Inc.*, 2022 WL 17256417, at *1 (N.D. Ill. Oct. 28, 2022) (33 1/3%); *Pierrelouis v. Gogo Inc.*, 2022 WL 7950362,

[6] In *CS Wang*, the Court awarded requested attorney fees of "one-third of the Settlement Fund after deducting incentive awards and settlement administration costs." Case No. 1:16-cv-11223, ECF No. 654 at 7. Under the CDK settlement, CDK is paying, in addition to $100 million, up to $250,000 in notice and administration costs. *See* ECF No. 1528-2 ¶¶ A.1(y), 1(ff), F. In the Reynolds settlement, Reynolds paid $29.5 million and agreed to pay up to $250,000 in notice costs. *See* ECF No. 427-2 ¶¶ A.1(cc) E.13. Dealership Counsel do not request any fees based on those notice and administration amounts. Moreover, the requested $42.735 million fee represents just under 33.06% of the combined CDK and Reynolds settlement funds ($129.5 million, not counting Defendants' additional payments for notice and administration), net of the $10,000 service awards requested for each of the 23 class representatives.

at *1 (N.D. Ill. Oct. 13, 2022) (33 1/3%); *Chambers*, 2021 WL 1948452, at *2 ("a one-third fee is common throughout district courts in the Seventh Circuit") (citing authorities); *Wolfe v. TCC Wireless, LLC*, 2018 WL 11215318, at *3-4 (N.D. Ill. Mar. 12, 2018) (awarding "one-third of the Gross Settlement Fund" plus expenses); *Briggs v. PNC Fin'l Servs. Group, Inc.*, 2016 WL 7018566, at *4 (N.D. Ill. Nov. 29, 2016) (St. Eve., J.) ("Courts routinely hold that one-third of a common fund is an appropriate attorneys' fee award in class action settlement …."); *In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d 838, 842 (N.D. Ill. 2015) (awarding one-third of $46 million fund, plus expenses).[7]

B. A Lodestar Cross-Check Confirms the Reasonableness of the Requested Fee

Although not required, a court may use the lodestar method to "cross-check" the fee calculated by the percentage-of-the-recovery method. *Corzo*, 2024 WL 3506498, at *7. Such a cross-check, however, "has fallen into disfavor in this Circuit." *Allen*, 2015 WL 14074780, at *3 (citation omitted); *see Synthroid II*, 325 F.3d at 979-80.

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[7] *See also Hale*, 2018 WL 6606079, at *10, 16 (awarding 33.33% of $250 million fund, plus expenses: "Courts within the Seventh Circuit, and elsewhere, regularly award percentages of 33.33% or higher to counsel in class action litigation."); *In re Prandin Direct Purchaser Antitrust Litig.*, 2015 WL 1396473, at *4 (E.D. Mich. Jan. 20, 2015) (awarding one-third fee, which is "within the range of fees ordinarily awarded"); *Standard Iron Works v. ArcelorMittal*, 2014 WL 7781572, at *1 (N.D. Ill. Oct. 22, 2014) (awarding 33% of $163.9 million settlement, noting "fee awards in similar complex litigation, including many recent antitrust class actions in which 33% fees were awarded for similar work"); *In re Potash Antitrust Litig.*, 2013 WL 12470850, at *1 (N.D. Ill. June 12, 2013) (awarding one-third of $90 million); *In re Se. Milk Antitrust Litig.*, 2013 WL 2155387, at *1, 3, 8 (E.D. Tenn. May 17, 2013) (awarding 33 1/3% of $158.6 million; 33 1/3% "is certainly within the range of fees often awarded in common fund cases, both nationwide and in the Sixth Circuit"); *George v. Kraft Foods Glob., Inc.*, 2012 WL 13089487, at *2 (N.D. Ill. June 26, 2012) ("'[T]he normal rate of compensation in the market [is] 33.33% of the common fund recovered' because the class action market commands contingency fee agreements and the class counsel accepts a substantial risk of nonpayment.") (citation omitted); *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) ("A customary contingency fee would range from 33 1/3% to 40% of the amount recovered.") (citations omitted); *In re Lithotripsy Antitrust Litig.*, 2000 WL 765086, at *2 (N.D. Ill. June 12, 2000) ("33.3% of the fund plus expenses is well within the generally accepted range of attorneys fees in class-action antitrust lawsuits.").

In *In re Broiler Chicken*, the Circuit stated that the district court should award fees "in accord with a hypothetical *ex ante* bargain." 80 F.4th at 800. (On remand, the fee was set at $51.66 million -- 30% of the recovery after expenses and service awards. *See In re Broiler Chicken Antitrust Litig.*, 2024 WL 3292794, at *6 (N.D. Ill. July 3, 2024), *appeal filed*, No. 24-2387 (7th Cir. Aug. 9, 2024)).

Here, Dealership Counsel expended over 69,000 hours, for a total lodestar of $41,581,821.25 on the case. *See* Wedgworth Fee Decl., ¶ 13, Appendices. A & B.[8] The requested fee ($42.735 million) represents a multiplier of just under 1.03 of their historical lodestar. *Id.* ¶ 13. The multiplier is modest, further confirming the reasonableness of the requested fee. *See Corzo*, 2024 WL 3506498, at *7 (awarding $94.67 million fee; 1.35 multiplier of historical lodestar "confirms the propriety of the sought fee."); *Standard Iron Works v. ArcelorMittal*, 2014 WL 7781572, at *2-3 (N.D. Ill. Oct. 22, 2014) (approving $54 million fee award, representing one-third of the settlement fund and 1.97 multiplier); *see generally In re TikTok*, 617 F. Supp.3d at 943 ("In practice, most multipliers fall between one and four.") (citing *Harmon v. Lyphomed, Inc.*, 945 F.2d 969, 976 (7th Cir. 1991)).

C. The Substantial Litigation Risks Support the Requested Fee

Dealership Counsel's requested fee also is "reasonable in light of the significant risks of nonpayment that they faced." *Linnear*, 2019 WL 13072750, at *3. Counsel "took this case on a contingent basis, meaning that there was a strong risk that they would not be paid." *Id.* "As the Seventh Circuit has noted, Plaintiff's Counsel 'could have lost everything' they invested." *Id.* (quoting *Matter of Cont'l Ill. Sec. Litig.*, 96 2 F.2d 566, 570 (7th Cir. 1992) (Posner, J.)). "Risk cannot be overlooked for it is considerable even in a relatively simple class case." *McDaniel*, 2011 WL 13257336, at *3.

Although all cases present risk, the risks faced by counsel are significantly heightened in antitrust cases. *See Wilk v. Am. Med. Ass'n*, 895 F.2d 352, 355 (7th Cir. 1990) ("We have observed before that 'antitrust cases are notoriously extended.'") (citation omitted); *Bohack Corp. v. Borden, Inc.*, 599 F.2d 1160, 1169 n.9 (2d Cir. 1979) ("antitrust cases are notoriously lengthy and tortuously complex."); *In re Packaged Ice Antitrust Litig.*, 322 F.R.D. 276, 292 (E.D. Mich. 2017).

[8] Besides the usual work required in multi-year, antitrust litigation (*i.e.*, preparation of multiple pleadings, and briefing of Rule 12(b)(6), discovery, summary judgment, *Daubert*, and class certification motions), Dealership Counsel's work included taking/defending and participating in more than 115 depositions. Wedgworth Fee Decl. ¶18.

"As in any antitrust case, this one presents substantial risks of non-recovery, even after preliminary victories were achieved." *In re Elec. Carbon Prods. Antitrust Litig.*, 447 F. Supp. 2d 389, 400 (D.N.J. 2006). This Court's earlier rulings, including its order largely denying CDK's summary judgment motion (*see* ECF No. 1381), did not eliminate the risks – including those facing Dealership Counsel in the trial scheduled against CDK back in September. *See, e.g.*, *In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781 (7th Cir. 1999) (affirming in part district court's grant of judgment for defendants at trial, following earlier order denying summary judgment); *In re NFL "Sunday Ticket" Antitrust Litig.*, 2024 WL 3628118, at *3 (C.D. Cal. Aug. 1, 2024) (granting defendants' motion for judgment as a matter of law following jury's verdict for class plaintiffs). These risks support the requested fee. *See Burnett v. Nat'l Ass'n of Realtors*, 2024 WL 2842222, at *16 (W.D. Mo. May 9, 2024), *appeal filed*, No. 24-2143 (8th Cir. June 4, 2024) ("Because antitrust claims are especially complex, expensive, and difficult to prosecute, courts have recognized that antitrust settlements should result in attorneys' fees equal to one-third of the fund.") (citations omitted).

Some of the specific risks confronting Dealership Counsel are described below.

1. The Alleged Conspiracy

A key risk was whether Dealership Counsel could prove the alleged antitrust conspiracy. *See In re Packaged Ice Antitrust Litig.*, 322 F.R.D. at 292 ("an antitrust litigation of this scope has great complexity and undeniable inherent risks, such as … whether the conspiracy as alleged in the Complaint can be established"); *Apex Oil Co. v. DiMauro*, 713 F. Supp. 587, 599 (S.D.N.Y. 1989) ("The frequent difficulty of proving a conspiracy needs no extended comment."). Although Defendants vehemently denied that they conspired – and CDK submitted voluminous evidence to dispute Dealers' allegations – Dealership Counsel prevailed at summary judgment, and the Court found sufficient evidence from which a jury could find a conspiracy. *See* ECF No. 1381 at 50-60.

Nonetheless, whether a jury would find Dealers' evidence persuasive remained uncertain. The uncertainty reflected, among other things, the possibility that the jury would find that Defendants' conduct was undertaken unilaterally to promote data security, not to restrain competition. *See* ECF No. 378 at 18 (CDK's argument that its "decision to restrict access to its DMS" is "the same kind of access restriction imposed by firms throughout the economy as a sound security measure."). As the Court stated in its summary judgment ruling, "[t]here is no dispute that data security is important to the automotive industry, including dealers and data integrators." ECF No. 1381 at 21. The importance of data security in this case, moreover, cannot be overstated, given the critical role played by DMSs in the Dealers' business. *See id.* at 2 (summary judgment ruling, explaining that DMSs are "complex enterprise computer systems employed by car dealerships to collect, manage, and deploy data they generate.").

Defendants' data security defense presented substantial risk, as data breaches have become "increasingly common in our digitized world." *McMorris v. Carlos Lopez & Assocs., LLC*, 995 F.3d 295, 297 (2d Cir. 2021); *see Cmty. Bank of Trenton v. Schnuck Markets, Inc.*, 887 F.3d 803, 817 (7th Cir. 2018) ("Data breaches are a foreseeable (and foreseen) risk of participating in the card networks …."); *Haney v. Charter Foods N., LLC*, 2024 WL 4054361, at *9 (E.D. Tenn. Aug. 28, 2024) ("Given the high level of foreseeability and known risks of data breaches, Defendants had a duty to take reasonable care to protect Plaintiffs from the data breach."). Indeed, in June 2024 – just a few months before the scheduled trial – CDK reported that it was targeted in a major data cyberattack, leading to the shutdown of its DMS.[9] Whether and how the cyberattack would be addressed at trial, and its potential

[9] *See* M. Cerullo, *CDK Global calls cyberattack that crippled its software platform a "ransom event"*, Moneywatch (June 25, 2024), *available at* https://www.cbsnews.com/news/cdk-attack-cyber-ransom-event.

impact on a jury's assessment of the data security defense, underscore the risk faced by Dealership Counsel.[10]

2. Pass-on Damages

Dealership Counsel also faced the risk that a jury would award no damages. "'[T]he history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal.'" *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998)).

The risk of proving the existence and amount of *any* antitrust damages is well recognized. *See In re NFL "Sunday Ticket" Antitrust Litig.*, 2024 WL 3628118, at *3 (granting defendants' motion for judgment as a matter of law following jury verdict, where plaintiffs' economists employed "flawed methodologies" and "there was no other support for the class-wide injury and damages elements of Plaintiffs' § 1 and § 2 claims"); *In re Elec. Carbon Prods. Antitrust Litig.*, 447 F. Supp. 2d 389, 401 (D.N.J. 2006) ("a battle of experts addressing the measurement of ... overcharges … can become an esoteric exercise with unpredictable results"). But the risk was enhanced here because the Court ruled that Dealers' damages are limited to *indirect* damages – *i.e.*, alleged overcharges to vendors that were passed onto Dealers. *See* ECF No. 1381 at 67. Proving such damages is difficult. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 751 (1977)(citing "the difficulty of proving and quantifying a pass-on"); *In re Packaged Ice Antitrust Litig.*, 322 F.R.D. at 292 ("[I]n an indirect purchaser case, 'the problem of proof [ ] is intrinsically more complex, because the damage model must account for the action of innocent intermediaries who allegedly passed on the overcharge.'") (citation omitted).

[10] Notably, the release in the CDK settlement agreement does not restrict Dealers' right to assert claims against CDK relating to the cyberattack. *See* ECF No. 1528-2 ¶¶ A.1(l), N.33. That fact further supports approval of the requested fee. *See Linnear*, 2019 WL 13072750, at *4 (N.D. Ill. Dec. 17, 2019) (Pallmeyer, J.) ("The absence of a general release exemplifies the results achieved for the Settlement Class.").

Furthermore, CDK urged that, under various state laws – including the Illinois Antitrust Act, 740 ILCS 10/1, *et seq.* ("IAA"), under which Dealers sought certification of a nationwide class – Dealers' damages may be offset to avoid duplicate recoveries, *see* ECF No. 1457 at App'x G, p. 4, thus creating the risk that recoveries by *others* (including the certified vendor class and the previously-settling Cox Automotive vendors, *see* ECF No. 723) would reduce any recovery by the Dealers. CDK also argued that, in various states (including Illinois), Dealers' damages must be reduced to the extent that they passed on the alleged overcharges to their customers. *See* ECF No. 1457 at 34 ("In some states, an indirect purchaser (*i.e.*, dealers) forfeits damages by passing its overcharge downstream (*i.e.*, to automobile purchasers)."); *id.* at App'x. E, p. 4 (arguing that Illinois and various other states allow pass-on defense).

3. Class Certification

Although Dealership Counsel secured *nationwide* settlements for the Class, whether they would obtain *any* class certification absent settlement presented additional risk that persisted throughout the litigation. That risk also supports the requested fee. *See Linnear*, 2019 WL 13072750, at *3 (Pallmeyer, J.) (awarding fees: "Plaintiff's Counsel also faced significant legal hurdles in establishing certification ….").

For example, in its motion to dismiss, Reynolds argued that pursuant to its DMS agreement, Reynolds' dealers' claims must be arbitrated – and then on an individual (*i.e.*, non-class) basis. *See* ECF No. 256 at 6-19. In its motion to dismiss, CDK argued that, because of the Reynolds agreement with dealers, their claims against CDK must be arbitrated as well; additionally, the CDK dealers' claims should be stayed. *See* ECF No. 265 at 8-10. Dealership Counsel opposed the motions, *see* ECF No. 357, and the Court, in its January 2019 decision (issued after the Reynolds settlement was reached), rejected CDK's arguments (and otherwise largely denied its motion to dismiss). *See* ECF No. 507-1. Thereafter, in opposing Dealers' class certification motion, CDK urged that "many dealers" signed

class action waivers (*see* ECF No. 1457 at 23); thus, "individualized questions regarding putative class members would predominate …." *Id.* at 24. Each of Defendants' arguments presented substantial risks. *See Kaufman v. Am. Express Travel Related Servs. Co.*, 877 F.3d 276, 286 (7th Cir. 2017) (district court did not abuse discretion "in concluding that the pending appeal concerning the arbitration provision is a significant potential bar to the class's success"); *In re TikTok*, 617 F. Supp. 3d at 935 ("significant litigation risks" included arbitration clauses and class action waivers); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 480 (S.D.N.Y. 2013) (awarding 33.3% fee, citing, *inter alia*, risk of class action waivers).

Moreover, because the Court ruled that Dealers' damages were limited to "indirect" damages that are not recoverable under federal law (*see* ECF No. 1381 at 67), any damages could be recovered only under the laws of those states that permit indirect purchaser claims. Dealership Counsel developed the novel argument that, based on the factual record in this case, certification of a *nationwide* indirect purchaser class of dealers was warranted under the IAA. *See* ECF No. 1425 at 12-15; ECF No. 1478 at 17-19. CDK vigorously opposed the argument (*see* ECF No. 1457 at 34), and whether Dealership Counsel's argument would prevail was far from certain.[11]

CDK also filed a *Daubert* motion to exclude the classwide damages model proffered by Dealers' economist, Dr. Michael Williams. ECF No. 1458; *see* ECF No. 1459-1. The motion was *sub judice* when the CDK settlement was reached.[12] If granted, the motion could have resulted in the denial of class certification, leaving Dealers with no recovery from CDK. *See In re Lithium Ion Batteries Antitrust*

[11] CDK also argued that the IAA (and other state statutes) bar class certification. Although Dealership Counsel successfully opposed the argument at summary judgment, *see* ECF No. 1381 at 90-92 (applying *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 559 U.S. 393 (2010)), the issue remains disputed. *See Biddle v. Walt Disney Co.*, 2024 WL 3171860, at *16 (N.D. Cal. June 25, 2024) (applying *Shady Grove*, and ruling that IAA's class action bar trumps Rule 23).

[12] Dr. Williams was also challenged in an earlier *Daubert* motion by CDK. *See* ECF No. 1321 at 1, 29-48.

Litig., 2018 WL 1156797, at *5 (N.D. Cal. Mar. 5, 2018) (expert's flawed pass-on model precluded class certification).

Finally, CDK argued that, in July 2019 – *i.e.*, *after* the litigation began – it "started offering fee waivers to its Dealers." ECF No. 1520, July 2, 2024 Hearing Tr. at 24; *see also* ECF No. 1457 at 7-8. This development underscored the *increasing* risk that confronted Dealership Counsel during the case.

4. Defendants' Highly Qualified Counsel

The requested fee is also supported by the fact that, for seven years, Dealership Counsel stood toe-to-toe against Defendants represented by nationally acclaimed law firms.[13] *See In re TikTok*, 617 F. Supp. 3d at 942 ("[T]he quality of representation Defendants had for their defense supports the fee request as well …. That Class Counsel were able to secure a favorable settlement in the face of this opposition weighs in favor of a one-third fee."); *In re E. Palestine Train Derailment*, 2024 WL 4370003, at *12 (N.D. Ohio Sept. 27, 2024).

* * *

As shown above, Dealership Counsel's tenacity and perseverance, and the remarkable results they achieved in the face of substantial litigation risks, confirm the reasonableness of the requested fee.[14]

IV. THE COURT SHOULD REIMBURSE DEALERSHIP COUNSEL'S EXPENSES

In addition to awarding attorneys' fees, the Court should reimburse Dealership Counsel $4,192,133.86 for their expenses. As described above, that amount, plus the amount previously awarded in connection with the Reynolds Settlement, totals $7,192,133.86.

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[13] Kirkland & Ellis and Mayer Brown represented CDK, and Gibbs & Bruns and Sheppard Mullin represented Reynolds.

[14] The fee award should include 33% of the interest earned on the settlement funds. *See Corzo*, 2024 WL 3506498, at *7; *Macovski*, 2022 WL 17256417, at *1; *Pierrelouis*, 2022 WL 7950362, at *1.

"In addition to fees, '[i]t is well established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses.'" *Chambers*, 2021 WL 1948452, at *2 (citation omitted); *see also McDaniel*, 2011 WL 13257336, at *4 (Pallmeyer, J.) (expense reimbursement "in most cases are the subject of an additional award.") (citation omitted), *Corzo*, 2024 WL 3506498, at *7 (N.D. Ill. July 20, 2024) (granting one-third fee, plus expenses of over $3.5 million, "including costs for computerized legal research, creation and maintenance of an electronic database, substantial expert and consultant costs, travel and lodging expenses, copying, court reporters, transcripts, filing fees, and mediation expenses. These expenses are typical considering the complexity of the action and the length of the litigation."); *CS Wang*, Case No. 1:16-cv-11223, ECF No. 654 at 8 (Pallmeyer, C.J.) (Exh. 1); *City of Greenville v. Syngenta Corp Protection, Inc.*, 904 F. Supp. 2d 902, 910-11 (S.D. Ill. 2012) (awarding $8.57 million for, *inter alia*, expert and consulting fees, depositions, travel, and photocopying).

"[M]odern antitrust litigation is expensive," *Ass'n of Am. Physicians & Surgeons, Inc. v. Am. Bd. of Med. Specialties*, 15 F.4th 831, 835 (7th Cir. 2021), and the expenses here were reasonable and necessarily incurred. Wedgworth Fee Decl. ¶¶ 12, 15, 25, 26. Most of the total expenses (approximately 74%) were for experts in economics, cybersecurity, and the automotive industry. *Id.* ¶ 26. *See Glaberson v. Comcast Corp.*, 2015 WL 5582251, at *16 (E.D. Pa. Sept. 22, 2015) (awarding $8.57 million in expenses, "[t]he largest component" of which was $6.7 million for economic expert fees). Moreover, Dealership Counsel incurred over $4 million in expenses "at the risk of not recovering them if the lawsuit was unsuccessful and therefore had incentive to ensure money was spent wisely and not frivolously." *Chambers*, 2021 WL 1948452, at *2.

V. THE COURT SHOULD GRANT CLASS REPRESENTATIVE AWARDS

Finally, the Court should grant $10,000 service awards to each of the 23 class representatives. *See* ECF No. 1528 at 15-16 (identifying the representatives). "The Seventh Circuit has endorsed

incentive awards as a means of inducing an individual to participate in expanded litigation." *McDaniel*, 2011 WL 13257336, at *5 (citing cases). In this Circuit, "class representative service awards of $10,000 to $25,000 or more are not uncommon." *Chambers*, 2021 WL 1948452, at *3 (citing cases). *See, e.g.*, *Roberson*, 2024 WL 4785359 (awarding $10,000 service awards); *Corzo*, 2024 WL 3506498, at *8 (awarding $20,000 to each of eight class representatives); *Allen*, 2015 WL 14074780, at *3 ($25,000 award); *In re Potash Antitrust Litig.*, 2013 WL 12470850, at *2 (awarding $15,000 to each of six representatives).

The class representatives substantially contributed to the litigation's successful outcome. In addition to consulting with Dealership Counsel, each of them produced documents and answered interrogatories. Wedgworth Fee Decl. ¶¶ 28, 30. Sixteen of them also prepared for and sat for depositions. *Id.* The services of multiple representatives were important, as the Complaint asserts claims under the laws of twenty-six states, and CDK argued that representatives for *each* state are necessary. *See* ECF No. 1457 at 36.

The class representatives also undertook substantial risks. Most of them opposed their *current* DMS provider, *see* Wedgworth Fee Decl. ¶ 29, thus risking retaliation by a supplier on whom they relied for critical business operations. *See In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 751 (E.D. Pa. 2013) (granting service awards: "These class representatives launched this litigation despite the risk of retaliation inherent in suing a supplier."); *Scott v. Dart*, 99 F.4th 1076, 1083 (7th Cir. 2024) ("[I]n certain contexts, such as employment discrimination actions, incentive awards may also recognize the added risks of retaliation or stigmatization that named plaintiffs assume in participating in a lawsuit against their current or former employers."), *petition for cert. filed sub nom. Dart v. Scott*, No. 24-464 (U.S. Oct. 24, 2024); *McDaniel*, 2011 WL 13257336, at *5 (Pallmeyer, J.) (granting service awards, noting "substantial risks" to class representatives).

Moreover, CDK filed counterclaims against various Dealers, including claims for breach of contract, and violations of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, and the Digital Millennium Copyright Act, 17 U.S.C. § 1201 ("DMCA"). *See* ECF No. 523 at 240-82. Although Dealership Counsel obtained dismissal of the counterclaims (*see* ECF No. 749 at 24 (motion to dismiss ruling), ECF No. 1832 (summary judgment ruling)), the DMCA damages sought by CDK – including *over $24.4 million* against a group of eight dealers (*see* ECF No. 1382 at 17) – highlight the enormous risks undertaken by the class representatives. These risks further support the requested awards. *See Zilhaver v. UnitedHealth Group, Inc.*, 646 F. Supp. 2d 1075, 1085 (D. Minn. 2009) (awarding $15,000 to plaintiffs who "bore the risks of counterclaim or collateral attack").

VI. CONCLUSION

For the foregoing reasons, the Court should grant Dealership Counsel's motion for attorneys' fees, reimbursement of expenses, and class representative service awards.

Dated: November 27, 2024

Respectfully submitted,

/s/ Peggy J. Wedgworth

Peggy J. Wedgworth (*pro hac vice*)
Elizabeth McKenna (*pro hac vice*)
Robert A. Wallner (*pro hac vice*)
John Hughes (*pro hac vice*)*
Michael Acciavatti (*pro hac vice*)**
MILBERG COLEMAN BRYSON PHILLIPS GROSSMAN, PLLC
405 East 50th Street
New York, NY 10022
(212) 594-5300
pwedgworth@milberg.com
emckenna@milberg.com
rwallner@milberg.com
jhughes@milberg.com
macciavatti@milberg.com
* *Admitted in Michigan only*
** *Admitted in Pennsylvania only*

Dealership Class Lead Counsel

Leonard A. Bellavia (*pro hac vice*)
BELLAVIA BLATT, PC
200 Old Country Road, Suite 400
Mineola, New York 11501
(516) 873-3000
lbellavia@dealerlaw.com

Dealership Class Plaintiffs' Steering Committee

Daniel C. Hedlund (*pro hac vice*)
Michelle J. Looby (*pro hac vice*)
GUSTAFSON GLUEK PLLC
Canadian Pacific Plaza
120 South Sixth Street, Suite 2600
Minneapolis, Minnesota 55402
(612) 333-8844
dhedlund@gustafsongluek.com
mlooby@gustafsongluek.com

Dealership Class Plaintiffs' Steering Committee

James E. Barz
Frank Richter
ROBBINS GELLER RUDMAN & DOWD LLP
200 South Wacker Drive, 31st Floor
Chicago, Illinois 60606
(312) 674-4674
jbarz@rgrdlaw.com
frichter@rgrdlaw.com

Dealership Class Plaintiffs' Steering Committee

Robert A. Clifford
CLIFFORD LAW OFFICES, P.C.
120 N. LaSalle Street, 31st Floor
Chicago, Illinois 60602
(312) 899-9090
RAC@cliffordlaw.com

MDL Liaison Counsel

CERTIFICATE OF SERVICE

I, Peggy J. Wedgworth, an attorney, hereby certify that on November 27, 2024, I caused a true and correct copy of the **DEALERSHIP CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND CLASS REPRESENTATIVE SERVICE AWARDS** to be filed and served electronically via the Court's CM/ECF system. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF system.

/s/ Peggy J. Wedgworth
Peggy J. Wedgworth

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DISTRICT

CS WANG & ASSOCIATE, *et al.*,	)	
	)	
Plaintiffs,	)	**Case No. 1:16-cv-11223**
	)	
v.	)	**Chief Judge Rebecca R. Pallmeyer**
	)	
WELLS FARGO BANK, N.A., *et al.*,	)	
	)	
Defendants.	)	
	)	

ORDER GRANTING FINAL APPROVAL OF
CLASS ACTION SETTLEMENT

Plaintiffs CS Wang & Associate and Jay Schmidt Insurance Agency, Inc. (collectively, "Plaintiffs") and Defendants Wells Fargo Bank, N.A. and First Data Merchant Services, LLC (collectively, the "Wells Fargo Defendants"), having appeared before the Court for a hearing on final approval of the class action settlement in the above-captioned matter with respect to the claims asserted against the Wells Fargo Defendants, the Court having reviewed the Motion for Final Approval of Class Action Settlement (the "Final Approval Motion") and Plaintiffs' Petition for Award of Attorneys' Fees, Costs, and Incentive Awards, as well as the parties' presentation at the hearing on final approval and otherwise being fully informed in the premises:

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The Motion for Final Approval of Class Action Settlement (Dkt. 648) is **GRANTED**. The settlement of this matter as it pertains to claims asserted against the Wells Fargo Defendants is granted final approval.

2. The Final Approval Motion attaches and incorporates the Settlement Agreement that, together with the exhibits thereto, sets forth the terms and conditions for a settlement of

claims, on a class-wide basis, against the Wells Fargo Defendants. Capitalized terms and phrases that are not defined in this Order shall have the same meanings ascribed to them in the Settlement Agreement.

3. On August 16, 2021, this Court preliminarily approved the Settlement Agreement, and certified, for settlement purposes, the Settlement Class consisting of:

> All business that received a telephone call from a call center operated by International Payment Services, LLC or one of its affiliates between March 7, 2011 through May 7, 2014, while the call recipient was physically present in California, and who did not sign a contract for merchant processing services with First Data Merchant Services, LLC.[1]

(Dkt. No. 604)

4. This Court has jurisdiction over Plaintiffs, the Wells Fargo Defendants, and all members of the Settlement Class. The Court has jurisdiction over the claims and the subject matter of this Lawsuit pursuant to 28 U.S.C. § 1332(d).

5. The Court finds that Plaintiffs and the Wells Fargo Defendants and their counsel are familiar with the claims being settled and the defenses asserted and have had the opportunity to conduct, and have conducted, extensive investigation and discovery relating to the claims alleged in the Lawsuit, including propounding and responding to written discovery, inspection and review of documents, and conducting and defending depositions.

6. The Court finds that Plaintiffs and the Wells Fargo Defendants and their counsel have investigated the facts and have analyzed the relevant legal issues with regard to the claims

[1] Excluded from the Settlement Class are (i) the Judge and the Magistrate Judge presiding over this Lawsuit and members of their immediate families, and (ii) the Wells Fargo Defendants and their employees, subsidiaries, parent companies, successors, and predecessors. Also excluded from the Settlement Class are those businesses that would otherwise be members of the Settlement Class but who validly and timely requested exclusion in accordance with the Settlement Agreement and the requirements set by the Court.

and defenses asserted in the Lawsuit. The Court further finds that Plaintiffs and the Wells Fargo Defendants have each looked at the uncertainties of trial and the benefits to be obtained under the proposed settlement, and have considered the costs, risks, and delays associated with the continued prosecution of this complex litigation, and the likely appeals of any rulings in favor of either party.

7. The Court finds that the settlement was the product of extensive arm's length negotiations conducted in good faith, including a mediation on February 26, 2021, before the Honorable Layn R. Phillips (ret.). The Court finds no evidence of collusion amongst the Plaintiffs and the Wells Fargo Defendants in reaching the settlement. The settlement is supported by the Plaintiffs and Settlement Class Counsel. The Plaintiffs and Settlement Class Counsel adequately represented the Settlement Class for purposes of entering into and implementing the Settlement Agreement.

8. The notice sent to the Settlement Class via direct first class mail at each Settlement Class Member's last known address, publication of the Settlement Website, and internet Publication Notice as set forth in the Settlement Agreement adequately informed Settlement Class Members of the nature of the action, the terms of the Settlement Agreement, their right to request exclusion from the settlement, and their opportunity to file written objections and to appear and be heard at the final approval hearing regarding approval of the Settlement Agreement. The Court finds that the method and form of notice to the class was the best notice practicable under the circumstances and satisfied the requirements of Rule 23(c)(2)(B) and Rule 23(e)(1) and due process.

9. The Court finds that the appropriate government officials were properly and timely notified of the Settlement Agreement, pursuant to the Class Action Fairness Act of 2005

("CAFA"), 28 U.S.C. § 1715. The Court has reviewed the substance of this notice and finds that it complied with all applicable requirements of CAFA. As required by CAFA, more than ninety (90) days have elapsed between the date notice was provided pursuant to CAFA and the final approval hearing.

10. The Court hereby approves the proposed Settlement Agreement and finds that the settlement is fair, reasonable, and adequate. "To evaluate the fairness of a settlement, a court must consider 'the strength of plaintiffs' case compared to the amount of defendants' settlement offer, an assessment of the likely complexity, length and expense of the litigation, an evaluation of the amount of opposition to settlement among affected parties, the opinion of competent counsel, and the stage of the proceedings and the amount of discovery completed at the time of settlement.'" *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.,* 789 F.Supp.2d 935, 958 (N.D. Ill. 2011) (quoting *Synfuel Techs., Inc. v. DHL Express (USA), Inc.,* 463 F.3d 646, 653 (7th Cir. 2006)). Each of these five factors favors approval of the settlement reached here and supports the Court's finding that the settlement is fair, reasonable, and adequate, and is in the best interests of the Settlement Class Members:

a. The strength of Plaintiffs' case compared to the terms of the proposed settlement: The Wells Fargo Defendants vigorously disputed the merits of Plaintiffs' claims on a number of grounds. Among other things, the Wells Fargo Defendants have maintained that they had no principal-agent relationship with International Payment Services, LLC ("IPS") and, even if there were such a relationship, that IPS acted outside the scope of its authority when it recorded appointment-setting phone calls. Whether these complex issues would have been decided at summary judgment or at trial, they were far from certain for either side. The Wells Fargo Defendants

have also raised a number of other defenses to the claims asserted against them, the resolution of which also remain uncertain. The amount of the settlement, on the other hand, provides a substantial recovery and is larger than any prior settlement of a class action lawsuit brought under the California Invasion of Privacy Act ("CIPA"). For these reasons, the consideration provided under the Settlement Agreement constitutes fair value given in exchange for the Released Claims. The first factor, therefore, clearly weighs in favor of final approval of the settlement.

b. The likely complexity, length, and expense of continued litigation: Trying this class action lawsuit to conclusion would have been a complex, lengthy, and expensive endeavor. Moreover, appeals almost certainly would have followed any judgment. The second factor, therefore, clearly favors final approval of the settlement.

c. The amount of opposition to settlement among effected parties: There was no opposition to the settlement amongst Settlement Class Members. Of the approximately 193,000 potential class members, none objected to the settlement. Nearly 24,000 class members, on the other hand, submitted a claim to participate in the settlement. The class members' reaction to the settlement, and the lack of opposition thereto, favors final approval.

d. The settlement is supported by the opinion of competent counsel: In connection with the fourth factor the Court has reviewed the declaration of Myron M. Cherry, a lawyer with over 50 years of experience in complex and class action litigation. *See Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 586-87 (N.D. Ill. 2011) (concluding that class counsel's opinion that settlement was fair supported

approval of the proposed settlement where counsel had extensive experience in class actions and complex litigation); *Vought v. Bank of Am., N.A.*, 901 F. Supp. 2d 1071, 1096 (C.D. Ill. 2012) (considering declarations of class counsel expressing their opinions that the proposed settlement was fair, reasonable and adequate). The Court finds that Mr. Cherry's declaration supports the Court's conclusion that the proposed settlement is fair, reasonable, and adequate, and provides substantial and meaningful relief to the Settlement Class.

e. The stage of the proceedings and the amount of discovery completed at the time of settlement: The stage of the proceedings and amount of discovery completed at the time of the settlement clearly weigh in favor of final approval. The case settled only after the parties engaged in substantial discovery and litigated and obtained rulings from the Court on several substantive and potentially dispositive issues in the case. The docket alone has over 600 entries thus far. The Court ruled on the Wells Fargo Defendants' motion to dismiss and motion for judgment on the pleadings. The parties also fully and extensively briefed Plaintiffs' motion for class certification. Due to the extensive investigation and discovery that occurred, as well as receiving a number of substantive rulings from the Court, the parties were in position to fully assess the strengths and weaknesses of the claims and defenses in negotiating this settlement. Accordingly, this factor favors approval of the settlement as well.

11. Plaintiffs and Settlement Class Counsel have acknowledged and agreed that, based upon the claims asserted and discovery conducted in this matter, the Wells Fargo Defendants could not have any liability for any call at issue in the Lawsuit placed after May 7,

2014. The Court finds that the Lawsuit does not assert any claims against the Wells Fargo Defendants for any call placed on or after May 8, 2014.

12. The Court directs Plaintiffs and the Wells Fargo Defendants to perform their duties set forth in the Settlement Agreement, including, but not limited to, causing the Settlement Administrator to issue settlement checks to Settlement Class Members who submitted valid and timely claims. The Settlement Class Members and the Wells Fargo Defendants are bound by the terms and conditions of the Settlement Agreement and this Order.

13. Plaintiffs' Petition for Award of Attorneys' Fees, Costs, and Incentive Awards and their motion to supplement that Petition (Dkt. 622 and Dkt. 649) are **GRANTED** as follows. The Court finds the requested attorneys' fees are fair and reasonable considering the value of the settlement, the benefits conferred on the class, the risks undertaken by class counsel, class counsel's knowledge and experience, and the normal rate of compensation class counsel likely would have received had they handled a similar suit on a contingent fee basis for a paying client. In common fund cases, "courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001). "[A] typical contingency agreement in this circuit might range from 33% to 40% of recovery." *Leung v. XPO Logistics, Inc.*, 326 F.R.D. 185, 201–02 (N.D. Ill. 2018) (citing cases). Here, class counsel seeks an award of attorneys' fees in an amount of one-third of the Settlement Fund after deducting incentive awards and settlement administration costs. This request is consistent with the market rate for awarding attorneys' fees in class cases in this Circuit. *Id.*; *see also Young v. Cty. of Cook*, No. 06 C 552, 2017 WL 4164238, at *6 (N.D. Ill. Sept. 20, 2017) ("[A] 33% contingent fee of the total recovery is on the low end of what is typically negotiated *ex ante* by plaintiffs' firms

taking on large, complex cases….") (awarding attorneys' fees in the amount of one-third of the $32.5 million fund); *Standard Iron Works v. ArcelorMittal*, No. 08 C 5214, 2014 WL 7781572, at *1 (N.D. Ill. Oct. 22, 2014) ("The Court finds that a 33% fee comports with the prevailing market rate for legal services of similar quality in similar cases.") (awarding attorneys' fees in the amount of 33% of $163.9 million settlement fund); *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, 97-cv-7694, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) ("A customary contingency fee would range from 33 1/3% to 40% of the amount recovered."); *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2018 WL 6606079 (S.D. Ill. Dec. 16, 2018) (awarding attorneys' fees in the amount of one-third of the $250 million common fund); *Will v. Gen. Dynamics Corp.*, 06-cv-698, 2010 WL 4818174, at *2 (S.D. Ill. Nov. 22, 2010) ("Where the market for legal services in a class action is only for contingency fee agreements … 'the normal rate of compensation in the market' is '33.33% of the common fund recovered.'"). The Court, therefore, approves attorneys' fees to class counsel in the amount of $9,195,636, which shall be paid from the Settlement Fund pursuant to the terms of the Settlement Agreement.

14. Class counsel also seeks reimbursement of costs in the amount of $83,191.45, the most significant amount of which was for the electronic hosting of the Wells Fargo Defendants' document production, deposition transcripts, legal research costs, and copying costs. All these costs were necessary to properly prosecute this action, manage and review the voluminous document production, and to respond to numerous dispositive motions. The Court finds that the costs incurred by class counsel were reasonable and necessary. The Court, therefore, approves costs to class counsel in the amount of $83,191.45, which shall be paid from the Settlement Fund pursuant to the terms of the Settlement Agreement.

15. The Court finds that the requested incentive awards of $5,000 each to Plaintiffs CS Wang & Associate and Jay Schmidt Insurance Agency, Inc. are fair and reasonable and are approved, which amounts shall be paid from the Settlement Fund pursuant to the terms of the Settlement Agreement.

16. The Court finds that the businesses identified in Exhibit 1 attached hereto validly and timely requested exclusion from the Settlement Class in accordance with the Settlement Agreement and the requirements set by the Court and, therefore, are not part of the Settlement Class and are not bound by the Settlement Agreement or this Order.

17. The Court hereby dismisses all claims against the Wells Fargo Defendants released in the Settlement Agreement with prejudice and without awarding costs to any of the Plaintiffs, the Wells Fargo Defendants, or the Settlement Class Members (each a "Settling Party," and collectively, the "Settling Parties") as against any other Settling Party, except as provided above and in the Settlement Agreement. Other than as provided in the Settlement Agreement and this Order, the Settling Parties shall bear their own costs and attorneys' fees.

18. The Court orders that, upon entry of this Order, all Plaintiffs and Settlement Class Members shall have released and discharged the Released Parties from the Released Claims, as provided in Paragraph 21 of the Settlement Agreement.

19. All Settlement Class Members are hereby permanently barred and enjoined from filing, commencing, prosecuting, intervening in, or participating in any capacity (as class members or otherwise) in any lawsuit or other action in any jurisdiction asserting claims based on the Released Claims, or seeking an award of fees or costs of any kind or nature whatsoever and pursuant to any authority or theory whatsoever, relating to or arising from the Lawsuit as it relates to the Released Claims and/or as a result of or in addition to those provided by the

Settlement Agreement as it relates to the Released Claims.

20. The terms of the Settlement Agreement and this Order shall have maximum res judicata, collateral estoppel and all other preclusive effect in any and all claims for relief, causes of action, suits, petitions, demands in law or equity, or any allegations of liability, damages, debts, contracts, agreements, obligations, promises, attorneys' fees, costs, interest or expenses that were or could have been asserted in the Lawsuit as it relates to the Released Claims or that are covered by the releases contained in the Settlement Agreement.

21. For the avoidance of doubt, this Order does not bar or enjoin claims, nor does it operate as res judicata, collateral estoppel, or as having any other preclusive effect on claims, based on telephone calls other than Eligible Calls, by any Settlement Class Members against Fifth Third Bank, N.A., Vantiv, Inc., National Processing Company, Fidelity National Information Services, Inc., Worldpay, Inc., Ironwood Financial, LLC, John Lewis, Dewitt Lovelace, International Payment Services, LLC, Brian Bentley, Adam Bentley, or Andrew Bentley.

22. The Plaintiffs and the Wells Fargo Defendants may, without further approval from the Court, agree to and adopt such amendments or modifications of the Settlement Agreement and its implementing documents (including all exhibits) that (i) shall be consistent in all material respects with this Final Judgment, and (ii) do not limit the rights of Settlement Class Members.

23. The Court grants final approval of the settlement in all respects. The claims in this action asserted against the Wells Fargo Defendants are dismissed on the merits and with prejudice.

24. This Order is a final and appealable judgment as to the Wells Fargo Defendants and the claims asserted against them, and the Court expressly determines pursuant to Federal Rule of Civil Procedure 54(b) that there is no just reason for delay of a final and appealable judgment with respect to all claims asserted against these defendants.

25. All persons or entities who have not made their objections to the Settlement Agreement in the manner provided in the Settlement Agreement are deemed to have waived any objections by appeal, collateral attack, or otherwise.

26. Without affecting the finality of this Final Judgment for purposes of appeal, the Court retains jurisdiction as to all matter related to the administration, consummation, enforcement, and interpretation of the Settlement Agreement and this Final Judgment, and for any other necessary purpose including the distribution of any remaining funds as a *cy pres* award as provided in the Settlement Agreement.

27. This Order, the Settlement Agreement, the settlement that it reflects, and all acts, statements, documents, or proceedings relating to the settlement are not, and shall not be construed as or used as an admission by or against the Wells Fargo Defendants of any fault, wrongdoing, or liability on the part of the Wells Fargo Defendants, or of the validity or certifiability for litigation of any claim or the existence of any amount of damages.

28. In the event that the Settlement Agreement does not become effective in accordance with its terms, or the Final Settlement Date does not occur, then this Order shall be rendered null and void to the extent provided by and in accordance with the Settlement Agreement and shall be vacated.

29. The Clerk is directed to enter final judgment consistent with this Order.

Dated: December 2, 2021

Hon. Rebecca R. Pallmeyer
United States District Court Judge

Exhibit 1

(Businesses that validly and timely opted out of the Settlement Class)

1) AAA Mobile Blind and Window Washing
2) Advantage Products, Inc.
3) American Postal Workers Union
4) Art on the Rock
5) Blair Aquatics Swim School
6) Campus Auto Care
7) Close Construction
8) Contractor Coatings, Inc.
9) Cruise One
10) Daryl Fogg Tax & Accounting, Inc.
11) DATAdvantage Group, Inc.
12) Evalueserve, Inc.
13) Evelyn's Nursery
14) Gantry
15) Gill Reprographics, Inc.
16) Ginny Powell
17) G.I. Trucking Company
18) Hearing & Speech Services
19) Mike Perry Photography
20) Petro-Lock, Inc.
21) Poetry & Prose
22) Poway-Bernardo Mortuary
23) Rae Neumen Private Gallery
24) Rodger L. Smith Construction Company
25) SAS Shoes
26) Teamsters Local No. 87
27) Walnut Creek Ctr

TAB 57A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PRECISION ASSOCIATES, INC., *et al.,* Plaintiffs, v. PANALPINA WORLD TRANSPORT (HOLDING) LTD., *et al.* Defendants.	CASE NO. 08-CV-00042 (BMC)(PK)

AMENDED [PROPOSED] ORDER GRANTING CO-LEAD COUNSEL'S PETITION FOR A THIRD AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

This Court, having considered Co-Lead Counsel's Petition for a Third Interim Award of Attorneys' Fees and Reimbursement of Expenses (the "Motion") and memorandum in support thereof, after a duly noticed hearing, hereby finds that:

1. The Motion seeks (1) a total award of attorneys' fees of $29,443,654.19, or 25% of the Current Available Settlement Fund, to be paid now from existing cash in the Settlement Fund; (2) an order awarding $1,757,081.72 in unreimbursed costs and expenses incurred to date during the pendency of this action; and (3) a maximum future-looking award of $22,500,000.00, or 25% of the Future Available Settlement Fund up to a cap of $90,000,000.00 in future deposits, to be paid upon each such contribution to the Settlement Fund.

2. The amount of attorneys' fees requested is fair and reasonable under the percentage-of-the-fund method, which is confirmed by a lodestar "cross-check." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). In this petition and prior petitions Class Counsel have filed with the Court — and published on the website established for this case,

www.freightforwardcase.com, for review by class members — detailed lodestar information and a detailed description of work performed by Class Counsel during each relevant time period.

3. The attorneys' fees requested were entirely contingent upon a successful outcome for the Class. The risk undertaken by Class Counsel was significant, especially considering that Co-Lead Counsel developed the case on their own before any government complaints, with all the risks of dismissal of Plaintiffs' complaint under *Twombly*,[1] complex foreign discovery, summary judgment, class certification, trial and collecting on judgments against foreign defendants, with complex legal theories advanced in the case, and vigorous efforts by experienced defense counsel to defeat this litigation throughout in motions to dismiss Plaintiffs' complaints, in discovery, and otherwise.

4. In addition to risking time and effort, Class Counsel have paid out-of-pocket substantial costs in connection with the prosecution of the litigation for the benefit of the Class with no guarantee of reimbursement.

5. An award of 25% of the Current Available Settlement Fund and 25% of the Future Available Settlement Fund is reasonable and warranted for the reasons set forth in the Memorandum In Support Of Co-Lead Counsel's Petition For A Third Award Of Attorneys' Fees And Reimbursement Of Expenses (the "Memorandum"), including, but not limited to, the following: the outstanding result obtained for the Class; the diligent investigation and prosecution of the case by Class Counsel, including voluminous briefing, discovery, extensive fact interviews, and substantial research into the freight forwarding industry; and the substantial risks faced throughout the litigation, which existed from the outset.

[1] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

6. Therefore, upon consideration of the Motion and accompanying Memorandum, and based upon all matters of record in this action, the Court hereby finds that: (1) the requested attorneys' fees are warranted and just; and (2) the requested expenses were necessary, reasonable, and proper.

Having considered Co-Lead Counsel's Petition for a Third Interim Payment of Attorneys' Fees and Reimbursement of Expenses,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Class Counsel are awarded attorneys' fees as follows:

   a. Class Counsel are awarded $29,443,654.19, to be paid now from funds currently paid into the Settlement Fund; and

   b. Class Counsel are awarded 25% of all future contributions made to the Settlement Fund made by Settling Defendants and not subject to a previous fee award, up to a maximum of $90,000,000.00 in future contributions, for a maximum future-looking award of attorneys' fees of $22,500,000.00, to be paid upon each such contribution to the Settlement Fund from each such contribution;

2. Except as indicated otherwise in Paragraph 1.b. above, the awarded attorneys' fees shall be paid pro rata from the Settlement Funds.

3. Class Counsel are awarded $1,757,081.72 as remuneration for their unreimbursed costs and expenses incurred during the course of the litigation. The award of reimbursement of expenses shall be paid pro rata from the Settlement Funds.

4. The awarded attorneys' fees and reimbursed expenses shall be equitably distributed by Co-Lead Counsel in a good-faith manner that in Co-Lead Counsel's

judgment reflects Class Counsel's contribution to the institution, prosecution, and resolution of the litigation.

5. The Court finding no just reason for delay, this Order shall be entered as of this date pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

This 4th day of November, 2016.

Digitally signed by Brian M. Cogan

HONORABLE BRIAN M. COGAN
UNITED STATES DISTRICT JUDGE

TAB 57B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PRECISION ASSOCIATES, INC., et al., on behalf of themselves and all others similarly situated, Plaintiffs, *vs.* PANALPINA WORLD TRANSPORT (HOLDING) LTD., et al., Defendants.	Case No.: 08-CV-00042 (BMC) (PK)

MEMORANDUM IN SUPPORT OF
CO-LEAD COUNSEL'S PETITION FOR A THIRD
AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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I. INTRODUCTION

Plaintiffs' Co-Lead Counsel and other Plaintiffs' Counsel (collectively "Class Counsel") respectfully move the Court for a third award of attorneys' fees and reimbursement of litigation expenses. Since the last time the Court granted an interim fee, *see* ECF No. 1330 (filed November 10, 2015), Settling Defendants have paid or soon will pay an additional $117,774,616.77 to the Class, from which no attorneys' fees or litigation expenses have been awarded. These latest payments bring the settlement totals in this case to over $406 million. Class Counsel now respectfully request the Court to award from that additional amount, referred to as the Current Available Settlement Fund: (1) fees of 25%, for a fee award of $29,443,654.19; and (2) reimbursement of litigation expenses totaling $1,762,803.75.

Many Settling Defendants also have agreed to make future settlement payments from proceeds they will recover in *In re: Air Cargo Shipping Services Antitrust Litigation*, MDL No. 1775 (E.D.N.Y.) ("*Air Cargo*"), into a "Future Available Settlement Fund." Like all settlement payments to date, these future payments are the direct result of Class Counsel's years-long efforts for the Class. Accordingly, Class Counsel respectfully request a forward-looking fee award of 25% of up to $90 million of that Future Available Settlement Fund, for a maximum future-looking fee award of $22,500,000. If the Future Available Settlement Fund exceeds the $90 million cap, Class Counsel would move the Court for any additional fees.

In the nearly nine years this case has been pending, Class Counsel have worked tirelessly for the Class to litigate these complex international claims. As summarized below and described in detail in the Bruckner Declaration and the Joint Declaration,[1] Class Counsel have settled with

[1] References to the "Bruckner Decl." or "Bruckner Declaration" are to the Declaration Of W. Joseph Bruckner In Support Of Co-Lead Counsel's Petition For A Third Award Of Attorneys' Fees And Reimbursement Of Expenses, dated September 1, 2016 and filed herewith, which summarizes Class Counsel's work on behalf of the Class from August 16, 2015 through July 31,

all 29 Defendant groups named in the Fourth Amended Class Action Complaint, fully resolving all of Plaintiffs' 11 claims. The total settlements of roughly $406.1 million will grow as settling Defendants make additional payments due under their settlement agreements.[2]

Judge Gleeson noted that "[f]rom the outset, the potential for this complex litigation to consume considerable time and resources has been great. Complex legal and factual issues abound." *Precision Assocs., Inc. v. Panalpina World Transport (Holding) Ltd.*, No. 08-cv-42 (JG)(VVP), 2013 WL 4525323, at *7 (E.D.N.Y. Aug. 27, 2013) ("*Precision I*"); *see also Precision Assocs., Inc. v. Panalpina World Transport (Holding) Ltd.*, No. 08-cv-42 (JG)(VVP), 2015 WL 6964973, at *6 (E.D.N.Y. Nov. 10, 2015) ("*Precision II*") (quoting *Precision I*). The Court's observation three years ago remains undoubtedly correct. The Joint Declaration in support of Class Counsel's 2015 fee petition (ECF No. 1282), supplemented here by the Bruckner Declaration, describes in detail the motion practice, discovery, depositions, interviews, appearances, conferences, negotiations, settlements, stipulations, and other work Class Counsel performed for the Class's benefit. Class Counsel's zealous litigation over nearly nine years has resulted in the additional settlement funds from which Class Counsel now seek this award.

It is important to note that this case is not derivative of *Air Cargo*. The two cases are somewhat factually related, since freight forwarders almost always buy air cargo services. As a

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2016. References to the "Joint Decl." or "Joint Declaration" are to the Joint Declaration Of Co-Lead Counsel In Support Of Co-Lead Counsel's Petition For A Second Interim Award of Attorneys' Fees And Reimbursement of Expenses, ECF No. 1282, which summarized Class Counsel's work on behalf of the Class from the inception of the case through August 15, 2015, and which was the subject of Class Counsel's second fee petition, filed approximately one year ago.

[2] The exact timing and amount of any future *Air Cargo* payments to Plaintiffs in this case cannot be determined at this time, and no fees have previously been sought or awarded from them.

result, most of the Defendants in this case are class members and claimants in *Air Cargo*.[3] But the defendants in each case operate in different markets and at different levels in the cargo shipping industry, and the two cases alleged different conspiracies, with different plaintiffs, different class members, different defendants, different surcharges, and different meetings and communications among different key players. *Compare* ECF No. 1310 (operative *Precision* Complaint) *with* Complaint, *In re: Air Cargo Shipping Services Antitrust Litigation*, MDL No. 1775 (E.D.N.Y.) [ECF No. 271]. Like *Air Cargo* and many other cases, this case involved complicated antitrust issues, well-funded defendants, and a plethora of foreign defendants and evidence. But unlike *Air Cargo*, in this case there were no government criminal complaints at the time this civil litigation was filed; there were no guilty pleas to criminal charges until more than two and one-half years after Plaintiffs' case began (whereas the *Air Cargo* plaintiffs were assisted by the amnesty applicant almost from the inception of the case); and there were 11 distinct claims and conspiracies (compare *Air Cargo* alleging a single global conspiracy).

II. FEES AND EXPENSES REQUESTED

A. Prior Fee Awards

On December 27, 2013, the Court ordered a first interim award of attorneys' fees, and awarded Class Counsel 15% of the recoveries they had obtained in the First Round Settlements.[4]

[3] Plaintiffs consistently took the position that the Class in this case was entitled to Defendants' *Air Cargo* proceeds because, they alleged, Defendants agreed to pass on (sometimes after marking up) many external surcharges, including *Air Cargo* surcharges, to Plaintiffs and Class members in this case. Though Defendants denied Plaintiffs' allegations, many Defendants in this case agreed to use *Air Cargo* proceeds to fund settlements with Plaintiffs.

[4] First Round Settlements were reached with Deutsche Bahn AG, Schenker AG, Schenker, Inc., Bax Global Inc., and DB Schenker (collectively "**Schenker**"); EGL, Inc. and EGL Eagle Global Logistics, LP, Inc. (collectively "**EGL**"); Vantec Corporation and Vantec World Transport (USA), Inc. (collectively "**Vantec**"); Expeditors International of Washington, Inc. (**"Expeditors**"); Nishi-Nippon Railroad Co., Ltd. (**"Nishi-Nippon**"); United Aircargo Consolidators, Inc. ("**UAC**"); Kuehne + Nagel International and Kuehne + Nagel, Inc. (collectively "**Kuehne + Nagel**"); Morrison Express Logistics Pte. Ltd (Singapore) and Morrison

See Electronic Order dated Oct. 3, 2013 (awarding fees and expenses); ECF No. 984 (granting motion for reconsideration and increasing first interim fee award to 15%). At the Court's instruction, the first interim award used as a lodestar cross-check only Class Counsel's time incurred directly in obtaining the First Round Settlements, not time incurred in litigating the case overall against all Defendants.

On November 10, 2015, the Court ordered a second interim award of attorneys' fees, and awarded Class Counsel 25% of the total settlement fund available as of August 15, 2015. ECF No. 1330. The then-available funds included: (1) all then-received payments and guaranteed future payments from the Second Round Settlements,[5] *plus* (2) all *Air Cargo* proceeds actually

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Express Corporation (U.S.A.) (collectively "**Morrison Express**"); UTi Worldwide, Inc. ("**UTi**"); and ABX Logistics Worldwide NV/SA ("**ABX**"). The Court entered final approval as to each. ECF Nos. 879-88.

[5] Second Round Settlements were reached with SDV Logistique Internationale ("**SDV**"); Panalpina World Transport (Holding) Ltd. and Panalpina, Inc. (collectively "**Panalpina**"); Geodis S.A. and Geodis Wilson USA, Inc. (collectively "**Geodis**"); Jet Speed Logistics, Ltd. also known as Jet Speed Air Cargo Forwarders (HK), Ltd, Jet Speed Logistics (USA), LLC, and Jet-Speed Air Cargo Forwarders, Inc. (USA) (collectively "**Jet Speed**"); DSV A/S, DSV Solutions Holding A/S, and DSV Air & Sea Ltd. formerly known as DFDS Transport (HK) Ltd. (collectively "**DSV**"); Toll Global Forwarding (USA), Inc., Baltrans Logistics, Inc., and Toll Holdings, Ltd. (collectively "**Toll**"); Agility Holdings, Inc., Agility Logistics Corp., Geologistics Corp., and Geologistics International Management (Bermuda) Limited (collectively "**Agility**"); United Parcel Service, Inc. and UPS Supply Chain Solutions, Inc. (collectively "**UPS**"); Dachser GmbH & Co., KG, doing business as Dachser Intelligent Logistics and Dachser Transport of America, Inc. (collectively "**Dachser**"); Hankyu Hanshin Express Holding Corporation, formerly known as Hankyu Express International Co., Ltd., Hankyu Hanshin Express Co., Ltd.; and Hanshin Air Cargo USA, Inc. (collectively "**Hankyu Hanshin**"); Japan Aircargo Forwarders Association ("**JAFA**"); Kintetsu World Express, Inc. and Kintetsu World Express (U.S.A.), Inc. (collectively "**Kintetsu**"); "K" Line Logistics, Ltd. and "K" Line Logistics (U.S.A.), Inc. (collectively "**'K Line'**"); MOL Logistics (Japan) Co., Ltd. and MOL Logistics (USA) Inc. (collectively "**MOL Logistics**"); Nippon Express Co., Ltd. and Nippon Express USA, Inc. (collectively "**Nippon Express**"); Nissin Corporation and Nissin International Transport U.S.A., Inc. (collectively "**Nissin**"); Yamato Global Logistics Japan Co., Ltd. and Yamato Transport U.S.A. Inc. (collectively "**Yamato**"); Yusen Air & Sea Service Co., Ltd. and Yusen Air & Sea Service (U.S.A.) Inc. (collectively "**Yusen**"), and with Hankyu Hanshin, JAFA, Kintetsu, "K" Line, MOL Logistics, Nippon Express, Nissin, and Yamato, the "**Japanese Defendants**"); and, for the severed Japanese Claims only, Deutsche Post AG, Danzas Corporation (doing business as

received from the First and Second Round Settlements, *minus* (3) certain offsets. *See*, *e.g.*, ECF No. 1281 at 6. Unlike the Court's narrower lodestar approach in the first interim award, in the second interim award the Court considered as a lodestar cross-check all attorneys' fees accrued from the inception of the case through August 15, 2015. The second interim award yielded a deflator. *Precision II*, 2015 WL 6964973, at *7.

B. Fee Request As To Current Available Settlement Fund

1. Third Round Settlements With DHL and Hellmann

The Court has preliminarily approved settlements with DHL and Hellmann, the remaining two Defendants (the "Third Round Settlements").[6] ECF Nos. 1343, 1358. Those Third Round Settlements provide for cash payments of $53,550,000, all of which has been received and deposited in interest-bearing escrow accounts. Bruckner Decl. ¶ 5. Each of the Third Round Settlements includes funds reserved to pay for notice to the Class of these proposed settlements and other related expenses, and requires the settling Defendant to cooperate with Plaintiffs in prosecuting their claims if the Court does not finally approve both settlements. *Id*. The Court has scheduled a fairness hearing on these two settlements for November 4, 2016, the same day that the Court will hear this petition. ECF No. 1367.

2. **Additional Payments Made Under The Prior Rounds of Settlements**

Most of the First and Second Round Settlements (collectively "Prior Round Settlements") require those settling Defendants to pay to the Class some or all proceeds they recover in *Air*

DHL Global Forwarding), DHL Express (USA) Inc., DHL Forwarding Japan K.K., DHL Japan Inc., Exel Global Logistics, Inc., and Air Express International USA, Inc. (collectively "**DHL**"). The Court granted final approval to the Second Round Settlements on November 10, 2016. ECF No. 1330.

[6] Plaintiffs reached Third Round Settlements with Hellmann Worldwide Logistics GmbH & Co. KG, Hellmann Worldwide Logistics Ltd. Hong Kong, and Hellmann Worldwide Logistics, Inc. for all claims against them; and with DHL for the non-severed claims.

Cargo. Thus, in addition to the Prior Round Settlement recoveries on which the Court calculated the first and second interim fee awards, some of those Defendants now also have received a fourth round of *Air Cargo* distributions and have now deposited, or soon will deposit,[7] those funds, totaling $54,224,616.77, into their respective settlement escrow accounts.[8]

3. **Additional Adjustment Following Second Interim Fee Award**[9]

In calculating the second requested fee award, Class Counsel explicitly did not seek fees on a $10 million portion of settlement payments by the Japanese Defendants which was potentially subject to refund under a ratchet-down provision in their settlement agreement. Instead, Class Counsel specifically reserved the right to seek fees on that amount at a future time,

[7] As described more fully in the Bruckner Declaration, DSV has deposited nearly all of its *Air Cargo* Round 4 proceeds into the Settlement Fund, as required under its settlement agreement, and is waiting to receive one re-issued *Air Cargo* Round 4 claim check in the amount of $6,264.43. Bruckner Decl. ¶ 15. When DSV receives that check, it will deposit the proceeds into the Settlement Fund. *Id*. Because the reissuance and deposit of that check is purely an administrative matter, Class Counsel now seek fees on all DSV's Round 4 proceeds. If the Court grants Class Counsel's fee petition, Class Counsel will not deduct any fees from DSV's forthcoming Round 4 payment until that money is actually paid in the account and available for distribution to qualified class member claimants.

[8] As this Court is aware, the *Air Cargo* litigation apparently has now settled in its entirety, and several defendants in that case will make payments over time, into 2018. Thus, class members in that case — including Settling Defendants in this case —likely will receive additional distributions in the future.

[9] Although it does not affect either the Current or Future Available Settlement Funds or the fees sought in this petition, one additional aspect of the Court's second interim award of fees may have an extremely small effect on the lodestar cross-check calculation described below. As described more fully in the Bruckner Declaration, Jet Speed did not timely make its final scheduled payment of $250,000, and it has entered into a payment plan with Plaintiffs to complete its payment obligations by the end of June 2017. The Court's second interim fee award already awarded as attorneys' fees 25% of that final scheduled payment. Class Counsel did not deduct any part of that Court-ordered fee award from that delinquent payment. Furthermore, Class Counsel will not deduct any portion of those previously awarded fees until Jet Speed deposits at least $187,500 — 75% of its final scheduled payment — into the settlement fund and that money is available to qualified claimants. *See generally* Bruckner Decl. ¶¶ 6-7. Class Counsel anticipate that Jet Speed will pay all amounts still due under its settlement agreement. Nevertheless, if Jet Speed does not do so, Class Counsel bear the primary risk of any eventual underpayment, which would reduce the fees paid to Class Counsel and similarly reduce the multiplier resulting from the lodestar cross-check.

after the size of any refund was known. ECF No. 1281 at 5 (reservation), 6 (calculation). Because so few Class members ultimately opted out, the ratchet-down provision was not triggered, ECF No. 1328, and the Current Available Settlement Fund now includes the $10 million previously held back on the basis of that provision.

4. **Calculation Of Current Available Settlement Fund And Requested Fees And Expenses**

At this time, Class Counsel request that the Court order a third fee award of 25% of the Current Available Settlement Fund to be paid now, and calculated as follows:

$54,224,616.77	New *Air Cargo* proceeds from Prior Round Settlements
+ $53,550,000.00	Third Round Settlement proceeds (DHL and Hellmann)
+$10,000,000.00	Previously reserved ratchet-down for Japanese Defendants
= $117,774,616.77	Current Available Settlement Fund
x 25%	Fee award percentage requested by Class Counsel
= $29,443,654.19	Total fee requested from Current Available Settlement Fund

The Court previously ordered two fee awards of 15% and 25%, respectively, for a total of $59,100,217.82. ECF No. 984; ECF No. 1330. If the Court now awards the third fee request of $29,443,654.19 from the Current Available Settlement Fund, then the aggregate fees awarded thus far in this case of $88,543,872.01 will represent a multiplier of 1.23 on Class Counsel's time spent from the inception of the case through July 31, 2016.

Class Counsel also request unreimbursed expenses incurred from August 15, 2015 through July 31, 2016. The unreimbursed expenses for this period total $1,762,803.75 and are set forth in the summaries of deferred billings and unreimbursed expenses (Bruckner Decl. Exs. J and K) and each of the law firm declarations filed therewith.[10]

[10] Class Counsel do not include in this request reimbursement of certain contributions made in late August 2015 by Co-Lead Counsel to the litigation fund established in this case. The Court's

C. Fee Request as to Future Available Settlement Fund.

In addition to the requested fee award from the Current Available Settlement Fund described above, Class Counsel respectfully request a forward-looking fee award of 25% of the Future Available Settlement Fund comprising any future *Air Cargo* payments Settling Defendants make under their settlement agreements, up to a cap of $90 million. The requested future-looking award, plus the fee award sought here from the Current Available Settlement Fund and the two prior fee awards, would result in an aggregate fee award of no more than $111,043,872.01. Even assuming Class Counsel's lodestar was frozen as of July 31, 2016,[11] this would represent a multiplier of no more than 1.54 with respect to the value of Class Counsel's work in this case from its inception, for an overall blended fee award not exceeding 23%.

III. ARGUMENT

A. The Court Should Award Attorneys' Fees Based On A Percentage Of The Common Fund.

The common fund doctrine provides that plaintiffs' attorneys in a class action may petition the court for compensation from any benefits to the class that resulted from counsel's efforts. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). While the Second Circuit permits either the "percentage of the fund" approach or the lodestar approach when calculating fees in a common fund case, *see, e.g.*, *McDaniel v. Cnty. of Schenectady*, 595 F.3d 411, 419 (2d Cir. 2010) (holding that a district court may in its discretion chose either approach), the "trend in this Circuit is toward the percentage method, which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of

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second interim award of litigation expenses already reimbursed Co-Lead Counsel for those late August 2015 contributions. *See* Joint Decl. ¶¶ 332-33 and n.42.

[11] This assumption is extremely conservative and unlikely, given that considerable class administration work will be required of Class Counsel through final distribution, which will not conclude until 2018 at the earliest.

litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (citation omitted); *accord In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 128 (S.D.N.Y. 2009).

The percentage method dispenses with the "cumbersome, enervating, and often surrealistic process of lodestar computation." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) (quotation marks and citations omitted). However, the Court of Appeals recommends considering the hours submitted by counsel as a cross-check on the reasonableness of the requested percentage. *Id.* Accordingly, Class Counsel's lodestar in this case and the cross-check it provides are discussed in Section III.E. below. Regardless of which method of calculation a court uses, the key consideration in awarding fees is what is reasonable under the circumstances. *Goldberger*, 209 F.3d at 47; *see also* Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees . . . .").

B. A Future-Looking Order Awarding 25% Of The Future Available Settlement Fund Is Reasonable.

In addition to the fee award requested based on the Current Available Settlement Fund, an order making a future-looking award from the Future Available Settlement Fund is also reasonable and appropriate at this time.

A fee award should be based on the entire settlement fund, not a portion of the fund. *See Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007) ("The entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class. An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not."). Many Settling Defendants' settlement agreements require them to pay some or all of any future *Air Cargo* proceeds they receive, and those future payments constitute part of the entire settlement fund. Although the precise amount

and timing of future *Air Cargo* proceeds cannot be pinpointed with certainty now, such funds will provide real and tangible value to the Class.[12] The Court's second interim fee award, based in part on future payments from Settling Defendants, implicitly recognized the reasonableness of prospectively awarding fees as to future payments. *Precision II*, 2015 WL 6964973, at **5, 8. Other courts likewise have entered forward-looking fee orders in cases involving future settlement payments. *E.g., In Re: Urethane Antitrust Litigation (Polyether Polyol)*, MDL No. 1616, Order at ¶¶ 2, 3 (D. Kan. December 12, 2011) (Bruckner Decl. Ex. M).

Prospectively awarding attorneys' fees now as to future *Air Cargo* proceeds promotes judicial economy and also makes more money available to pay qualified claimants because it avoids unnecessary motion practice and preserves the Settlement Fund. The Court-approved notice program in this case has cost nearly $10.4 million to date, Bruckner Decl. ¶ 26 n.4, and the notice program as to the Third Round Settlements alone were estimated to cost nearly $2.4 million, ECF No. 1362 at 15. Notifying the Class of a fourth fee petition after all future *Air Cargo* proceeds have been received would incur additional notice costs and would diminish the funds available to qualified claimants.

Furthermore, Class members have received adequate notice of the future-looking award Class Counsel now seek.[13] The Class Notice approved by this Court for the Third Round Settlements informed potential Class members that Class Counsel would seek an award of up to 33% of the Third Round Settlements and "additional proceeds received in connection with prior

[12] Indeed, more than $91 million has been deposited in the Settlement Fund to date as a result of the provisions requiring payment of *Air Cargo* proceeds. *See* ECF No. 836 at 10 n.16 (*Air Cargo* proceeds exceeding $16 million in the first interim fee petition); ECF No. 1281 at 6 (new *Air Cargo* proceeds exceeding $21 million in the second interim fee petition); Bruckner Decl. ¶ 14 (new *Air Cargo* proceeds exceeding $54 million in the third fee petition).

[13] As with Class Counsel's prior fee petitions, this petition is being posted on the case website, www.freightforwardcase.com/en, simultaneously with being filed with the Court.

settlements" and reimbursement of expenses. ECF No. 1364-1 at 18. Class Counsel now seek an award of a smaller percentage — 25% — of up to $90 million in future settlement payments.

C. Co-Lead Counsel Seek A Reasonable Percentage Of The Current Available Settlement Fund And The Future Available Settlement Fund.

In assessing the reasonableness of Class Counsel's current fee request under a lodestar cross-check, the Court should compare the total of all fees previously awarded and fees requested in this petition, to the lodestar reflecting all work done in this case from inception until July 31, 2016. The Joint Declaration and the Bruckner Declaration describe the work Class Counsel have performed since the inception of this case through July 31, 2016. The reasonableness of Class Counsel's fee request is appropriately measured over the life of the case thus far. All of this work is directly related to Class Counsel's efforts to prosecute Plaintiffs' claims against all Defendants and to recover overcharges for purchasers from any Defendant.

For instance, discovery from one Defendant directly bears on the participation of other Defendants in the same conspiracy. Thus, Class Counsel's review of documents, interviews of witnesses, and depositions of each Defendant resulted in incrementally more favorable settlements with each succeeding Defendant and proving the liability of all non-settling Defendants. *See, e.g., In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 681 F. Supp. 2d 141, 160-61 (D. Conn. 2009) (evidence found in competitor's files was considered important evidence against another defendant); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662-63 (7th Cir. 2002) (evidence of statements from competitor employees' documents used to defeat ADM's motion for summary judgment). Indeed, it is for this reason that nearly every settlement agreement in this case to date has required the settling Defendant to provide substantial cooperation to Plaintiffs through discovery and trial. The substantial early cooperation provided by Schenker, the first settling Defendant, well illustrates the benefits the

Class has received from Class Counsel's strategy of leveraging each settlement against remaining Defendants. Similarly, each succeeding settlement enabled Class Counsel to favorably resolve all claims against all Defendants. For these reasons, the Court should consider the lodestar amount for all work performed in the case from inception through July 31, 2016 in assessing the reasonableness of the requested fee. *See, e.g., In re Air Cargo Shipping Services Antitrust Litigation*, No. 06-MD-1775, 2012 WL 3138596, at *5 (E.D.N.Y. Aug. 2, 2012) ("*Air Cargo 3*") (awarding 25% and applying a lodestar cross-check based on work performed since appointment of lead counsel).

Class Counsel are mindful of Judge Gleeson's fee decisions in *In re Visa Check/Mastermoney Antitrust Litigation*, 297 F. Supp. 2d 503, 520 (E.D.N.Y. 2003), *aff'd sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005), in which the Court considered not only the appropriate percentage that should be applied in a "mega-case" such as *Visa Check*, but also the multiplier that would result if plaintiffs' counsel's request was granted. *See Visa Check*, 297 F. Supp. 2d at 424-25 & n.33. The Court concluded that a multiplier of almost 10 was not warranted, but a multiplier of 3.5 was reasonable. *See id.* at 522, 524.

The nature of this litigation makes it easily distinguishable from a typical monolithic two-defendant mega-conspiracy such as in *Visa Check*. Unlike *Visa Check*, where class counsel obtained a $3,383,400,000 settlement (a large fund by any measure) against two defendants for domestic conduct, in this case Class Counsel have achieved full settlements as to 68 Defendants from 29 Defendant families alleged to have engaged in widespread international conduct constituting 11 distinct conspiracies, despite the fact that many Defendants paid relatively small government fines and others paid none. Although the large number of settling Defendants magnifies the total amount of the settlements here, each of the individual settlement agreements

is well below megafund amounts. As discussed in more detail below, the lodestar cross-check from inception shows that Class Counsel's request for 25% of the Current Available Settlement Fund (which results in a multiplier of 1.23) and for 25% of the Future Available Settlement Fund up to $90 million in future contributions (resulting in a maximum possible multiplier of 1.54) is reasonable given the risks, complexities and work involved to prosecute these multiple international conspiracies against many Defendants.

It is well within the Court's discretion to award the request of 25% of the Current Available Settlement Fund and to award 25% of the Future Available Settlement Fund. *See, e. g.*, *Air Cargo 3*, 2012 WL 3138596, at *5 (E.D.N.Y. Aug. 2, 2012) ("*Air Cargo 3*") (granting class counsel's requested interim fee of 25% of the gross amount of the settlement fund when such a request represented a modest 1.11 multiplier); *In re Checking Account Overdraft Litig.*, Case No. 09-MD-02036-JLK, 2011 WL 5873389 at *28 (S.D. Fla. Nov. 22, 2011) (approving fee award of 30% of $410 million settlement fund); *In re Linerboard Antitrust Litig.*, No. MDL 1261, Civ. A. 98-5055, Civ. A. 99-1000, Civ. A. 99-1341, 2004 WL 1221350, at *17 (E.D. Pa. June 2, 2004) (approving fee award of 30% of $202,572,489 fund); *In re Vitamins Antitrust Litig.*, No. Misc. 99-197 (TFH), MDL No. 1285, 2001 WL 34312839, at *10 (D.D.C. July 16, 2001) (approving fee award of 34.6% of $365 million fund); *see also Visa Check*, 297 F. Supp. 2d at 525 & n.33 (distinguishing large size of $3 billion fund in that case and the size of the multiplier, and stating that if the fund was not as large, "a larger percentage might be appropriate").

D. Class Counsel's Request Is Consistent With The *Goldberger* Factors.

"Generally, the factor given the greatest emphasis [when awarding a percentage of a fund] is the size of the fund created, because 'a common fund is itself the measure of success. . . [and] represents the benchmark from which a reasonable fee will be awarded.'" *Manual for Complex Litigation (Fourth)* § 14.121 (2004) (quoting Alba Conte & Herbert B. Newberg,

4 *Newberg on Class Actions* § 14.6, at 547, 550 (4th ed. 2002)). Courts in this Circuit have repeatedly held that "a fee award should be assessed based on scrutiny of the unique circumstances of each case . . . [with] a jealous regard to the rights of those who are interested in the fund." *Goldberger*, 209 F.3d at 53; *see McDaniel*, 595 F.3d at 426. In determining the reasonableness of a fee request, the Court should consider: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. *Goldberger*, 209 F.3d at 50 (citation omitted); *Precision II*, 2015 WL 6964973, at *7 (applying *Goldberger*). An award of 25% of the Current Available Settlement Fund and a future-looking award of 25% of the Future Available Settlement Fund up to the requested cap are reasonable under the *Goldberger* factors.

1. The Time And Labor Expended By Counsel Supports The Requested Fee.

The large international scale of this litigation, the sheer number of Defendants, the enormous amount of discovery, and the contentious motion practice have required an intensive effort by Class Counsel. Since the inception of this case, Class Counsel have spent 158,233.55 hours prosecuting the litigation, and to date have received no compensation for 4,451.37 hours of that time because it occurred after August 15, 2015. *See* Bruckner Decl. Exs. H, I.

The Joint Declaration and the Bruckner Declaration taken together describe Class Counsel's work since the case's inception, which is briefly summarized as follows:

- Prepared a First Amended Class Action Complaint consisting of 326 numbered paragraphs containing specific and detailed allegations against Defendants, including names, dates, places and subject matters of conspiratorial meetings and other communications;
- Responded to 18 motions to dismiss the First Amended Complaint and 11 objections to Magistrate Judge Pohorelsky's resulting Report & Recommendation;

- Prepared a Corrected Third Amended Class Action Complaint, comprising 593 numbered paragraphs and additional detailed and specific allegations;

- Responded to 15 motions to dismiss the Corrected Third Amended Complaint (including the 13 initial motions and two later-filed motions by Hellmann and JAFA, respectively), one motion to sever certain claims, and 11 objections on Magistrate Judge Pohorelsky's resulting Report & Recommendation;

- Prepared and filed a Fourth Amended Class Action Complaint;

- Filed 27 non-ministerial motions (including 12 motions to compel and 1 motion to quash) and 2 objections;

- Made 16 appearances before Magistrate Judge Pohorelsky, 5 appearances before Judge Gleeson, and 1 appearance before Judge Cogan;

- Attempted to negotiate a confidentiality order with Defendants concerning confidential material to be produced in discovery and, when Defendants refused to agree, successfully moved the Court for a confidentiality order;

- Engaged in lengthy briefing and motion practice to obtain customer lists from non-settling Defendants to assist in providing Class notice;

- Participated in Rule 26(f) conferences, negotiating multiple disputed provisions;

- In addition to the motions described above, responded to a total of 3 pre-motions and submitted briefing in response to 8 motions;

- Reviewed 84,842 Plaintiff documents, ultimately producing 46,064 documents to Defendants;

- Utilized advanced analytical search tools, as well as keyword searches, to identify the most relevant documents of the more than 5.1 million documents produced by Defendants;

- Ultimately reviewed 1,062,552 million Defendant documents electronically (including translating and reviewing several documents in Japanese, German, and Italian) and reviewed additional documents on-site in Seattle, Washington;

- Held innumerable meetings and conferences with Defendants to obtain and understand Defendants' transactional data;

- Prepared witness and Defendant factual summaries to assist in depositions, discovery responses, work by experts engaged by Plaintiffs, and trial;

- Prepared for and conducted 50 depositions in 4 countries spread across three continents;

- Prepared and served 20 sets of discovery requests;
- Responded to 27 sets of discovery requests from Defendants, and prepared and served multiple amended and supplemental discovery responses as appropriate;
- Interviewed 43 witnesses and received approximately 18 attorney proffers;
- Engaged in lengthy settlement negotiations and mediations that led to the 10 First Round Settlements, the 11 Second Round Settlements, and the 2 Third Round Settlements;
- Carried out three extensive programs to notify potential claimants of the Prior Round Settlements and the Third Round Settlements and communicated extensively with Class Members relating to the claims-administration process;
- Extensively researched the facts and law regarding pertinent issues; and
- Worked with industry and economic consultants and experts to develop pleadings, evaluate transactional data, guide discovery, formulate settlement strategies, assess damages, and prepare for Plaintiffs' class certification motion.

See Joint Decl. generally and ¶ 15 specifically; Bruckner Decl. ¶ 3.

2. The Magnitude And Complexities Of The Litigation Support The Requested Fee.

Antitrust class actions "are notoriously complex, protracted, and bitterly fought." *Wesely v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989); *see In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. at 129 ("antitrust cases are typically complex"). Indeed, as this Court has recognized, this litigation is "irrefutably complex." *Precision I*, 2013 WL 4525323, at *15; *see also Precision II*, 2015 WL 6964973, at 7 ("this litigation was obviously risky and complex"). It involves international conspiratorial conduct across the globe with 68 different Defendants, 29 Defendant families, and 11 conspiracies. Because of the large number of Defendants, the complexity of the legal issues, and the extensive motion practice, this litigation is nearly nine years old.

3. The Risk Of Litigation Supports The Requested Fee.

The risk of litigation is "perhaps the foremost factor to be considered in determining

whether to award an enhancement." *Goldberger*, 209 F.3d at 54 (quotation omitted); *accord In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. at 129. Courts in this Circuit have repeatedly recognized that the risk associated with a case undertaken on a contingent basis is an important factor in determining an appropriate fee award. *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010); *In re NASDAQ Mkt. Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998). As this Court has acknowledged, this action "is obviously risky." *Precision I*, 2013 WL 4525323, at *15; *accord Precision II*, 2015 WL 6964973, at *7.

To establish a price-fixing violation, a plaintiff must demonstrate not only that a conspiracy existed, but also that the conspiracy caused antitrust impact and damages, measurable by reference to prices that would have existed but for the conspiracy. Here, even if Plaintiffs prevailed through class certification and other pre-trial proceedings and obtained a judgment of liability, such a judgment could be overturned on appeal. *See, e.g., Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1218-19 (10th Cir. 1996) (overturning plaintiffs' verdict obtained after two decades of litigation); *Backman v. Polaroid Corp.*, 910 F.2d 10, 12 (1st Cir. 1990) (en banc) (reversing plaintiffs' verdict and ordering entry of judgment for defendants).

Moreover, the litigation risk "must be measured as of when the case is filed." *Goldberger*, 209 F.3d at 55. When Plaintiffs filed their original complaint in January 2008, no government criminal complaints had been filed, and no guilty pleas had been entered. The first fines related to government investigations did not occur until the Japan Fair Trade Commission issued fines in March 2009, over a year after the inception of the case. And the United States Department Of Justice ("DOJ") did not announce any guilty pleas until 2010 — more than two and one-half years after Plaintiffs' case began. The European Commission did not impose fines until 2012. As such, the case faced significant initial risks with respect to showing liability.

Plaintiffs also vigorously pursued claims and alleged conspirators where no DOJ guilty pleas or EC fines exist, all of which have been sustained under Fed. R. Civ. P. 12 (*i.e.*, Count 1: Security Surcharge; Count 9: Ocean AMS; Count 10: Global Agreement). Against this backdrop, all Defendants sought dismissal under one or more provision of Fed. R. Civ. P. 12, each making multiple of arguments, and often in multiple motions. Plaintiffs defeated a total of 33 motions to dismiss under Rules 12(b)(1) and (6).[14]

Even if Plaintiffs had succeed at trial and through appeal, settling Defendant DHL made clear prior to settlement that, as the amnesty applicant to the DOJ, it would seek an order that it was not subject to treble damages or joint and several liability pursuant to the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"), Pub. L. No. 108-237, § 213(a)-(b), 118 Stat. 661, 666-668 (June 22, 2004). Plaintiffs would have vigorously contested any such motion and argued that DHL's limited cooperation did not earn it ACPERA's benefit, but a ruling in DHL's favor would have significantly reduced Plaintiffs' potential recovery at trial.

Plaintiffs faced other risks. The significant international dimension of the case made discovery difficult, and would have made collecting judgments against foreign Defendants difficult as well. Defendants also would have vigorously challenged Plaintiffs' standing and class certification and argued that no damages existed because the surcharges would have been passed through to Plaintiffs in any event. Plaintiffs believe they would have prevailed, but those challenges posed very real risks to the Class.

Plaintiffs' recovery in the face of these risks is remarkable and justifies the requested fee. In the nearly nine years Class Counsel have litigated this case, they have committed 158,233.55

[14] The fact that the Defendants DHL and Hellmann prevailed on much narrower motions, *see* ECF Nos. 1236, 1269, does not detract from Plaintiffs' nearly total success in sustaining their complaint against an onslaught of challenges by these and the other Defendants.

hours of their time — amounting to over $72 million in lodestar — and incurred $6,420,333.74 in expenses, all of which were and are at risk of never being recovered. Bruckner Decl. ¶¶ 25, 26, 28; Joint Decl. Exs. P, Q; Electronic Order dated Oct. 3, 2013.

4. The Quality Of Counsel's Representation Supports The Requested Fee.

As the Court recognized, Class Counsel in this case "are highly experienced practitioners in complex litigation generally and antitrust litigation specifically." *Precision I*, 2013 WL 4525323, at *16; *Precision II*, 2015 WL 6964973, at *8 ("The settlement amounts proposed here attest to Class Counsel's abilities."). Notwithstanding Defendants' extensive efforts to defeat this case, Co-Lead Counsel settled all 11 claims against all 29 Defendant families, which in nearly every applicable instance exceeded the fines paid by settling Defendants in the United States,[15] and in many other instances involved settlements with Defendants who were never criminally charged in the United States.[16] Such a recovery is consistent with Co-Lead Counsel's extensive experience successfully litigating antitrust class actions, and supports the fee request. *See* ECF No. 101 (outlining Co-Lead Counsel's extensive experience and success in the class action field).

Similarly, in addition to the collective wealth of Defendants themselves, their counsel include top antitrust legal practitioners at some of the world's largest and most skilled law firms. *See* Joint Decl. ¶ 18. Throughout this litigation, Defendants' counsel have worked tirelessly to protect their clients' interests, and Co-Lead Counsel's ability to obtain these significant

[15] The only settlement that did not exceed the fines paid to the Department of Justice was the ice-breaker settlement with Schenker, which in addition to cash provided extensive and early cooperation. That cooperation enabled Plaintiffs and the Class to survive Defendants' first barrage of motions to dismiss and facilitated future settlements that in many instances far exceeded the settling Defendants' fines paid to the DOJ.

[16] The following Defendant groups were never charged in the United States: Hellmann, Expeditors, UAC, Morrison Express, UTi, ABX, SDV, DSV, Geodis, Jet Speed, Toll, Dachser, and UPS.

settlements further underscores the adequacy of the requested fee award. *See In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156, 174 (S.D.N.Y. 2007) ("The quality of opposing counsel is also important in evaluating the quality of Class Counsels' work."); *In re NASDAQ Market Makers Antitrust Litig.*, 187 F.R.D. 465, 488 (S.D.N.Y. 1998).

5. The Size And The Scope Of The Settlements Supports The Requested Fee.

The requested fee represents 25% of the Current Available Settlement Fund, which represents a multiplier of 1.23 since inception, and 25% of the Future Available Settlement Fund (up to the requested cap), representing a maximum possible multiplier of 1.54 over the same period. Class Counsel respectfully suggest the requested award is fair given the extensive effort that was required to achieve these excellent results.

The fee requested is consistent with fee awards in other class action litigations with settlements of this size. *See, e.g.*, *In re Air Cargo Shipping Services Antitrust Litigation*, No. 06-MD-1775, 2011 WL 2909162, at *6-7 (E.D.N.Y. July 15, 2011) ("*Air Cargo 2*") (awarding 25% fee recovery in related antitrust case); *In re Initial Public Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding one-third fee in a securities fraud case); *In re Priceline.com, Inc. Sec. Litig.*, Master File No. 3:00-cv-1884, 2007 WL 2115592, at *4 (D. Conn. July 20, 2007) (awarding 30% of $80 million settlement); *see also In re Prudential Sec., Inc. Ltd. P'ships Litig.*, 912 F. Supp. 97, 103 (S.D.N.Y. 1996) ("Many courts have approved and awarded fees in class actions of one-third of the settlement fund in recognition of the substantial services performed by counsel and the risks undertaken.").

6. Public Policy Considerations Support the Award of the Requested Fee.

The award requested by Class Counsel will encourage the continued private enforcement of antitrust laws and support attorneys who take such cases on a contingent fee basis. The Supreme Court has held repeatedly that private enforcement of U.S. antitrust laws is essential to

effective antitrust enforcement, *e.g.*, *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969), and a market-rate fee award such as is requested here incentivizes competent, experienced counsel to undertake such high-risk, complex class action litigation. This Circuit has noted that "[i]n the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation." *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2d Cir. 1973). In determining whether public policy supports the requested fee request, the court should balance providing lawyers with a "sufficient incentive to bring common fund cases" against preventing an "unwarranted windfall" to counsel. *Air Cargo 2*, 2011 WL 2909162, at *6 (E.D.N.Y. July 15, 2011). Given the time and effort Co-Lead Counsel have dedicated to this case, the requested fee of 25% fairly compensates Co-Lead Counsel, helps to ensure the availability of skilled counsel in future antitrust class actions, and is not a windfall.

E. <u>The Requested Fee Is Reasonable Under A Lodestar Cross-check.</u>

The use of the lodestar cross-check on the reasonableness of a percentage fee award is encouraged. *Farinella v. Paypal, Inc.*, 611 F. Supp. 2d 250, 269 (E.D.N.Y. 2009). Courts may award fees higher than the lodestar by applying a multiplier based on factors such as the riskiness of litigation. *See In re Nortel Networks Corp. Secs. Litig.*, 539 F.3d at 132 n.4. Courts commonly award multipliers from two to six times the lodestar. *See Monserrate v. Tequipment, Inc.*, No. 11 CV 6090, 2012 WL 5830557, at *3 (E.D.N.Y. Nov. 16, 2012) (collecting cases).

The total lodestar in this case, from inception, is $72,264,953.34. Bruckner Decl. ¶ 25 and Ex. I. This Court has implicitly recognized that in long-lasting, hard-fought litigation such as this, it is appropriate to calculate the lodestar cross-check over the duration of the entire case, rather than piecemeal from interim fee award to interim fee award. *See Precision II*, 2015

WL 6964973, at *7 (making interim award of 25% of settlement proceeds and applying a lodestar cross-check period from inception through the conclusion of counsel's requested cross-check period); *Air Cargo 2*, 2011 WL 2909162, at *6-7 (making a second interim award of 25% of settlement proceeds and applying a lodestar cross-check period from the appointment of co-lead counsel through the conclusion of counsel's requested cross-check period).

A fee award of 25% of the Current Available Settlement Fund would yield a multiplier of 1.23.[17] A forward-looking award of 25% of the Future Available Settlement Fund (to an upper limit of $90 million in future contributions) would yield a multiplier of 1.54, even conservatively assuming that Class Counsel perform no additional work on this case.[18] Both cross-check figures are reasonable. *See, e.g., Wal-MartStores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123 (2d Cir. 2006) (multiplier of 3.46 for attorneys' fees totaling $220 million); *In re Cedant Corp. PRIDES Litig.*, 243 F.3d 722, 742 (3d Cir. 2001) (surveying cases and concluding that multipliers ranging from 1.35 to 2.99 were common where the common fund exceeded $100 million); *In re Urethane Antitrust Litig.*, MDL No. 1616, 2016 WL 4060156, at *7-8 (D. Kan. July 29, 2016) (multiplier of 3.2); *In re Credit Default Swaps Antitrust Litig.*, No. 13-MD-2476 (DLC), 2016 WL 2731524, at *17 (S.D.N.Y. Apr. 26, 2016) (multiplier of approximately 6.0 on attorneys' fees totaling $253.8 million); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481-82 (S.D.N.Y. 2013) (listing cases and noting that "[c]ourts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers"); *In re Bristol-Myers Squibb Sec. Litig.*, 362 F. Supp. 2d 299, 236-37 (S.D.N.Y. 2005) (finding 2.29 multiplier "quite

[17] This lodestar calculation reflects Class Counsel's expectation that Jet Speed will pay the entire amount it owes, under the terms of the agreed-upon payment plan. If Jet Speed does not make pay the full amount it owes, Class Counsel will not take the full amount of fees previously awarded by the Court, and the lodestar cross-check will yield a slightly lower multiplier.

[18] This assumption ignores the considerable claims administration work which lies ahead.

reasonable" where litigation risk was typical, facts and legal theories were not complicated, and counsel did not expend extraordinary effort); *In re Elan Sec. Litig.*, 385 F. Supp. 2d 363, 376 (S.D.N.Y. 2005) (awarding 12% on revised lodestar, amounting to 3.47 multiplier).

Counsel's lodestar is based on rates they currently charge, Joint Decl. ¶ 325, Bruckner Decl. ¶ 25, an approach courts consider reasonable. *Velez v. Novartis Pharm. Corp.*, 04 CIV 09194 CM, 2010 WL 4877852, at *23 (S.D.N.Y. Nov. 30, 2010) ("The use of current rates to calculate the lodestar figure has been repeatedly endorsed by courts as a means of accounting for the delay in payment inherent in class actions and for inflation. . . .") (citation omitted)). These rates are well within the normal range for counsel litigating similar antitrust class actions. From inception, Class Counsel conducted the litigation as efficiently as possible, and the Bruckner Declaration describes the manner in which the time reported by Class Counsel was scrutinized to eliminate time entries that did not comply with Co-Lead Counsel's criteria. Bruckner Decl. ¶ 10.

F. The Requested Expense Reimbursement Is Reasonable.

Class Counsel's request for reimbursement of expenses of $1,762,803.75 is reasonable. "Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients." *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993). In the Second Circuit, courts "normally grant expense requests in common fund cases as a matter of course." *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *11 (E.D.N.Y. Oct. 23, 2012); *In re Arakis Energy Corp. Sec. Litig.*, No. 95CV3421, 2001 WL 1590512, at *17 n.12 (E.D.N.Y. Oct. 31, 2001). Co-Lead Counsel now seek reimbursement of reasonable litigation expenses including economic and industry experts, deposition transcription, court reporter services, claims administration, data hosting, online legal research, travel expenses, and document imaging and copying. *See* Bruckner Decl. ¶¶ 26-27 (expenses borne by Class Counsel), ¶ 29 (same), ¶¶ 36-38 (expenses paid from litigation fund and thus from Co-Lead

Counsel's assessments). These expenses were reasonably necessary to advance the interests of the Class and to obtain the excellent result on their behalf. Due to the risk that they might never be recovered, Class Counsel endeavored to keep expenses to a minimum.

G. In The Future, Co-Lead Counsel Will Make Subsequent Applications For The Court's Consideration For Expenses Related To Claims Settlement, Administration, And Processing.

Processing and administration of Class Members' claims for the Prior Round Settlements is well underway and Co-Lead Counsel anticipate presenting a motion to approve a plan of distribution of settlement funds in the coming months. Processing and administration of Class Members' claims for the Third Round Settlements will begin in earnest following the April 3, 2017 deadline to submit claims. The Claims Administrator has mailed direct notice to potential Class members in accordance with the Court-approved notice plan. Class Members have been submitting claims for the Third Round Settlements and will continue to do so until the April 3, 2017 deadline. Before payment of such claims can be recommended to the Court for its approval, each claim will be verified and in some cases audited, to ensure that the Class Member is qualified and that its claimed purchases are allowable.

Expenditures for escrow fees, taxes on the escrowed funds, and preparation of those tax forms, also will be necessary in the foreseeable future. Accordingly, in the future and as appropriate Co-Lead Counsel will apply to the Court for approval to pay expenses related to the escrow accounts and for claims administration and processing. These items may be considered by the Court in due course before any such expense payments are made.

H. Class Members Have Received Notice and Have an Opportunity to Object.

The Class Notice approved by this Court informed potential Class members that Class Counsel would seek a fee award of up to 33% of the settlement fund, and would also seek reimbursement for expenses. ECF No. 1364-1 at 18. That Notice has been distributed to potential

Class members in accordance with the Court's order approving notice. Bruckner Decl. ¶ 16. This fee petition and all supporting papers will be posted to the settlement website within 24 hours of filing, as directed by the Court. ECF No. 1367. Objections from Class Members, if any, are to be filed by September 20, 2016. If there are any such objections, Class Counsel will respond before the November 4, 2016 final approval hearing.

IV. CONCLUSION

For all of these reasons, Co-Lead Counsel respectfully requests that the Court enter an Order awarding attorneys' fees and expenses as follows:

(1) Class Counsel are awarded 25% of the Current Available Settlement Fund of $117,774,616.77 as attorneys' fees, for a total fee award of $29,443,654.19, to be paid from funds currently paid into the settlement fund.

(2) Class Counsel are awarded 25% of the Future Available Settlement Fund, up to a maximum of $90 million received from Settling Defendants and deposited into the settlement fund, for a maximum future-looking award of attorneys' fees of $22,500,000.00; and

(3) Class Counsel are awarded $1,762,803.75 as reimbursement for litigation expenses.

Dated: September 1, 2016

Respectfully submitted,

s/ W. Joseph Bruckner

W. Joseph Bruckner
Heidi M. Silton
Anna M. Horning Nygren
Craig S. Davis
Kristen G. Marttila
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401
T: (612) 339-6900
F: (612) 339-0981
E-mail: wjbruckner@locklaw.com
hsilton@locklaw.com
amhorningnygren@locklaw.com
csdavis@locklaw.com
kgmarttila@locklaw.com

Christopher Lovell
Gary S. Jacobson
Ian T. Stoll
Merrick S. Rayle
Benjamin M. Jaccarino
LOVELL STEWART HALEBIAN JACOBSON LLP
61 Broadway, Suite 501
New York, NY 10006
T: (212) 608-1900
F: (212) 719-4775
E-mail: clovell@lshllp.com
GSJacobson@lshllp.com
istoll@lshllp.com
msrayle@sbcglobal.net
bjaccarino@lshllp.com

Daniel E. Gustafson
Daniel C. Hedlund
Michelle J. Looby
Joshua J. Rissman
GUSTAFSON GLUEK PLLC
Canadian Pacific Plaza
120 South 6th Street, Suite 2600
Minneapolis, MN 55402
T: (612) 333-8844
F: (612) 339-6622
E-mail: dgustafson@gustafsongluek.com
dhedlund@gustafsongluek.com
mlooby@gustafsongluek.com
jrissman@gustafsongluek.com

Steven N. Williams
Adam J. Zapala
COTCHETT, PITRE & MCCARTHY, LLP
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
Burlingame, CA 94010
T: (650) 697-6000
F: (650) 697-0577
E-mail: swilliams@cpmlegal.com
azapala@cpmlegal.com

Interim Co-Lead Counsel for Plaintiffs

TAB 57C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PRECISION ASSOCIATES, INC., *et al.*, Plaintiffs, v. PANALPINA WORLD TRANSPORT (HOLDING) LTD., *et al.* Defendants.	CASE NO. 08-CV-00042 (JG)(VVP)

DECLARATION OF W. JOSEPH BRUCKNER
IN SUPPORT OF CO-LEAD COUNSEL'S PETITION FOR A THIRD AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

I, W. Joseph Bruckner, declare and state:

1. I am a partner of the law firm of Lockridge Grindal Nauen P.L.L.P. I submit this Declaration in support of Plaintiffs' petition for a third award of attorneys' fees and reimbursement of costs and expenses in connection with services rendered and expenses incurred by my firm in connection with this litigation.

2. My firm is one of four co-lead counsel appointed by the Court to represent Plaintiffs and the Plaintiff class in this action ("Co-Lead Counsel"). The Court previously granted two fee petitions following Co-Lead Counsel's obtaining significant settlements with Defendants up to that time. In each fee petition Co-Lead Counsel filed with this Court — and published on the website established for this case, www.freightforwardcase.com, for review by class members — detailed lodestar information[1] and a description of work by Co-Lead and other

[1] *I.e.*, the number of hours expended and an hourly rate for each professional so engaged. For Class Counsel's prior lodestar information and descriptions of work performed, *see* ECF Nos. 875, 875-8, 1281, 1282-15.

Plaintiffs' Counsel (collectively "Class Counsel") up to that time for the Court to use as a lodestar cross-check in considering the appropriate percentage fee award. Neither of those two prior fee awards considered Class Counsel's work on behalf of the Class after August 15, 2015, and one of the purposes of this Declaration is to provide that supplemental information to the Court.

I. Summary Description Of Work Performed Since Second Interim Fee Petition

3. From August 16, 2015 through July 31, 2016, Class Counsel continued to work on behalf of the Class; none of that work has been the subject of any request for attorneys' fees. Each Class Counsel who performed work during this time period is submitting its own declaration describing such work, simultaneous with this declaration. During that time period, my own firm, Lockridge Grindal Nauen P.L.L.P., performed the following:

- Researched case evidence, documents, and depositions for Plaintiffs' supplemental discovery responses and responses to contention interrogatories;
- Drafted and served Plaintiffs' supplemental discovery responses;
- Reviewed and prepared Plaintiffs' documents for supplemental productions;
- Coordinated and served Plaintiffs' verifications for interrogatory responses;
- Researched, drafted, and served contention interrogatories to Defendants;
- Researched and drafted Plaintiffs' privilege logs;
- Negotiated with Defendants regarding issues with Plaintiffs' privilege log entries;
- Reviewed and analyzed Defendants' privilege log entries;
- Negotiated with Defendants regarding Defendants' privilege log deficiencies;
- Reviewed Defendant DHL documents produced for inspection in Seattle, Washington;
- Drafted and served requests for admissions on Defendants;
- Researched and drafted responsive briefing on Defendant Hellmann's motion to compel responses to requests for admissions and motion for protective order;
- Researched documents regarding fraudulent concealment issues;
- Researched documents regarding built-in surcharge issues;
- Drafted, served, and filed motion to quash subpoena served by Defendant Hellmann on claims administrator in the *Air Cargo* case;

- Corresponded with Defendants regarding their demand that Plaintiffs amend their complaint;
- Drafted stipulation regarding the amended complaint;
- Drafted, served, and filed correspondence to the Court regarding proposed amended complaint;
- Drafted, served, and filed a proposed agenda for the status conference in August 2015 before Magistrate Judge Pohorelsky and a case management statement in connection with the status conference in March 2016 before Judge Cogan;
- Attended Court status conferences;
- Reviewed issues and strategized with co-counsel regarding settlement issues with remaining Defendants;
- Reviewed issues and strategies regarding settlement mediation;
- Negotiated settlement terms with the remaining two Defendants, DHL and Hellmann;
- Drafted a Memorandum of Understanding regarding the proposed settlement with the DHL Defendants;
- Assisted in drafting and finalizing settlement agreements and escrow agreements with the DHL Defendants and with the Hellmann Defendants;
- Assisted in drafting motions for preliminary approval of settlements with the DHL Defendants and with the Hellmann Defendants;
- Assisted in drafting motions for final approval of Second Round settlements;
- Researched and verified the status of Defendants' Class Action Fairness Act notices to state attorneys general and other government entities for the Second Round settlements, and apprised the Court on the progress of those CAFA notices;
- Prepared for and attended the hearing before Judge Gleeson regarding final approval for the Second Round settlements;
- Assisted in drafting a third notice plan to class members regarding the Third Round settlements with DHL and Hellmann;
- Calculated and verified pro-rata payment amounts for class notice costs allowed by settlement agreements;
- Directed the escrow agent regarding payments to vendors for allowed class notice costs;
- Conferred frequently and extensively with many class members, third-party claim filers, and the claims administrator on questions regarding claim filing and issues regarding claims administration;
- Analyzed and researched issues regarding claims administration, including deficient claims and late-filed claims;
- Researched currency conversion issues in preparation for claims administration and distributions;
- Monitored filed claims and worked with claims administrator to verify claims;

- Monitored whether entities opted out of the proposed settlement classes;
- Researched and confirmed Most Favored Nation refunds to two Defendants, and coordinated those refund payments and directed escrow agent for same;
- Researched Defendants' revenues which were affected by the conspiracies alleged in Plaintiffs' complaint; analyzed, calculated, and drafted settlement allocation matrix consistent with Plan of Allocation in preparation for distribution;
- Analyzed and defined strategies for claims processing, auditing, and verification;
- Drafted updates for settlement web site and coordinated posting same with the claims administrator;
- Reviewed and processed settlement escrow account statements;
- Monitored settlement escrow account activity and balances and verified receipt of settlement payments with escrow agent;
- Held multiple conferences with defense counsel regarding the status and timing of subsequent settlement payments;
- Verified receipt of settlement payments with escrow agent;
- Negotiated with counsel for Settling Defendant Jet Speed a modification of settlement payment schedule and researched options and proposals for same;
- Reviewed and processed vendor invoices regarding case expenses;
- Maintained litigation common cost fund and related ledger report; and
- Corresponded with named Plaintiffs regarding case issues, status and progress.

II. New Settlements And Settlement Administration Since August 15, 2015

A. Third Round Settlements

4. Since August 15, 2015, Plaintiffs have entered into settlement agreements with the last two defendant groups in this case, **DHL** (comprising Deutsche Post AG, Danzas Corporation (doing business as DHL Global Forwarding), DHL Express (USA) Inc., DHL Forwarding Japan K.K., DHL Japan Inc., Exel Global Logistics, Inc., and Air Express International USA, Inc.) and **Hellmann** (comprising Hellmann Worldwide Logistics GmbH & Co. KG, Hellmann Worldwide Logistics Ltd. Hong Kong, and Hellmann Worldwide Logistics, Inc.). The Court has granted preliminary approval to both of those settlements.

5. Under those settlement agreements, described more fully in their respective motions for preliminary approval filed at ECF Nos. 1340 and 1355, and in the forthcoming final

approval briefs, DHL has paid Plaintiffs $53,000,000 and Hellmann has paid Plaintiffs $550,000. Those funds have been received and deposited into interest-bearing escrow accounts. Each of those settlement agreements also includes funds reserved to pay for notice to the Class of these proposed settlements and other related expenses, and requires the settling Defendant to cooperate with Plaintiffs in prosecuting their claims if the Court does not finally approve both settlements.

B. **Jet Speed**

6. A handful of the Second Round Settlement agreements — Jet Speed's among them — required the Settling Defendant to make a future payment of a sum certain on a date certain. Because the scheduled dates and amounts of those payments were discernable, the second interim fee petition sought fees on those definite future payments, but stated that Class Counsel would not deduct any fees on scheduled future payments until the funds were actually in the escrow account and available for distribution to Class members. *See* ECF No. 1282 at 4 nn.2-4. The Court's order approving the requested second interim fee award implicitly assumed, therefore, that 75% ($187,500) of Jet Speed's final scheduled payment would be available for payment to qualified Class members and that 25% ($62,500) would be paid as attorneys' fees.

7. In May 2016, Jet Speed failed to timely make its final payment of $250,000. Class Counsel has not withdrawn any part of that delinquent amount which the Court previously awarded as fees. Jet Speed has agreed to a payment plan with Plaintiffs. Pursuant to that payment plan, Jet Speed will make monthly payments of $10,000 for one year, totaling $120,000, with a balloon payment of $130,000 due on June 30, 2017. To date, Jet Speed has paid $20,000 in monthly payments and is current on this modified payment plan. Class Counsel reiterate that they will not withdraw any fees from any portion of Jet Speed's delinquent payment unless and until $187,500 of that payment is available for payment to the Class. Class Counsel

anticipate that Jet Speed will pay all amounts still due under its settlement agreement. Nevertheless, if Jet Speed does not fully pay all amounts still due, Class Counsel bear the primary risk of any eventual underpayment, which would reduce the fees paid to Class Counsel and similarly reduce the multiplier resulting from the lodestar cross-check.

C. **Future Work Anticipated**

8. Going forward, my firm and other Class Counsel will continue to be active in all aspects of settlement and claims administration, including working with the Claims Administrator and Settling Defendants to obtain customer data that may be useful to Class members in filing claims, and supervise final distribution of settlement proceeds to qualified class members.

III. Class Counsel's Time And Expense Reporting To Co-Lead Counsel

9. The four Co-Lead firms and three other law firms which, at the Co-Leads' direction, performed work on behalf of Plaintiffs now submit lodestar information for the period of August 16, 2015 through July 31, 2016.

10. Co-Lead Counsel have carefully managed the allowable time to be included in the lodestar cross-check for this third application including, among other things, the exclusion of time previously submitted as part of the lodestar cross-check for the first and second interim fee petitions. At the inception of this case and in an effort to control Class Counsel's lodestar, Co-Lead Counsel instituted a protocol for reporting time and expenses of all Class Counsel on a monthly basis. Pursuant to that protocol, all Class Counsel including Co-Lead Counsel have been instructed not to submit time for certain categories of work, including work not requested by Co-Lead Counsel, duplicative work, reading and reviewing, preparing time and expense reports, routine clerical tasks, or for work related to any client not retained. Additionally, the

protocol required that each firm submit, via email, all litigation-related expenses incurred by the firm for the month. Finally, time spent reviewing documents was capped at $400 per hour.

11. After Co-Lead Counsel received time submissions from Plaintiffs' Counsel, Co-Lead Counsel ensured that time and expenses had been submitted in accordance with the protocol, and only for work to be included in this fee petition, by thoroughly vetting each firm's submission, including a line-by-line review of their time entries. If any non-compensable time was submitted by Plaintiffs' Counsel, such entries were excluded.

IV. Calculation Of Current Available Settlement Fund And Fees Sought

12. In the notices sent to Class members following preliminary approval of the Third Round Settlements, Co-Lead Counsel advised the Class that, as compensation for their time and the risk in prosecuting this case on a wholly contingent fee basis, they would ask the Court for an award of attorneys' fees to be deducted from the Settlement Fund in an amount not to exceed 33% of the Settlement Fund, as well as reimbursement for their expenses actually incurred in the prosecution of the litigation. *See* ECF No. 1364-1 at 18. This information also was posted contemporaneously on the case website, www.freightforwardcase.com, as will be this Petition For A Third Award Of Attorneys' Fees And Reimbursement Of Expenses, this Declaration, and all other supporting papers.

13. Co-Lead Counsel are requesting interim attorneys' fees of 25% of the Current Available Settlement Fund, for a total third fee award of $29,443,654.19, as well as reimbursement of interim expenses totaling $1,762,803.75.

14. The currently available portion of each settlement from which Class Counsel are requesting an award of attorneys' fees of 25% is as follows:

	Settlement	**Settlement Fund (Paid)**	**Explanation**
Third Round Settlements	DHL Settlement (Non-severed claims)	$53,000,000.00	
	Hellmann Settlement	$550,000.00	
	Subtotal	***$53,550,000.00***	
	Settlement	**Additional Current Settlement Fund**	**Explanation**
Second Round Settlements	SDV Settlement	$947,501.35	
	Panalpina	$4,379,227.40	
	Geodis	$0.00	
	Jet Speed	$0.00	
	DSV	$2,017,061.41	DSV has paid $2,010,814.88; DSV will deposit its final *Air Cargo* Round 4 check for the balance of $6,264.53 when it received that re-issued check (*see* ¶ 15 below).
	Toll	$287,618.14	
	Agility	$2,126,245.60	
	UPS	$16,628,765.02	
	Dachser	$304,345.51	
	Japanese Defendants	$10,000,000.00	Excluded from second interim fee request for ratchet down
	DHL (severed claims)	$0.00	
	Subtotal	***$36,690,764.43***	

		Additional Current Settlement Fund	**Explanation**
First Round Settlements	Schenker	$0.00	
	Vantec	$1,038,568.11	
	EGL	$0.00	Reached cap under settlement agreement
	Expeditors	$11,790,137.30	
	Nishi-Nippon	$0.00	Reached cap under settlement agreement
	UAC	$14,922.86	
	K+N	$7,330,453.63	
	Morrison	$3,254,554.49	
	UTi	$4,105,215.96	
	ABX	$0.00	
	Subtotal	***$27,533,852.35***	
Current Available Settlement Fund		**$117,774,616.77**	

15. With one exception, all of the funds described in the above chart have been received and deposited into the settlement escrow account. As for the one exception: as described above, DSV has paid $2,010,814.88 in Round 4 *Air Cargo* recoveries. DSV did not receive one *Air Cargo* Round 4 claim check it was owed, in the amount of $6,264.53, and that check is in the process of being reissued and sent to DSV. Once DSV receives those funds, it will deposit them into the Settlement Fund. Because there is no dispute about whether those

funds will be reissued by the *Air Cargo* claims administrator or deposited into the Settlement Fund by DSV, those funds are included in the Current Available Settlement Fund on which Class Counsel now seek fees. If the Court grants Class Counsel's fee petition, Class Counsel will not deduct any fees from DSV's forthcoming payment of $6,264.53 until those funds are actually paid in the escrow account and available for distribution to qualified Class member claimants.

V. Calculation Of Fees Sought From Future Available Settlement Fund

16. The Class Notice approved by this Court informed potential Class members that Class Counsel would seek an award of up to 33% of the settlement fund. That Notice has been distributed to potential Class members in accordance with the Court's order approving notice. As described in the Memorandum In Support Of Co-Lead Counsel's Petition For A Third Award Of Attorneys' Fees And Reimbursement Of Expenses, filed contemporaneously with this Declaration, Class Counsel also seek a future-looking award of fees to be paid out of any future payments by Settling Defendants (the "Future Available Settlement Fund"). Specifically, Class Counsel seek a future-looking award of 25% of any Future Available Settlement Fund, up to a maximum of $90 million in future payments by Settling Defendants,[2] for a maximum possible future-looking fee award of $22,500,000.00. In addition to the notices already received by the Class, this Petition and its supporting papers will be filed contemporaneously on the case website, www.freightforwardcase.com, for all Class Members' notice and review.

VI. Lodestar Cross-Check Calculation

17. Attached to this Declaration are summary descriptions by Counsel (**Exhibits A-G**), including other Co-Lead Counsel (**Exhibits B-D**), whose work underlies this Petition for

[2] The amount and timing of any future payments by Settling Defendants can only be reasonably estimated at this time. If such future payments exceed $90 million, Class Counsel will make a supplemental request for attorneys' fees at that time.

attorneys' fees and unreimbursed expenses. As set forth above, we are describing for this lodestar cross-check and fee-reimbursement request only work not previously covered by the first and second interim fee awards. Counsel's prior work and lodestar were described in detail in ECF Nos. 875, 875-8, 1281, 1282-15.[3]

18. Each firm's declaration submitted with this Petition includes two exhibits. One exhibit details the hours and value of the applicable time spent by personnel at the firm and included in the lodestar cross-check. The other exhibit details the nature and amount of unreimbursed expenses.

19. Attached as **Exhibit H** to this declaration is a chart summarizing the individual declarations of counsel showing lodestar cross-check amounts not included in either of the two prior interim fee petitions.

A. **Lockridge Grindal Nauen Lodestar: August 16, 2015 Through July 31, 2016**

20. The schedule attached hereto as **Exhibit A** is a detailed summary indicating the amount of time spent by the partners, attorneys, and other professional support staff of my firm who have been involved in this litigation. The lodestar calculation described in Exhibit A is based on my firm's current hourly billing rates, except that work done on document review was capped at $400 per hour from August 16, 2015 through July 31, 2016.

21. The total number of hours expended on this litigation by my firm from August 16, 2015 through July 31, 2016, is 1,538.00 hours. The total lodestar for my firm is $916,510.00. My firm's lodestar figures are based on my firm's current hourly billing rates. The hourly rates

[3] As noted in our Memorandum In Support of this Petition, in performing the lodestar cross-check and to ensure an apples-to-apples comparison, we respectfully submit that the Court should compare the total of all fees previously awarded and fees requested in this petition, to the total case lodestar from inception until July 31, 2016. Memorandum In Support Of Co-Lead Counsel's Petition For A Third Award Of Attorneys' Fees And Reimbursement Of Expenses, September 2, 2016 (filed herewith) at 22.

for the partners, attorneys, and professional support staff in my firm are the same as the usual and customary hourly rates charged for their services in contingent billable matters. We determined the total number of hours from contemporaneous, daily time records regularly prepared and maintained by my firm and which have been made available to other co-lead counsel for their review.

B. **Aggregate Lodestar For All Class Counsel From Inception Through July 31, 2016**

22. At Judge Gleeson's direction, the first interim award of attorneys' fees and expenses used as a lodestar cross-check attorneys' work time only to the extent that it related directly to the First Round Settlements. The lodestar cross-check for the first interim award was based on 33,060.04 hours in professional time, yielding a lodestar of $13,796,633.27 at Class Counsel's then-current hourly rates. ECF No. 875 at ¶ 16.

23. The second interim award of attorneys' fees and expenses used as a lodestar cross-check all attorneys' work time from the inception of this case through August 15, 2015, excluding time already included in the first fee petition relating solely to the First Round Settlements. ECF No. 1281. The sum of the second petition lodestar in ECF No. 1281 and the first petition lodestar in ECF No. 875 gave the Court the total lodestar from inception until August 15, 2015. The lodestar cross-check for the second interim award was based on a cumulative total of 153,782.18 hours of professional time since inception through August 15, 2015, for an aggregate lodestar for that period of $69,869,851.59 at Class Counsel's then-hourly rates. ECF No. 1281.

24. For this third period, from August 16, 2015 through July 31, 2016, based on the monthly attorney and paralegal time reports submitted to Co-Lead Counsel, Class Counsel have reported over 4,451 hours of professional time expended for the benefit of the Class, none of

which was encompassed by either of the prior fee petitions. This additional work represents a $2,395,101.75 using Class Counsel's current hourly rates. This work, like all legal work done in this case, was performed on an entirely contingent basis.

25. This third fee petition proposes as a lodestar cross-check attorney work from the inception of the case through July 31, 2016, at Class Counsel's current hourly rates, to be compared to the total of all fees previously awarded and fees requested in this petition. Therefore and in sum, the total professional time expended by all Class Counsel from the inception of this case through July 31, 2016 represents 158,233.55 hours of work, for an aggregate lodestar of $72,264,953.34. Attached as **Exhibit I** to this declaration is a chart summarizing the aggregate lodestar for that time period.

VII. Class Counsel's Unreimbursed Expenses

A. Deferred Billings

26. Co-Lead Counsel entered into deferred billing agreements with three competitively priced vendors that have performed work necessary to the prosecution of this case.[4] These vendors provided deposition transcription, claims administration, and document-hosting services, respectively, and agreed not to seek payment for all or part of their services

[4] In addition to the expenses described here and for which Class Counsel now seek reimbursement, a total of $10,367,569.82 has been paid from the settlement escrow accounts for class notice expenses and other expenses regarding preliminary or final approval, and related bank fees. Of that total, $1,834,833.00 has been spent during the time period of August 16, 2015 through July 31, 2016. To the extent appropriate, any similar future expenses also will be paid from the settlement escrow accounts. These payments were, or will be, made pursuant to language in each of the Settling Defendant's Settlement Agreements reserving a specific amount of such Settling Defendant's payment that may be used for payment of notice and related costs (and which would be non-refundable to the Settling Defendant in the event the settlement was not finally approved), and have already been authorized by the Court. While these payments are not included in the requested reimbursement in this petition, and have already been paid or have been authorized by the Court to be paid from those escrow accounts, we describe those expenditures here to fully describe all litigation-related expenses incurred in this case.

from Class Counsel on an ongoing (*e.g.*, monthly) basis, to allow Co-Lead Counsel the opportunity to recover those expenses as part of a fee petition. Class Counsel now seek reimbursement of $1,639,871.47 in unreimbursed deferred billings.

27. These deferred billings are summarized at **Exhibit J** hereto, and include three components: (1) deferred billings from U.S. Legal Support, for deposition transcription services, totaling $3,938.25; (2) deferred billings from Epiq Systems, Inc., for claims administration work totaling $1,602,552.99;[5] and (3) deferred billings from Shepherd Data Services, Inc., for data hosting totaling $33,380.23.

B. **Class Counsel's Recorded Expenses**

28. Class Counsel also request reimbursement of $122,932.28 in unreimbursed costs and expenses paid by those firms. This total is based on monthly expense reports submitted to Co-Lead Counsel.

29. **Exhibit K** hereto summarizes the expenses reported as having been incurred by all Class Counsel and paid by those firms, separately from those expenses that were paid out of the Litigation Fund. Class Counsel have itemized their costs separately in their requests for reimbursement accompanying this motion (*see* Exhibits A-G), and have thereby attested to the reasonableness and accuracy thereof. Each firm requesting reimbursement of expenses has averred that the expenses are reflected in the books and records maintained by the firm. These expenses include, for example, the costs for photocopying, computer research, postage and courier expenses, telephone and fax costs, and travel and accommodations.

[5] This total comprises deferred billings from Epiq dating from August 1, 2015 through July 31, 2016. Class Counsel previously received reimbursement for deferred billings from Epiq through July 2015 only. No billings from Epiq for services provided August 1, 2015 or later were available at the time of Class Counsel's second fee petition, and in that petition Class Counsel informed the Court that they intended to seek reimbursement of such expenses at a later time. Joint Decl. ¶ 328 n.41.

30. As detailed in Exhibit A, my firm has incurred a total of $28,822.19 in unreimbursed expenses during the period August 16, 2015 through July 31, 2016.

31. The expenses incurred in this action are reflected on the books and records of my firm. These books and records are prepared from expense vouchers, check records, and other source materials and represent an accurate recordation of the expenses incurred.

32. In Co-Lead Counsel's judgment, all the expenses sought by this petition were reasonable and necessary to prosecute this litigation and to obtain the substantial settlements here, and all were made for the direct benefit of the Settlement Class and the putative litigation Class.

C. Class Counsel's Common Cost Litigation Fund

33. On behalf of all Class Counsel, my firm has established, monitored, and administered a Common Cost Litigation Fund ("Litigation Fund") from which to pay litigation costs incurred for the case overall in its prosecution. The Litigation Fund is used as a source to pay ongoing litigation expenses on behalf of the Class in this matter. The Litigation Fund initially was funded and is replenished as required from assessment payments from Class Counsel. The total received in Litigation Fund assessments from August 28, 2015[6] through July 31, 2016 is $36,000. *See* Ex. K line 1. No part of those assessments has been reimbursed.

34. The expenses paid from the Litigation Fund from August 28, 2015 through July 31, 2016 are in addition to the expenses incurred by each Class Counsel, which are described in each Class Counsel's individual declaration and summarized in Exhibit K. As noted

[6] Although in general the second interim fee petition sought reimbursement of expenses only through August 15, 2015, it sought reimbursement for contributions to the Litigation Fund that were made through August 27, 2015. Joint Decl. ¶ 333 n.42. Therefore Class Counsel now seek reimbursement for only those contributions to the Litigation Fund that were made from August 28, 2015 through July 31, 2016.

above, the Litigation Fund is funded by assessments paid by Class Counsel. As part of this petition to the Court for reimbursement of litigation-related expenses, Class Counsel seeks reimbursements for assessments paid to the Litigation Fund from August 28, 2015 through July 31, 2016. Therefore, to avoid double-counting, the instant petition does not seek reimbursement of any expenditures made directly from the Litigation Fund. Nevertheless, I describe the Litigation Fund's expenditures from August 28, 2015 through July 31, 2016 below and in **Exhibit L**, in order to fully describe all new litigation-related expenses incurred in this case and to attest to their accuracy and necessity.

35. In Co-Lead Counsel's judgment, all expenses paid from the Litigation Fund have been reasonably incurred and necessary to the prosecution of this case. The recorded costs and expenses incurred by Class Counsel from August 28, 2015 through July 31, 2016 are itemized in Exhibit L attached hereto.

36. Class Counsel spent $404.28 for court reporters and hearing transcripts. Those transcripts were necessary for briefing and efficient management of the case.

37. Class Counsel spent $183,403.07 for expert consultants. Those expert consultants were necessary for investigation of the case, to guide discovery efforts, and for settlement evaluation

38. Class Counsel incurred $73,926.28 in expenses paid to a document database vendor. These services were necessary to enable Class Counsel to house, review, and code documents produced through discovery and cooperation to assist in briefing and mediation.

39. As of July 31, 2016, the Litigation Fund had a zero balance.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 1st day of September 2016 at Minneapolis, Minnesota.

s/ W. Joseph Bruckner
W. Joseph Bruckner

EXHIBIT 15

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEOFFREY OSBERG	:	
	:	
On behalf of himself and on behalf of all others similarly situated,	:	
	:	**Case No.: 07 CV 1358 (KBF)**
Plaintiff,	:	
	:	
- against -	:	
	:	
FOOT LOCKER, INC.,	:	
	:	
FOOT LOCKER RETIREMENT PLAN,	:	
	:	
Defendants.	:	

~~[PROPOSED]~~ ORDER AWARDING ATTORNEYS' FEES AND EXPENSES AND SERVICE AWARDS FOR PLAINTIFF AND TESTIFYING CLASS MEMBERS

This matter came on for hearing on June 8, 2018 on Class Counsel's motion for attorneys' fees and expenses from the common fund created by this Court's October 2015 judgment (Dkt. 399) and for approval of service awards to Mr. Osberg and the eight Class members who were deposed by Defendants and testified at the July 2015 trial, to be paid out of Class Counsel's fee award.

Now, the Court, having heard argument and having reviewed all of the evidence and other submissions presented with respect to the motion and the record of all proceedings in this case, enters the following findings:

1. On or about April 10, 2018, the Notice Administrator caused the Notice to be mailed via first-class mail to the last known address of each individual identified as a Class member, as evidenced by the Notice Administrator's June 1, 2018 filed proof of mailing (Dkt.

415). In addition, follow-up efforts were made to send the Notice to individuals whose original notice was returned as undeliverable, as the Notice Administrator has attested. *Id.* at 2.

2. The Court finds that the Notice gave Class members notice "in a reasonable manner" of Class Counsel's motion for attorneys' fees and expenses and approval of service awards for Plaintiffs and the testifying Class members, and properly informed them of their right to comment or object in accordance with Fed. R. Civ. P. 23(h).

3. In response to the Notice, no Class member submitted an objection.

4. As reflected in the jointly proposed Class Notice, Dkt. 407-1, the parties have stipulated and their actuaries agree that the estimated value of the Class's total recovery as of June 1, 2018 is $290 million.

5. Class Counsel have sought an award of attorneys' fees equal to 33% of this $290 common fund, net of the $1,520,057 in out-of-pocket expenses incurred during the litigation of this matter for which Counsel seek reimbursement. Hence, the fee award sought is 33% of $288,479,943, which equals $95,198,381.

6. Under *Goldberger v. Integrated Resources Inc.*, 209 F.3d 43 (2d Cir. 2000), "the traditional criteria in determining a reasonable common fund fee, includ[e]: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the [recovery]; and (6) public policy considerations." *Id.* at 50. In addition to the criteria set forth in *Goldberger*, courts in the Second Circuit consider the reaction of the class to the fee request in deciding how large a fee to award. *In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 WL 7323417, at *18 (S.D.N.Y. Dec. 19, 2014). The Court finds, consistent with "'a jealous regard to the rights of those who are interested in the fund,'" *id.* at 53, that all six *Goldberger* factors, and the

absence of any objection from even a single member of the Class, weigh in favor of a 33% award, and Class Counsel's requested fee award is hereby approved.

7. The Court finds that the requested 33% fee is fair and reasonable in light of the following facts and circumstances:

(a) **Quality of Representation**. Class Counsel took this case to trial and prevailed, and then successfully defended the Court's judgment on appeal and in opposition to Defendants' petition for *certiorari* in the United States Supreme Court;

(b) **Extraordinary 100% Recovery**. Counsel thereby achieved an exceptional, perhaps unprecedented 100% recovery of the Class's maximum possible damages claim against a formidable opponent represented by first-rate legal counsel;

(c) **Risk.** Counsel faced very high risks of non-recovery from the inception of the case in 2007 through the denial of *certiorari* in 2018, including very high merits risk, very high statute of limitations risk, and very high class-certification risk that could have easily resulted in zero recovery for the Class and Class Counsel—as is confirmed by the fact that this Court dismissed this case in its entirety with prejudice on multiple grounds in 2012;

(d) **Scope and Magnitude**. The case was exceedingly difficult and complex and of considerable scope and extraordinarily long duration;

(e) **Time and Effort**. Class Counsel expended very significant time and resources in prosecuting this action, all with no guarantee of payment;

(f) **Awards in Other Cases**. The requested award compares very favorably to awards in other successful class cases tried to verdict, *see* Rubenstein Decl. ¶¶ 9, 19, Dkt. 461-1, *Krakauer v. Dish Network*, No. 14-333 (M.D.N.C. May 7, 2018) (36% on average), as well as awards in settled cases involving large ($100 million-plus) "mega-funds" where courts, including

many within this Circuit, have awarded attorneys' fees that equal or exceed the 33% fee sought here, in circumstances that do not approach the efficacy and value that Class Counsel's tenacity and commitment—and assumption of great financial risk by litigating the case to judgment—created for the Class here;

(g) **Public Policy**. As a matter of public policy, the requested 33% common fund is necessary to ensure that counsel in future meritorious cases will not hesitate to be equally persistent and press forward as Class Counsel did here to achieve maximum recovery for their clients despite the complications, difficulties, and risk.

(h) **The Class's Reaction**. Under the circumstances here, the Class's lack of objection should be taken to mean that the Class consents to Counsel's request and finds it reasonable. *See In re Kentucky Grilled Chicken Coupon Marketing & Sales Practices Litig.*, 280 F.R.D. 364, 380 (N.D. Ill. 2011) ("the day has long since passed when class members simply accepted the amount of proposed fees"). Here, the notice campaign was unusually successful, with only a very small number of notices returned as undeliverable. Yet not a single Class member objected. Had Class members found the requested one-third fee unreasonable, they could have easily registered an objection—and had every incentive to do so since, as the notice made clear, they stood to gain material additional benefits if the Court agreed with their objection.

8. When a percentage-of-the-fund approach is used, the Court may also use a lodestar "cross-check" based on a summary of hours to test the reasonableness of the percentage. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123 (2d Cir. 2005). Applying the lodestar method as a cross check, this Court finds that the fee Class Counsel seeks is reasonable. Based on Class Counsel's reported lodestar, the requested 33% award equates to an implied

multiplier of 4.8, which is in line with implied multipliers approved in other comparable cases in this Circuit and elsewhere.

9. The Court finds that the $1,520,057 in requested out-of-pocket litigation expenses and costs incurred have been adequately documented, were reasonably incurred in connection with the prosecution of the action, and are reasonable for a case of this complexity, scope, and duration. Reimbursement of the requested amount is also hereby approved.

10. The Court directs the Foot Locker Qualified Settlement Trust (the "Fund") – a $150 million trust fund established by Foot Locker with the intent it be utilized in the first instance to satisfy the Court's award of attorneys' fees and expenses – to disburse, within 7 business days of this Order, the attorneys' fees and expenses approved in ¶¶ 5-9 above in accordance with Class Counsel's payment instructions.

11. The Court finds that the service awards requested for Plaintiff Geoffrey Osberg in the amount of $50,000 and for the eight Class members who were deposed and testified at trial—Ada Cardona, Russell Howard, Rita Welz, Ralph Campuzano, Doris Albright, Richard Schaeffer, Michael Steven and Ellen Glickfield—in the amount of $15,000 each, are well-deserved, appropriate, and in line with those awarded in other cases. The Court authorizes and directs Class Counsel to pay these awards within 10 business days of this Order.

SO ORDERED.

Dated: New York, New York
6/8, 2018.

KATHERINE B. FORREST
United States District Judge

EXHIBIT 16

2024 Antitrust Annual Report

Class Actions in Federal Court

Published July 2025

Center for Litigation and Courts
UC Law SF

Huntington Bank

Foreword

We are pleased to present the 2024 Antitrust Annual Report produced in partnership with the Center for Litigation and Courts at UC Law SF and The Huntington National Bank. Key findings include:

- From 2009-2024, a mean number of 123 consolidated complaints were filed per year, with outlier years as low as 72 and as high as 220.
- From 2009-2024, there were Defendant Wins in 146 cases as a result of judgments on the pleadings, summary judgment, judgment as a matter of law, or trial.
- From 2009-2024, most antitrust class actions that reached final approval did so within 5-7 years.
- The mean settlement amount varied by year from $6 million to $184 million, and the median amount varied by year from $2 million to $18.5 million.
- The total annual settlements ranged from $225 million to $9.6 billion per year.
- The cumulative total of settlements was $44.8 billion from 2009-2024.

We want to acknowledge several people who helped with the report including Lindsay Schuch and Abby Van Nostran. We would also like to acknowledge Lex Machina as our primary data source.

We hope that you find this information interesting and helpful.

Professor Joshua Davis
Center for Litigation and Courts
UC Law SF
davisjosh@uclawsf.edu

Rose Kohles Clark
Vice President
The Huntington National Bank
rose.clark@huntington.com

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2024 Year at a Glance

Federal Antitrust Class Actions

Total # Consolidated Filings	# Cases with Defendant Win	# Cases with Settlements Reaching Final Approval	Total Settlements
135	9	28	$2.9B

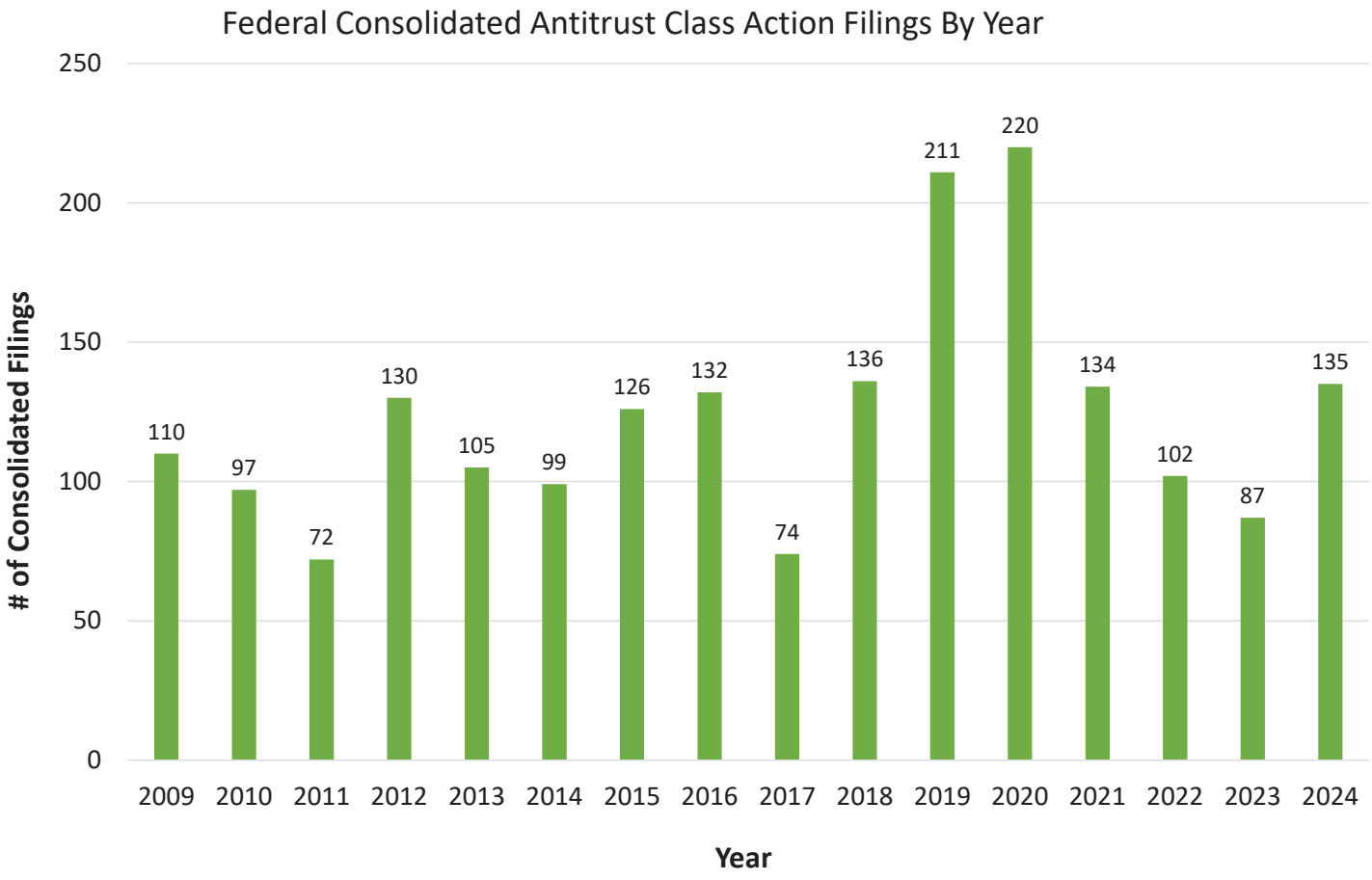
Consolidated Filings by Year

In 2024, the number of consolidated filings rebounded significantly, reaching a total of 135. This marks a strong recovery from 2023, which saw only 87 filings—the third lowest total in the past 16 years. Over this period, the average number of consolidated filings has been 123, with a standard deviation of 81. Notably, only four years have strayed beyond one standard deviation from the mean:

- 2011 (72 filings),
- 2017 (74 filings),
- 2019 (211 filings), and
- 2020 (220 filings).

These years fall short of being considered true outliers, but as stand out years they still highlight the relative stability of filing volumes across most of the timeframe, with 2024's total aligning closely with the long-term average.

Figure 1: **Federal Antitrust Filings**
2009 - 2024

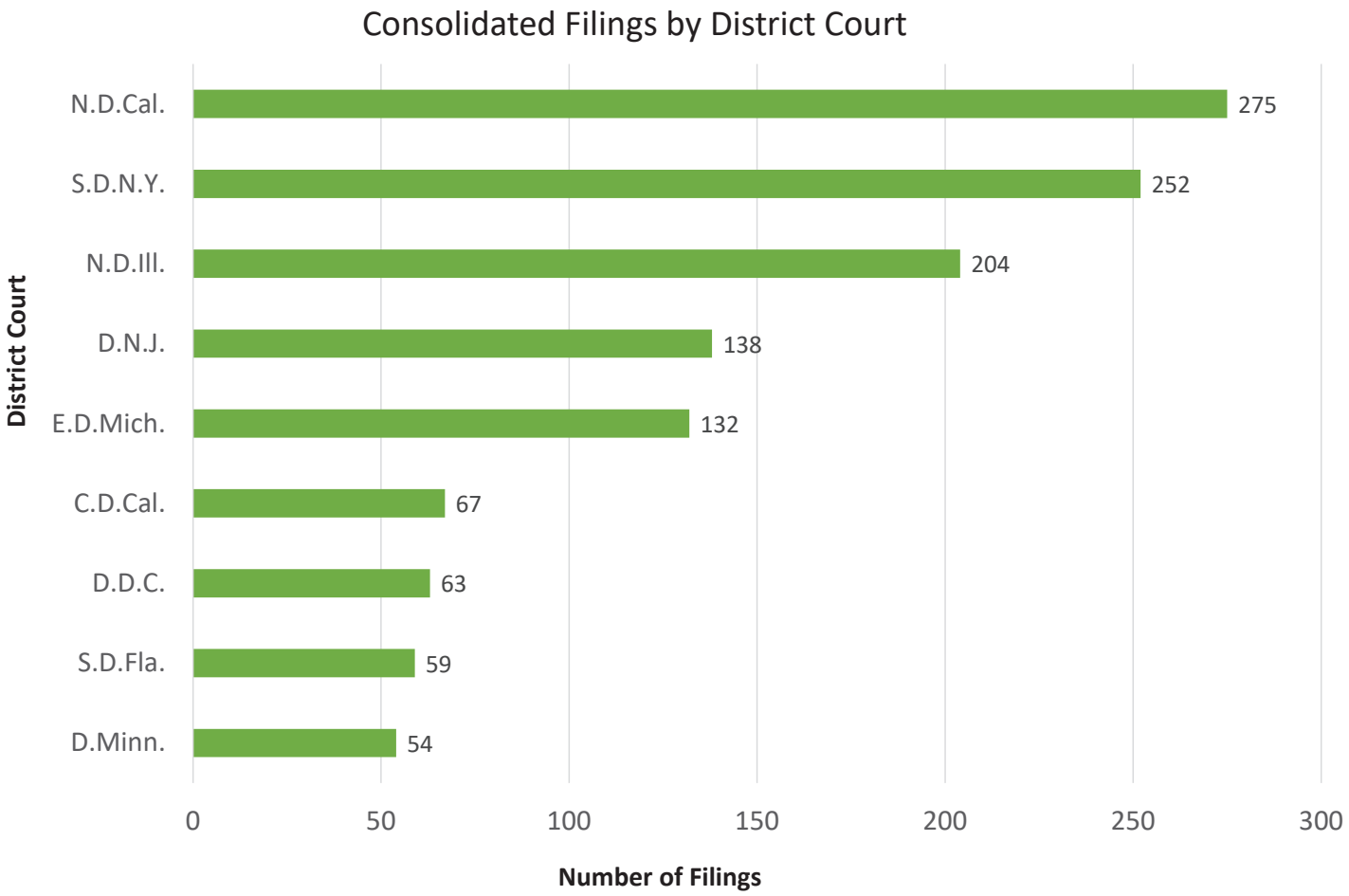


Consolidated Filings by District Court

Since 2009, there were 1,970 consolidated antitrust class action filings across all federal district courts in the United States. Of these districts, the Northern District of California (275), the Southern District of New York (252), and the Northern District of Illinois (204) have been the most frequent forums. There appears to be five district courts—add the District of New Jersey and the Eastern District of Michigan to the others listed above—in which plaintiffs file the most cases.

We may wonder whether the filing behaviors are based on the law in the district and circuit, a desire for judicial expertise based on experience in antitrust law, geography of the defendants, or some combination of the three. The relatively large number of antitrust cases filed in these five courts may be a characteristic of the underlying cases and defendants themselves.

Figure 2: **Federal Antitrust Filings by District Court**
2009 - 2024



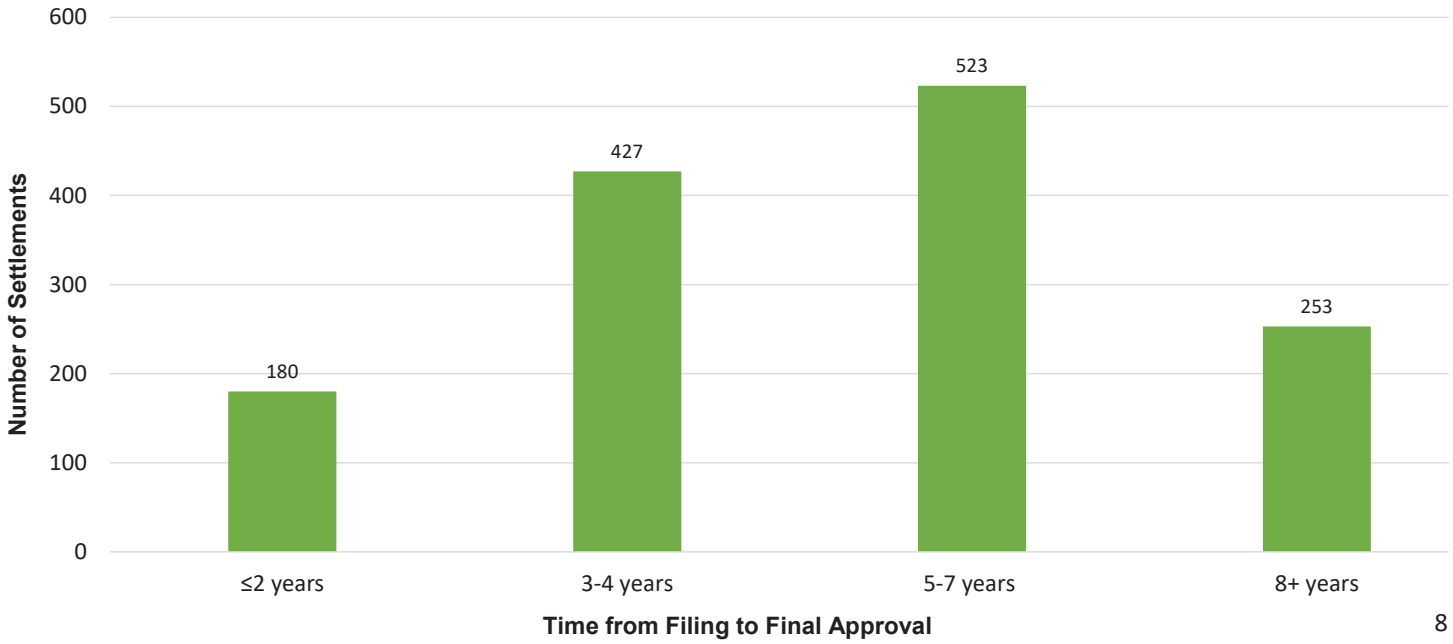
Time from Filing to Final Approval

During the period from 2009-2024, the median time from the filing of the complaint to the order granting final approval of a settlement was 5.3 years. Figure 3 illustrates a general increase in the length of time to reach final approval from 4.5 years in 2009 to 5.8 years in 2024.

Figure 3: **Percentage of Cases Settled by Number of Years from Filing to Final Approval**
2009 - 2024

Percentage of Cases Settled by Number of Years from Filing to Final Approval					
Year	≤2 years	3-4 years	5-7 years	8+ years	Mean
2009	15.4%	34.6%	46.2%	3.8%	4.5
2010	17.9%	43.6%	33.3%	5.1%	4.3
2011	9.9%	51.6%	33.0%	5.5%	4.4
2012	13.2%	42.6%	36.8%	7.4%	4.7
2013	8.0%	18.0%	52.0%	22.0%	5.5
2014	6.0%	11.9%	50.7%	31.3%	7.4
2015	20.2%	23.9%	26.6%	29.4%	5.1
2016	27.2%	38.6%	16.5%	17.7%	4.3
2017	6.7%	57.8%	26.7%	8.9%	4.5
2018	11.4%	24.4%	60.2%	4.0%	4.9
2019	1.8%	42.2%	47.7%	8.3%	5.5
2020	10.1%	26.2%	34.2%	29.5%	6.1
2021	14.6%	18.8%	35.4%	31.3%	6.1
2022	14.0%	11.6%	50.0%	24.4%	6.0
2023	7.7%	13.5%	36.5%	42.3%	7.4
2024	18.5%	23.1%	24.6%	33.8%	5.8
All Years	13.0%	30.9%	37.8%	18.3%	5.3

Figure 4: **Number of Years from Filing to Final Approval for Federal Cases**
2009 - 2024



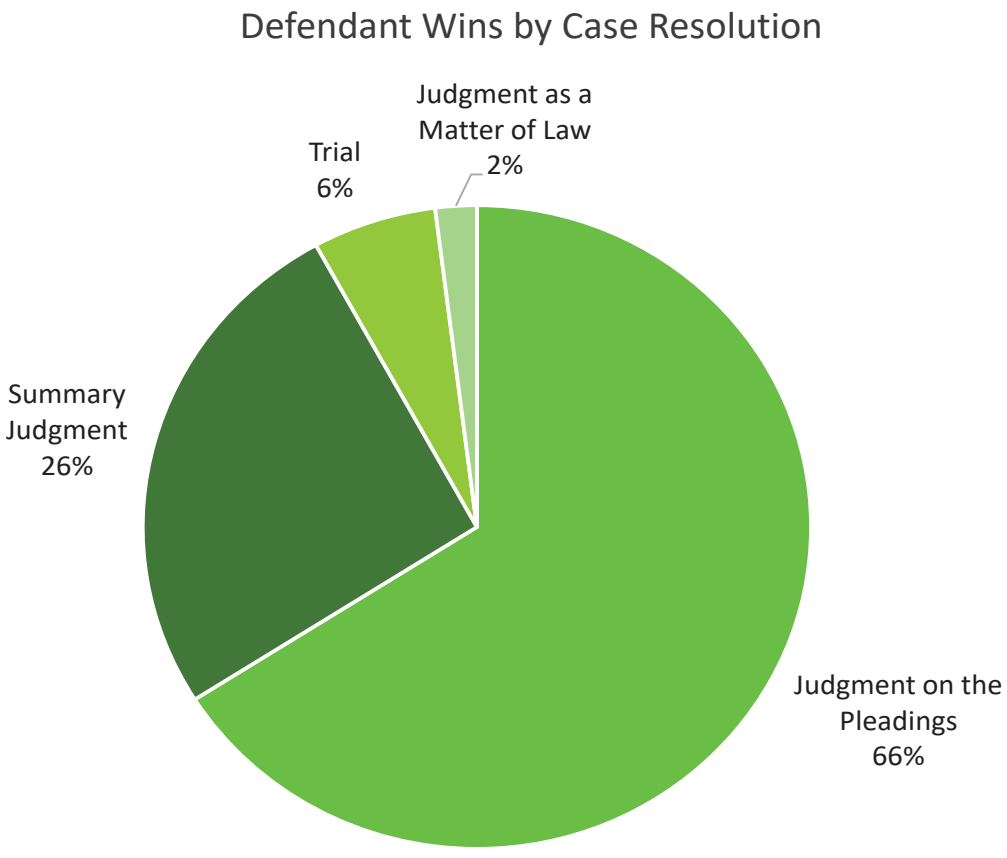
Defendant Wins by Case Resolution

Of the 146 cases won by defendants with all appeals resolved between 2009-2024, nearly two-thirds were based upon judgment on the pleadings. Over one quarter of them were won at summary judgment.

Figure 5: **Defendant Wins by Case Resolution**
2009 - 2024

Defendant Wins by Case Resolution		
Case Resolution	**# of Cases**	**% of Cases**
Judgment on the Pleadings	96	66%
Summary Judgment	38	26%
Trial	9	6%
Judgment as a Matter of Law	3	2%
Total	146	100%

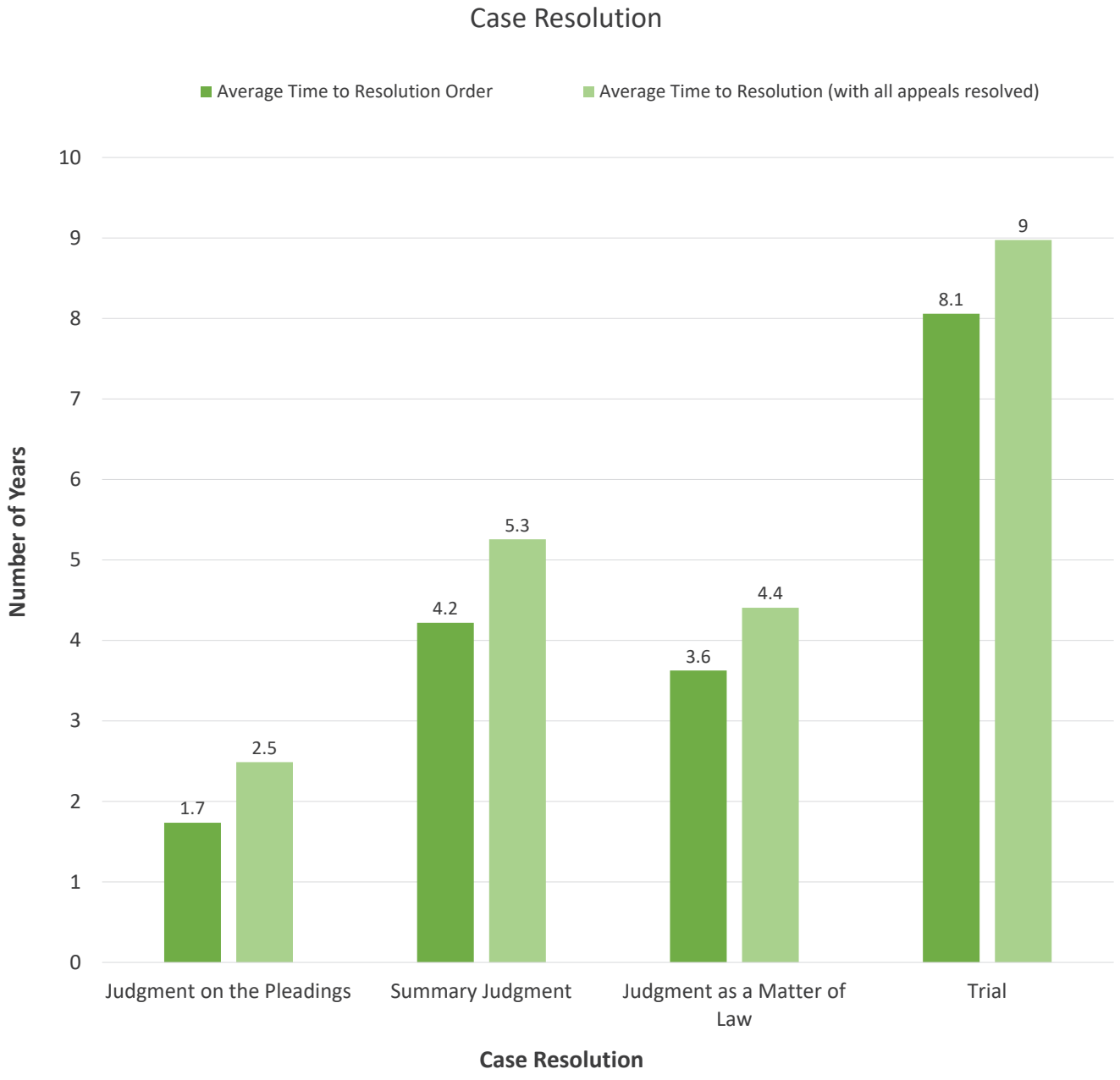
Figure 6: **Percentage of Defendant Wins by Case Resolution**
2009 - 2024



Defendant Wins by Length of Case Resolution

Comparing figures 5, 6, and 7, Judgment on the Pleadings was the quickest resolution in favor of defendants, and the most frequently awarded by the courts. Judgments on the Pleadings were ordered on average 1.7 years after filing. Summary Judgment was ordered on average 4.2 years after filing, and was also a frequent way for a defendant to prevail. Judgment as a Matter of Law during trial was ordered on average 3.6 years after filing. As expected, a resolution by trial was the most time consuming, lasting on average for 8.1 years between filing and a Court's order to resolve a case.

Figure 7: **Defendant Wins by Length of Case Resolution**
2009 - 2024



Top Defense Counsel in Defendant Wins

Rank	Firm	# of Cases 2009-2024	
1	Gibson, Dunn & Crutcher LLP	22	
2	Kirkland & Ellis LLP	14	(tie)
2	Skadden, Arps, Slate, Meagher & Flom LLP	14	(tie)
4	Latham & Watkins LLP	13	(tie)
4	Morgan, Lewis & Bockius LLP	13	(tie)
4	Paul, Weiss, Rifkind, Wharton & Garrison LLP	13	(tie)
4	Sullivan & Cromwell LLP	13	(tie)
8	Sidley Austin LLP	12	
9	Boies Schiller Flexner LLP	11	(tie)
9	Covington & Burling LLP	11	(tie)
9	Davis Polk & Wardwell LLP	11	(tie)
9	Jones Day	11	(tie)
9	Locke Lord LLP	11	(tie)
9	Simpson Thacher & Bartlett LLP	11	(tie)
9	White & Case LLP	11	(tie)
16	Ballard Spahr LLP	10	(tie)
16	Hogan Lovells	10	(tie)
16	Mayer Brown LLP	10	(tie)
16	O'Melveny & Myers LLP	10	(tie)
16	WilmerHale	10	(tie)
21	Baker Botts LLP	9	(tie)
21	DLA Piper	9	(tie)
21	Faegre Drinker Biddle & Reath LLP	9	(tie)
21	Greenberg Traurig LLP	9	(tie)
25	King & Spalding LLP	8	(tie)
25	Winston & Strawn LLP	8	(tie)

Note: Cases with more than one law firm as listed on complaint are attributed to each firm.

Total Settlement Amount by Year

We observe a 2024 Total Settlement Amount of $2.9B, which aligns closely with the median of this dataset at $2.5B. With respect to prior years, 2023 stands apart as an outlier. Falling just over 3 standard deviations (one standard deviation is approximately $2.5 billion) over the median settlement amount over the 16 year period, 2023 realized a significant $9.6 billion in aggregate over 52 settlements. This figure is driven primarily by two high dollar settlements that received final approval and resolved all appeals in 2023:

- The Payment Card Interchange Fee and Merchant Discount Antitrust Litigation -23(b) Monetary Class settling for $5.5 billion
- The Blue Cross Blue Shield Antitrust Litigation - Subscriber Class settling for $2.7 billion

Other notably high years (though within 1 standard deviation of the mean) include 2016, where 154 settlements reached final approval for a total of $4.7 billion, and 2018, where 176 settlements reached final approval for a total of $5.3 billion.

High dollar settlements in 2016 include:

- In re: Credit Default Swaps Antitrust Litigation: $1.8B
- In re: Urethane Antitrust Litigation: $835M
- In re: Automotive Parts Antitrust Litigation: $224M for end payors class (first round of settlements)

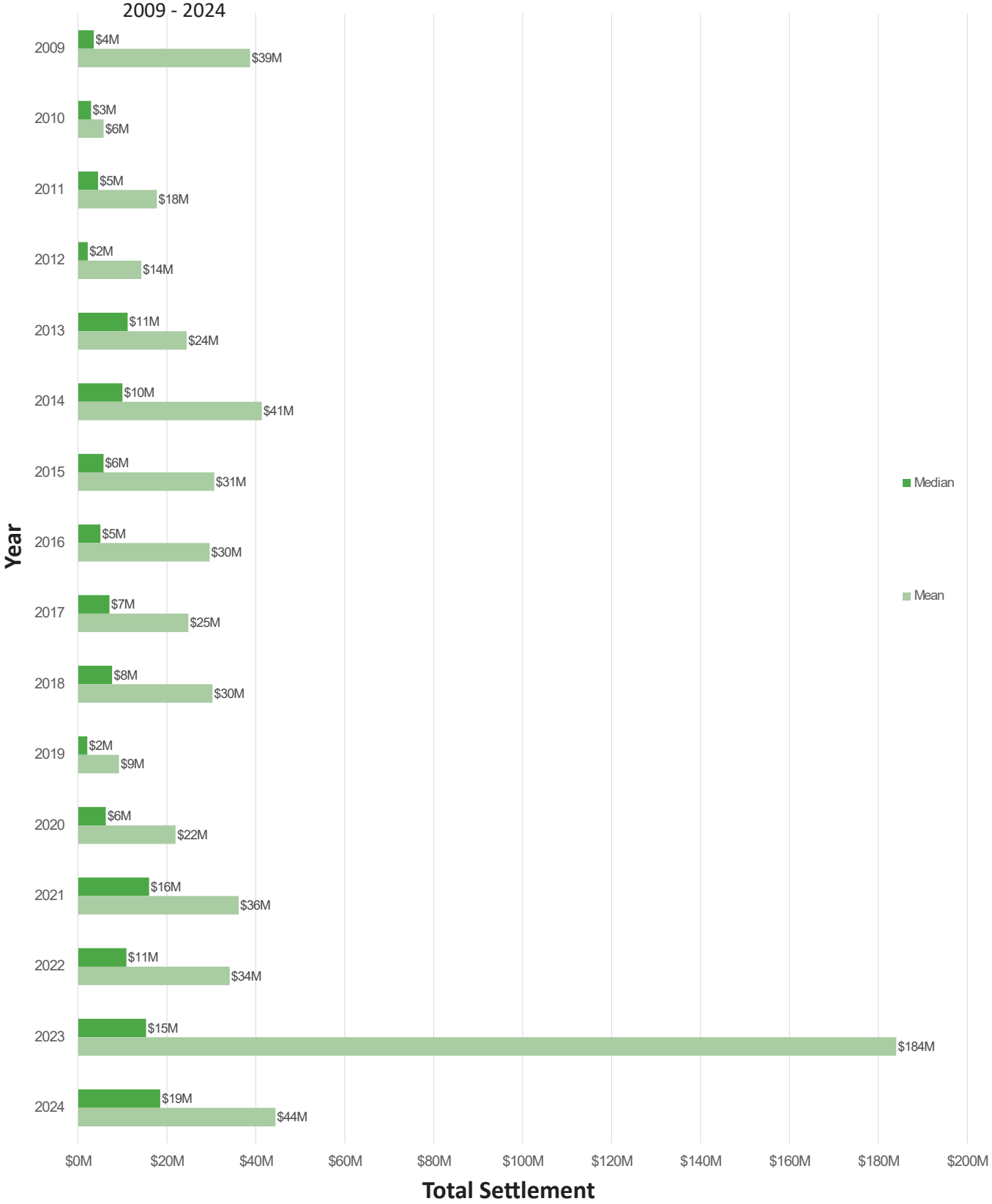
High dollar settlements in 2018 include:

- In re: Foreign Exchange Benchmark Rates Antitrust Litigation: $2.3B
- In re: LIBOR Based Financial Instruments Antitrust Litigation: $590M
- In re: ISDAfix Antitrust Litigation: $504M

Figure 8: **Total Settlement Amount by Year**
2009 - 2024

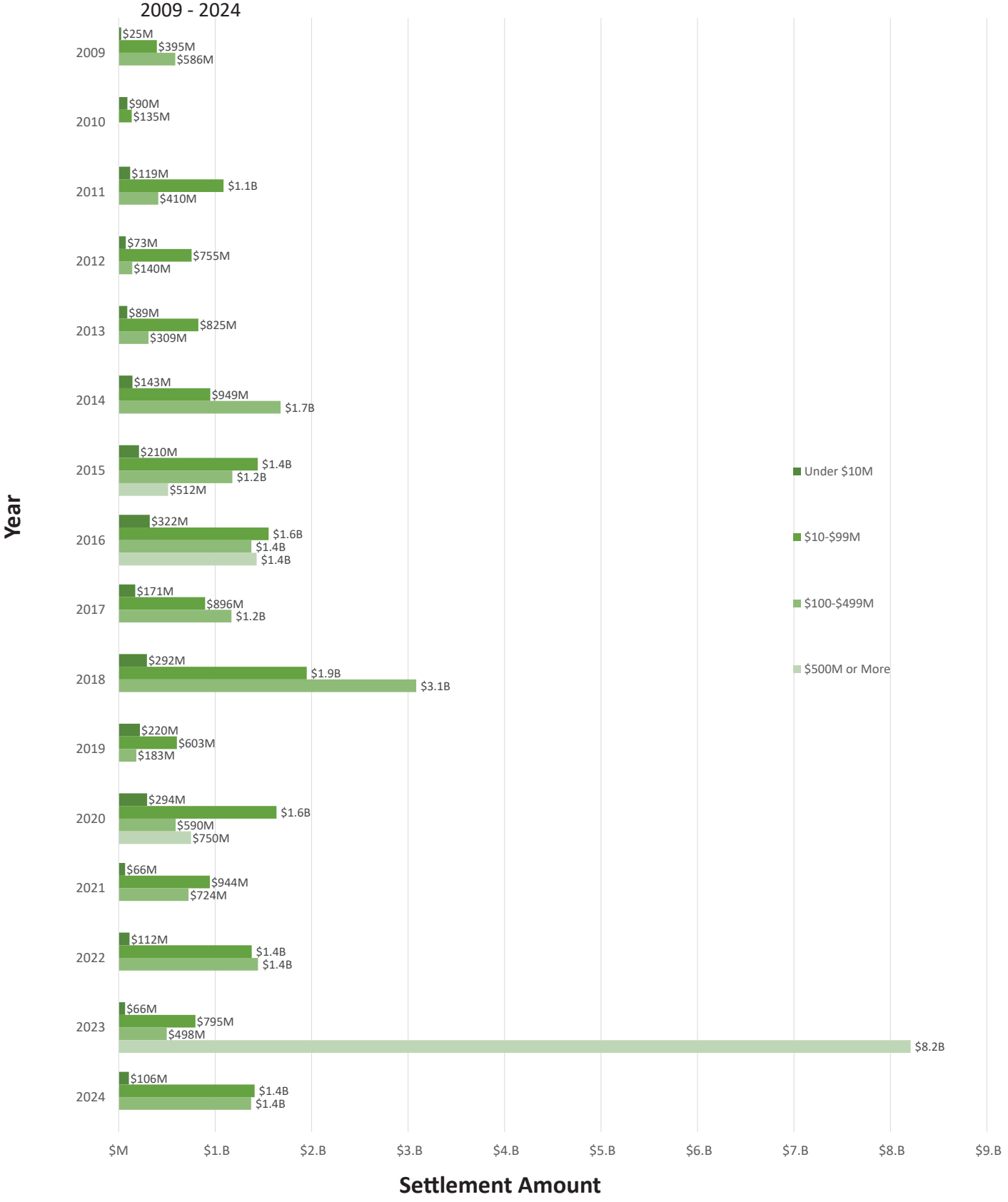
Average Settlement Amount by Year

Figure 9: **Median and Mean Federal Case Settlement Amount by Year**
2009 - 2024



Aggregate Settlement Value by Size

Figure 10: **Aggregate Settlement Value by Size**
2009 - 2024



Settlements by Industry

Figure 11: **Aggregate Settlement Amount by Industry**
2009 - 2024

Industry	Aggregate Settlement Amount	# of Settlements	Average Settlement Amount
Financial Services	$15,753,485,057	183	$86,084,618
Pharmaceuticals	$7,342,332,378	119	$61,700,272
Electronics Manufacturing	$4,244,339,565	167	$25,415,207
Insurance	$2,847,365,769	7	$406,766,538
Automotive Manufacturing	$2,510,244,520	431	$5,824,233
Chemical Manufacturing	$1,836,925,300	56	$32,802,238
Logistics and Freight	$1,826,212,670	70	$26,088,752
Food Processing	$1,403,441,762	56	$25,061,460
Agriculture	$1,221,194,250	52	$23,484,505
Entertainment	$749,566,763	10	$74,956,676
Publishing	$584,419,000	9	$64,935,444
Media	$522,000,000	8	$65,250,000
Construction	$420,770,000	21	$20,036,667
Manufacturing - Wood Products	$376,400,000	3	$125,466,667
Healthcare	$372,274,187	50	$7,445,484
All Others	$2,778,870,255	141	$19,708,300

Recoveries by Class Type

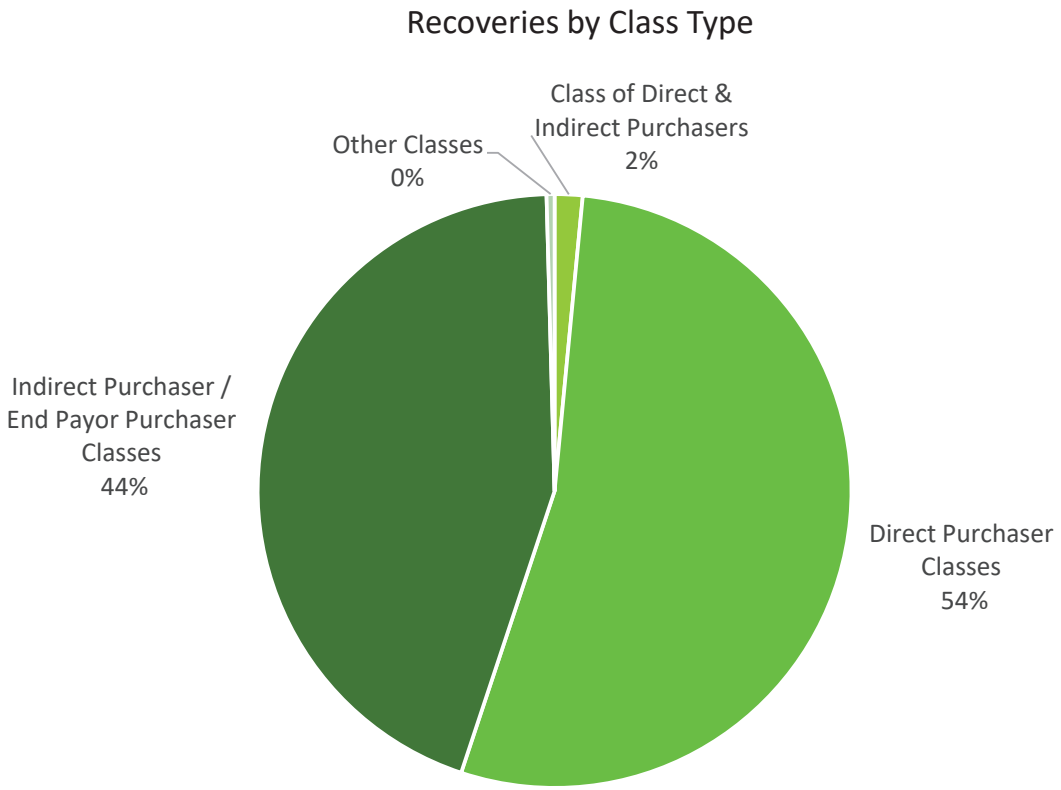
The number of settlements and the amount of the class recoveries are strikingly different for direct purchaser class actions than for indirect purchaser class actions. From 2009 through 2024, direct purchaser actions recovered far more in total than indirect purchaser actions—$32.9 billion and $10.2 billion, respectively.

That is because there were more direct purchaser settlements than indirect purchaser settlements, and because the direct purchaser settlements averaged $44.3 million while the indirect purchaser settlements averaged approximately $16.5 million.

The ultimate result is that direct purchaser settlements recovered more than three times as much --3.2 times as much, to be precise -- as indirect purchaser actions.

Figure 12: **Recoveries by Class Type**
2009 - 2024

Recoveries by Class Type	# of Settlements	% of Settlements	Aggregate Amount	% of Amount
Direct Purchaser Classes	741	54%	$32,857,784,680	73%
Indirect Purchaser / End Payor Purchaser Classes	615	44%	$10,167,272,278	23%
Class of Direct & Indirect Purchasers	21	2%	$1,655,684,519	4%
Other Classes	6	0%	$109,100,000	0%
Total	1,383	100%	$44,789,841,477	100%

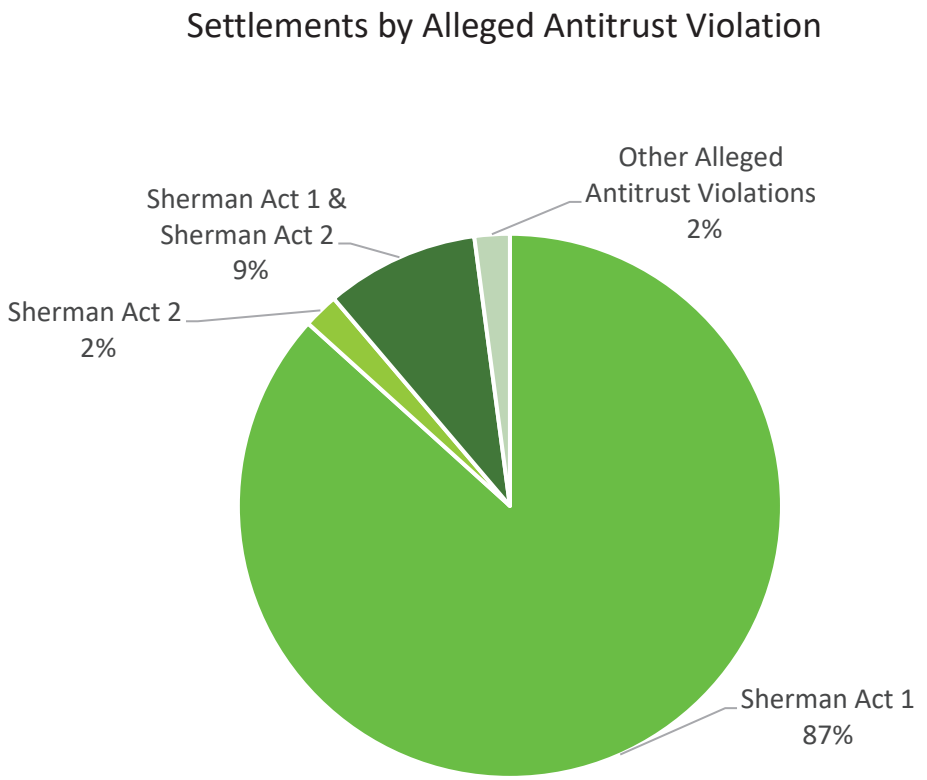


Settlements by Alleged Antitrust Violation

The vast majority of antitrust recoveries in federal court—just shy of 90%—were in cases brought only under Section 1 of the Sherman Act. These entail allegations of a contract, combination or conspiracy—sometimes called concerted action—and would include traditional horizontal agreements to fix prices. Far fewer recoveries occurred in actions—approximately 2%—based solely on Section 2 of the Sherman Act, which does not require concerted action and would include illegal monopolization. Approximately 9% of recoveries came in actions pursuing claims under both Section 1 and Section 2. The recoveries were more balanced when measured not by number of settlements but by amounts recovered. Section 1 claims accounted for $31 billion of recoveries—69%—Section 2 claims for slightly over $2.1 billion—5%—and cases involving claims under Section 1 and Section 2 for Approximately $10.5 billion—23%.

Figure 13: **Settlements by Alleged Antitrust Violation**
2009 - 2024

Alleged Antitrust Violation	# of Settlements	% of Settlements	Aggregate Amount	% of Amount
Sherman Act 1	1,199	87%	$30,992,998,478	69%
Sherman Act 2	29	2%	$2,119,988,000	5%
Sherman Act 1 & Sherman Act 2	126	9%	$10,477,754,999	23%
Other Alleged Antitrust Violations	29	2%	$1,199,100,000	3%
Total	1,383		$44,789,841,477	100%



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Cases with Settlements Reaching Final Approval in 2024

Rank	Case Name	Co-Lead Counsel	Aggregate Settlement Amount in 2024
1	Iowa Public Employees' Retirement System et al v Bank of America Corp et al (Stock Loan)	Cohen Milstein Sellers & Toll PLLC Quinn Emanuel Urquhart & Sullivan LLP	$580,008,750
2	Suboxone (Buprenorphine Hydrochloride and Naloxone) Antitrust Litigation - Direct Purchasers	Faruqi & Faruqi LLP Garwin Gerstein & Fisher LLP Hagens Berman Sobol & Shapiro LLP	$385,000,000
3	Burnett et al v National Association of Realtors et al (Real Estate Broker Commissions) - Direct Purchasers	Boulware Law LLC Cohen Milstein Sellers & Toll PLLC Hagens Berman Sobol & Shapiro PLLC Ketchmark and McCreight PC Susman Godfrey LLP Williams Dirks Dameron LLC	$319,100,000
4	Henry et al v. Brown University et al (Elite School Financial Aid) - Direct Purchasers	Berger Montague PC Freedman Normand Friedland LLP Gilbert Litigators & Counselors PC	$284,000,000
5	HIV Antitrust Litigation - Direct Purchasers	NastLaw LLC Roberts Law Firm	$246,750,000
6	Packaged Seafood Products Antitrust Litigation - End Payors	Wolf Haldenstein Adler Freeman & Herz LLC	$136,000,000
7	European Government Bonds Antitrust Litigation - Direct Purchasers	Berman Tabacco DiCello Levitt LLC Lowey Dannenberg Scott + Scott Attorneys at Law	$120,000,000
8	Google Play Developer Antitrust Litigation - Developers	Hagens Berman Sobol & Shapiro LLP Hausfeld LLP Sperling Kennedy Nachwalter	$112,000,000
9	Lipitor Antitrust Litigation - Direct Purchasers	Berger Montague PC Garwin Gerstein & Fisher LLP Hagens Berman Sobol & Shapiro LLP	$93,000,000
10	Varsity Brands Cheer Antitrust Litigation - Indirect Purchasers	Gustafson Gluek PLLC Hartley LLP Joseph Saveri Law Firm Inc Paul LLP Turner Field PLLC	$82,500,000

Cases with Settlements Reaching Final Approval in 2024 (Continued)

Rank	Case Name	Co-Lead Counsel	Aggregate Settlement Amount in 2024
11	Broiler Chicken Antitrust Litigation - Direct Purchasers	Lockridge Grindal Nauen PLLP Pearson Warshaw LLP	$75,000,000
12	Packaged Seafood Products Antitrust Litigation - Direct Purchasers	Hausfeld LLP	$64,750,000
13	FWK Holdings LLC v Shire et al (Intuniv) - Direct Purchasers	Hagens Berman Sobol & Shapiro LLP	$58,000,000
14	Northshore University HealthSystem Antitrust Litigation - Direct Patients and Third Party Payors	Miller Law LLC	$55,000,000
15	KPH Healthcare Services Inc v Mylan (EpiPen) - Direct Purchasers	Nussbaum Law Group PC Roberts Law Firm	$50,000,000
16	Generic Pharmaceuticals Pricing Antitrust Litigation - Direct Purchasers	Berger Montague PC Hagens Berman Sobol & Shapiro LLP Kaplan Fox & Kilsheimer LLP NastLaw LLC Nussbaum Law Group PC Roberts Law Firm	$45,000,000
17	Effexor XR Antitrust Litigation - Direct Purchasers	Barrett Law Group PA Berger Montague PC Faruqi & Faruqi LLP Hagens Berman Sobol & Shapiro LLP NastLaw LLC Taus Cebulash & Landau LLP	$39,000,000
18	Laydon v Mizuho Bank, Ltd. Et al (Euroyen) - Direct Purchasers	Lowey Dannenberg PC	$35,000,000
19	Lipitor Antitrust Litigation - Indirect Purchasers	Cohen Milstein Sellers & Toll PLLC Grant & Eisenhofer PA Motley Rice LLC Wexler Boley & Elgersma LLP	$35,000,000
20	Effexor XR Antitrust Litigation - Indirect Purchasers	Carella Byrne Cecchi Brody & Agnello PC	$25,500,000

Cases with Settlements Reaching Final Approval in 2024 (Continued)

Rank	Case Name	Co-Lead Counsel	Aggregate Settlement Amount in 2024
21	Pork Antitrust Litigation - Direct Purchasers	Lockridge Grindal Nauen PLLP Pearson Warshaw LLP	$14,606,000
22	Robinson et al v Jackson Hewitt Inc et al (Jackson Hewitt No Poach) - Employees	Adhoot & Wolfson PC Freed Kanner London & Millen LLC Gustafson Gluek PLLC Hartley LLP Joseph Saveri Law Firm Inc Lite DePalma Greenberg & Afandor LLC Paul LLP	$10,800,000
23	Pork Antitrust Litigation - Commercial and Institutional Indirect Purchasers	Cuneo Gilbert LaDuca LLP Larson King LLP	$7,389,000
24	Packaged Seafood Products Antitrust Litigation - Commercial Food Preparers	Cuneo Gilbert LaDuca LLP	$3,875,000
25	LIBOR Based Financial Instruments Antitrust Litigation - Exchange Based Plaintiffs	Kirby McInerney LLP Lovell Stewart Halebian Jacobson LLP	$3,450,000
26	Xyrem (Sodium Oxybate) Antitrust Litigation - Direct Purchasers	Girard Sharp LLP Motley Rice LLC	$3,400,000
27	LIBOR Based Financial Instruments Antitrust Litigation - Lender Class	Pomerantz LLP	$1,900,000
28	Automotive Parts Antitrust Litigation - Dealership Plaintiffs	Barrett Law Group PA Cuneo Gilbert & LaDuca LLP Larson King LLP	$948,000

Top 50 Cases with Settlements Reaching Final Approval 2009-2024

Rank	Case Name	Co-Lead Counsel	Aggregate Settlement Amount
1	Payment Card Interchange Fee and Merchant Discount Antitrust Litigation	Berger Montague PC Robbins Geller Rudman & Dowd LLP Robins Kaplan LLP	$5,540,000,000
2	Blue Cross Blue Shield Antitrust Litigation - Subscriber Plaintiffs	Boies Schiller & Flexner LLP Hausfeld LLP	$2,670,000,000
3	Foreign Exchange Benchmark Rates Antitrust Litigation - Direct Purchasers	Hausfeld LLP Scott + Scott, Attorneys at Law LLP	$2,310,275,000
4	Credit Default Swaps Antitrust Litigation - Direct Purchasers	Pearson Warshaw LLP Quinn Emanuel Urquhart & Sullivan LLP	$1,864,650,000
5	Air Cargo Shipping Services Antitrust Litigation - Direct Purchasers	Hausfeld LLP Kaplan Fox & Kilsheimer LLP Levin Sedran & Berman LLP Robins Kaplan LLP	$1,235,907,442
6	Automotive Parts Antitrust Litigation - End Payor Plaintiffs	Cotchett Pitre & McCarthy LLP Robins Kaplan LLP Susman Godfrey LLP	$1,224,004,658
7	TFT-LCD (Flat Panel) Antitrust Litigation - Indirect Purchasers	Alioto Law Firm Zelle LLP	$1,082,055,647
8	Urethane Antitrust Litigation - Direct Purchasers	Cohen Milstein Sellers & Toll PLLC Fine Kaplan & Black RPC	$919,000,000
9	LIBOR Based Financial Instruments Antitrust Litigation - OTC Class	Hausfeld LLP Susman Godfrey LLP	$781,000,000
10	Namenda Direct Purchaser Antitrust Litigation - Direct Purchasers	Berger Montague PC Garwin Gerstein & Fisher LLP	$750,000,000

Top 50 Cases with Settlements Reaching Final Approval 2009-2024 (Continued)

Rank	Case Name	Co-Lead Counsel	Aggregate Settlement Amount
11	Sullivan v. Barclays PLC et al (Euribor) - Direct Purchasers	Lovell Stewart Halebian & Jacobson LLP Lowey Dannenberg PC	$651,500,000
12	Automotive Parts Antitrust Litigation - Direct Purchaser Plaintiffs	Freed Kanner London & Millen LLC Kohn Swift & Graf PC Preti Flaherty Beliveau & Pachios LLP Spector Roseman & Kodroff PC	$631,693,335
13	EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litigation - Consumer Class	Burns Charest LLP Keller Rohrback LLP Pritzker Levine LLP Robbins Geller Rudman & Dowd LLP Sharp Law LLP	$609,000,000
14	Capacitors Antitrust Litigation - Direct Purchasers	Joseph Saveri Law Firm, Inc	$604,550,000
15	Klein et al v. Bain Capital Partners, LLC et al (Leveraged Buyouts) - Direct Purchasers	Robbins Geller Rudman & Dowd LLP Robins Kaplan LLP Scott + Scott, Attorneys at Law LLP	$590,500,000
16	Iowa Public Employees' Retirement System et al v Bank of America Corp et al (Stock Loan)	Cohen Milstein Sellers & Toll PLLC Quinn Emanuel Urquhart & Sullivan LLP	$580,008,750
17	Electronic Books Antitrust Litigation - Direct Purchasers	Cohen Milstein Sellers & Toll PLLC Hagens Berman Sobol Shapiro LLP	$566,119,000
18	Cathode Ray Tube (CRT) Antitrust Litigation - Indirect Purchasers	Trump Alioto Trump & Prescott	$545,750,000
19	King Drug Company of Florence, Inc vs Cephalon, Inc et al (Provigil) - Direct Purchasers	Garwin Gerstein & Fisher LLP	$512,000,000
20	ISDAfix Antitrust Litigation - Direct Purchasers	Robbins Geller Rudman & Dowd LLP Quinn Emanuel Urquhart & Sullivan LLP Scott + Scott, Attorneys at Law	$504,500,000

Top 50 Cases with Settlements Reaching Final Approval 2009-2024 (Continued)

Rank	Case Name	Co-Lead Counsel	Aggregate Settlement Amount
21	TFT-LCD (Flat Panel) Antitrust Litigation - Direct Purchasers	Lieff Cabraser Heimann & Bernstein LLP Pearson Warshaw LLP	$473,022,242
22	Glumetza Antitrust Litigation - Direct Purchasers	Hagens Berman Sobol Shapiro LLP Hilliard & Shadowen LLP Sperling Kenny Nachwalter	$453,850,000
23	High-Tech Employee Antitrust Litigation - Direct Plaintiffs	Berger Montague PC Grant & Eisenhofer PA Joseph Saveri Law Firm Inc Lieff Cabraser Heimann & Bernstein LLP	$435,000,000
24	Polyurethane Foam Antitrust Litigation - Direct Purchasers	Boies Schiller Flexner LLP Quinn Emanuel Urquhart & Sullivan LLP	$432,300,000
25	Automotive Parts Antitrust Litigation - Dealership Plaintiffs	Barrett Law Group PA Cuneo Gilbert & LaDuca LLP Larson King LLP	$403,327,787
26	GSE Bonds Antitrust Litigation - Indirect Purchasers	Lowey Dannenberg PC Scott + Scott, Attorneys at Law, LLP	$386,500,000
27	Currency Conversion Fee Antitrust Litigation	Berger Montague PC Hulett Harper Stewart LLP Robbins Geller Rudman & Dowd LLP	$385,500,000
28	Suboxone (Buprenorphine Hydrochloride and Naloxone) Antitrust Litigation - Direct Purchasers	Faruqi & Faruqi LLP Garwin Gerstein & Fisher LLP Hagens Berman Sobol & Shapiro LLP	$385,000,000
29	Kleen Products LLC et al v. International Paper et al - Direct Purchasers	Freed Kanner London & Millen LLC MoginRubin LLP	$376,400,000
30	Laydon v Mizuho Bank, Ltd. Et al (Euroyen) - Direct Purchasers	Lowey Dannenberg PC	$364,500,000

Top 50 Cases with Settlements Reaching Final Approval 2009-2024 (Continued)

Rank	Case Name	Co-Lead Counsel	Aggregate Settlement Amount
31	Precision Associates, Inc et al v. Panalpina World Transport (Freight Forwarders) - Direct Purchasers	Cotchett Pitre & McCarthy LLP Gustafson Gluek PLLC Lockridge Grindal Nauen PLLP Lovell Stewart Halebian & Jacobson LLP	$344,315,228
32	Ranbaxy Generic Drug Application Antitrust Litigation - Direct Purchasers	Hagens Berman Sobol Shapiro LLP Hilliard & Shadowen LLP	$340,000,000
33	Burnett et al v National Association of Realtors et al (Real Estate Broker Commissions) - Direct Purchasers	Boulware Law LLC Cohen Milstein Sellers & Toll PLLC Hagens Berman Sobol & Shapiro PLLC Ketchmark and McCreight PC Susman Godfrey LLP Williams Dirks Dameron LLC	$319,100,000
34	Southeastern Milk Antitrust Litigation - Direct Purchasers	Baker Hostetler Brewer & Terry PC	$303,600,000
35	Dynamic Random Access Memory (DRAM) Antitrust Litigation - Indirect Purchasers	BoiesBattin LLP Cooper & Kirkham PC Gustafson Gluek PLLC MoginRubin LLP	$287,650,000
36	Broiler Chicken Antitrust Litigation - Direct Purchasers	Lockridge Grindal Nauen PLLP Pearson Warshaw LLP	$284,651,750
37	Henry et al v. Brown University et al (Elite School Financial Aid) - Direct Purchasers	Berger Montague PC Freedman Normand Friedland LLP Gilbert Litigators & Counselors PC	$284,000,000
38	HIV Antitrust Litigation - Direct Purchasers	NastLaw LLC Roberts Law Firm	$257,550,000
39	Tricor Direct Purchaser Antitrust Litigation	Berger Montague PC Garwin Gerstein & Fisher LLP Kaplan Fox & Kilsheimer LLP Odom & Des Roches LLC Rosenthal Monhait & Goddess PA The Smith Foote Law Firm	$250,000,000
40	Pharmaceutical Industry Average Wholesale Price Litigation - Indirect Purchasers	Hagens Berman Sobol Shapiro LLP Hoffman & Edelson LLC Spector Roseman & Kodroff PC Wexler Boley & Elgersma LLP	$247,000,000

Top 50 Cases with Settlements Reaching Final Approval 2009-2024 (Continued)

Rank	Case Name	Co-Lead Counsel	Aggregate Settlement Amount
41	Dial Corporation, et al v. News Corporation et al - Direct Purchasers	Kellogg Hansen Todd Figel & Frederick PLLC Susman Godfrey LLP	$244,000,000
42	Municipal Derivatives Antitrust Litigation - Direct Purchasers	Boies Schiller Flexner LLP Hausfeld LLP Susman Godfrey LLP	$223,514,307
43	Fresh Dairy Products Antitrust Litigation - Direct Purchasers	Barrett Law Group PA NastLaw LLC Roberts Law Firm	$220,000,000
44	Cathode Ray Tube - Direct Purchasers	Saveri & Saveri Inc	$212,200,000
45	National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation	Hagens Berman Sobol Shapiro LLP Pearson Warshaw LLP	$208,664,445
46	Optical Disk Drive Products Antitrust Litigation - Indirect Purchasers	Hagens Berman Sobol Shapiro LLP	$205,000,000
47	Steel Antitrust Litigation - Direct Purchasers	Fine Kaplan & Black RPC Kellogg Hansen Todd Figel & Frederick PLLC	$193,899,999
48	Domestic Drywall Antitrust Litigation - Direct Purchasers	Berger Montague PC Cohen Milstein Sellers & Toll PLLC Spector Roseman & Kodroff PC	$192,500,000
49	LIBOR Based Financial Instruments Antitrust Litigation - Exchange Based Plaintiffs	Kirby McInerney LLP Lovell Stewart Halebian Jacobson LLP	$190,450,000
50	Neurontin Antitrust Litigation - Direct Purchasers	Garwin Gerstein & Fisher LLP Kaplan Fox Kilsheimer LLP	$190,000,000

LEX

Class Recovery by Settlement Size

This report analyzes class recoveries by dividing settlements by a category, with the smallest settlements included in a single category of recoveries under $10 million and the largest settlements in a category of $1 billion or more.

Generally speaking, the larger the class settlement recovery by category, the higher the median percentage the class retained, the lower the median percentage awarded in attorneys' fees, and the lower the median percentage paid in expenses. As shown in Figure 14, for recoveries under $10 million, the median percentage the class received was 63% and the median fees and costs awarded were 30% and 7%, respectively. In contrast, for settlement recoveries greater than or equal to $1 billion the median class recovery was 86%, the median fee award 13%, and the median expenses 1%.

While the median class recovery on the whole increased incrementally as a percentage of the class settlement, and the median expenses incrementally decreased, the awards of attorneys' fees varied less. The median award of attorneys' fees remained largely around 30-33% for recoveries up to $249 million. Between $250 - $999 million, attorneys' fees were 25-27%. The median fee award decreased significantly—again, to 13%—only for recoveries greater than or equal to $1 billion.

Looking at the data as a whole, Figure 15 illustrates the median class recovery was 67% of the settlement amount, the median award of attorneys' fees was 30%, and the median expenses were 3%. When we move from the median to totals, we see that plaintiff classes received 74% of the total settlement recoveries between 2009 and 2024, attorneys' fees awards were 23%, and expenses were 3%.

Many of these numbers would be expected. For example, as the settlement recoveries increase in size, the percentage allocated in expenses decreases. That likely reflects economies of scale, ones that have generally been recognized by commentators.

The median numbers in this Report, however, reveal that a typical award in antitrust class actions is actually 25 to 32%. They also indicate that 30% is typical unless the recovery is greater than $250 million. Further, they suggest that so-called "mega-funds"—in which attorneys receive a significantly smaller percentage fee award when there is a really large class recovery—arise only when there is a settlement in excess of $1 billion. To confirm this last point, additional analyses of awards just below and just above $1 billion would be helpful.

This analysis largely involves medians. It does so because medians are informative about typical cases. It protects against weighing larger settlements more heavily than smaller settlements in assessing patterns. Note, for example, that we get different results when we analyze the median fees and expenses for all of the settlements than when we consider the total percentages allocated to fees and expenses. Yet these results are perfectly consistent. As for the typical antitrust class action from 2009 through 2024, the court awarded 30% of the class recovery in fees and 3% in expenses, and 67% of the recovery was available to class members. Medians help to analyze a typical case, weighing large and small cases equally.

In contrast, an analysis of overall percentages as illustrated in Figure 16, weighs cases with larger recoveries more heavily than cases with smaller recoveries. But that approach can be valuable too. The overall amounts and percentages can be particularly instructive if we want to assess the benefits and efficiency of private antitrust enforcement. In that case, it is useful to know that the total recovery over 16 years was $44.8 billion, that lawyers received 23% of this amount—about $10.5 billion—that expenses totaled 3%—about $1.3 billion—that the plaintiff classes had available 74% of the total settlements—about $33 billion.

Class Recovery by Settlement Size (continued)

While the attorneys' fees total percentage has remained consistent throughout the period of our analyses (23%), expenses have increased over time from 2% of the total settlement to 3% of the total settlement. This could potentially indicate that antirust class actions are becoming more expensive to litigate for reasons such as discovery, expert witness fees, length and complexity of litigation, trial preparation, and appeals.

Figure 14: **Class Recovery by Settlement Size - Median**
2009 - 2024

Settlement Amount	Class Recovery	Attys Fees	Expenses	Total
$1B+	86%	13%	1%	100%
$500-$999M	71%	27%	2%	100%
$250-$499M	74%	25%	1%	100%
$100-$249M	68%	30%	2%	100%
$50-$99M	64%	33%	3%	100%
$10-$49M	63%	33%	4%	100%
<$10M	63%	30%	7%	100%
All Settlements	67%	30%	3%	100%

Class Recovery by Settlement Size (continued)

Figure 15: **Class Recovery by Settlement Size - Median**
2009 - 2024

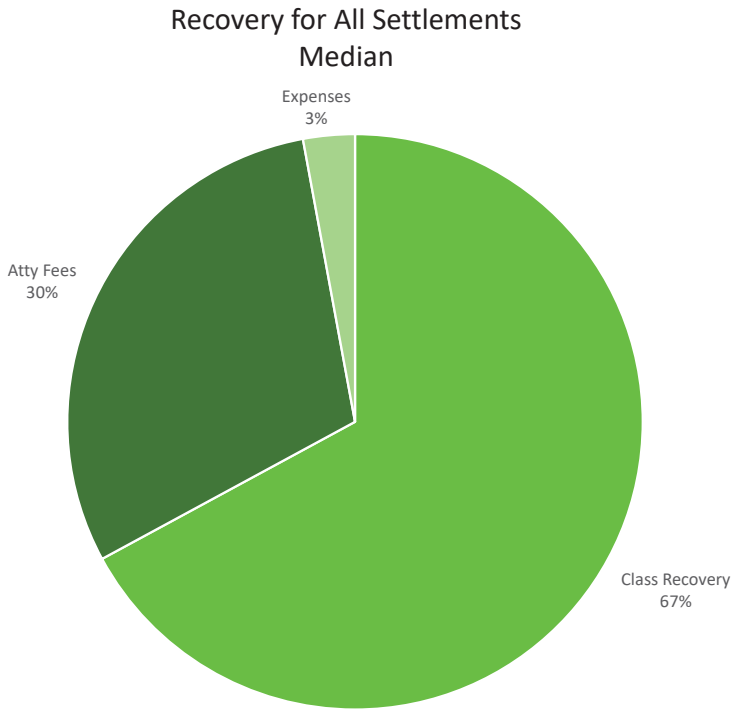
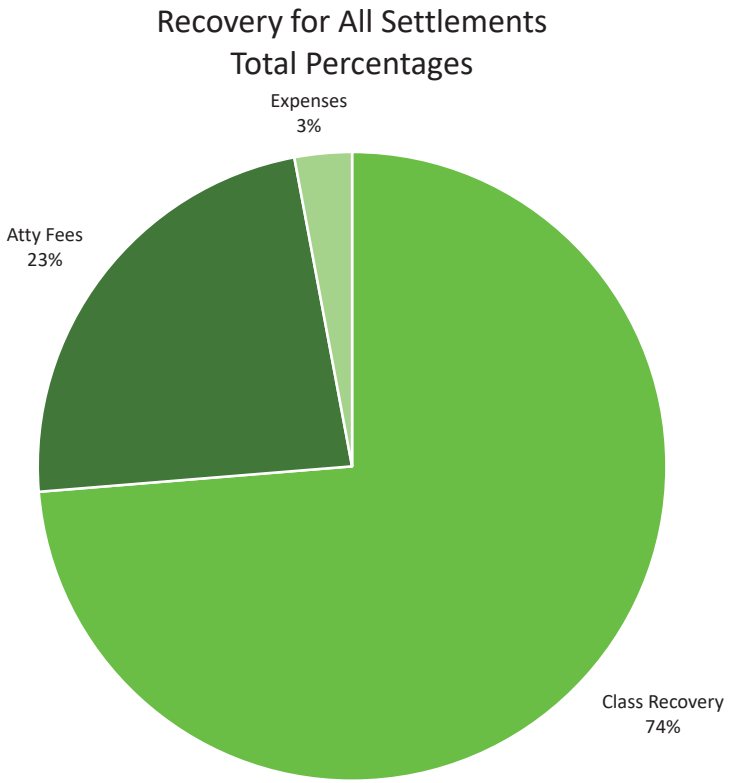


Figure 16: **Class Recovery by Settlement Size - Total Percentages**
2009 - 2024



Top 25 Firms Acting as Defense Counsel

Rank	Firm	# Cases Defended 2009-2024	
1	Latham & Watkins LLP	584	
2	Gibson, Dunn & Crutcher LLP	545	
3	Skadden, Arps, Slate, Meagher & Flom LLP	415	
4	Kirkland & Ellis LLP	401	
5	Hogan Lovells	330	
6	Jones Day	296	
7	O'Melveny & Myers LLP	294	
8	Freshfields Bruckhaus Deringer LLP	267	
9	Morgan Lewis & Bockius LLP	255	
10	Crowell & Moring LLP	253	
11	Arnold & Porter Kaye Scholer LLP	235	
12	Vinson & Elkins LLP	230	
13	Cleary Gottlieb Steen & Hamilton LLP	224	
14	Mayer Brown LLP	218	
15	Simpson Thacher & Bartlett LLP	216	
16	Covington & Burling LLP	214	
17	Paul, Weiss, Rifkind, Wharton & Garrison LLP	211	
18	Wilson Sonsini Goodrich & Rosati	204	
19	Winston & Strawn LLP	201	
20	WilmerHale	200	
21	Sidley Austin LLP	195	
22	White & Case LLP	194	
23	Foley & Lardner LLP	176	
24	Faegre Drinker Biddle & Reath LLP	175	(tie)
24	Sullivan & Cromwell LLP	175	(tie)

Note: Cases with more than one law firm listed on the docket are attributed to each firm.

Top 25 Lead Counsel in Complaints Filed

Rank	Firm	# of Complaints Filed 2009-2024	
1	Hagens Berman Sobol Shapiro LLP	373	
2	Hausfeld LLP	356	
3	Berger Montague PC	312	
4	Spector Roseman & Kodroff PC	309	
5	Gustafson Gluek PLLC	302	
6	Lockridge Grindal Nauen PLLP	276	
7	Cohen Milstein Sellers & Toll PLLC	269	
8	Freed Kanner London & Millen LLC	258	
9	Cuneo Gilbert & LaDuca LLP	246	
10	Scott + Scott, Attorneys at Law, LLP	233	
11	Susman Godfrey LLP	226	
12	Cotchett, Pitre & McCarthy LLP	223	
13	The Miller Law Firm (millerlawpc.com)	206	(tie)
13	Robins Kaplan LLP	206	(tie)
15	Nussbaum Law Group PC	199	
16	Glancy Prongay & Murray LLP	191	
17	NastLaw LLC	190	
18	Labaton Sucharow LLP	184	(tie)
18	Mantese Honigman PC	184	(tie)
20	Barrett Law Office (barrettlawoffice.com)	182	
21	Grant & Eisenhofer PA	181	
22	Kaplan Fox & Kilsheimer LLP	175	
23	Lowey Dannenberg PC	168	
24	Joseph Saveri Law Firm Inc	162	
25	Lieff Cabraser Heimann & Bernstein LLP	159	

Note: Filings with more than one law firm as listed on complaint are attributed to each firm.

Top 25 Lead Counsel in Number of Settlements

Rank	Firm	# of Settlements 2009-2024
1	Cotchett Pitre & McCarthy LLP	227
2	Susman Godfrey LLP	210
3	Robins Kaplan LLP	174
4	Cuneo Gilbert & LaDuca LLP	158
5	Larson King LLP	153
6	Barrett Law Group PA	151
7	Hausfeld LLP	132
8	Hagens Berman Sobol Shapiro LLP	111
9	Freed Kanner London & Millen LLC	108
10	Berger Montague PC	103
11	Spector Roseman & Kodroff PC	103
12	Preti Flaherty Beliveau & Pachios LLP	96
13	Kohn Swift & Graf PC	94
14	Cohen Milstein Sellers & Toll PLLC	80
15	Lovell Stewart Halebian Jacobson LLP	69
16	Gustafson Gluek PLLC	65
17	Labaton Sucharow LLP	61
18	Pearson Warshaw LLP	57
19	Quinn Emanuel Urquhart & Sullivan LLP	57
20	Lockridge Grindal Nauen PLLP	56
21	Lowey Dannenberg PC	56
22	Kaplan Fox & Kilsheimer LLP	55
23	Scott + Scott, Attorneys at Law, LLP	53
24	Garwin Gerstein & Fisher LLP	43
25	Robbins Geller Rudman & Dowd LLP	42

Note: Settlements with more than one law firm as lead counsel are attributed to each firm.

Top 25 Lead Counsel in Class Recovery

Rank	Firm	Aggregate Settlement Class Recovery 2009-2024	# of Settlements 2009-2024	Average Settlement Class Recovery 2009-2024
1	Berger Montague PC	$9,491,778,068	103	$92,153,185.13
2	Hausfeld LLP	$8,656,793,711	132	$65,581,770.54
3	Robins Kaplan LLP	$8,204,734,600	174	$47,153,647.13
4	Robbins Geller Rudman & Dowd LLP	$7,903,050,000	42	$188,167,857.14
5	Hagens Berman Sobol Shapiro LLP	$5,110,201,895	111	$46,037,854.91
6	Cohen Milstein Sellers & Toll PLLC	$4,119,167,369	80	$51,489,592.11
7	Scott + Scott, Attorneys at Law, LLP	$4,096,975,000	53	$77,301,415.09
8	Quinn Emanuel Urquhart & Sullivan LLP	$3,902,098,750	57	$68,457,872.81
9	Boies Schiller Flexner LLP	$3,523,264,307	37	$95,223,359.66
10	Susman Godfrey LLP	$3,394,971,465	210	$16,166,530.79
11	Pearson Warshaw LLP	$3,212,408,737	57	$56,358,048.02
12	Garwin Gerstein & Fisher LLP	$3,161,549,000	43	$73,524,395.35
13	Lowey Dannenberg PC	$2,252,983,000	56	$40,231,839.29
14	Cotchett Pitre & McCarthy LLP	$2,239,699,363	227	$9,866,517.02
15	Kaplan Fox & Kilsheimer LLP	$2,025,973,692	55	$36,835,885.31
16	Lovell Stewart Halebian Jacobson LLP	$1,824,420,228	69	$26,440,872.87
17	Lieff Cabraser Heimann & Bernstein LLP	$1,650,122,242	41	$40,246,883.95
18	Freed Kanner London & Millen LLC	$1,359,067,085	108	$12,583,954.49
19	Spector Roseman & Kodroff PC	$1,356,020,935	103	$13,165,251.80
20	Joseph Saveri Law Firm, Inc	$1,351,125,000	30	$45,037,500.00
21	Levin Sedran & Berman LLP	$1,331,023,917	34	$39,147,762.26
22	Fine Kaplan and Black RPC	$1,190,818,749	21	$56,705,654.71
23	Zelle LLP	$1,142,427,647	29	$39,394,056.79
24	Gustafson Gluek PLLC	$1,141,911,703	65	$17,567,872.35
25	Alioto Law Firm	$1,083,199,397	17	$63,717,611.59

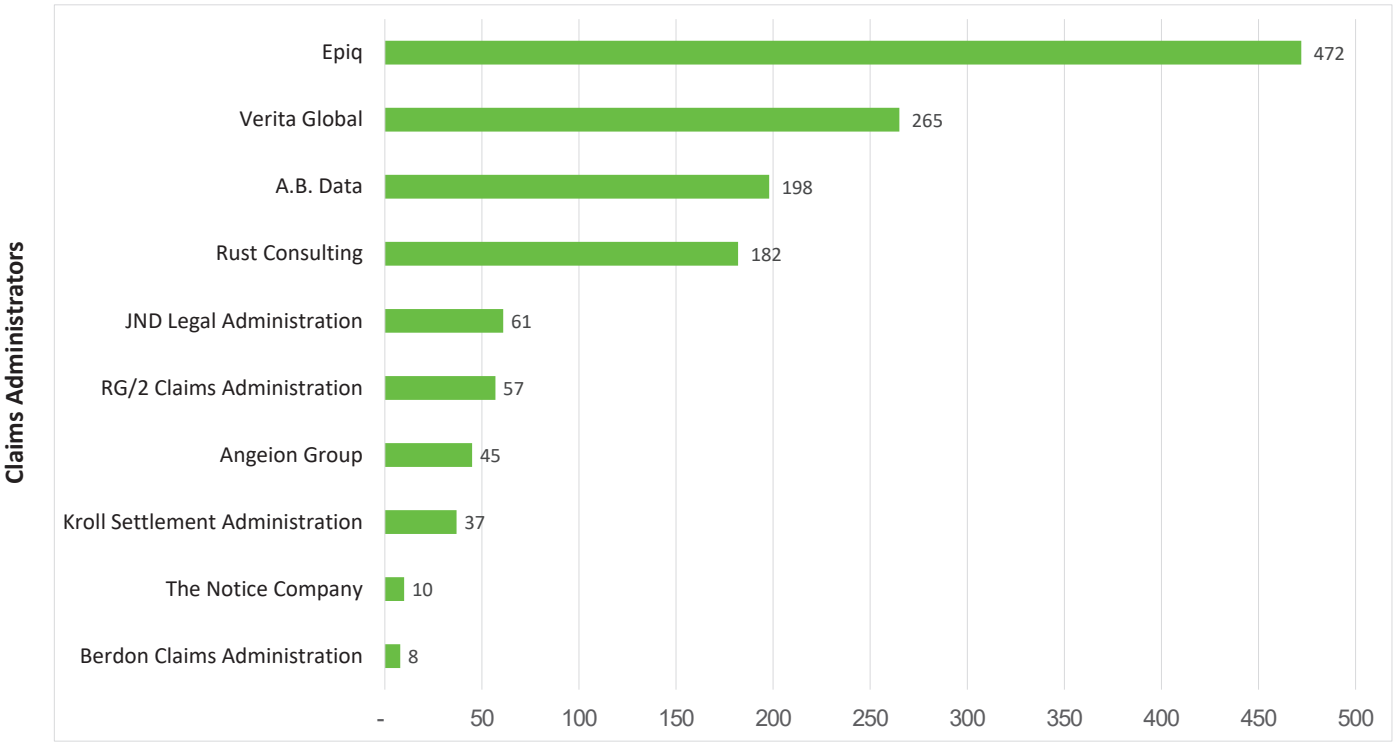
Note: Settlements with more than one law firm as lead counsel are attributed to each firm.

Top Claims Administrators

Figure 17: **Top Claims Administrators by Aggregate Settlement Amount**
2009 - 2024

Rank	Claims Administrator	Aggregate Settlement Amount 2009-2024	# of Settlements 2009-2024	Average Settlement Amount 2009-2024
1	Epiq	$18,916,377,839.62	472	$40,077,071.69
2	Rust Consulting	$7,536,510,284.90	182	$41,409,397.17
3	A.B. Data	$5,496,380,399.99	198	$27,759,496.97
4	JND Legal Administration	$3,832,526,211.86	61	$62,828,298.56
5	Verita Global	$3,323,203,889.39	265	$12,540,392.04
6	Angeion Group	$1,689,584,050.00	45	$37,546,312.22
7	RG/2 Claims Administration	$1,283,669,068.17	57	$22,520,509.97
8	Berdon Claims Administration	$1,004,200,000.00	8	$125,525,000.00
9	Kroll Settlement Administration	$848,305,000.00	37	$22,927,162.16
10	The Notice Company	$547,562,500	10	$54,756,249.95

Figure 18: **Top Claims Administrators by Number of Settlements**
2009 - 2024



Notes:
1. Epiq includes the Garden City Group (GCG)
2. Rust Consulting includes Complete Claims Solutions
3. Verita includes KCC, Administar, and Rosenthal & Company
4. Kroll Settlement Administration includes Heffler Claims Group
5. JND Legal Administration includes Class Action Administration

Methodology and Sources

Cases Analyzed

The cases analyzed in the preceding report represent three individual data sets: complaints filed from 2009-2024, cases won by defendants from 2009-2024, and cases with settlements reaching final approval or verdicts awarded within the time period of 2009-2024. Settlement data analyzed within the 2009-2024 period are not first evaluated by complaint filing date; which is to say, any settlement granted final approval during the sixteen year analysis period is represented in the data, regardless of when the complaint was filed. Only settlements granted final approval within the sixteen year analysis period are represented in the data. Regarding cases with multiple settlements, settlements reaching final approval outside of the sixteen year period of the study are excluded. Settlement Amounts refer to the full dollar value awarded by the court, inclusive of awards to lead plaintiffs, attorneys' fees, expenses, etc.

Sources

Data for this report are collected primarily through Lex Machina's Legal Analytics Platform. Lex Machina uses artificial intelligence to categorize federal court case data from PACER (Public Access to Court Electronic Records). The case data obtained from Lex Machina was verified by the supporting court docket and supplemented with additional data points also available through the Lex Machina platform. All analysis, commentary, and conclusions were reviewed by each member of the authoring team.

Historical data in this report may vary from last year's edition due to updates in case status, additional sources of information, or new methodology for analysis. The authors will continually update the data set for accuracy to provide the most recent information available.

The data gathered are not necessarily exhaustive of every settlement during the analyzed period. While this is intended to be an accurate reflection of class action matters in federal courts, there is a possibility that cases have been excluded due to source limitations or unintentional error.

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Center for Litigation and Courts
UC Law SF
200 McAllister Street
San Francisco, CA 94102
www.uclawsf.edu

The Huntington National Bank
41 South High Street
Columbus, OH 43287
www.huntington.com

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EXHIBIT 17

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

B & R SUPERMARKET, INC., d/b/a MILAM'S MARKET, a Florida corporation, et al., Individually and on Behalf of All Others Similarly Situated, Plaintiffs, v. VISA, INC., et al., Defendants.	:	Case No. 1:17-cv-02738-BMC-JAM CLASS ACTION

[PROPOSED] ORDER AWARDING ATTORNEYS' FEES AND EXPENSES AND APPROVING SERVICE AWARDS

This Court, having considered the Motion for Attorneys' Fees, Expenses, and Service Awards (the "Motion") submitted by plaintiffs B & R Supermarket, Inc. (d/b/a Milam's Market) ("B & R"), Grove Liquors LLC ("Grove"), Strouk Group LLC (d/b/a Monsieur Marcel) ("Strouk"), and Palero Food Corp. and Cagueyes Food Corp. (d/b/a Fine Fare Supermarket) ("Fine Fare, and collectively, "Plaintiffs" or "Class Representatives") in the above-captioned matter (the "Action"), and all of the submissions and arguments submitted with respect to the Motion, and after having held a duly noticed fairness hearing on April 27, 2026, hereby finds as follows:

1. The Motion seeks (1) an award of attorneys' fees of $65,594,270, or 28.31% of the $231,700,000 common fund ("Common Fund") obtained, and (2) reimbursement of $4,548,300.91 in expenses, along with any interest earned on both the attorneys' fees and the expenses.

2. The amount of attorneys' fees requested is fair and reasonable under the percentage-of-the-fund method, which is confirmed by a lodestar "cross-check." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). Class Counsel provided for the Court detailed lodestar information and a detailed description of the work performed by Plaintiffs' counsel. Class Counsel made the Motion, and the supporting documents are available for review by the Class at the website www.fraudliabilityshiftlitigation.com.

3. The attorneys' fees requested by Class Counsel are appropriate and consistent with the awards in similar cases, and represent a reasonable percentage of the Common Fund, in view of the applicable legal principles and the particular facts and circumstances of the action.

4. The attorneys' fees requested by Class Counsel were entirely contingent upon a successful outcome for the Class. The risk undertaken by Class Counsel was significant, especially considering that this Action did not benefit from a prior or concurrent government investigation or litigation. Among other things, Class Counsel faced risks in the motions to dismiss, the class

certification oppositions, the *Daubert* motions, the motions to decertify the class, and the summary judgment motions. Class Counsel also faced risks in litigating complex antitrust theories and the Supreme Court's decision in *Ohio v. American Express Co.*, 585 U.S. 529 (2018), which was issued during the litigation of this Action, and in addressing Defendants' indirect purchaser arguments based on *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Class Counsel also faced risk litigating against the vigorous efforts of experienced defense counsel representing defendants.

5. An award of 28.31% of the $231,700,000 Common Fund is reasonable and warranted for the reasons set forth in the memorandum in support of Plaintiffs' Motion (the "Memorandum"), including, but not limited to, the following: the significant time and labor expended by Plaintiffs' counsel over nearly a decade of litigation; the broad magnitude and scope of this Action—as demonstrated by the breadth of fact and expert discovery and the motion practice engaged in by the parties—and high complexity of this antitrust Action; the risks faced by Class Counsel throughout the litigation; the quality of representation, as demonstrated by the results achieved, among other things; and public policy considerations of incentivizing private antitrust enforcement actions like this one, particularly where there is no separate government investigation or action.

6. In addition to risking the substantial time and effort that Class Counsel invested into this case on a contingent basis, Plaintiffs' counsel also incurred $4,548,300.91 in unreimbursed expenses with no guarantee of repayment. The primary expense in this case was for experts. Together with Class Counsel's claimed expenses for discovery platform costs and deposition costs, these expenses account for 86% of Class Counsel's expense reimbursement request. As a whole, the expenses were necessarily and reasonably incurred in service of the Class, with no reimbursement or promise of repayment. Accordingly, Class Counsel's request for reimbursement of $4,548,300.91 in expenses is reasonable.

7. Class Counsel also seek service awards for each of the three Class Representatives in this Action. Each of the three Class Representatives has provided valuable service to the Class in maintaining this Action for nearly a decade, including through providing discovery, working with and monitoring counsel throughout the litigation, and sitting for depositions. The requested service awards are in line with service awards granted in other comparable cases, and collectively reflect just 0.06% of the Common Fund. Accordingly, the requested service awards are reasonable and appropriate.

8. Therefore, upon consideration of the Motion, the accompanying Memorandum, and all documents submitted in support thereof, and based upon all matters of record in this Action, the Court hereby finds that: (1) the requested attorneys' fees are warranted and just; and (2) the requested expense were necessary, reasonable, and proper; and (3) the requested service awards are appropriate and reasonable.

Having considered the Motion, the Memorandum, including all documents submitted in support thereof, and all matters of record in this Action,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Notice of the Motion was provided to potential Class members in a reasonable manner, and such notice complies with Rule 23(h)(1) of the Federal Rules of Civil Procedure and due process requirements;

2. The Court awards Class Counsel attorneys' fees of $65,594,270 (28.31% of the $231,700,000 Common Fund), and litigation expenses of $4,548,300.91, together with interest on the fees and expenses for the same time period and at the same rate as earned by the Common Fund until paid.

3. Class Counsel shall have the sole authority to allocate and distribute any attorneys' fees and expenses awarded pursuant to this Order in a manner which, in the opinion of Class Counsel, fairly compensates Plaintiffs' counsel for their services.

4. Service awards in the amount of $50,000 to each of the named Plaintiffs are approved, to be paid from the Common Fund.

5. Without affecting the finality of this Order in any respect, this Court reserves jurisdiction over any matters related to or ancillary to this Order.

6. Finding that there is no just reason for delay, this Order shall constitute a final judgment pursuant to Federal Rule of Civil Procedure 54(b). The Clerk of the Court is directed to enter this Order on the docket.

IT IS SO ORDERED.

DATED:

THE HONORABLE BRIAN M. COGAN
UNITED STATES DISTRICT JUDGE